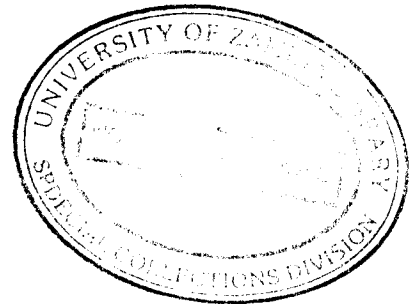


THE UNIVERSITY OF ZAMBIA

LUSAKA



**Freedom of the Press and protection of the Right to Reputation: The role of the media in
Zambia in the Third Republic**

BY

MBILIMA BRIAN

(Comp. 27004015)

A dissertation submitted to the University of Zambia Law Faculty in partial fulfillment of the
requirements for the award of the Bachelor of Laws (LLB) Degree.

2012

DECLARATION

I, MBILIMA BRIAN, Computer Number 27004015, do hereby declare that this directed research is the result of my own investigation and research. All other works referred to in this essay have been duly acknowledged. I bear unqualified responsibility for all errors, defects or any omissions herein.

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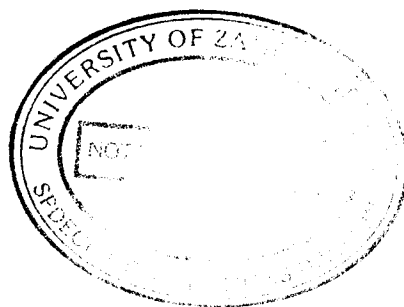
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ABSTRACT

Defamation laws can serve a legitimate purpose and are recognised internationally as valid grounds for restricting freedom of expression. However, it is critical to the health of democracy that people should be free to debate issues and challenge authority in all spheres of life, whether political, scientific, academic or any other. Notwithstanding, freedom of speech does not mean that people should be able to ride roughshod over the reputations of others, and defamation laws must therefore strike the right balance.

This research essay therefore examined the conflict between freedom of expression/press on one hand and the right to protection of reputation on the other hand. The research essay through a plethora of works referred to such as those of Kasoma Francis¹ has shown that in Zambia the Press/media houses have gone through thorny periods especially during the colonial and post colonial one- party independence up to 1991. The research essay has examined the effects, if any; the pluralist period of 1991 onward has brought in so far as balancing freedom of the press and right to reputation is concerned. The research paper has shown that the multi-party period of 1991 onward, guaranteed a much freer press.

The research essay through its examination of the Zambian case law such as *Fred M'mbe, Bright Mwape v The People (S.C.Z Judgment No. 4 of 1996)*, has shown that the Courts in Zambia have leaned heavily towards protecting the right to reputation of public officers at the expense of press freedom; in construing defamation cases. The research essay has also shown that the Defamation Act (CAP 68 of the laws of Zambia) in its current form is moribund. Further this research essay has recommended that the Defamation Act should be amended so as to include the definition of defamation as well as the constitutive elements that have to be proved. Additionally this essay has recommended that the Courts in Zambia should adopt the stance taken by the American Courts which has advanced more of press freedom than the reputation of public officials who otherwise have public media to dispel any falsehoods perpetuated against them. The research paper in conclusion has also recommended that freedom of the media should be separately guaranteed in the Constitution.

¹ Festus Eribe and William Jong-Ebot eds Francis Kasoma. *Press Freedom in Zambia. Press Freedom and Communication in Africa..* (Trenton NJ: Africa World Press Inc,1997)

ACKNOWLEDGEMENTS

To simply bequeath ingenuity and praise on oneself for every success scored only show serious lack of courtesy. This research essay would be deficient without paying due recognition to numerous people whose tireless efforts has rendered its realisation feasible. Professor M.P Mvunga exposed me to the intricate issues of tort law and henceforth stimulated my interest in pursuing a career in law. I have never looked back since then. I immensely benefited from the invaluable guidance and input of Professor Mvunga who was also my supervisor during the production of this research essay. To him I owe a debt of gratitude for sparing his time and being available to offer priceless guidance and prompt feedback. I am evermore beholden.

He, who invests in knowledge, invests perpetually! A man of self-effacing beginnings and ending; Mr. V.C Mbilima, aka dad, your indefatigable investments are not futile. Words can only express my feelings thus far, deep down my heart of hearts; there is elation of the emancipation you gave me; till we meet again! To the very foundation of my family; mum, you are indeed a true African pillar, your words of astuteness and support still lingers every day. Bana Mbilima, posterity will judge you kindly. To my siblings and their spouses and children, I cannot quantify the material and moral support you render to me almost on a daily basis; blessed truly you are.

To find a friend is trouble-free, to make true friendship based on shared bonds, aspirations and trust is a meticulous task. I thank God for bringing Lukundo Phiri, rather unsurprisingly in my life. Kundo, you are a true friend no material worth can replace; I will value you for years to come; it's indeed the favour of God that I met you. You simply replenish my soul. I also wish to thank Michael C. Kanga, Mulawo Mwaba, Lolo Chaile, and many others too numerous to mention for the support rendered. Finally but of priority, all glory and honour be to God.

DEDICATION

This paper is dedicated to my late father, Mr. V.C Mbilima through my current mother/ father, Mrs. H Mbilima who has saved as my inspiration and has been an invaluable source of support and encouragement.

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Republic of Zambia, First Draft Constitution of the Republic of Zambia, Technical Committee
on Drafting the Zambian Constitution

TABLE OF INTERNATIONAL INSTRUMENTS

The African Charter on Human and People's Rights

The International Covenant on Civil and Political Rights

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The International Covenant on Economic, Social, and Cultural Rights

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Abrams v United States, 250 U.S 616 (1919)

Alberts V California, 344 U.S. (1957)

Archbishop of Tuam v Robeson (1828) 5 Bling

Benny Hamainza Wycliff Mwinga v Times Newspapers Ltd (1988-1989) Z.R. 177

Berkoff v Burchill et al [1996] 4All ER 1008

Bowen v. Hall (1881) 6 Q.B.D

Christine Mulundika and 7 Others v The Attorney General SCZ Judgment No. 25 of 1995

Cobbett-Tribe v The Zambia Publishing Company (1973) Z.R.

Cooper v Lawton(1838) 8 A & E. 746

Curtis Publishing Co v Walker 388 U.S 130 [1967]

Cutler v McPhail [1962] 2QB

Fred Mme'mbe, Bright Mwape v The People and Fred Mme'mbe, Masutso Phiri, Goliath Munkonge v The People SCZ Judgment No. 4 of 1996

Gertz v. Robert Welch Inc [1974] 418 U.S

Harold Phiri v Radio Maria 2002 /HJ/31

Howlet v Holding (2003) Unreported

Hulton v Jones [1910] AC

J'Anso v Stuart (1787) 1 TR

Joseph Banda v Zambia Publishing Company Limited (1982) Z.R 4 (H.C.)

Kerr v Force (1826) 3 Cranch 8

Knupffer v London Express Newspapers [1944] 1 All ER 495 (HL)

Lewis v Daily Telegraph Ltd [1964] AC 234

Lyon v Daily Telegraph [1943] 1 K.B

Mitchell v book Sales ltd 1994 the independent 25 March

Mitchell v Faber (1998) C.A

New York Times v Sullivan 376 U.S 254 (1964)

Newstead v London Express Newspaper [1939]4 All ER 319 (CA)

Nyirenda v Kapiri Glass Products (1985) Z.R. 167

O'Shea v MGN Ltd (2001) Unreported

Parmiter v Coupland and Another (1980) 6 M & W

Re Munhemeso [1994] 1 ILRC 282

Sata v The Post Newspaper Ltd and Another 1993/HP/1395

Sim v Stretch [1936] 2 All ER 1237

Sutherland v Stopes [1925] A.C.

Theaker v Richardson [1962] 1 WLR 151

Toogood v Spying (1834) 1 C.M. & R

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LIST OF ABBREVIATIONS

ACHPR-African Charter on Human and Peoples Rights

AU-African Union

ICCPR - International Convention on Civil and Political Rights

ICESCR - International Covenant on Economic, Social and Cultural Rights

UDHR - Universal Declaration of Human Rights

UN-United Nations

CHAPTER ONE

INTRODUCTION TO PRESS FREEDOM AND THE LAW OF DEFAMATION

1.0 Introduction

In every egalitarian nation, the need for a steady flow of information about what and how government is running is an essential tenet in the realization of democratic principles. Any government operating under a written constitution must act in accordance with it; and that in part means allowing a robust press to play the role of information disseminators. Freedom of expression and the press forms one of the basic tenets of democracy. According to Professor Chanda¹, freedom of expression plays a vital role in any democracy. Democracy cannot exist without it.

In the *Re Munhemeso*², the Supreme Court of Zimbabwe stated that freedom of expression serves four broad purposes; firstly it helps an individual attain self-fulfillment; the rational individual requires information and an opportunity to express his or her own ideas if he/she is to grow; secondly it assists in the discovery of the truth; thirdly it enhances the capacity of an individual to participate in a democratic society; and lastly it provides a mechanism by which to establish a reasonable balance between stability and social change. It is only when people are able to offer their criticism to government without looking at their backs would democracy be said to be flourishing.

¹ Alfred Chanda, "The role of lower Courts in the domestic implementation of Human Rights in Zambia" *Zambia Law Journal* 33 (2001): 2

² [1994] 1 ILRC 282

Emphasizing the importance of freedom of expression/press, Justice Secretary Kenneth Clarke³ commenting on the publication of the Defamation Bill in Britain stated that:

"The right to freedom of speech is a cornerstone of [every] constitution. It is essential to the health of...democracy that people should be free to debate issues and challenge authority - in all spheres of life, whether political, scientific, academic or any other"

The media in any democratic nation therefore assumes an important role in the realization of the freedom of expression. Primarily, the media plays the center role between the state and the people. Without the media people would be sidelined in playing an active role in governance and would become passive stakeholders, albeit major stakeholders in governance. In Zambia as an instant case, part of the reasons why the nationalists revolted against the colonial rulers was because of the suppression that they encountered in trying to disseminate their ideas to the general public. This suppression was mainly achieved by sidelining black nationalists from accessing the media. In fact due to the omnipotence of white (colonialist) rule, all media houses towed the line of the rulers and disseminated information that suited the powers that be.⁴

The UNIP party premised its campaign for independence, among other things, on the need for Africans (or indigenous people) to have greater access to the media so that their views could be heard. The dawn of the new era of multi-party democracy in 1991 even promised for more freedom of expression and indeed of the media. The then emergent winning party, MMD, liberalized not only the economy but media houses in Zambia, and for the first time in the history of Zambia there was a proliferation in media houses, both print and electronic.⁵ One caveat is

³ Ministry of Justice, "Draft Defamation Bill, Consultative Paper CP3/11" Ministry of Justice [http:// www.official-documents.gov.uk](http://www.official-documents.gov.uk) and/or on [http:// www.justice.govt.uk](http://www.justice.govt.uk) (accessed on 12th March 2011)

⁴ Worldmark Encyclopedia of the Nations: "Africa" 7th edition, WorldMark Ltd, (John Wiley & Sons Inc, 1988)

⁵ Phiri, Isaac "Media in 'democratic' Zambia: Problems and Prospects"; Africa Today 46(2) 1999 :52-65

necessary here; it is unproductive and even dangerous, to postulate that freedom of expression is absolute. The Constitution of Zambia provides in Article 20⁶ for freedom of expression/press but also provides in the same Article for the right to reputation. The limitation placed on freedom of the expression/press can better be summed up in the words of Justice Secretary Kenneth Clarke⁷ when he put it succinctly that:

“freedom of speech does not mean that people should be able to ride roughshod over the reputations of others, and...defamation laws must therefore strike the right balance - between protection of freedom of speech on the one hand and protection of reputation on the other.”

There is little dispute that defamation laws can serve a legitimate purpose and it is recognised internationally as a valid ground for restricting freedom of expression. Good defamation laws – those which lay the groundwork for striking a proper balance between the protection of individuals’ reputation and freedom of expression – aims to protect people against false statements of fact which cause damage to their reputation.⁸ Nearly all countries have some form of protection, although it can have different names such as libel, slander, insult, *desacato*, *lese majeste* and so on.⁹

It goes without mentioning, as is usually the case, but needs to be mentioned here that defamation laws are often times used for the ill-defined and stifling protection of ‘feelings’, which are subjective and place a plaintiff in a position where they need only persuade a court that they feel offended.¹⁰ Defamation law in many instances represents a direct threat to freedom

⁶ Article 20 of The Constitution of Zambia, CAP 1 of the Laws of Zambia

⁷ Ministry of Justice, “Draft Defamation Bill, Consultative Paper CP3/11”

⁸ Article 19, “Global Campaign for Freedom of expression: Civil defamation undermining freedom of expression” Article 19 <http://creativecommons.org/licenses/by-nc-sa/2.5/legalcode> (accessed 12th December 2011)

⁹ Ibid

¹⁰ Article 19, “Global Campaign for Freedom of expression Civil defamation undermining freedom of expression”

of the press and, indeed, anyone who wishes to criticise the government or those in power. As a result of this threat, newspaper, radio and television listeners and/or readers tend not to receive news and information that exposes government's wrongdoing unless the media houses have access to solid and substantial evidence to prove their allegations before publication.

This research essay therefore seeks to analyse whether the proliferation in media houses in post one-party Zambia has helped strike a balance between the two competing interest of protection of individual reputation and freedom of the press. The essay will critically analyse the law of defamation and its adverse effects on press freedom in Zambia in the Third Republic. The essay will devotedly seek to find out if the right balance has been struck as a result of the proliferations in media houses.

1.1 Statement of the problem

It cannot be seriously understated that the law of defamation is indeed meant to protect the integrity and privacy of individuals. The Constitution of Zambia clearly recognizes the need to protect and respect other people's privacy as one of the restrictions to the freedom of expression¹¹. However, there is an apt argument that the law of defamation has in most cases been inhibitive to the media in fully scrutinizing and exposing the flaws in governments. The result has been that most often than not, the media shy away from exposing the alleged information which is at their disposal which nevertheless would be beneficial to the public; for fear of being sued.

Despite the Constitution guaranteeing the protection of freedom of the press, the law of defamation has in most cases been used as a scapegoat especially by politicians who would not

¹¹ Article 20(1) of CAP 1 of the Laws of Zambia

want their true character and standing to be fully exposed to the electorate. Newspaper editors, broadcasters, avoid publishing news reports exposing those in power; for example if they feel they might lose in court if challenged. Professor Malee Boonsiripunth¹², who teaches journalism at the University of the Thai Chamber of Commerce, in Bangkok, once remarked that defamation law has been used as a tool to prevent the media from doing their work.

The realisation of freedom of expression cannot be divorced from the special role the media plays as a custodian of this freedom. However a cowed media is not healthy to democratic tenets at all. The media therefore has a task to ensure that the public is fed with information in a fair, timely and robust manner, of course operating within the confines of their journalistic ethics. It cannot also be ignored that side by side with freedom of expression and press is an equally important interest for the protection of the integrity of private and public men and women.¹³ However, where a balance between the above mentioned interests is not properly drawn, one interest, and in most cases the right to freedom of expression/press is stifled.

It becomes perceptible therefore that there is need to address this conflict between freedom of expression/press on one hand and the right to protection of reputation on the other hand. This research essay offers concrete insights to the conflict between freedom of expression and the right to reputation. Specifically the essay will seek to determine what changes, if any plurality of the economy and indeed the press has brought in helping strike a balance between freedom of the press and the right to reputation.

¹² Article 19, "Global Campaign for Freedom of expression Civil defamation undermining freedom of expression"

¹³ Sata v The Post Newspaper Ltd and Another 1993/HP/1395

1.2 Objectives of the Study

- (a.) To bring to light the obstacles that the law of defamation poses on the media in Zambia
- (b) To highlight the areas of the law of defamation which need considerable reformation in order to ensure that there is a balance between the interests of the media and that of an individual.
- (c) To suggest practical solutions on how to maintain the balance between the interests mentioned above in Zambia

1.3 Significance and Purpose of the Study

The importance of this research cannot be overemphasized because, as above mentioned freedom of the media forms the cornerstone of every democratic nation. The realization of freedom of the press is the ultimate objective of many constitutions worldwide and this can only be attained if there are no laws which unjustifiably inhibit the media in discharging their informative and instructive responsibilities. It is therefore imperative that the major factor which is responsible in most cases of stifling the freedom of the media is brought to light. This would ensure that the media operates in a self-evident environment where safeguards are already in place.

One of the basic values of a free society is founded on the conviction that there must be freedom not only for the thought that we cherish but also for the thought that we hate.¹⁴ Hence criticism of government, however unpalatable it may be, cannot be restricted or penalized unless it is intended or has a tendency to undermine the security of the state or public order or to incite the commission of an offence. Debate on public issues should be uninhibited, robust and wide open and may well include vehement, caustic and sometimes unpleasant sharp attacks on

¹⁴Christine Mulundika and 7 Others v The Attorney General SCZ Judgment No. 25 of 1995

government.¹⁵ In fact freedom of expression/the press is a basic human right as well as an indispensable means to combat poverty, prevent and resolve conflicts¹⁶. In other words denial of freedom of expression is a violation of a basic human right, therefore, the significance of this research hinges upon the very essence of human existence. Further, this research is of great significance as it seeks to challenge the law of defamation and how well a balance between defamation laws and the right to freedom of expression can best be maintained in order not to kill an informative and robust media.

1.4 Specific Research Questions

- (a) To what extent does the Zambian Media help expose the flows in government?
- (b) How has the confidence or trust in the Zambian judiciary affected the media in discharging their responsibilities?
- (c) Has the law of defamation been inhibitive on the Media in Zambia?
- (d) To what extent are political officials challengeable in Zambia? Is the law inadequate in protecting the Media?

¹⁵ Ibid

¹⁶ UNDP, "Access to Justice, 2004" UNDP [http:// www.undp.org/governance/docs/justicePN_English.pdf](http://www.undp.org/governance/docs/justicePN_English.pdf), P.3 [Accessed on 19th September 2010].

1.5 Methodology

This study will embrace mainly desk research. In conducting this research available literature from national and international sources on law on defamation and press freedom will be consulted. In particular, this desk research will be done through the collection of secondary data from relevant Law Reports, books, journals, dissertations and as well as the internet.

1.6 Conclusion

In conclusion this Chapter has devotedly illustrated the background of the conflict between defamation laws on one hand and the freedom of the media on the other hand. The Chapter has detailed the significance of the study and the value it adds in the realisation of a right balance between freedom of the media and the right to reputation. It is hoped that this essay will add to the plethora of other works in finding insights on how to create an enabling environment where the media is free to operate albeit without injuring other people's reputation willfully and without any reasonable defences. The next Chapter will examine in detail the definition of defamation from different perspectives as well as discuss some defences.

CHAPTER TWO

THE DEFINITION AND NATURE OF DEFAMATION

2.0 Introduction

Defamation is a peculiar tort in several ways. It is the most clearly social tort: it covers not some kind of harm one person has directly caused to another person – not something the defendant has done to the plaintiff – but rather something the defendant has done resulting in how other people regard the plaintiff. It protects the plaintiff's 'reputation: his or her status, the image society has of the plaintiff.

In SHAKESPEARE'S *Much Ado About Nothing*, the female protagonist Hero who was supposed to marry her lover Claudio fell down in a dead faint in front of the priest who was to conduct their wedding after her lover mistakenly accused her of talking to another man at her bedroom window at midnight – a most improper conduct for a young lady of that era. Not able to bear the shame, Hero's father wished that his daughter might never open her eyes again as he looked at her lying stiff on the ground.¹ This story written or told many years ago bear resemblance to the modern day's urge for saving "face" or reputation, suffice to state that in modern times no drastic measure should be resorted to as there are laws of defamation that are aimed at protecting a person's reputation. The pertinent question to be addressed at this point then is; what is defamation?

Chelsea L. Y "Facing up to libel suits", *The Sunday Star* Tuesday, June 03,2008

2.1 The Definition of Defamation

It is relatable from the onset to state that the definition of defamation is an issue of considerable difficulty. The difficulty is not only a legal one of framing a satisfactory definition of the word, but is also a troublesome issue of policy.² Lord Wensleydale provided a classical definition of defamation in *Parimeter v Coupland*³ when he stated that defamation is:

“A publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule.”

This definition is shrouded in ambiguities and hence not satisfactory, as it espouses the exposition of a claimant to ridicule, contempt and hatred as the conclusive elements of the definition of defamation. However the statement need not have that effect. Thus to impute that the claimant had been raped would be defamatory. The fact that the claimant was said to have been raped would not have exposed her to ‘hatred, ridicule or contempt’ but it may have caused people to shun her or to avoid or lose confidence in her. This was the reasoning in *Youssoupoff v Metro-Goldwyn-Meyer*⁴ where the court, extending the reasoning of the *Parmiter v Copland* definition, stated that:

“...not only is the matter defamatory if it brings the plaintiff into hatred, ridicule, or contempt by reason of some moral discredit on the plaintiffs part, but also if it tends to make the plaintiff be shunned and avoided and that without any moral discredit on the plaintiff’s part. It is for that reason that persons who have been alleged to have been insane, or suffering from certain diseases, and other cases where no direct moral

Cracknell D. G *Obligations: the law of tort*, 5th edn (Old bailey Press ,London, 2005): 432
(1840) 6 M & W 105 at 108
(1934) 50 TLR 581

responsibility could be placed upon them, have been held to be entitled to bring an action to protect their reputation and their honour.”

Further in the case of *Berkoff v Burchill et al*⁵ the court held that:

“A statement which left the claimant subject to contempt, scorn or ridicule, or tended to exclude him from society, could be defamatory even though it did not impute disgraceful conduct or lack of professional skill. The standard here is objective, i.e. what would right-thinking members of society think?”

However, mere vulgar abuse is an insult that is not necessarily defamatory because it is not intended to be taken literally or believed, or likely to cause real damage to a reputation. Vituperative statements made in anger, such as calling someone "an asshole" during a drunken argument, would likely be considered mere vulgar abuse and not defamatory.⁶ The definition in the *Youssouppoff* case is not without its deficiencies, because it is not always that the statement has to refer to the plaintiff's reputation. The statement may simply refer to the appearance of the person as the case was in the *Burchill's* case. Thus, in *Benny Hamainza Wycliff Mwinga v Times Newspapers Ltd*⁷, the defamatory words complained of did not refer to the plaintiffs business or occupation, but referred to him as being connected to drug dealers in England. The courts found this imputation to be defamatory.

Generally, defamation occurs when a statement or publication injures the reputation of another. In other words Defamation—also called calumny, vilification, traducement, slander (for transitory statements), and libel (for written, broadcast, or otherwise published words)—is the

⁵ [1996] 4 All ER 1008

⁶ Roger LeRoy Miller and Gaylord A Jentz, *The Fundamentals of Business Law Today* (Cengage Learning 2008): 115

⁷ (1988-1989) Z.R. 177

communication of a statement that makes a claim, expressly stated or implied to be factual, that may give an individual, business, product, group, government, or nation a negative image.⁸ This can be also any disparaging statement made by one person about another, which is communicated or published. It is usually a requirement that the claim is false and that the publication is communicated to someone other than the person defamed.⁹ Perhaps the definition given by the Faulks Committee on Defamation is all inclusive. In their report the Committee recommended that for the purposes of civil cases, defamation shall consist of the publication to a third party of a matter which in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally.

Despite the difficulties in coming up with a single definition of defamation, there has been consensus among scholars and jurists that three elements must be proved in order for the plaintiff to succeed in a suit for defamation. The basic three elements that have to be proved together in order to establish defamation are; *the existence of a defamatory statement; reference to the claimant and lastly; the publication of the defamatory statement.*

Hankin Ron., "Navigating the Legal Minefield of Private Investigations: A Career-Saving Guide for Private Investigators, Detectives, And Security Police" Loose-leaf Law Publications,(2008):59
bid

2.2 Tort Elements of Defamation discussed

2.2.1 Existence of defamatory statement

The words which are used by the defendant must be words which are defamatory. Lord Atkin in *Sim v Stretch*¹⁰ said that defamatory words were:

"Words which tend to lower the claimant in the estimation of right thinking members of society generally."

In *Parmiter v Coupland and Another*¹¹ it was said that:

"The statement may lower the claimant in the estimation of right thinking people by exposing him to hatred, contempt or ridicule."

Whether a statement is capable of carrying a defamatory meaning is a matter of law. But whether it is actually defamatory in the circumstances of the case is a matter of fact. What this means is that, the law will spell out what is defamatory in nature from which arises liability. Whether it is actually defamatory will depend on the facts and evidence. A statement which disparages a person in his reputation in relation to his office, profession, calling, trade or business may be defamatory, for example the imputation of some quality which would be detrimental or the absence of some quality which is essential to the successful carrying out of the office.¹²

¹⁰ [1936] 2 All ER 1237
¹¹ [1980] 6 M & W 105
¹² The Defamation Act CAP 68, section 3

The case of *Harold Phiri v Radio Maria*¹³ is instructive on this point. The statement complained of was that the plaintiff as the person in-charge of the clinic had chased away a pregnant woman who needed delivery services as a result of which she gave birth under a tree. The Court stated that:

'...the news item exposed him to hatred and resentment .The local community demanded for his immediate removal and therefore, I find the words complained of in their natural and plain meaning defamatory of the plaintiff.'

Who then is a right-thinking member of society? Lord Reid in trying to answer this question said of a reasonable man in *Lewis v Daily Telegraph Ltd*¹⁴ that:

"...there is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs. I leave aside questions of innuendo where the reader has some special knowledge which might lead him to attribute a meaning to the words not apparent to those who do not have that knowledge."

Further in *Mitchell v Faber*¹⁵ the Court of Appeal held that:

"... in deciding whether or not words could be defamatory, it was necessary to consider the reaction of the reader who was neither unduly suspicious nor unduly naive, who was capable of reading between the lines and detecting implications,

2002 /HJ/31
[1964] AC 234
(1998) C.A

but not 'avid for scandal', and who was not prone to assume a derogatory meaning where an innocent one could apply. The question to be asked is: "what effect the allegation that someone had held those attitudes at the time would have on a reader in the current time period?"

In considering whether a statement is defamatory regard must be had to all the circumstances of the case. Words must be interpreted in the context in which they were spoken or written¹⁶ Thus where a book describes statements made in the 1960s the question as to whether or not they are defamatory must be decided on whether they would have been defamatory in the cultural context and circumstances of the time.¹⁷ However both law and principle hold that any false statement which has the effect of lowering the plaintiff in the estimation of right thinking members of society is defamatory.¹⁸

2.2.2 Publication

Since in defamation the determination is the effect on how others see the plaintiff, some other person must have heard or seen the defamatory statement. A derogatory statement made only to the plaintiff cannot be defamation, however insulting or hurtful it may be. It does not matter how many other people (or 'third parties' – i.e., people other than the plaintiff and the defendant) hear or see the defamatory statement. The term 'publication' should thus be understood as a term of art, including communication even to a single other person, not necessarily the 'public'.¹⁹ However for this purpose, a communication between the defendant and his spouse does not

¹⁶ Mitchell v Book Sales Ltd 1994 The Independent 25 March

¹⁷ Ibid

¹⁸ Parmiter v Coupland and Another (1980) 6 M & W 105

¹⁹ Ibid

constitute publication.²⁰ A communication however to the spouse of the claimant does constitute publication for this purpose. This is both on law and principle.²¹

The defendant need not have intended that the defamatory statement be communicated to any particular person. It is sufficient that the publication to that person could have been reasonably anticipated. Thus in *Theaker v Richardson*²², the defendant wrote a defamatory letter to the claimant, accusing her of being a whore and a brothel keeper. The claimant was a married woman and was a fellow local councilor with the defendant. The claimant's husband picked up the envelope and, believing it to contain an election address, he opened it and read its contents. It was held that the defendant was liable because it was a reasonable and probable consequence of the defendant's method of delivery of the letter that the claimant's husband would open it and read it.

Whenever a customer of an internet service provider accesses its newsgroup and sees a posting defamatory of the claimant there is a publication to that customer.²³ Further in *Howlet v Harding*²⁴, libel was established where untruthful allegations were made on banners towed by a private aircraft and leaflets dropped indiscriminately from it. Every time that the defamatory statement is repeated, the tort is committed again and a fresh cause of action arises.²⁵

Penhale v Morgan (1888) 20 QBD 635

Penman v Ash (1853) 13 CB 836

[1962] 1 WLR 151

Godfrey v Dermon Internet Ltd [1999] 4 All ER 342

[2003] Unreported

Butler v McPhail [1962] 2QB 292

2.2.3 Reference to claimant

Viscount Simon LC in *Knupffer v London Express Newspapers*²⁶ puts this point succinctly when he stated that:

“it is an essential element of the cause of action for defamation that the words complained of should be published of the plaintiff: if the words are not so published the plaintiff is not defamed and cannot have any right to ask that the defendant should be held responsible to him in respect of them”

Thus, the defamatory comment must identify the plaintiff; otherwise, of course, the plaintiff would have no ground of complaint. What is important here is that again, it is how the ordinary listener or reader would interpret the statement that matters. The statement need not refer to the plaintiff by name, and the defendant need not even intend that his or her statement refer to the plaintiff; the question is whether the ordinary audience would understand the statement to refer to the plaintiff. In *Newstead v London Express Newspaper*²⁷ the defendant newspaper ran a piece describing the conviction for bigamy of “Harold Newstead, thirty-year-old Camberwell man”. There happened to be two men who fitted that description: a barman and a hairdresser. The story was about the barman, and quite true about him – but the hairdresser had nothing to do with any bigamy charge. He sued the newspaper, and won. An ordinary reader of the article could easily have thought it referred to the hairdresser.

Further in *J'Anso v Stuart*²⁸, a newspaper referred to 'a swindler', describing the person meant in the words 'his diabolical character, like Polyphemus the man-eater, has but one eye, and is well known to all persons acquainted with the name of a certain noble circumnavigator.' The claimant

²⁶ [1944] 1 All ER 495 (HL)

²⁷ [1939] 4 All ER 319 (CA)

²⁸ (1787) 1 TR 478

had only one eye, and his name was very similar to the name of a famous admiral; he was able to prove that the statement referred to him, even though his name was never mentioned. Where a defamatory statement was intended to refer to a fictitious character or someone other than the claimant, the defendant will be liable for defamation of the claimant if a reasonable person would think the statement referred to the claimant. All that matters was what a reasonable person would understand the words to mean.²⁹

There can be cases where a defamatory statement was intended to refer to some one other than the claimant. As an example, in *O'Shea v MGN Ltd*³⁰, the defendant newspaper published an advert for a pornographic website. The advert contained a picture of a woman prostitute, Miss X, with full permission from her. However, the claimant was a woman who looked very like Ms X and certain details in the advert might also have been taken as referring to her by those who knew her. She sued, claiming that people who knew her would have reasonably thought that it was her, and that it was defamatory to suggest she would allow her picture to be used in such a context. The court found that the 'ordinary sensible reader', who knew her, could well think that it was her in the picture. Generally, where the defamatory statements had been directed at a group or class of persons, no individual belonging to that class can sue, unless there is something in the words or the circumstances in which they were uttered which might identify the claimant in particular.

The case of *Cobbett-Tribe v The Zambia Publishing Company*³¹ would be instructive on this point. One issue that arose was whether the statement complained of referred to the Plaintiff. The facts of the case were that the Plaintiff was the vice president of the Law Society of Zambia. The

²⁹ *Hulton v Jones* [1910] AC 20

³⁰ (2001) Unreported

³¹ (1973) Z.R. 9

Council of the Society issued a statement urging the government to bring to trial or before a tribunal persons detained under the Preservation of Public Security Act. Defendants published in their daily paper, the *Zambian Daily Mail*, statements imputing professional dishonesty, ignorance and immorality to the members of the Council. Consequently, the Plaintiff brought an action to recover damages from the defendants for the libelous statement made concerning him.

Doyle C.J stated that:

“... Where defamatory words refer to a limited class of persons of which the plaintiff is one; each and every member of the class has a right of action for defamation.”

What can be discussed from this case is that reference to the plaintiff does not mean that he or she has to be referred to by name. In the instant case, the statement referred to the Council as a whole and not the individuals consisting of the Council. The Court was of the view that where a class of persons has been defamed, every member or individual belonging to that class of persons has a right of action.

Further, another instructive case is *Knupffer v London Express Newspapers*. In that case the claimant was a Russian refugee and a member of the ‘Young Russian Party’, which had several members in England and abroad. An article alleged that the group was Nazis. The House of Lords held that the claimant could sue in respect of this statement if he could prove that the statement was capable of referring to him and that it was in fact understood as referring to him.

It was further held that the claimant could not show that the article was capable of referring to him as it referred mainly to the activities of the group overseas and so his action was dismissed.

This ruling makes it extremely difficult for a claimant to sue in respect of a group libel unless the group which is alleged to have been libeled is very limited in size, so that the statement can be

understood as referring to the claimant. This can have detrimental civil liberties implication especially where the group which has been defamed is an oppressed minority group with little other hope of obtaining redress.

2.3 Forms of defamation

Defamation is the general term used internationally, and is used in this article where it is not necessary to distinguish between "slander" and "libel". However 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.³² 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. Libel is defined as defamation by written or printed words, pictures, or in any form other than by spoken words or gestures.³³ Further, the distinction which English law makes between disparagement of reputation by written and by spoken words or between defamation in a permanent and in some transitory form derives from the different histories of the remedies for the two wrongs of libel and of slander, and has been said to be established "too firmly to be shaken."³⁴

2.4 Defences to Defamation

Even if a statement is defamatory, there are circumstances in which such statements are permissible in law. This happens if the defendant can, in the circumstances of the case, invoke and prove one of the defences that are available in a suit for defamation. The following are some of the defences to defamation:

Cracknell D. G *Obligations: the law of tort*

Cracknell D. G *Obligations: the law of tort*

Archbishop of Tuam v Robeson (1828) 5 Bling at p.21

2.4.1 Truth or Justification

In many legal systems, Zambia inclusive, adverse statements about the plaintiff must be proven false to be defamatory. It is no part of the plaintiff's case in an action for defamation to prove that the defamatory words are false: the law presumes it in his favour.³⁵ However proving adverse character statements to be true is often the best defense against a suit for defamation. To make good the plea, the defendant must prove that the imputation is true, not merely that he believed it to be true.³⁶ The use of the defence of justification has dangers however; if the defendant libels the plaintiff and then runs the defense of truth and fails, he may be said to have aggravated the harm. In *Kerr v Force*³⁷ it was stated that:

"If I say of the plaintiff that I believe he committed murder, I cannot justify by saying and proving that I did believe it. I can only justify by proving the fact of murder."

Another important aspect of defamation is the difference between fact and opinion. Statements made as "facts" are frequently actionable defamation. Statements of opinion or pure opinion are not actionable. If the defamatory statement [is] both of facts and of opinion, the defendant under a plea of justification must prove that the statement of facts are true and the statement of opinion are correct.³⁸ In *Cooper v Lawton*³⁹ it was stated that:

"In a plea of justification the defence that a matter of opinion or inference is true is not that the defendant truly made that inference or truly held that opinion, but that the opinion and inference are both of them true."

³⁵ Richard O'sullivan Q.C and Roland Brown, *The Law of Defamation*, (London, Sweet & Maxwell Limited London, 1958) p53

³⁶ *Ibid* p 53

³⁷ (1826) 3 Cranch 8, at p. 24

³⁸ Richard O'sullivan Q.C and Roland Brown, *The Law of Defamation* p 54

³⁹ (1838) 8 A & E. 746, see also *Sutherland v Stopes* [1925] A.C, at pp. 62,63,75

It is also true to state that the defence of justification will not fail if the statement is not true but substantially true. Thus in *Joseph Banda v Zambia Publishing Company Limited*⁴⁰ the court stated that a plea of justification is a complete defence to an action for a libel but to establish this defence the defendant must establish and prove that the defamatory imputation is true in substance and fact. Section 6 of the defamation Act⁴¹ gives credence to the reasoning in the *Joseph Banda case* by providing that in an action for libel or slander in respect of words contained in two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved, if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

2.4.2 Fair Comment

More often than not the defence of fair comment goes hand in hand with justification. Fair comment on a matter of public interest, such as arguments made with an honest belief in their soundness on a matter of public interest (such as regarding official acts) are defensible against a defamation claim, even if such arguments are logically unsound; if a reasonable person could honestly entertain such an opinion, the statement is protected.⁴² Scot L.J made this point succinctly when he stated in *Lyon v Daily Telegraph*⁴³ that:

"The right of fair comment is one of the fundamental rights of free speech and writing which are so dear...and it is of vital importance to the rule of law on which we depend for our personal freedom."

⁴⁰ (1982) Z.R 4 (H.C.)

⁴¹ CAP 68 of the Laws of Zambia

⁴² Richard O'sullivan Q.C and Roland Brown, "The Law of Defamation" Cambridge Law Journal (1960) 18: 113

⁴³ [1943] 1 K.B 746

In order to succeed in a defence of fair comment, all the defendant has to prove is that he commented on a matter of public interest; secondly that there is a requirement that the comment was made of facts. Thus there is a prima facie case of fair comment only when the comment is shown to be one which the defendant made honestly⁴⁴.

2.4.3 Absolute privilege

There are occasions on which in the interests of common convenience and the welfare of society, the law attaches a certain protection to defamatory matter, spoken or written: these occasions are said to be privileged.⁴⁵ In absolute privilege no action lies even though the defamatory statement may have been malicious and false.⁴⁶ Where a defence of absolute privilege is set up, it is for the defendant to allege and prove all such facts as are necessary to bring the words within the scope of the privilege, unless such facts are disclosed in the statement of claim or are admitted before or at the trial of the action.⁴⁷ There are certain situations which are absolutely privileged, chief among them; judicial proceedings, executive matters and solicitor-client communication.

2.4.4 Qualified Privilege

There are occasions when, on grounds of public policy and convenience, a person may, without incurring liability, make statements about another which are defamatory and in fact untrue.⁴⁸ Such occasions are called occasions of qualified privilege. It is not possible to set out all occasions at common law, which will be held, to be qualified privilege but, as a general rule, there must be a common and corresponding duty or interest between the person who makes the

⁴⁴ Street Harry, *The Law of Torts*, 4th edtn (London Butterworths, 1968): 311

⁴⁵ Richard O'sullivan Q.C and Roland Brown, "The Law of Defamation" p 56

⁴⁶ Ibid p 57

⁴⁷ Richard O'sullivan Q.C and Roland Brown, "The Law of Defamation" p 58

⁴⁸ Ibid p 67

communication and the person who receives it.⁴⁹ “Statements made on an occasion of qualified privilege are protected “*for the common convenience and welfare of society,*” as per Parke B in *Good v Spying*⁵⁰. Further the court in *Bowen v. Hall*⁵¹ stated that:

“It is better for the general good that individuals should occasionally suffer than that freedom of communication between persons in certain relations should in any way be impeded. But the freedom of communication which it desired to protect is honest and kindly freedom, it is not expedient that liberty should be made the cloak of maliciousness.”

For the defence of qualified privilege to suffice, the defendant has to show the court that he published the statement in honest belief that it was true and that there was no malice on his part. In *Nyirenda v Kapiri Glass Products*⁵² the court held that the defence of qualified privilege could not stand because there is no statutory or reciprocal duty on the part of the defendant to notify the senior labour as he had no common interest in the circumstances and reasons for the dismissal of the plaintiff.

5 Conclusion

From the foregoing discussion it is true to state that defamation is a peculiar tort. It is the most early social tort: it covers not some kind of harm one person has directly caused to another person but rather something the defendant has done to *how other people regard* the plaintiff. It protects the plaintiff's 'reputation. It is also the most political tort. In determining what sort of things a person may say about other people without being liable to pay damages, it more or less

Richard O'sullivan Q.C and Roland Brown, *The Law of Defamation* p 67

[1834] 1 C.M. & R 181

[1881] 6 Q.B.D, AT P 343

[1985] Z.R. 167

determines how free people in the jurisdiction are to discuss each other. The tort of defamation shares legal space with the right of free speech – a constitutional right in our jurisdiction. Finally the basic three elements that have to be proved together in order to establish defamation are; *the existence of a defamatory statement; reference to the claimant and lastly; the publication of the defamatory statement*. There are indeed a number of defences to a suit of defamation and this legal essay has endeavored to discuss some of them but not in totality. The next chapter will discuss freedom of expression; explaining its meaning, development, importance and indeed status of it in the Third Republic.

CHAPTER THREE

PRESS FREEDOM AND THE ROLE IT PLAYS IN FOSTERING DEMOCRACY

3.0 Introduction

The existence of the press in every democratic nation is of great importance. However, guaranteeing press freedom assumes an even greater importance and expedience. In fact freedom of the press is the cornerstone of every democratic state. It has become a tendency world over to frown upon countries where press freedom is being stifled. In fact a country's democratic adherence is measured mainly on how well the media houses can function. The latitude of the type of news that media houses can cover is also a milestone measure of democratic affinity. This chapter will therefore examine press freedom in detail with biasness to the advantages that come with it, however; an examination of the shortfalls of excessive freedom of the press will also be stated.

The chapter will firstly define press freedom, analyse its importance, development and the status it has acquired in the third republic. It is pertinent to state from the onset that press freedom cannot be studied in abstract form; it is therefore cardinal to state a brief background of it and the hurdles it has faced in its evolution. Further it is fundamental to state the political and socio-economic antecedents through which press freedom has evolved in Zambia up to the Third Republic.

3.1 The Definition of Press Freedom

The Constitution of Zambia guarantees the right to freedom of expression. Article 20¹ states that:

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

It is explicit from the wording of Article 20 that press freedom is guaranteed as an ancillary to freedom of expression. This is a very important fundamental right. It is indispensable for the development of one's own individuality and for the success of parliamentary democracy. It is said that in a democracy the right to free expression is not only the right of an individual but rather a right of the community to hear and be informed.² In fact Article 20(2)³ goes so far as to prohibit any derogation from press freedom. The said Article provides that:

“Subject to the provisions of this Constitution, a law shall not make any provision that derogates from freedom of the press.”

It has been argued throughout this research essay that freedom of expression is the life- blood of any democratic nation and press freedom is the medium through which freedom of expression is realized. The Constitution does not define press freedom but one cardinal issue that comes out of the constitutional provision is that freedom of expression/press is literally the liberty to hold, communicate and impart information or opinions without interference. In the alternative,

¹ Article 20 of The Constitution of Zambia, CAP 1 of the Laws of Zambia

² William Steven Banda v The Attorney General 92/HP/1005

³ The Constitution of Zambia, CAP 1 of the Laws of Zambia

freedom of the press is synonymous with freedom to express oneself without censorship or limitation.⁴

3.2 The importance of Press Freedom

Zambia as a democratic state prides itself in the fundamental realisation that freedom of the press is the cornerstone of maintaining the status quo. Freedom of information is vital to the proper functioning of a modern representative government; it enhances the notion of deliberate or even participatory democracy. In this regard, just as freedom of expression is considered to be an indispensable concomitant of modern democracy, so is freedom of information.⁵ The Supreme Court in *Christine Mulundika and 7 Others v The Attorney General*⁶ endorsed this preposition when it stated that:

“...freedom of expression constitutes one of the essential foundations of such a society, it is not only applicable to information or ideas that are favourably received or regarded as inoffensive, but also those which offend, shock, or disturb the population.”

Perhaps Mr. Justice HOLMES in *Abrams et al v. United States of America*⁷ (dissenting) put the point of fundamental importance of press freedom succinctly when he stated that:

“... when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any

⁴ Smith David “Timeline : a history of free speech” The Guardian (London), (accessed on 15th February 2012)

⁵ Mason A “The relationship between freedom of expression and freedom of information” In Beatson J and Cripps Y ed “Freedom of expression and freedom of information (200) 233

⁶ SCZ Judgment No. 25 of 1995

⁷ 250 U.S 616 [1919]

rate this is the theory of our Constitution... every day we have to wager our salvation upon some prophecy based upon imperfect knowledge... [However]... we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

The principle of freedom of speech springs from the necessities of the program of self-government. It is not of nature or reason in the abstract. It is a deduction from the basic agreement that public issues shall be decided by universal suffrage.⁸ From the foregoing it is imperative that press freedom is important for an individual's own development as it is for a country's. Government must be open to public scrutiny so as to be accountable and exposed to the judgment and evaluation of the citizens.⁹ Before parliament passes any law, it is imperative that law be subjected to a robust debate in order to get the aggregate views of the public, at least to ensure that the law has some popular acclaim. The Indian Press Commission illuminates this point when it stated that:

*"Democracy can thrive not only under a vigilant eye of the legislature but also under the care and guidance of public opinion and the press is par excellence the vehicle through which opinion can become articulate."*¹⁰

Indeed there can be no freedom of expression where there is some potential sanction to follow.

The Court in *William Steven Banda v The Attorney General*¹¹ stated that:

⁸ Meiklejohn Aalexander , *Political Freedom; Political Rights in the United States*, 4th edtn, (Little Brown, Boston, 1976)

⁹ Mason A "The relationship between freedom of expression and freedom of information"

¹⁰ *William Steven Banda v The Attorney General* 92/HP/1005

¹¹ 92/HP/1005

“The freedom of expression rests on the assumption that the widest possible dissemination of information from divergent and antagonistic sources is essential to the welfare of the public. Such freedom is the foundation of a government of a free people. The purpose of such a guarantee is to prevent public authorities from assuming the guardianship of the public mind. The fundamental right enshrined in Article 20 of the Constitution is essential for political liberty and proper functioning of democracy.”

Further in emphasizing the importance of freedom of the press, the American Press Commission¹² stated thus:

“Freedom of the press is essential to political liberty. When men cannot freely convey their thoughts to one another, no freedom is secured, where freedom of expression exists the beginning of a free society and a means for every retention of liberty are present. Free expression is, therefore unique among liberties.”

It is to be appreciated that freedom of the press as espoused above is an instrument through which social balance can be achieved.¹³ By guaranteeing freedom of the press, a nation ensures political liberty as well as individual development. A robust press is as good as democracy itself, the two are intertwined. The Constitution by providing for a justiciable Bill of Rights¹⁴ under which freedom of the press is guaranteed ensures that this freedom is not tempered with unnecessarily by any other laws unless to the extent to which the Constitution so allows.

There can be no political liberty without freedom of the press and people cannot feel connected to their government if freedom of the press is not guaranteed. It is unthinkable that everyone will have a homogenous way of thinking, but that does not mean that those whose views are different

¹² William Steven Banda v The Attorney General 92/HP/1005

¹³ William Steven Banda v The Attorney General 92/HP/1005

¹⁴ Part Three of the Constitution, CAP One of the Laws of Zambia

and even repugnant to those of the majority should be shunned from expressing their views. Society thrives on the understanding that different views should be able to compete without being unnecessarily censored.

3.3 Laws both local and international that protect press freedom

Locally the Constitution in Article 20 provides for the protection of press freedom. This is one of the cardinal provisions so far effective in Zambia. However there is an array of both regional and international treaties/convention that provides for freedom of the press. At regional level, Zambia is party to the African Union. The African Union has as one of its human rights instruments, the African Charter on Human and Peoples' Rights¹⁵ (Hereinafter the Charter). The Charter states in Article 9 that:

“Every individual shall have the right to receive information. Every individual shall have the right to express and disseminate his opinions within the law.”

Article 9 of the Charter clearly provides for freedom of the press. The African Union in fact deliberately distinguishes itself from the OAU by placing human rights and good governance at the heart of its objectives.¹⁶ The AU can impose sanction in any member country where there is flagrant abuse of human rights. The sanctions contained in the Constitutive Act's provisions can only be realized through the exercise of political will by states in the form of concrete action to protect human rights, raising hopes that African states are preparing to confront the urgent challenges of strengthening democracy, collective security, and human rights in Africa.

¹⁵ The African Charter on Human and Peoples' Rights Article 9

¹⁶ Abuja Treaty Articles 3(h) and (g). June 3, 1991, O.A.U. Doc. AHG/Res. 205 (XXVII) (entered into force May 12, 1994), available at www.africa-union.org/root/au/Documents/Treaties/Text/AEC_Treaty_1991.pdf> [Abuja Treaty] www.uneca.org/itca/ariportal/abuja.htm

The addition of sanctions elaborates how Africa as a continent is serious about human rights situations prevailing in member states. The imposition of sanctions serves as a deterrence to would be perpetrators of human rights abuses.

At international level the Universal Declaration of Human Rights also provides for the right to freedom of opinion and expression. Additionally, the UDHR defines freedom of expression as:

“The freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

Additionally The International Covenant on Civil and Political Rights in Article 19 (1) states (paraphrasing) that:

“Freedom of expression includes the right to seek, receive and impart information and ideas, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

The International Covenant on Civil and Political Rights provides that the exercise of the right to freedom of expression carries with it special duties and responsibilities. The restrictions the freedom of expression is subjected to must be provided by law and must be necessary for the respect of the rights or reputations of others and for the protection of national security, public order, public health or morals.¹⁷

¹⁷ The International Covenant on Civil and Political Rights Art.19(3)

3.4 Brief historical Development of the Press in Zambia

All forms of media are shaped by political, economic, educational, and social conditions, but the media can help shape things as well. The existence of the media in Zambia has not always been a happy one. Like elsewhere in Africa, the initial newspapers in what was then known as Northern Rhodesia were aimed at the small white community. Africans were ignored, except in so far as they could be depicted as criminals or in other negative ways.¹⁸ When African nationalists started agitating for change in the 1950s and continuing into the 1960s, they could not count on newspapers, radio, or television to tell their story.¹⁹ During federation days, the federal government controlled radio and television outlets, which were used to demonize black nationalists and to tout the views of the federal government.²⁰

Zambia was a colony of Britain until 1964. This colonial history undeniably influenced the type of leadership that was adopted in post-colonial Zambia. Just eight years after the declaration of independence, Zambia was declared a one-party state. This change saw the media, transfer into state hands.²¹ Kasoma's work on the history of the press in Zambia²² shows that the media failed to gain autonomy during Kaunda's one-party rule. Kasoma shows that attempts by individuals and groups to establish an independent press in the late 1960s through the 80s also failed miserably.²³ By the late 1980s, the one-party state's grip on

¹⁸ *Worldmark Encyclopedia of the Nations*: 7th edition

¹⁹ *Ibid*

²⁰ *Worldmark Encyclopedia of the Nations*: 7th edition

²¹ Festus Eribe and William Jong-Ebot eds: Kasoma, Francis P. *Press Freedom in Zambia: Press Freedom and Communication in Africa*. (Trenton NJ: Africa World Press Inc, 1997)

²² *Ibid*

²³ Festus Eribe and William Jong-Ebot eds: Kasoma, Francis P. *Press Freedom in Zambia: Press Freedom and Communication in Africa*

the country began to loosen, paving way for a multi-party democracy and the possibility of pluralism.²⁴

The crumbling of the one-party state also accompanied unprecedented changes in the legal and political climate. The period leading up to the 1991 democratic elections was characterised by an environment of increased optimism among the people for a more democratic and pluralistic government.²⁵ When the MMD came into power, many expected that it would be committed to what it termed 'multi-party pluralism' and draft a constitution that was steeped in democratic ideals. At their very first public conference, leaders of [the MMD] championed freedom of speech and criticized the one-party state for failing to foster an environment conducive to a free press. Remmy Mushota, who became Minister of Legal Affairs when the MMD eventually came to power, identified freedom of the press as 'one of the most significant freedoms in the process of establishing and sustaining a free and democratic society.'²⁶ The MMD manifesto stated thus:

'The MMD believes that freedom of expression and the right to information are basic human rights. As such journalists will have to play an important role in promoting democracy and development in an MMD-led government'.

²⁴ Ibid

²⁵ Banda F. *Elections and the Press in Zambia: A case of the 1996 polls* (Independent Media Association 1997)

²⁶ Mushota, Remmy, *Constitutional framework and restructuring prospects: Democracy, human rights and the one party state* (1989) see also Lewanika Mbikusita & Derrick Chitala (Eds) *'Hour has come : Proceedings of the National Conference on the Multiparty Option'* (Lusaka Research Foundation)

3.5 Status of Press freedom in Zambia in the Third Republic

Although far from being totally free, the media in Zambia has been far freer than it was in the 27 years from independence in 1964 to the 1991 electoral defeat of Kaunda and his UNIP. Zambians now have access to competing and opposing voices.²⁷ The private press has taken upon itself the role of public watchdog and defender of freedom and the truth. Access to the media has improved markedly.²⁸ Criticism of the government is no longer a crime. However, despite these newfound freedoms, access to the media remains limited because of illiteracy, poverty, inability to afford newspapers, and the costs of radio and television.²⁹

The MMD was, therefore, in part elected based on its apparent commitment to the transformation of the media from an instrument of the ruling party to being an autonomous participant in the democratic process.³⁰ Kasoma posits that democracy entails the right to choose from alternatives regarding the best course of action and to this end is largely based on the availability of information which lays out those alternatives (Kasoma, 2000: 29). However, when a growing independent press began challenging Chiluba's policies or reporting official corruption, the new president wavered on his electoral commitments to press freedom and repression ensued.

Chiluba's successor, late President Mwanawasa, introduced a series of positive media reform legislation in 2003, including a Freedom of Information (FOI) Bill presented to parliament in

²⁷ Kasoma, Francis P. *"The Press and Multiparty Politics in Africa"* (Unpublished manuscript)

²⁸ Festus Eribe and William Jong-Ebot eds: Kasoma, Francis P. *Press Freedom in Zambia: Press Freedom and Communication in Africa*

²⁹ Lee, Philip, *The Democratization of Communication*, Cardiff: (University of Wales Press 1995): 2'6

³⁰ Collins Phiri and Henry Kabwe, 'Press Freedom Slips in Zambia' [http:// www.cpi.org/blog/2009/08/freedom-slips-in-zambia.php](http://www.cpi.org/blog/2009/08/freedom-slips-in-zambia.php) (Accessed on 14th August 2009)

2002³¹, but the reforms have not been implemented to this day and the FOI bill is still pending in parliament. The new Patriotic government has however committed itself to reintroduce the FOI in parliament and make it its number one priority. What is worse though is that outdated laws (some dating as far back as the colonial era), including sweeping presidential powers to ban publications, and sedition and criminal defamation laws, still threaten press freedom. One of the most disturbing aspects of our society is the way in which the mass media have, unashamedly, been manipulated to the exclusive monopoly of a small clique of the leaders at the top and how the views of the ordinary citizen who wishes constructively to criticize our policies are blacked out (Mushota, 1989: 42).

3.6 Conclusion

The need for freedom of the press in any democratic nation can not be overemphasized. Press freedom is one of the most cardinal rights in any state. The importance of this chapter cannot therefore go without saying. The chapter has elucidated the definition of press freedom as the liberty to hold, communicate and impart information or opinions without interference. Further, the chapter has stated many advantages of press freedom among them that democracy can thrive under the care and guidance of public opinion and the press is par excellence the vehicle through which opinion can become articulate. In the itinerary of this essay, the historical development of press freedom has been dealt with. It becomes certain that the existence of the media in Zambia has not always been a happy one. The next chapter analyses the intricate relation of defamation laws and press freedom.

³¹ *Daily Parliamentary Debates* Thursday 28 November 2002

CHAPTER FOUR

DEFAMATION IN RELATION TO PRESS FREEDOM

4.0 Introduction

Defamation law protects an individual's reputation or feelings from unwarranted attacks. There is little dispute that defamation laws can serve a legitimate purpose. On the other hand freedom of the press has also being recognized as the cornerstone of democracy. The existence of democracy indeed involves a combination of factors; however freedom of expression and the press forms one fundamental element of a free society. The paradoxical legal issue prevailing in Zambia is that whereas press freedom is guaranteed in the Supreme law of the land (the Constitution), the right to reputation is also provided for in the same Constitution, in fact in the same Article¹ as press freedom.

While there can be no contention of unconstitutionality between the two interest (freedom of expression and right to reputation) in the Constitution, what arises as a pertinent issue is how best to strike a balance between defamation (right to reputation) and freedom of expression. The essence of this chapter is therefore self-evident. This chapter will in detail discuss how to strike a better balance between the right to reputation and freedom of the press. Of particular importance is whether the pluralism in media houses has helped strike that balance.

¹The Constitution of Zambia, CAP 1 of the Laws of Zambia, Article 20

4.1 Balancing press freedom with defamation

It is illogical that anyone can argue for freedom of the press to be absolute. Freedom of the press is indeed no blank cheque for the media houses to be reporting as they wish, in fact that will defeat the very essence that proponents of freedom of the press hold; that of fostering democracy. This preposition is given credence in *Fred Mme'mbe, Bright Mwape v The People*² where the court stated that freedom of speech and press cannot be synonymous with freedom to defame. The need to balance press freedom with the right to reputation becomes even self-evident considering the fact that the two competing interest are provided for by the same Constitution with the effect that none would take a lesser standing than the other.

Ideally defamation should be limited to the protection of reputation. But in a number of countries across the world, Zambia inclusive, defamation laws are also used for the ill-defined and stifling protection of 'feelings', which are subjective and place a plaintiff in a position where they need only persuade a court that they feel offended.³ Having this preposition in mind, the Court in *Sata v The Post Newspaper Ltd and Another*⁴ was been asked to make modifications to the law of defamation in order to advance freedom of expression/the press. Counsels for the defendants Mr. Sikota and Mr. Lungu put forward the argument that:

"Because article 20 of the Constitution of the Republic of Zambia 1991 specifically recognizes, among others, the principle of the freedom of the press, it is now time 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

² S.C.Z Judgment No. 4 of 1996

³ Article 19, "Global Campaign for Freedom of expression Civil defamation undermining freedom of expression"

⁴ 1993/HP/1395

proof, and the latitude the press should be permitted to subject public officials to criticism and scrutiny.”

This preposition was in fact based upon what is prevailing in the United States of American and in particularly what was held in *New York Times Co v Sullivan*⁵. Before reverting to the holding in the *Sullivan case* which would be discussed under the case law part, what is of importance however to state is that the question to which the Court was been invited to address itself was very a cardinal one in so far as freedom of the press is concerned. The latitude, in type of news that the press have, in reporting especially about political matters has been inhibited by the fear of being sued. Chief Justice Ngulube alluded to the fact that when under attack, those who fill public positions must not be too thin-skinned. They are also taken to have offered themselves to public attack and criticism and the public interest requires that public conduct shall be open to the most searching criticism.⁶

The discussion has centered on mostly press freedom in relation to reporting on political matters. It is perceptible that there cannot be any meaningfulness in arguing for larger latitudes for freedom of the impress in relation to private individuals. Private individuals need utmost protection of their privacy and reputation. Public officers have chosen to be in the lime light and hence place themselves under public scrutiny. Rigorous implementation of defamation law where public officials are concerned may have a negative consequence on the right to freedom of expression. This may in turn undermine transparency and accountability. The press may for instance be inhibited from reporting on matters that are of interest to the public for fear of being sued. Necessity entails that certain news are supposed to reach the public even if there are some

⁵ [1964] USSC 41; (1964) 376 US 254, 11 L Ed 2d 686

⁶ Ibid

errors in some reporting. Fear of having insufficient or conclusive data must not inhibit the media from nevertheless reporting the half-truths that they know.

4.2 Has the proliferation helped in shaping the balance?

The MMD government ascended to power on the premise of affording greater freedom of the press. This indeed could not have been far-fetched. Under the UNIP err the media towed the lines of the government. According to Kasoma⁷, Kaunda became a fixture on ZNBC news, regardless of what he was doing. His speeches, even at political rallies, were repeatedly shown on television, often uncut and unedited. Some of those speeches were repeated a number of times during the broadcast cycle. As president, Kaunda could and did appoint and fire the ZNBC director-general, the person with the responsibility for the daily programming.⁸

Therefore the Third Republic which commenced in 1991 and the period leading up to the 1991 democratic elections was characterised by an environment of increased optimism among the people for a more democratic and pluralistic government. In terms of progress in media freedom and latitude, it can be argued that although far from being totally free, the media in Zambia has been far freer than it was in the 27 years from independence in 1964 to the 1991 electoral defeat of Kaunda and his UNIP government. Zambians now have access to competing and opposing voices. Of remarkable importance is the role the private media played in dislodging the UNIP government and ushered in the MMD government.⁹

⁷ Festus Eribe and William Jong-Ebot eds: Kasoma, Francis P. *Press Freedom in Zambia: Press Freedom and Communication in Africa*

⁸ Ibid

⁹ Festus Eribe and William Jong-Ebot eds: Kasoma, Francis P. *Press Freedom in Zambia: Press Freedom and Communication in Africa*

The media was also steadfast to report adequately on the third term bid of Fredrick Chiluba with the effect that it failed. Indeed the media has performed exceptionally well in advancing democracy amidst difficult circumstances. One particular important role the media has played is that of unearthing corrupt practices and other malpractices in government. The media especially the private media airs divergent views of society pertaining to pressing issues of the time.¹⁰ It goes therefore without saying that the media in the pluralist period (Third Republic) has added profoundly to the realisation of press freedom as guaranteed in the Constitution

However, this press freedom has not come without a price. Media houses in the Third Republic have time and again been dragged to court for defamation of public men. This is what has led to a lot of people to call for reforms in defamation laws to protect press freedom.

4.3 Press freedom versus defamation: analysis of case law

It has already been stated that freedom of expression/press is not limitless. Article 20(3b) of the Constitution of Zambia recognize the need to protect the reputation of other people as some of the restrictions to press freedom. In fact Chief Justice Ngulube endorsed this preposition when he stated that Article 20 of the Constitution recognizes both the freedom of the press and the right to reputation.¹¹ However case law in Zambia seems to lean on the protection of reputation as opposed to advancing press freedom. A plethora of case law will be considered below.

In *Sata v The Post Newspaper Ltd and Another* the Plaintiff, who was at all material times a politician and public official holding a ministerial appointment, brought three actions for libel against the defendant, contending that they had defamed him in their newspaper publications. In

¹⁰ Lee. Philip, *The Democratization of Communication*

¹¹ Michael Chilufya Sata v. Post Newspapers Limited and Printpak Zambia Limited 1993/HP/1823

May 1992 the defendants published an editorial article in their newspaper stating that the plaintiff was a political survivor and that in the second Republic 'he survived vetting on several occasions'. The article stated that in 1990 the plaintiff's 'political prostitution' prompted the former president's decision to fire him. The article listed the plaintiff's 'thoughtless' actions, including the razing of houses, his alleged order to fire striking workers, the alleged awarding of contracts to associates, riotous behaviour where some mourners from the ruling party were stoned at a funeral and outrageous or intolerant behaviour on television. The Court stated that:

"In order to give effect to art 20 of the Constitution, which guaranteed the freedom of the press, the law of defamation as currently applied was to be interpreted as precluding impersonal attacks on governmental operations from being treated as libels of an official responsible for those operations. It was of the highest public importance that a democratically elected governmental body should be open to uninhibited public criticism, and since the threat of civil actions for defamation induced the chilling effect or tendency to inhibit free discussion and placed an undesirable fetter on the freedom to express such criticism, it would be contrary to the public interest for governmental institutions to have any right at common law to maintain an action for damages for defamation."

Having stated this preposition so well, the Court then drifted away and stated that side by side with freedom of expression is an equally important public interest in the maintenance of the public character of public men for the proper conduct of public affairs which requires that they be protected from destructive attacks upon their honour and character if made without any foundation.¹² It then found for the plaintiff on certain statements in the article. The preposition above is a startling one; on one hand, the Court clearly states the advantages of press freedom

¹² Ibid

and the expedience in protecting it while on the other hand the Court affirms what most people have feared by finding for the plaintiff. The court rather distinguished between a public body and a public person.

Further, in *Fred Mme'mbe, Bright Mwape v The People and Fred Mme'mbe, Masutso Phiri, Goliath Munkonge v The People*¹³, the Court stated that freedom of speech and press cannot be synonymous with freedom to defame. The Court further endorsed the view held in *Sata v The Post Newspaper and Another*. The Court in the above case illuminated the importance of right to reputation and postulated that it goes side by side with freedom of expression.

The position taken in Zambia in relation to public figures is different from the one taken by the United States of America. The Zambian Courts¹⁴ in fact makes this difference apparent when it stated that:

"...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] all facts alleged are not established if the imputation complained of is competent on the remainder of the 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 of falsity or recklessness should be proved by the plaintiff and to a degree of convincing clarity. "

The Supreme Court of the United States in *New York Times v Sullivan*¹⁵ was able to imply some requirements in order to promote the freedom guaranteed by the Constitution. The Court held

¹³ SCZ Judgment No. 4 of 1996

¹⁴ Michael Chilufya Sata v. Post Newspapers Limited and Printpak Zambia Limited 1993/HP/1823

¹⁵ 376 U.S 254 (1964)

that in order to sustain an action for defamation, public officials must prove the falsity of the allegedly defamatory statement as well as actual malice and that is; the defendant published a falsehood with knowledge that it was false or with reckless disregard of whether it was false or not. Additionally, in *Curtis Publishing Co. v Walker*¹⁶, the Supreme Court extended the Sullivan rule to apply to all public figures, reasoning that public figures have access to the media to react to false statements and, at least to some degree, invite the comment to which they are exposed. On the latitude of what can be published, the Court in *Alberts v California*¹⁷ was of the view that all ideas having even the slightest social importance, unorthodox ideas, controversial ideas or even hateful ideas to the prevailing climate have full protection of the Constitutional guarantees, unless they are excludable because they encroach upon the limited areas of more important interests.

4.4 Conclusion

From the foregoing discussion, an interesting revelation made is the unholy relationship that exists between freedom of the press and right to reputation. Indeed the task of striking a right balance is not an easy task. The importance of press freedom is overly emphasized in this paper and need no mention here. However, to balance it with the right to reputation of public men is what has brought about difference in approach among jurisdictions. The American approach has weighed favourably on the side of the media while the Zambian approach seems to lean on not giving wider latitude for the press in so far as offering criticism to public officials is concerned. The next chapter therefore put the nail on its head by suggesting practical reforms to help balance the two competing interests.

¹⁶ 388 U.S 130 (1967)

¹⁷ 344 U.S (1957)

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction

This is the concluding chapter of the research essay. Throughout the research a number of intriguing issues have been canvassed like the relationship between press freedom and the right to reputation. This chapter therefore gives a holistic appraisal of the research essay and makes recommendation where shortcomings were noted. The research will firstly give an overall appraisal of the essay and then give recommendations at the end. In the final analysis a conclusion will be given.

5.1 General conclusion from the Research Findings

This research essay has taken an intriguing journey up to its end. The research essay has firstly noted that a plethora of research exists on this topical subject matter, but indeed hastened to note that with changing trends in defamation case approach as well as improved technological advances in media equipment, there is need for even more research to be done suiting the prevailing trends of a given time. The research has elaborately stated the importance of press freedom and also that of the competing interest of right to reputation. The paper deliberately handled the two interests (freedom of expression and right to reputation) separately in order to do justice to the important roles they play in a democratic dispensation.

The research essay has articulated, with considerable precision, the law of defamation and the importance it serves. There has been a general consensus that in order to succeed in an action for defamation, three elements have to be proved together in order to succeed in an action for defamation. The basic three elements that have to be proved together in order to establish defamation are; *the existence of a defamatory statement; reference to the claimant and lastly; the publication of the defamatory statement.* However, the exposition of these elements in fact has led to considerable difficulty in construing a time tested way of proving defamation. The common law has been altered by subsequent case law in order to satisfy the requirement for proving defamation. It cannot be understated that the definition of defamation is an issue of considerable difficulty. The difficulty is not only a legal one of framing a satisfactory definition of the word, but is also a troublesome issue of policy.

As an instance case, the research has shown that the Court in *Berkoff v Burchil*¹ did not fall within the general definition of defamation. This is because the statement complained against just referred to the Plaintiff's appearance as 'hideously ugly' and did not refer to his reputation or character as such. The Court nevertheless found the reference to be defamatory. This shows modifications that are constantly made to the law of defamation. From the foregoing finding, it becomes clear that the Defamation Act (as per research finding) is incomprehensive to deal with defamation cases. The Act is so concentrative on defences other than what constitutes defamation in the first place. This has led in most instances for reliance to be placed heavily on the common law in defamation cases.

The research essay has also elaborately discussed press freedom and the role it plays in a democratic nation. From the research findings, it is clear, as was stated in *Christine Mulundika*

¹ [1996] 4 All ER 1008

and 7 Others v The Attorney General² that freedom of expression constitutes one of the essential foundations of a democratic society, it is not only applicable to information or ideas that are favourably received or regarded as inoffensive, but also those which offend, shock, or disturb the population. What comes out pertinently on this issue is the realisation that it is not for the law to proscribe what can and cannot be said in public. The research has shown that instead of resorting to blows, free speech is the medium through which ideas are exchanged and government policies promulgated. The research as timely stated, echoing the Courts ruling in *Fred Mme'mbe, Bright Mwape v The People and Fred Mme'mbe, Masutso Phiri, Goliath Munkonge v The People*³, that freedom of speech and press cannot be synonymous with freedom to defame. That as it may, the research has outlined the historical development of the press in Zambia from the atrocious colonial and one-party rule to the situation prevailing in the Third Republic.

In terms of progress the research essay has shown that, the media has indeed made a giant leap to liberalization, at least better placed than the situation prevailing prior to independence. It has been shown in the research that the approach taken by the Zambian Courts in construing cases of defamation of public officers differs considerably to that taken by say, the Courts in the United States of America. The American Courts seems to lean on press freedom as was shown in *New York Times v Sullivan* than public officers while the Zambia Courts places a strict scrutiny on the press before finding for the press as was shown in *Sata v The Post Newspaper Ltd and Another*⁴.

SCZ Judgment No. 25 of 1995
SCZ Judgment No. 4 of 1996
1993/HP/1395

.2 Recommendations

A. The Defamation Act

The Defamation Act in its form is not suited to address the challenges prevailing in the country now. No wonder it is moribund. There is therefore need for review and amendment of the Defamation Act to include, inter alia, the definition of defamation, as well as its constituent element. Perhaps the definition adopted by the Faulks Committee on Defamation would suffice as a starting point. The Faulks Committee's definition is all inclusive and encompasses new situations. This is welcome considering the technological age the country is in presently. With technologies such as internet, twitter, facebook e.t.c there is need for the law to adapt to the new trends. In their report the Committee recommended that for the purposes of civil cases, defamation shall consist of the publication to a third party of a matter which in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally.

B. Balancing of Press Freedom with Right to Reputation

The approach taken by the Zambian Courts in construing defamation cases involving public officers must be modified to that prevailing in the United States. It is true and little dispute is offered to the fact that side by side with freedom of expression is an equally important public interest in the maintenance of the public character of public men for the proper conduct of public affairs which requires that they be protected from destructive attacks upon their honour and character. However to state that the media should only publish that to which it has foundation is not only bad for democracy but effectively narrows the scope of operation of the media. It must be appreciated that public officers have public resources at their disposal, such that they can react

to the allegations made against them in a public media with wider coverage. This mitigating factor alone should shield the media from unnecessary suits. This point was illuminated in *Curtis Publishing Co v Walker*⁵ where the US Supreme Court held 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. It is true indeed that critique even unfairly is one of the occupational hazards of being a public figure, but as alluded to above the public media exists and is accessible almost freely by public officers.

Indeed an individual who decides to seek governmental office must accept certain necessary consequences that involvement in public affairs brings. The media are entitled to assume that public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them.⁶ The Zambian Courts will do well to adopt the approach in *Sullivan* in order to come up with a precise position and settle the matter once and for all.

C. Guaranteeing Separately Press freedom in the Constitution

It is recommended that freedom and independence of electronic, print and other types of media be guaranteed separately in the Constitution, unlike the current prevailing situation where press freedom is only guaranteed as an ancillary to freedom of expression. The Article providing for this fundamental freedom should also state the obligations of the state to the media in relation to regulation and interference. The Draft Constitution⁷ in Article 38 has provided for freedom of media in the following terms:

Freedom and independence of the electronic, print and other types of media is guaranteed."

⁵ 388 U.S 130 [1967]

⁶ *Gertz v. Robert Welch Inc* [1974] 418 U.S. 323

⁷ Republic of Zambia, First Draft Constitution of the Republic of Zambia, Technical Committee on Drafting the Zambian Constitution

In subsection 2 of Article 38, the Draft Constitution specifically restricts the state not to exercise control over, or interfere with, any person engaged in broadcasting, the production or circulation of any publication or dissemination of information by any medium. It is highly recommended that this is the form the Constitution should take.

5.3 Conclusion

The law of defamation as articulated by the Zambian Courts as well as stated in the statute must surely be reviewed if it is to serve any meaningful purpose in society. The Defamation Act needs to be amended extensively to meet the demands of the current situation. Further the Courts in Zambia need to adopt the purposive approach adopted by the U.S.A as espoused in the Sullivan case. This in turn will add to certainty about the approach the Courts in Zambia would take. Further media freedom should be separately be provided for like it is in Article 38 of the Draft Constitution. Lastly press freedom must prevail in many instances as a way of fostering democracy.

Phiri, Isaac, "Media in "democratic" Zambia: Problems and Prospects" (Africa Today 1999)

PAPERS AND REPORTS

Abuja Treaty O.A.U. Doc. AHG/Res. 205 (XXVII) (entered into force May 12, 1994), available

at www.africa-union.org/root/au/Documents/Treaties/Text/AEC_Treaty_1991.pdf> [*Abuja Treaty*] www.uneca.org/itca/ariportal/abuja.htm

UNDP, "Access to Justice, 2004" UNDP [http://](http://www.undp.org/governance/docs/justicePN_English.pdf)

www.undp.org/governance/docs/justicePN_English.pdf, P.3 [Accessed 19 September 2010].

OTHER SOURCES

Article 19,"Global Campaign for Freedom of expression: Civil defamation undermining freedom of expression" Article 19

Banda F. Elections and the Press in Zambia: A case of the 1996 polls: (Independent Media Association 1997)

<http://creativecommons.org/licenses/by-nc-sa/2.5/legalcode> (accessed 12th December 2011)

Ministry of Justice, "Draft Defamation Bill, Consultative Paper CP3/11" Ministry of Justice [http:// www.official-documents.gov.uk](http://www.official-documents.gov.uk) and/or on [http:// www.justice.govt.uk](http://www.justice.govt.uk) (accessed on 12th March 2011)

Phiri and Henry Kabwe, "Press Freedom Slips in Zambia" [http:// www.cpj.org/blog/2009/08/freedom-slips-in-zambia.php](http://www.cpj.org/blog/2009/08/freedom-slips-in-zambia.php) (Accessed on 14th August 2009)

Phiri, Isaac. 'Media in "democratic" Zambia: Problems and Prospects, (Africa Today),

Smith David "Timeline: a history of free speech" The Guardian (London), (accessed on 15th February 2012)

Timothy L .Gal ed. *Worldmark Encyclopedia of the Nations*. "Africa" 7th edn, WorldMark Ltd, John Wiley & Sons Inc, 1988