

**HUMAN DIGNITY versus FREEDOM OF EXPRESSION: AN EVALUATION OF NECESSARY
BALANCE IN ZAMBIA.**

By
TEMBO NOEL.
(28024851)

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A dissertation submitted to the University of Zambia in partial fulfilment of the requirements of
Bachelor of Laws degree (LLB)

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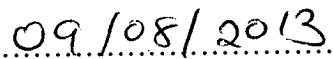
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ABSTRACT



Human dignity is one of the founding values of our Constitution. Human dignity is the source of a person's innate rights to freedom and to physical integrity. Human dignity and reputation have to be protected. This is where the tort of defamation comes in because this law attempts to protect the interest of an individual in his dignity and reputation. Where a defendant makes a statement that injures the claimant on his reputation hence causing the claimant to be lowered in the estimation of right thinking members of society, the claimant will have a cause of action in a defamation suit. On the other hand there is the freedom of expression. The importance of this freedom is that it allows people to voice their views, morals and independence as well as political opinions. This becomes a problem because a balance has to be attained between human dignity and freedom of expression. The courts therefore are required to balance the interest of an individual in the protection of his reputation and against the freedom of speech of the person who allegedly makes the defamatory statement. This has brought about a conflict between human these two rights. This dissertation focused on evaluating the effectiveness of the laws governing the two rights. It examined whether these pieces of legislation have adequately and effectively addressed prevailing importance of the two rights at the same level. The study methodology was based on secondary sources and evaluation of other academic materials.

The dissertation made a comparative study with South Africa's human dignity and freedom of expression legal regime. The findings of the comparative study were that South Africa has enacted comprehensive and better pieces of legislation. Further, the dissertation identified

problems in the various pieces of legislation in Zambia and has therefore given recommendations in order to fill up such shortfalls.



ACKNOWLEDGEMENT

Firstly, my special thanks go to the almighty God the creator and giver of life for making this piece of work a possible. Secondly, to my mother and Mrs. Mwachande for their continuous encouragements and support throughout my life.

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DEDICATION

To my entire family and my supervisor, this work was supported and inspired by your endless encouragement and support to me. Thank you so much.

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The Penal Code, Chapter 87 of Laws of Zambia.

State Securities Act, Chapter 354 of the Laws of Zambia.

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Lazarus Mumba v Zambia Publishing House (SCZ Judgment no 24 of 1982).

M'Pherson v Daniels (1829) 10B&C 263.

National Media Ltd and Others v Bogoshi 1998 (4) SA 1196 (SCA).

Pakendorf v De Flamingh 1982 (3) SA 146 (A).

Roy Clarke v The Attorney General (2004) H.C.

R v Keegstra[1990] 3 SCR 697, 3 CRR (2d) 193.



Simon Kapwepwe v. Zambia Publishing Company Limited (SCZ JUDGMENT NO 7 OF 1978).

CHAPTER 1

1.0 GENERAL INTRODUCTION

1.1 Introduction

Human dignity is one of the founding values of our Constitution. Human dignity is the source of a person's innate rights to freedom and to physical integrity¹. Human dignity and reputation have to be protected. This is where the tort of defamation comes in because this law attempts to protect the interest of an individual in his dignity and reputation. The law of defamation has evolved and developed with time. This is clear in the way defamation was defined in the case of **Mwanza v Zambia Publishing House Company Ltd**². In this case defamation was defined as "any imputation which may tend to injure a man's reputation in a business, employment, trade, profession, calling or office carried or held by him". However with time this definition was made wide and more comprehensive and this is evident in the Halsburys Laws of England³ where a defamatory statement was defined as one "which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt, or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession, calling or trade or business".

1.2 Outline of Chapters.

The dissertation will be presented in four chapters.

¹ "BKM ATTORNEYS, *Freedom of Expression versus the Right to Dignity*." Accessed December 19, 2012. <http://www.freedomofexpression.com>.

² (1981)Z.R.234.

³ Volume 28, paragraph 10 (4th edition)

Chapter one

This chapter will state and explain the law of defamation in Zambia and how it has evolved.

Chapter two

This chapter will then focus on human dignity and the freedom of expression and how the two rights are legally governed.

Chapter three

This segment of the dissertation will evaluate how human dignity and the freedom of expression have been seen to conflict as far as the law of defamation is concerned.

Chapter four

This part focuses on a comparative analysis on how other jurisdictions handle the tort of defamation.

Chapter five

This chapter will give recommendations and suggestions on how to make improvements in the law of defamation in light of the findings of the investigation.

1.3 The Scope of the Law of Defamation

In the law of defamation the defendant makes a statement that injures the claimant on his reputation hence causing the claimant to be lowered in the estimation of right thinking members of society, the claimant will have a cause of action in a defamation suit. One of the most important questions to be decided is whether or not the words used were defamatory. Generally, a court faced with such a decision will ask itself whether a 'reasonable, right-thinking man', hearing or reading the words, would think any less of you as a result. Meaning only if the court is clear as to the meaning of the offending words can it decide whether or not they harmed a person's reputation. Furthermore, the meaning of the words must be determined in the context in which they were used.

Obviously, to succeed in an action, the plaintiff would need to prove that the defamatory words were aimed at them directly. If a name is mentioned, there wouldn't be any problem, but if the speaker or writer does not mention the name specifically, the plaintiff may encounter problems. A defendant cannot avoid liability by not directly naming a person but speaking in such a way that everyone knows who is being referred to. The question before the court would then be: would a 'reasonable man' reading or hearing the words know that the plaintiff were the subject of the statement? If, for example, someone said, 'The man who runs the synagogue is helping himself to the money under his control', the local rabbi would be able to sue, even though he was not mentioned by name⁴.

⁴. "BKM ATTORNEYS, *Freedom of Expression versus the Right to Dignity*." Accessed December 19, 2012.
<http://www.freedomofexprssion.com>

Due to the fact the law of defamation exists to protect reputations, it follows that an action will succeed only if a third person heard the defamatory remarks in a broadcast or read them in a newspaper, magazine or in some other form. Anyone can express the most insulting ideas about a person, but as long as these are expressed only to the person in question, then a suit for defamation cannot succeed. You could, however, succeed with an action for injury to your dignity. It is immaterial for purposes of liability whether one or a few thousand people heard or read the defamatory remarks. Provided that at least one third did, there will be liability. However, even if one person heard the defamatory statement, liability in defamation will still arise, what matters is that the statement should be communicated.

The amount of damages is assessed on the basis of the extent of the damage to your reputation. If, for instance, the defamation is published to only one or two persons, the damage to your reputation may be very slight; in which case the damages awarded will be low. If, on the other hand, the defamation is published to only one or two persons, but to them your reputation is important - for example, if one is your employer - your damages may well be substantial.

On the other hand there is the freedom of expression. The importance of this freedom is that it allows people to voice their views, morals and independence as well as political opinions. Freedom of expression like human dignity is a fundamental human right; however, there is often a conflict between these two rights. The courts therefore are required to balance the interest of an individual in the protection of his reputation and the enjoyment of the freedom of speech of the person who allegedly makes the defamatory statement. The Constitution of Zambia provides for the protection of the freedom of speech of an individual under Article 20 which provides as follows

20. (1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, that is to say freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with any correspondence⁵.

From the cited provision, it is clear that the Constitution governs and defines what freedom of expression is. By virtue of being provided for in the Constitution, it means that freedom of expression is an important right which has to be respected and reconciled with human dignity. However, like any other right, freedom of expression has limitations and this is where the law of defamation comes in to strike a balance between the two, freedom of expression and human dignity.

The Defamation Act⁶ governs defamation issues. The basic idea of the law of defamation is simple, it is an attempt to balance the private right to protect a person's reputation with the public right to freedom of speech as it was seen in the case of **Bevin Ndovi vs. Post Newspapers Limited and Times PrinkPak Zambia Limited**⁷ where the court tried to strike a balance between the right to an individual's reputation and the freedom of expression that is conferred on media houses.

⁵ Constitution of the Republic of Zambia, CAP 1.

⁶ Chapter 68 of the Law of Zambia.

⁷ SCZ Judgment no. 8 of 2011, p.164.

1.4 Problem Statement

Human dignity and freedom of expression have become two conflicting concepts as far as the law of defamation is concerned. The protection of a person's reputation has to some extent become a hindering factor in a person's freedom of expression. This is not a recent idea but it is inherent in the rights themselves. The law of defamation at most times is not seen as a way of protecting people's reputation but as a way to inhibit free speech. With this in mind, it is clear that the problem at hand is the conflict exists between human dignity and freedom of expression. The law of defamation as provided and as applied in the Zambian legal system does not reflect the prevailing social, economic and political realities. This is augmented by the fact that the law of defamation which is meant to protect human dignity and reputation to some extent suppresses the freedom of expression and deters a lot of people from expressing their views.

1.6 General Objectives of the Study

The main purpose of this study is to examine the current law in defamation and evaluate how the balance between human dignity and freedom of expression can be achieved. It endeavours to show the balance that can exist between these two because the right to a reputation and dignity and the freedom of expression are both good laws can be justified in their own ways.

1.6.1 Specific objectives

- 1) To tabulate the different sources of defamation laws in Zambia.

- 2) Discuss the concept of people's right to have the protection of their reputation and the existing freedom of expression.
- 3) To analyse the provisions of the Defamation Act and decided case law in trying to understand how human dignity and freedom of expression have both been realised.
- 4) To clearly demonstrate how the law of defamation under its various types should develop or evolve in light with the current social, economic realities prevalent in Zambia and ultimately strike a balance between human dignity and freedom of expression.

1.7 Significance of the study

The essence of this dissertation is to evaluate the necessary balance between human dignity and the freedom of expression as governed by the Constitution. The current law governing defamation in Zambia has been to have a number of inadequacies as far as reflecting the social, economic and political realities in Zambia as a result the balance that is supposed to exist between right to a reputation and freedom of expression has been compromised. The law of defamation seems to cause a conflict between the right to reputation and the freedom of speech.

Another notable reason is that media houses in Zambia and in most counties fear having to face legal charges before making final publications so they have lawyers go through their articles to cut out certain information which may be defamatory. This is clear that the freedom of expression which is governed by the Constitution has not been realised to some extent. In this regard, the dissertation will discuss the balance that needs to exist and if possible suggest a legal framework where defamation protects right to a reputation but still allows freedom of speech.

1.8 Research Methodology.

The major method of data collection to be deployed will be desk research. Where necessary, this will be supplemented by interviews with various personnel in sectors related with the study of the reconciliation between human dignity and the freedom of expression. The data for this research will be sourced from books, the internet, journal articles, paper presentations, student obligatory essays, reports by mandated bodies and, in a few and necessary cases, newspaper articles. Some of the works that will inform this study include

- 1) Winfield and Jolowicz. Tort. 17th Edition 2006.
- 2) Gantley on Libel and Slander 5th Edition 1960.
- 3) Cracknell. The Law of Tort. 5th Edition 2005.
- 4) W.V.H Rodgers. Tort. 2006.

1.8 Overview of the Conflict and the Legal Framework

The current law governing defamation in Zambia does not reflect the social, economic and political realities in Zambia. As a result the balance that is supposed to exist between right to a reputation and freedom of expression has been compromised.

Another notable reason as to why this conflict exists is the fact that media houses in Zambia and in most counties fear having to face legal charges before making publications so they have lawyers go through their articles to cut out certain information which may be defamatory⁸. This is clear that the freedom of expression which is governed by the Constitution has not been realised to some extent.

⁸ W. Friedman, *"Report on freedom of expression."* Accessed 1st December, 2012. www.legalcity.net.

However, it is important to examine the current law in defamation and evaluate how the balance between human dignity and freedom of expression can be achieved. Both the right to a reputation protected by human dignity and the freedom of expression are good laws and are necessary in a modern democratic state. However in most jurisdictions, the importance of the press in society has to be balanced with the political control of that country. It can be said that in different jurisdictions, the character and development of the media is bound up with political and social evolution of the nation it serves⁹.

Meanwhile, the fairness of the law is also an important issue that has played a major role in trying to balance the right to a reputation and the freedom of the press.

It is necessary to evaluate the law of defamation in light of criticism, due to the fact that in the past the law of defamation in libel weighed heavily against the press and stifled investigative journalism as journalists, newspapers lived under the constant fear of being sued hence not exposing in society.

The evolution of defamation has however attempted to create an optimum balance between individual reputation and the freedom of expression that each and every person has.

1.9 Forms of Defamation

There are two types of defamation, the first being slander and the second being libel. Slander involves the comments made verbally that could cause damage to a person's reputation. Libel involves written or recorded material being distributed which adversely affects someone's reputation. The most common type of defamation is libel which is in a permanent form. The

⁹ P, Chalwa. *The law of defamation and freedom of the Press*. Obligatory Essay submitted to the school of law in partial fulfilment of the award of the Bachelor of Laws Degree. 1989.

principle practicable difference between claims for libel and claims for slander is that a claimant must generally prove damage to succeed in his or her claim¹⁰ in the latter. In libel claims, the claimant does not have to prove that he or she suffered loss or damage as a result of the publication. Defamation law requires that the person suing must be able to prove that he or she was the person defamed by the statement in question.

1.10 Defences

The defendant on the other hand has a number of defences in this law. Fair comment, justified truth and privilege are the defences available in the law of defamation. The defence of fair comment entails that as part of a person's right of free speech, anyone who wishes may express a genuine opinion on any matter of public interest. Most expressions of opinion are protected and entail no liability for defamation, even when they defame a person.

There are, however, limitations to this defence: for example, a man cannot, by saying 'I think that Jones is a thief', escape the liability that would attach to him if he had said straight out 'Jones is a thief'. In other words, simply attempting to dress up an allegation of fact as an expression of opinion will not help the defendant. Moreover, the opinion expressed by a defendant must be based on fact for it to qualify as a protected opinion. If the defendant had said 'The police have found my stolen motorcar in Jones's garage; I think he is the thief', he would be protected, because he would have indicated that his opinion was based on fact.

Comment also needs to be fair and must have honestly reflected the defendant's state of mind. If the purpose of a comment, even if it was based on established facts, was maliciously to damage

¹⁰ Friedman, "Report on Liberty Guide to Human Rights." Accessed 1st December 2012. <http://www.legalcity.net>

your reputation, the defendant would not be entitled to the defence of fair comment, for this comment would not reflect his or her true opinion at the time.



Unlike justified truth, the comment in fair comment must be expressed on a matter concerning the public interest. A defendant cannot express an opinion of another person's private life or morality unless it is in the public interest, for example, if that person is a politician¹¹.

Sometimes a defendant who is being sued for defamation may offer the defence of privilege. For example, the courts have ruled that an employer cannot be sued for defamation if the defamatory remarks are made in a reference for a former employee¹². This information is regarded as privileged because the former employer has a duty to put before a prospective employer any pertinent information, as he or she sees it about an ex-employee.

Remarks made in the course of court proceedings whether true or false, or whether fair comment or not are similarly privileged, as are remarks made in parliament. Fair and accurate reports of either parliamentary or court proceedings enjoy a similar privilege¹³.

However, if this defence is abused by a defendant it will not succeed. Therefore, if a former employer uses a reference simply to vent malice on an unfortunate employee, or to ensure that the employee does not get another job, a defamation action would succeed.

On the other hand, the privilege that parliamentarians enjoy in this regard is absolute. Even when they act or speak in parliament out of the worst possible motives they will not lose their privilege. This is why it frequently happens that one parliamentarian will challenge another to

¹¹ "BKM ATTORNEYS, *Freedom of Expression versus the Right to Dignity*." Accessed December 19, 2012. <http://www.freedomofexpression.com>

¹² Cracknel, *The Law of Tort*. 5th edition (London: Sweet and Maxwell, 2005), 52.

¹³ W.V.H Rodgers. *Tort*. (London: 2006), 70.

repeat, outside parliament, what was said inside with privilege, in order to institute an action for defamation.



Furthermore, when a person pleads the defence of justified truth, it simply means that the purported defamatory statement is true in substance and fact.

In defamation cases, the only available reliefs or remedies are damages and injunctions (which can be interim reliefs). An action for damages provides for financial compensation for any person whose reputation has been damaged, unless the person who published the defamatory remarks can justify having done so. In the case of **Zambia Publishing Co Ltd v Eliya Mwanza**¹⁴ it was held inter alia that injury to reputation calls for damages to be awarded to the plaintiff.

1.11 Conclusion

The law of defamation is an important area of the law and the evolution of this law has shown that the freedom of expression has to a great extent collided with this law of defamation. However, this is the most important aspect of the writing. After showing what defamation is and how the freedom of expression has conflicted with this law, the next chapter will then focus on human dignity and the freedom of expression and how the two rights are legally governed.

¹⁴ (1979) Z.R. 76 (SC)

CHAPTER TWO

2.0 HUMAN DIGNITY AND FREEDOM OF EXPRESSION AND HOW THEY ARE LEGALLY GOVERNED

2.1 Introduction

Human dignity is the source of a person's innate rights to freedom. This is the basis for the law of defamation. The law of defamation seeks to protect individual's reputation. It protects people from untrue and malicious statements made against them. At law, every law person has the right to a good name and reputation, particularly mindful of the hard work, time and effort put into building your reputation. Therefore, the loss of such reputation may impact enormously on both individuals and legal entities insofar as their livelihood, goodwill or status in society is concerned and this is what the tort of defamation seeks to protect.

However there is need to reconcile the purpose of defamation with competing demands of free speech. Personal interests are highly valued in our society. A reputation is in fact the most dearly prized attribute of a civilized man. Freedom of speech is the very foundation of democratic community. What constitutes the correct balance between freedom of speech and protection of reputation through the right of human dignity is always contestable and varies from time to time and from place to place. This chapter focuses on the protection of an individual's dignity and the freedom of expression and how the two are governed under the law of Zambia. This will be done by discussing statutory law that protects defamation and freedom of speech in Zambia.

2.2 The Law Governing Human Reputation and Dignity.

The law has recognized that a person's reputation or dignity is one that merits protection and that compensation should be paid by someone who impugns that reputation. This means that the law of defamation will only protect a person who has a reputation and dignity. In **M'Pherson v Daniels**¹⁵, Littledale J stated that "the law will not permit a man to recover damages in respect of an injury to a character which he does not, or ought not, to possess".

In Zambia the law governing the protection of a reputation is governed under The Defamation Act Chapter 68 of the Laws of Zambia. The preamble of this Act states that it is an Act aimed at consolidating and amending the law relating to libel, other than criminal libel, and slander; and to provide for matters incidental thereto¹⁶. This Act does not depart from the fact that the law of defamation attempts to balance the private right to protect a person's reputation with the public right to freedom of speech. From this it can be said that the first law governing human dignity and reputation is the Defamation Act by providing for libel and slander¹⁷. Section 3 of the Defamation Act provides that:

In an action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of the publication, it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business¹⁸.

This is a clear indication that people's reputations are protected from statements that are defamatory put in spoken form.

¹⁵ (1829) 10B&C 263

¹⁶ Defamation Act Chapter 68 of the Laws of Zambia.

¹⁷ Libel is the type that is in written form whilst slander is in spoken form.

¹⁸ Defamation Act Chapter 68 of the Laws of Zambia.

Libel is the type of defamation that is in written form. In the case of **Lazarus Mumba v. Zambia Publishing House**¹⁹, the Court allowed an appeal in which the appellant appealed against the dismissal of a libel action arising out of an article published by the respondent. The article referred to a suit for divorce filed by the appellant's wife and was found to be not contemporaneous or fair i.e. an inaccurate account. This case has clearly shown that human reputation is protected when a defamatory statement is written about a person showing that the law protects human reputation under the law of defamation.

The laws in Zambia continue to govern the protection of individual reputations and dignity by awarding damages to people whose reputation or dignity have been infringed and this can be seen in the case of **Simon Kapwepwe v. Zambia Publishing Company Limited**²⁰ where the judge held inter alia that in Zambia exemplary damages may be awarded in any case where the defendant has acted in contumelious disregard of the plaintiff's rights to a reputation and dignity. In this case, the appellant (the plaintiff) was awarded damages of K6, 000 against the respondent (the defendant) in respect of a series of three articles published by the defendant on three successive days in December, 1971. The defendant entered appearance and filed a defence pleading justification and fair comment, but in the event the defence was withdrawn and judgment was entered for the plaintiff by consent. This clearly shows that in events of disregarding human reputation, the law entitles the injured person to be awarded damages indicating that human reputation is protected in Zambia.

¹⁹ (SCZ Judgment no 24 of 1982)

²⁰ (SCZ JUDGMENT NO 7 OF 1978)

Further, human dignity and reputation in Zambia are protected under the Constitution²¹. Part III of the Zambian Constitution known as the Bill of Rights protects human rights. The late Professor Alfred Chanda in his article entitled the “Role of The Lower Courts in the Domestic Implementation of Human Rights” states that human rights serve a number of purposes above all they protect human reputation and dignity under the law of defamation²². This is a clear indication that the Constitution of Zambia is another important governing law protecting human dignity and reputation under the Bill of Rights.

2.3 Law governing the freedom of expression

Human dignity and reputation cannot be understood in isolation under the law of defamation. Dr. Partrick Matibini wrote on the fairness of the law of defamation. He sought to evaluate the law of defamation weighed heavily against the press and media houses. According to him the press lived under the constant fear of being sued hence not exposing in society²³. With this it is important to bring to light the law protecting freedom of speech in Zambia. The Zambian Constitution provides under Article 20 as follows

20. (1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, that is to say freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any

²¹ Chapter 1 of the Laws of Zambia.

²² Alfred Chanda, Zambia Law Journal *“The Role of the Lower Courts in the Domestic Implementation of Human Rights”* (Lusaka: 2001), 99-100.

²³ Patrick Matibini, *is the law of defamation fair*: Legality magazine volume 3(1980), 52.

person or class of persons, and freedom from interference with his correspondence²⁴.



Chapter one of the Laws of Zambia provides the protection of freedom of speech. From this it is important to state that the protection of the freedom of expression is an important law of Zambia.

Further, Zambia has responsibilities under what is known as the International Covenant on Civil and Political Rights. The International Covenant on Civil and Political Rights is relevant and binds Zambia. The obligations of the Covenant in general and provisions of Article 2 in particular bind or are binding on every state party as a whole. All branches of government (executive, legislative, and judicial), and other public or government authorities, at whatever level - national, regional or local are in a position to engage in the responsibilities of the state party. A state party's obligation is to protect, respect and fulfil the right enshrined in the covenant is immediate.

Article 19 of the Covenant provides for the protection of the freedom of expression. The rationale behind this article is that the freedom of expression is under threat in all countries, governments and government officials are using defamation to suppress criticism of official wrong doing. Further, Article 19 of the Covenant is against the abuse of the law of defamation. Defamation laws should be interpreted strictly, government officials should not use these laws to threaten media houses by suing for unreasonable compensations²⁵. This is seen in the case of **Bevin Ndovi vs. Post Newspapers Limited and Times PrinkPak Zambia Limited**²⁶ where the Court refused to allow the compensation of the appellant based on the fact that he did not

²⁴ Constitution of the Republic of Zambia, CAP 1.

²⁵ N.S Okugbule "*Handbook on Freedom of Expression*," accessed March 16, 2013, <http://www.aricle19.com>.

²⁶ SCZ Judgment no. 8 of 2011, p.164.

show that indeed the two media houses infringed on his reputation and dignity. The case clearly shows among other things that the freedom of expression under the laws of Zambia is an important law and cannot be departed away from. In a nutshell, it can be said that freedom of expression in Zambia is protected under The Constitution and Article 19 of the International Covenant on Civil and Political Rights to which it is a member.

2.4 The Continued Existence of the Conflict between Human Dignity and the Freedom of Expression in Zambia.

The protection of reputation and the freedom of expression are important in Zambia. This means that an optimum balance has to be reached in the law in order to make sure that none of these laws is more prevalent than the other because they are both good laws in their own ways. In Zambia there are laws that have been seen to curtail the freedom of expression. Dr Patrick Matibini in his book “The Struggle for Media Law Reform in Zambia” stated that the Penal Code is a law used to suppress the freedom of expression and freedom of the press in Zambia. The Penal Code is Chapter 87 of the Laws of Zambia. Officials use the Penal Code to curtail the right to access information, free speech, free press and free expression.²⁷ Section 69 of the Penal Code provides 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

²⁷ Patrick Matibini, *The Struggle For Media Law Reform In Zambia*: Media Institute in Southern Africa-MISA (Lusaka: 2006), 169.

offence and is liable on conviction to imprisonment for a period not exceeding three years²⁸.



This section empowers the President to ban certain publications in order to protect national interests. What may be considered as national interest in issues of free expression is vague because it is usually determined by officials and what favours them is deemed national interest for the protection of their reputations.

The above paragraph has shown the struggle that exists between defamation and freedom of expression continues to exist in Zambia. However, most governments aim at protecting the right to a reputation more than the right express themselves freely. This battle has continued to exist and the most important question to ask is how can an optimum balance can be achieved between human dignity and freedom of expression?

2.5 Conclusion

Human dignity and freedom of expression as already mentioned are both good laws and can both be justified in their own ways. This chapter has focused on these two rights separately and how they are legally governed in Zambia in order to make sure that no one law should prevail over the other.

Internationally, principles above set out an appropriate balance between human dignity and freedom of expression as guaranteed in UN and regional human rights instruments as well as nearly every national Constitution. The need to protect individual reputations is widely recognized by international human rights instruments and the law in countries around the world. These principles of freedom of expression are based on the premise that in a democratic society,

²⁸ Penal Code, Chapter 87 of the laws of Zambia.

freedom of expression must be guaranteed and may be subject only to narrowly drawn restrictions which are necessary to protect legitimate interests, including reputations and human dignity. In particular, they set out standards of respect for freedom of expression to which legal provisions designed to protect reputations should, at a minimum standard conform to²⁹. From this, it is a clear cut fact that no law should prevail over the other.

In conclusion, it can clearly be said that the law of defamation protecting reputation and the laws protecting the freedom of expression are very important and they need to be applied in such a way that they do not conflict. This is done by bringing to light laws that govern them separately and identify where certain amendments need to occur if need calls. The purpose of the law of defamation is to protect human reputation and the purpose of the protection of freedom of expression is to make sure that any person is free to hold opinions without any interference. This is achieved when the governing laws of the two are applied. The law of defamation is an important area of the law and the evolution of this law has shown that the freedom of expression has to a great extent collided with this law. After showing the different laws that govern defamation and the freedom of expression defamation the next chapter of this dissertation will evaluate how human dignity and the freedom of expression have been seen to conflict as far as the law of defamation is concerned.

²⁹ Friedman, "*Handbook on Freedom of Expression*," Accessed March 16, 2013, <http://www.aricle19.com>.

CHAPTER 3

3.0 AN EVALUATION ON HOW HUMAN DIGNITY AND THE FREEDOM OF EXPRESSION CONFLICT

3.1 Introduction

One of the main purposes of the law of Defamation in Zambia is to make sure that human reputation and the freedom of expression do not conflict; the law of defamation as known by most people protects individuals in their reputation and dignity. The previous chapter critically discussed the laws that govern human dignity and freedom of speech in Zambia. However, due to the continued existence of the conflict between freedom of expression and human dignity, the desirable optimum balance that is supposed to be there between the two has been in the abstract. An evaluation of the two rights in relation to defamation is important. Chapter three of this dissertation will therefore evaluate how human dignity and freedom of expression conflict. This will enable us to understand how the conflict has continued to exist and how it can be solved.

3.2 Human Dignity and its Effect on the Law of Defamation.

In Zambia, the Defamation Act substantially protects the right to human dignity. Human dignity is a human right that protects a person's behaviour, character and above all their reputation. The Act provides for the protection of reputation, a fundamental aspect of human dignity. The law has recognized that a person's reputation merits protection and that compensation should be paid by someone who impugns that reputation. This means that the law of defamation will only protect a person who has a reputation.

Further, human dignity and reputation in Zambia are protected under the Constitution³⁰. Part III of the *Zambian Constitution* known as the Bill of Rights protects human rights. The Late Professor Alfred Chanda in his article³¹ states that human rights serve number of purposes above all they protect human reputation and dignity under the law of defamation. Clearly, the Constitution of Zambia is another important governing law protecting human dignity and reputation under the Bill of Rights. From this, one can firmly conclude that human dignity plays an important role in defamation.

The first role that human dignity plays under defamation is that it recognizes human reputation as an inalienable human right that has to be protected because every individual has one. In the case of **Benny Hamainza Wycliff Mwiinga v. Times Newspaper Ltd**³², the respondent published an article based on reports received from their London correspondent concerning criminal proceedings in Britain against some Zambians and their confederates charged with smuggling drugs. The articles which the trial judge found to be clearly defamatory in their natural and ordinary meaning imputed that the appellant was one of those Zambians involved in smuggling drugs. In passing judgment, the judge said that the Court pays particular attention to the fact that a person's reputation has been damaged because this law protects human reputation. From this, it can be said that the role that human dignity plays in defamation is that it influences the courts to pay particular attention to the respondent's reputation hence protecting human dignity. That way, defamation protects human reputation.

³⁰ Chapter 1 of the Laws of Zambia.

³¹ Professor Alfred Chanda, *The Role of the Lower Courts in the Domestic Implementation of Human Rights*. Zambia Law Journal, 2201.

³² (1988-1989) Z.R 177 (SC)

Any living human being may be the claimant in a defamation action, this is an important factor that human dignity plays under defamation. Defamation protects all human beings because by virtue of being human, all individuals have reputations. In the case of **John Namashoba Muchabi .v. Aggrey Mwanamufwenga**³³ the court held inter alia that defamation laws aim at protecting human dignity particularly reputation because every person has this right including artificial persons so long the words affect the trading reputation or property. Therefore, human dignity plays an important role in defamation in that it protects all reputations, individual, trading corporate reputations and non-trading corporations. This is a clear indication that defamation is a law that extends to all persons.

Meanwhile, human dignity is a human right that is recognized in most nations but democratic countries consider it as one of the top priorities. Another right that is of importance in this regard is freedom of expression. Freedom of expression is very important in a democratic nation. It has also played an important role in the law of defamation due to the fact that according to others, defamation violates people's freedom of expression.

3.3 Freedom of Expression and its Effect on the Law of Defamation.

Freedom of expression is the concept of the inherent right to voice one's opinion publicly without fear of censorship or punishment. Speech is not limited to public speaking and is generally taken to include other forms of expression. To show that this right is of great value and importance, the Constitution of Zambia provides for its governance under Article 20 which provides as follows:

³³ (1987) ZR 110 (SC)

20. (1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, that is to say freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence³⁴.

This right is one of great importance and value in a person's life and this is evident in the Constitution as it has been shown above. Freedom of expression in any jurisdiction would only function effectively in a democratic nation. This right assists people in the discovery of the truth, it allows an individual to participate in a democratic society and helps people attain self-fulfilment, a rational individual requires information and an opportunity to express his or her own. Furthermore, on an international level, this right is also protected in the United Nations Universal Declaration of Human right.

In many nations, particularly those with authoritarian forms of government, overt government censorship is enforced. Censorship has also been claimed to occur in other forms and there are different approaches to issues such as speech, obscenity and defamation laws. Defamation laws protect people in their reputations and these laws are restrictive as far as an individual's right to free speech is concerned.

Freedom of expression helps an individual attain self-fulfilment. The rational individual requires information and an opportunity to express his or her own ideas if he or she is to develop³⁵.

³⁴ Constitution of the Republic of Zambia, CAP 1.

³⁵ Alfred C. *The Role of the Lower Courts in the Domestic Implementation of Human Rights*. P 40.

Defamation on the other hand makes sure that people do not ruin other people's reputation through freedom of expression. The effect that defamation has on freedom of expression is that it makes sure that a person is careful in expressing their ideas, people are not reckless in their choice of words in fear of being defamatory. That way, in as much as freedom of expression helps an individual attain self-fulfilment, it makes sure that the individual does not injure another's reputation.

Another role that freedom of expression plays in a democratic society is that it enhances the capacity of an individual to participate in a democratic society. Democracy does not exist without freedom of expression. Law of defamation protects human reputation meaning the role that freedom of expression plays is that it provides that platform that promotes both good reputations and at the same time encourages person to carefully participate without being defamatory.

In Zambia the media is one of the most important tools used as a platform for the freedom of expression. The media plays an important role in freedom of expression. Zambian media consists of public media and the most famous is the Zambia National Broadcasting Corporation (ZNBC) which runs both television and radio stations, established under an Act of Parliament³⁶. The major private media in both television radio and newspaper include Muvi TV, Radio Phoenix, and the Post. In a democratic nation like Zambia, freedom of expression is mainly seen through these media houses.

Furthermore, these media houses work freely in Zambia under the premise that the Constitution and various Acts under which they are created advocate for freedom of speech. In the recent

³⁶ The Zambia National Broadcasting Corporation Act Cap 154 of the Laws of Zambia

past, it has been reported by various media houses on the violation of their right to freedom of expression and the right to freedom of press by the Government and law enforcers by using stringent anti-press laws which politicians have construed as defamation laws. Much of these complaints lodged involve law enforcers committing retaliatory acts in the form of arrests, beatings, detention, prosecution, and deportation of journalists and individuals who exercise their right to freedom of expression. Much of these reports and complaints can be drawn from a report by MISA - Zambia respectfully submitted to the United Nations Human Rights Committee on the occasion of its consideration of the Third Periodic Report of Zambia pursuant to Article 40 of the International Covenant on Civil and Political Rights in 2007. The report was based on Zambia's breach of its obligation under the International Covenant on Civil and Political Rights to respect and protect the media to access information, free speech, free press and free expression as provided under article 19 of the Covenant.

From the reports shown above, it is clear that countries in Africa including Zambia have denied people their freedom of expression and have opted to protect political name under the context of human reputation. Meanwhile, these media houses aim at disseminating information to the public but at the same time they've been seen to conflict with the right to a reputation because in Zambia, most defamation cases have a media house being the defendant clearly indicating that there is a continued conflict between human dignity and the freedom of expression. It is therefore important that this conflict is analysed and the factors that fuel it.

3.4 An Evaluation of the Conflict between Human Dignity and the Freedom of Expression in Zambia.



Dr. Patrick Matibini in his book *The Struggle for Media Law Reform in Zambia* stated that human dignity and the freedom of expression in as much as they are both important will never be realized to the same level in the law of defamation in Zambia due to the fact that the majority of existing legislation aims at suppressing the freedom of expression³⁷. According to him, the Penal Code is one of the laws used to suppress the freedom of expression and freedom of the press in Zambia³⁸. Section 69 of the Penal Code provides as follows:

Any person who, with the intent to bring the President into hatred, ridicule or contempt publishes any defamatory or insulting matter, whether in writing, print or word of mouth or in any other manner, is guilty of an offence on conviction to imprisonment to a period not exceeding three years³⁹.

This section of the Penal Code clearly shows that people are not free in Zambia to say things about the President in fear of facing criminal charges. In **The People v Bright Mwape and Fred M'membe**⁴⁰, the appellants who were journalists were charged with criminal defamation of the President arising from an article referring to him in a derogatory term but the appellants raised a preliminary issue as to the constitutionality of section 69 of the Penal Code. It is clear that this imbalance between freedom of expression and human dignity regarding the Penal Code is perpetuated because this section does not have exceptions or defences of truth. This clearly stops the public from passing an opinion about the President. From this, it can be said that the public's

³⁷ Patrick Matibini, *Struggle for Media Law Reform in Zambia*, (Lusaka:Media Institute in Southern Africa-MISA, 2006) 169.

³⁸ Matibini, *Struggle for Media Law Reform in Zambia*, 50.

³⁹ Chapter 87 of the Laws of Zambia.

⁴⁰ (1995) S.J

freedom of expression conflicts with the President's reputation because his reputation has been given priority.



Furthermore, section 53 of the Penal Code provides that the President should ban certain publications in order to protect national interest. What constitutes national interest is not mentioned and the people in authority construe it only to their benefit. In 1996, the government under former President Frederick Chiluba used section 53 of the Penal Code when it banned the 401st edition of the Post after an article appeared about Chiluba's plan to hold a referendum to adopt a proposed Constitution without adequate public notice. The police arrested Post News Paper chief editor Fred M'membe, editor Bright Mwape and reporter Masautso Phiri. Authorities charged these three under the State Securities Act Chapter 354 of the laws of Zambia for possessing and printing classified documents⁴¹. Professor Alfred Chanda in his article⁴² on free speech states that this is fuelled by the fact that existing Zambian laws like the State Securities Act are used by the government only to continuously suppress free speech on the premise that the dignity and reputation of politicians should not be injured⁴³.

In the case of **Roy Clarke v The Attorney General**⁴⁴, the Government attempted to use immigration laws when it attempted to deport the British writer Roy Clarke. He published an article about the Zambian government and the State concluded that the article had injured on the dignity of the President and his Government. The plaintiff, Roy Clarke, was only using his right of freedom of expression. Robin Clapp in the article⁴⁵ stated that human dignity prevails over freedom of expression in defamation cases because of that lack of proper investigations in

⁴¹ "Human Rights Report", *Freedom of Expression and the Media* (Lusaka: 2003), 28-29.

⁴² A.W.Chanda, *The Role of Lower Courts in the Domestic Implementation of Human Rights* (LUSAKA: 2001) 13.

⁴³ A.W.C, *The Role of Lower Courts in the Domestic Implementation of Human Rights*, 9.

⁴⁴ (2004)H.C

⁴⁵ Robin Clapp, *Challenging the Traditional Conception of Human Rights: Positive Obligations of the State under Freedom of Expression* (Lusaka: 2001) 51.

matters that involve free expression, this has caused an imbalance and impartiality in the way defamation cases are handled.



In evaluating the necessary balance between human dignity and the freedom of expression, it can be said that the freedom of expression is not respected especially in cases that involve politicians. The conflict between human dignity and the freedom of expression that exists in Zambia is clearly understood when one looks at the various situations when human dignity prevailed over free speech in defamation cases. This conflict has been fuelled by a number of reasons but the most important reason is the lack of strict interpretation of legislation.

Section 20 of the Constitution provides for freedom of expression but then legislation like the Penal Code, Public Order Act, and Societies Act create offences when a person expresses this right. This shows that Zambian laws are not construed narrowly or strictly. Laws like the Penal Code need to provide defences of truth, that way freedom of expression which is guaranteed by the Constitution would be respected to the same degree as human dignity.

For one to truly understand the law of defamation, an individual has to fully comprehend the conflict that exists between human dignity and free speech because defamation protects human dignity by making sure that people do not publish or say things that injure one's reputation. On the other hand, a person has the right to speak freely and this is where the necessary balance between human dignity and freedom of speech comes in. In most countries as it has been shown, politicians make sure that institutions that are in charge of information do not exercise their right of free speech to a greater degree.

3.5 Conclusion

The topic of human dignity versus freedom of expression is very important when one has to understand the law of defamation in various jurisdictions. This chapter has shown that in Zambia human dignity and the freedom of expression have been in conflict for a long time and this has been evaluated in this chapter using the various cases and situations. It has been seen that in political scenarios human dignity has prevailed over freedom of expression and this is because the Courts do not construe legislation in the narrow and strict sense.

From this it can be said that in democratic countries, both the right to human dignity and freedom of expression is present but the two have a conflict that has been in existence and the only way this can be curtailed is by enacting legislation which make sure that the two rights work hand in hand both on a national and an international level.

CHAPTER 4

4.0 DEFAMATION AND THE FREEDOM OF EXPRESSION IN THE REPUBLIC OF SOUTH AFRICA IN COMPARISON TO ZAMBIA.

4.1 Introduction

The South African press is rated as 'free' by international rating agency Freedom House. Press freedom is a value that needs to be vigilantly protected in any society as there are always powerful actors that have an interest in having a docile press. One of South Africa's great assets is a press that is institutionally strong and that has a powerful self-perception of its role in a democratic South Africa. Defamation law is a focal point for conflict between the right to freedom of expression and the right to dignity which includes legal protection of reputation and personality. The principles underlying the law of defamation are uncontroversial. A free press is an indispensable part of an open and democratic society in South Africa. At the same time false or unjustifiable attacks on an individual's reputation are damaging, wrong and not condoned by the Courts.

A defamatory statement impugns a person's reputation which is legally protected. There are however a number of traditional defences that media houses can use to justify their statements and avoid liability for defamation. Until recently, the most usual defence was that the statement was true and made for the public benefit.

In **Pakendorf v De Flamingh**⁴⁶, a rule was established which had imposed strict liability on the press and made newspaper owners, publishers, editors and printers liable for defamatory statements irrespective of whether they were at fault or not. This rule was overruled in **National**

⁴⁶ 1982 (3) SA 146 (A)

Media Ltd and Others v Bogoshi⁴⁷, where Hefer JA adopted the attitude that although there is no Constitutional value in false statements of fact, an erroneous statement of fact is nevertheless inevitable in free debate. The consequence of this judgment is that if a newspaper can show that a decision to publish was reasonable and justifiable, it will be able to avoid liability even in circumstances where the statements are false.

Like Zambia, South Africa has legislation that protects human dignity and freedom of expression.

4.2 South African Legislation Governing Freedom of Expression and the Reputation of Persons.

The South African Constitution also provides for freedom of expression under Article 16 which provides as follows:

1. Everyone has the right to freedom of expression, which includes-

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.

2. The right in subsection (1) does not extend to-

- (a) propaganda for war;
- (b) incitement of imminent violence

This above article shows that South Africa values people's freedom of expression because it is a fundamental principle of a democratic nation. Unlike the Zambian Constitutional provision for

⁴⁷ 1998 (4) SA 1196 (SCA).

freedom of expression, the South African one is absolute. Article 20 of the *Zambian Constitution* allows for laws making provision for derogation from freedom of the press as long as it is shown that the law in question makes provision that is reasonably required in the interests of defence, public safety, public order, public morality or public health⁴⁸. The *Zambia Constitution* can make this right absolute if it does not give a long list of derogations. In South Africa, freedom of expression is to some degree absolute compared to the *Zambian* one.

Meanwhile, the South African legal system also protects human reputations and provides that unjustified publications of anything damaging to a person's reputation may allow the injured person to claim damages. South Africa recognizes the protection of human dignity. *Crimen injuria* in South Africa protects human dignity and reputation.

The relationship between human dignity and freedom of expression in South Africa is also very important. South Africa is a nation that suffered a lot discrimination regarding human race, reputation, dignity, freedom of expression. Due to that, the nation took strong steps to enact legislation that aimed at bridging the gap between human rights and the conflict between human dignity and freedom of expression is no exception. The Act that has tried to remove the conflict between human dignity and freedom of expression is *The Equality Act*⁴⁹.

4.2.1 The Equality Act No 4 of 2000.

One of the objects of the Act as set out in section 2 provides as follows;

2. (1) To give effect to the letter and the spirit of the Constitution, in particular the prohibition of advocacy of hatred, based in race, ethnicity, gender or religion,

⁴⁸ "Zambian Human Rights Report" *Freedom of Expression and the Media* (Lusaka: 2002), 29.

⁴⁹ *Equality Act No 4 of 2000*.

human dignity that constitutes incitement to cause harm as contemplated in section 16(2) (c) of the Constitution and section 12 of this Act.

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This is a clear indication that the Act aims at providing equality in the listed areas. Human dignity is an important human right and the Act recognizes that. Furthermore, the Act allows for freedom of speech but at the same time controls it by stating that a person should not exercise this freedom to be hurtful or to incite harm. This is evident in section 10 which provides as follows:

10. (1) subject to the provisions in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be hurtful, harmful or to incite harm and promote or propagate hatred.

Furthermore, section 12 of the Act provides that No person may:

- (a) disseminate or broadcast any information;
- (b) publish or display any advertisement or notice, that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person provided that bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section.

Section 12 of Equality Act promotes freedom of expression but with restrictions, the Act makes sure that freedom of expression does not prevail over human dignity. This is what Zambia should do, it should come up with one law that balances human dignity and freedom of expression. The

Equality Act is a good example of law that tries that to reach an optimum balance between human dignity and freedom of expression. Freedom of expression in Zambia has been severely constrained by the country's statutes that uphold human dignity over freedom of expression.

South Africa in the hands of its colonial masters suffered racial insults, racial offensive language and emotional or psychological abuse, due to this fact, the country's Bill of Rights is the cornerstone of democracy in South Africa. The country affirms democratic values and human dignity is one of the most important values. All fundamental rights are respected at the same level in defamation. Under defamation, the Equality Act can be used to make sure that freedom of expression and human dignity do not conflict because it protects both of them. Zambia can do the same.

4.3 Conclusion

Zambian laws governing human reputation and freedom of expression act as important instruments that protect the two laws. However, is it important that another jurisdiction is evaluated in order to strictly understand how these rights are protected in other countries. South Africa has demonstrated that it has an efficient system that protects human dignity and freedom of expression. Like the Zambian Constitution, the South African one equally protects freedom of expression. This is a clear indication that freedom of expression is an important right that has to be recognized and protected. The need to protect individual reputations is widely recognized and an analysis of South Africa has shown that through the Equality Act. The principles of freedom of expression are based on the premise that in a democratic society, freedom of expression must be guaranteed and may be subject only to narrowly drawn restrictions. The principles above set out an appropriate balance between the human dignity and freedom of expression as guaranteed in the South African Constitution and supplementary legislation.

Further, an analysis of South Africa has shown set out standards of respect of freedom of expression to which legal provisions should conform to. The democracy in the country has also shown that the law in the country protects legitimate interests, including reputations and human dignity. In analysing human dignity versus freedom of expression, it can be said that the Zambian law should follow the steps that South Africa has taken by enacting an Act that protects both human dignity and freedom of expression and recognizes them at the same level like the Equality Act.

CHAPTER 5

5.0 GENERAL CONCLUSION AND RECOMMENDATIONS

5.1 General Conclusion

The dissertation has shown that human dignity and freedom of expression are two conflicting concepts as far as the law of defamation is concerned. The protection of a person's reputation has to some extent become a hindering factor in a person's freedom of expression. The law of defamation at most times is not seen as a way of protecting people's reputation but as a way to inhibit free speech. With this in mind, it is clear that the problem at hand is the conflict that has been seen to exist between human dignity and freedom of expression. The law of defamation is important in that it aims to strike a balance between human dignity and freedom of expression.

Meanwhile, the law of defamation as provided and as applied in the Defamation Act⁵⁰ does not reflect the prevailing social, economic and political realities. This is augmented by the fact that the law of defamation which is meant to protect human dignity and reputation, to some extent, suppresses the freedom of expression and deters a lot of people from expressing their views.

In the law of defamation, the defendant makes a statement that injures the claimant on his reputation hence causing the claimant to be lowered in the estimation of right thinking members of society. The claimant thus has a cause of action in a defamation suit. One of the most important questions to be decided is whether or not the words used are defamatory. Generally, a court faced with such a decision asks itself whether a reasonable, right-thinking man, hearing or reading the words, would think any less of the claimant as a result. Thus, only if the court is clear as to the meaning of the offending words can it decide whether or not they harmed a person's

⁵⁰ Chapter 68 of Laws of Zambia.

reputation. Furthermore, the meaning of the words must be determined in the context in which they were used.



To succeed in an action, the claimant would need to prove that the defamatory words were aimed at them directly. If the claimant's name is mentioned, there wouldn't be any problem, but if the speaker or writer does not mention the name, the claimant may encounter problems. A defendant cannot avoid liability by not directly naming a person, provided the public knows who's being referred to, the defendant will be liable. The question before the court would then be: would a 'reasonable man' reading or hearing the words know that the plaintiff were the subject of the statement?

Due to the fact that the law of defamation exists to protect reputations, it follows that an action will succeed only if a third person heard the defamatory remarks in a broadcast or read them in a newspaper, magazine or in some other form. Anyone can express the most insulting ideas about a person, but as long as these are expressed only to the person in question, then a suit for defamation cannot succeed. You could, however, succeed with an action for injury to your dignity. It is immaterial for purposes of liability whether one, or for that matter, a few thousand people, heard or read the defamatory remarks.

The amount of damages is assessed on the basis of the extent of the damage to your reputation. If, for instance, the defamation is published to only one or two persons, the damage to your reputation may be very slight; in which case the damages awarded will be low. On the other hand, the defamation is published to only one or two persons, but to them your reputation is important - for example, if one is your employer - your damages may well be substantial.

On the other hand there is the freedom of expression. The importance of this freedom is that it allows people to voice their views, morals and independence as well as political opinions. Freedom of expression in Zambia is provided for under the Constitution. Due to the fact that this freedom conveys such rights to people, a conflict is inevitable because a balance has to be attained between human dignity and freedom of expression. The courts therefore are required to balance the interest of an individual in the protection of his reputation and against the freedom of speech of the person who allegedly makes the defamatory statement. The Constitution of Zambia provides for the protection of the freedom of speech of an individual under Article 20 meaning that the courts have a task of protecting the reputations of individuals in light of freedom of expression.

Human dignity and freedom of expression have become two conflicting concepts as far as the law of defamation is concerned. The protection of a person's reputation has to a greater extent prevailed over people's freedom of expression. The law of defamation at most times is not seen as a way of protecting people's reputation but as a way to inhibit free speech.

Thus, the need to protect individual reputations is widely recognized by international human rights instruments and the law in countries around the world. These principles of freedom of expression are based on the premise that in a democratic society, freedom of expression must be guaranteed and may be subject only to narrowly drawn restrictions which are necessary to protect legitimate interests, including reputations and human dignity. In particular, they set out standards of respect for freedom of expression to which legal provisions designed to protect

reputations should, at a minimum standard conform to⁵¹. From this, it is a clear cut fact that no law should prevail over the other.

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In conclusion, it can clearly be said that the law of defamation protecting reputation a key concept of human dignity, and the laws protecting the freedom of expression are very important and they need to be applied in such a way that they do not conflict. This is done by bringing to light laws that govern them separately and identify and effecting the necessary amendments when need arises. The purpose of the law of defamation is to protect reputation and thus human dignity, and the purpose of the protection of freedom of expression is to make sure that any person is free to hold opinions without any interference. This is achieved when the governing laws of the two are applied. The law of defamation is an important area of the law and the evolution of this law has shown that the freedom of expression has to a great extent collided with this law.

The current law governing defamation in Zambia has is adequate as far as reflecting the social, economic and political realities in Zambia. As a result the balance that is supposed to exist between right to a reputation and freedom of expression has been compromised. The law of defamation seems to cause a conflict between the right to reputation and the freedom of speech.

Another notable reason as to why this conflict exists is the fact that media houses in Zambia and in most counties fear facing as a result of this work. Thus, they have lawyers go through their articles to cut out certain information which may be defamatory⁵². This is clear that the freedom of expression which is governed by the Constitution has not been realized to some extent.

⁵¹ N.S Okugbbule "*Defamation of Human Rights and Self-Determination*," Accessed July 5, 2013, <http://www.infor@article19.org>.

⁵² K.kindiki "*Report on freedom of expression*," Accessed 1st December, 2012. www.legalcity.net.

The study then took a comparative analysis with South Africa and this showed that South Africa has a better system that protects recognizes human dignity and freedom of expression at almost the same level and this done through enacted laws. This showed that there is need to balance these rights in all jurisdictions. Hence, it is apparent that justifiable recommendations are given in order to have a solution to the current situation which doesn't have a balance between the two rights

5.2 Recommendations

The following are proposed recommendations that should be considered. In order to create a conducive and favourable legal environment for human dignity and freedom of expression as a step to maintaining a balance between the two under the law of defamation.

5.2.1 Laws protecting freedom of speech should be enacted in accordance with Article 19 of the International Covenant on Civil and Political Rights:

The study has revealed that there is need for a piece of legislation that would will work in accordance with article 19 of the International Covenant on Civil and Political Rights. This Act should contain general provisions that will work as a single law.

5.2.2 Zambia Should amend Article 20 of the Republican Constitution to provide adequate safeguards against abuse of official discretion:

Zambia Should amend Article 20 of the Republican Constitution to provide adequate legal safeguards against abuse of official discretion in enforcing security, public order, and defamation laws and to eliminate unnecessary and excessive violations to the right of freedom of expression.

**5.2.3 Sections of the Penal Code that unduly curtail the right to freedom of expression under the
Zambian Constitution and Article 19 of the International Covenant on Civil and Political Rights
should be amended or repealed:**

Zambia should amend or repeal sections of the Penal Code that unduly curtail the right to freedom of expression under the Zambian Constitution and article 19 of the International Covenant on Civil and Political Rights. The Penal Code has shown that it allows for the human dignity to prevail over freedom of expression. This should be amended to provide a section(s) that will allow people to say certain things about the President.

**5.2.4 Among other Penal Code provisions Zambia should amend section 69 of the Penal Code to
include exceptions that could be available to the defendant⁵³.**

Section 69 of the Penal Code only states that any person who defames is liable to criminal charges but it does not give out exceptions or situations when a person is allowed to give an opinion about the President. A democratic nation allows for freedom of expression hence this section should be made comprehensive.

**5.2.5 The Zambian government should refrain from using immigration laws to suppress the
exercise of the right to freedom of speech and expression⁵⁴.**

In the already cited Roy Clarke case, it was shown that immigration laws were used to suppress his freedom of expression. This is evident that immigration laws should be used to promote international relationships and not used to threaten immigrants that exercise their freedom of expression.

⁵³ Fred M'membe, Bright Mwape v the People and Fred M'membe, Masautso Phiri, Goliath Mungonge v The People (1996) S.J.S.C.Z. Judgment NO 4 of 1996.

⁵⁴ Roy Clarke v the Attorney General (2004) H.C

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