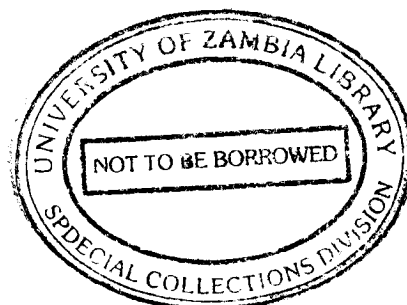


**THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW**



**THE CRIMINALIZATION OF THE DEFAMATION OF THE PRESIDENT AND
ITS IMPACT ON FREEDOM OF INFORMATION AND EXPRESSION**

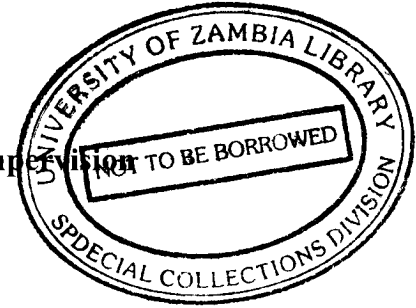
BY

WANTEMWA SIMUTENDA

**An Obligatory Essay submitted to the Faculty of Law of the University of Zambia in
partial fulfillment of the requirements for the award of the Degree of bachelor of
Law (LL.B)**

07th February, 2008

THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW



I recommend that the Obligatory Essay prepared under my supervision


By

WANTEMWA SIMUTENDA

Entitled

**THE CRIMINALIZATION OF THE DEFAMATION OF THE PRESIDENT AND
ITS IMPACT ON FREEDOM OF INFORMATION AND EXPRESSION**

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements pertaining to format as laid down in the regulations governing obligatory Essays.


.....
Mr. Simon Kulusika
(Supervisor)


.....
Date

DECLARATION

I, WANTEMWA SIMUTENDA, Computer Number: 22095527 DO HEREBY declare that the contents of this Directed Research paper are entirely based on my own findings. The work used herein that is not my own, I have endeavored to acknowledge the same.

I THEREFORE, take full responsibility for the contents, errors, defects and omissions therein.

07/02/2008
.....
Date

Simutenda
.....
Signature

DEDICATION

This Obligatory Essay is dedicated to my parents Mr. and Mrs. Simutenda. Thank you for the financial and educational support that you have rendered to me for all these years. I am greatly humbled.

ACKNOWLEDGEMENTS

First and foremost, I would like to thank God Almighty for all that he has done for me.

To my supervisor Mr. Simon Kulusika, thank you for the guidance you gave me during the writing of this essay ensuring that it was comprehensively and academically done. Frankly, without your able and dedicated guidance my entire efforts would have been a total failure.

I would also want to extend my heart felt thank you to the Government of the Republic of Zambia Bursaries Committee for the financial support given to me during my study at the University of Zambia.

To Mr. Agrippa Mwangi thank you for printing this Obligatory Essay for me and all the work you printed for me during my academic life at the University. Special thanks also go to Masuzyo ya mala for the laptop you always borrowed me to help me type the work.

Finally, I would like to acknowledge my friends who were of great help during the writing of this essay and also those that made my stay at the University exiting and memorable. Special thanks go to Chishala, Chitala, Chilumbe, Dwidwi, Eden, Kennan, Kenneth, Mutale and Sweathen.

LIST OF CASES

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Fred M'membe and Bright Mwape v The People SC 1995
Sata v The Post Newspapers and Another (1995) HC judgment No. 1
R v Mainza Chona (1962) R and N.L.R 344
Christine Mulundika and 7 Others v the People (1997)
Felona Nanzaluka v Zambia Sugar Limited (2000) SC
Resident Doctors Association v The Attorney General (1997) HC 32

OTHER JURISDICTIONS

Whitney v California (1927) 274 US 344
Handside v United Kingdom (1967) European Human Rights Report, 737
New York v Sullivan (1964) 376 US 254
Indian Express Newspaper v Union of India (1986) SC 515
Chief Arthur Nwako v The State, FCA/E/111/883; (1985) 6 NCLR, 228
Hector v Attorney General of Antigua and Bermuda (1990) 2 AC 313
Oropeza v Mexico Inter-American Commission on Human Rights, 19th November, 1999,
Report No. 130/99 Case
S.P Gupta V. The president of India and others (1983) Air SC 149 at 234
Fernando V. Sri Lanka Broadcasting Corporation and Others 30 May 1996, SC
application No. 81195 at 16

ABSTRACT

The requirement to respect reputations of others is a cardinal one. This requirement borders on the need to respect the dignity and worth of fellow humans. In this regard people should not engage in activities either by words or in writing or even by way of signs that tarnish the image of others. What is being referred to here is the fact that one should not venture into defamatory attacks or actions that tend to lower a person's reputation in the estimation of right thinking members of society to the extent that such a person is shunned or avoided.

On one hand however, is the growing desire for people to comment fairly and objectively on actions or decisions of people without being faced with legal suits for defamation. Such desire or temptation to comment on matters is even stronger were such matters emanate from public officials. Under the Zambian laws defamation is both civil and criminal. Whereas civil defamation can be commenced by any person, criminal defamation is peculiar to the president as he alone can commence a criminal suit for defamation.

It is criminal defamation of the president vis-à-vis its impact on freedom of expression and information that is the subject of this study. The study comprises five Chapters and aims at showing the chilling effect that criminal defamation has on both freedom of information and expression.

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CHAPTER ONE (1)

INTRODUCTION

By definition defamation is the publication of a statement that reflects on a person's reputation and tends to lower him in the estimation of right thinking members of society generally or leads to make them shun or avoid him. The law of defamation is therefore, important as it is aimed at protecting the reputations of other people, that is to say the beliefs and opinions that can be held by someone.

Freedom of information and expression are human rights that provide ordinarily for humans to develop and use their human qualities, intelligence, their talents and their conscience just like other human rights provide. Freedom of expression is provided for and guaranteed under Article 20 of the current constitution of Zambia.

The law regarding defamation is provided for under the Defamation Act Chapter 68 of the laws of Zambia and under the Section 68 of the Penal Code Chapter 87 of the Laws of Zambia. In this regard defamation suits can be commenced as a civil suit under the Defamation Act or indeed as a criminal suit under the Penal Code section. Criminal defamation is however only actionable by the president. This means that only the president can bring an action for defamation under the criminal jurisprudence of a court of law.

STATEMENT OF THE PROBLEM

Freedom of information and expression are indeed very important rights especially in a democratic society. However, even freedom of expression is not an absolute right; it needs to be curtailed otherwise there would be chaos. The law on defamation is one such law that endeavors to do just that. Never the less, the criminalization of the defamation of the president has more often than not been used as a tool to silence and oppress those that genuinely comment and attempt to inform the public about the actions or decisions of the president more especially the media. This has no doubt impacted negatively on both freedom of information and expression. The provision criminalization of defamation of the president is as such a hindrance to enabling the general public have access to meaningful and useful information. The public have a duty to be informed by the media but this can be curtailed by the use of the criminal law on defamation. There is in fact jurisprudence emanating from the Zambian courts as will be shown were media personnel have been cited for defaming the president when in actual fact a critical analysis of the supposedly defamatory matter would show that such reported matters are just legitimate undertakings by the media personnel in the performance of their respective duties professionally. The subjective nature of the criminal defamation law is in this case one of the many shortcomings of this law in addition to other equally important shortcomings as will be shown in Chapter four (4).

OBJECTIVES

MAIN OBJECTIVE

The main objective of this study is to give a critical analysis of the negative impact of the law criminalizing defamation of the president from the perspective of freedom of information and expression.

SPECIFIC OBJECTIVES

1. Explain the nature of defamation and its historical development particularly the criminal element under Section 69 of the Penal code Chapter 87 of the Laws of Zambia
2. Identify the constitutional guarantees of freedom of information and expression and its restrictions from the context of Part III of the constitution of Zambia Act, Chapter 1 of the Laws of Zambia with particular reference to Article 20 of the Act.
3. Describe the nature of a democratic society and its importance in upholding freedom of information and expression with reference to constitutional guarantee of democratic values.
4. Outline the negativity of criminalizing defamation of the president with reference to case law and how it has impacted negatively on the freedom of information and expression.
5. Propose ways of reform by which the negative impact of defamation of the president can be arrested to ensure that the media enjoys freedom of expression without being erroneously and subjectively punished.

RESEARCH QUESTIONS

1. What is the necessity of criminal defamation under the Zambian law when other commonwealth jurisdictions have scraped it off their laws?
2. Of what importance is freedom of information and expression in promoting democracy?
3. How does criminal defamation impact negatively on freedom of expression and information?
4. What components of the Section 69 make it undesirable and a fetter on both freedom of expression and information?

METHODOLOGY

in this study desk research will mostly be employed. This means that data from text books, articles, statutes and also case law shall be used. In an effort to make the study more informative and qualitative, the internet shall also be used.

CRIMINAL DEFAMATION AND THE NEED TO ENCOURAGE FREEDOM OF EXPRESSION.

One of the most important attributes of a democratic state is the ability to encourage the free flow of ideas amongst the citizens. This to a large extent entails providing a conducive atmosphere in which individuals can communicate and exchange ideas. Indeed communication of this sort is not only between and among individuals but expression of ideas by individuals is also to and from government organs and officials.

Expression of thoughts and ideas by individuals is a very important tool to influence decisions either made or intended to be made by the government officials. Moreover such expression of thoughts ultimately enables government and its officials to be accountable to the people from whom they derive their legitimacy. This is because the views of the people go a long way in ensuring that officials act in accordance with the wishes of the people as expressed.

It is against this belief that the views of the people are important to ensure that officials act in accordance with the people's wishes that it can firmly be stated that rigorously implementing criminal sanctions against individuals who express thoughts and ideas in order to influence government officials to perform the right act is a denial of justice and contravenes one of the important tenets of a democratic society.

It therefore follows that there must be protection of fundamental rights to ensure that there is security through which individual's right to expression can flourish. There ought to be a forum of

communication encouraging the defenseless to speak up, even in cases which have gone unheard in democracy's conflict of opinion or have had no opportunity to emerge¹.

In this regard, the state has a duty to protect the individuals to engage in communication and to accommodate such communication in the interest of democracy.

THE LAW GOVERNING DEFAMATION IN ZAMBIA.

Defamation under the Zambian legal system can be instituted either under civil law or under criminal law. Under civil law, the law enables private individuals, organizations or institutions to institute proceedings for defamation. The civil law applicable is the law of Tort. In addition under civil law the Defamation Act applies.

Defamation under criminal law is provided under the Penal Code. Section 69 of the Penal Code criminalizes defamation but only if it concerns a statement defamatory against the president. The section is couched in the following terms:

“any person who, with intent to bring the president into hatred, ridicule or contempt, publishes any defamation or insulting matter, whether by writing or print , word of mouth or in any other matter, is guilty of an offence and is liable on conviction to imprisonment for up to three (3) years.”

Criminal defamation thus only criminalizes defamation of the president; it is only the president that can institute defamation proceedings under the criminal jurisdiction of a court of law.

¹ "Fundamental Rights in Democracy", Jorg Paul Muller in HUMAN RIGHTS LAW JOURNAL VOLUME 4/ part 2 1983, pp 136-137

DEFINATION OF DEFAMATION

There is what can be termed general acceptance amongst most writers as to what defamation in law is. According to Heuston, R.F.V. and Buckley, R.A.,² defamation is the publication of a statement that reflects on a person's reputation and tends to lower him in the estimation of right thinking members of society generally or leads to make them shun or avoid him. Writers such as Sims, R.S. and Scott, D.M.M.³ equally use the above definition of defamation.

EXPLANATION

The word statement as used in the definition has an extended meaning and includes words, visual images, gestures and any method of signifying meaning. Defamation takes two forms; libel and slander. The differences between these two forms of signifying meaning are as follows:

Firstly, libel is a defamatory statement published in a permanent form, while slander is a defamatory statement published in a transient form. The following types of publication are classified as libel; writings, printings, pictures. The following are classified as slander; word of mouth, gestures.

Secondly, some libels amount to a crime where they tend to provoke a breach of peace, but

² (2004) Salmond and Heuston on the Law of Tort London: Sweet and Maxwell p. 145

³ (1970) English Law London Butterworths p. 186

slander can only be a tort.

Thirdly, libel is actionable per se (that is, without proof of actual damage but slander is actionable only on proof of actual damage.⁴

The test of a defamation nature of a statement is its tendency to excite against an individual the adverse opinion or feelings of other persons. In this regard, the typical form of defamation is an attack upon the moral character of an individual attributing to him any form of disgraceful conduct, such as crime, dishonesty, untruthfulness,

ingratitude or cruelty. Never the less, a statement may be defamatory if it tends to bring an individual into ridicule or contempt even though there is no suggestion of any form of misconduct.⁵

Heuston, R.A.V. and Buckley, R.A.⁶ therefore, conclude by summing up the nature of a defamatory statement in the following way: it is one which has a tendency to injure the reputation of the person to whom it refers; which tends to, that is to say, lower him in the estimation of right thinking members of society generally and in particular to cause him to be regarded with feeling of hatred, contempt, ridicule, fear, dislike or disesteem.

⁴ Ibid p. 187

⁵ (2004) Salmond and Heuston on Tort London: Sweet and Maxwell p. 146

⁶ Ibid p. 145

The law on defamation is clearly aimed at protecting the reputation of individuals. The Constitution of Zambia under Article 20 (3) (b) and International and Regional Instruments provide for protection of reputations.

HISTORICAL DEVELOPMENT OF CRIMINAL DEFAMATION

The discussion that follows hereunder aims at establishing an historical account of the development of the law of criminal defamation from the colonial era or period to date. It shall further be examined whether this law on defamation is necessary.

The law that applied to Northern Rhodesia, as Zambia was known before attaining independence in 1964, was English law. English law consisted of common law, doctrines of Equity, Statutes and Judicial decisions.

England does not have a written constitution and a Bill of Rights. This means that the law applicable to England is in the form of conceptions, practices that have evolved over a period of time and common law. There are various definitions of Common Law. Among them is that common law is the law that was made by the judges sitting in Common Law Courts. It is also that law that applied to the whole of England emanating from Common Law Courts as distinguished from that law from the Courts of Chancery. Common law is further the law that applied to England and extended to its colonies, protectorates and dominions.⁷

⁷ Munalula, M.M. (2004) Legal Process Lusaka: UNZApress p.19

Arising from the absence of a written constitution and Bill of Rights is the fact that under English law, human rights are protected by Common Law. In Northern Rhodesia however, the natives had supplementary rights in addition to those under Common Law by virtue of the Northern Rhodesia Order in Council of 1924 and the Royal Instructions also of 1924. These provisions provided for other rights that were peculiar to the natives.

During the colonial era there was a general common motion and spirited belief that everyone was entitled to freedom of expression which undoubtedly includes freedom to hold opinions and to receive and impart information and ideas without interference. Due to this there was a positive action to respect and protect freedom of expression and information.

Nevertheless, freedom of expression and information were not without limitation. The colonial government considered it prudent in the proper administration of the territory as well as to protect the reputations of top officials such as the governor to ensure that freedom of expression and information was greatly limited.⁸

In order therefore, to limit freedom of expression and information, the colonial government formulated and used wide sedition and censorship laws. Under Section 53 Of the Penal Code⁹, sedition law was framed and coined as follows:

“Any person who (a) conspires with other people or persons to do any act in furtherance of any seditious intention common to both or all of them, or (b) prints or publishes any

⁸ Jere, F. (2006) Obligatory Essay Lusaka: UNZApress p. 11

⁹ No. 42 of 1930

word or working with a seditious intention or (c) sells, offers for sale, distributes or in his possession any newspaper, book or document the importation of which has been declared to be a seditious publication, or (d) imports into the territory any newspaper, book or document containing any seditious words or writing or any newspaper, book..... is guilty of a misdemeanor and is liable to imprisonment for two years.....”

The leading case of **R v Chona**¹⁰ highlights how the above section was interpreted by the courts.

In this case, a leading nationality, Mainza Chona was the National Secretary of the United National Independence Party (UNIP), the main nationalist party. He issued a press statement describing the evil of colonial rule. The statement accused that there was no justice whatever under colonial rule anywhere in the world. The accused argued that the words were not seditious and were published merely to identify the errors or defects in the administration of justice, and to try and persuade the inhabitants of the territory to procure by lawful means the alteration of the matter he complained of. The High court nevertheless held that the statement was a seditious publication because it intended to

bring into hatred or contempt, and to excite dissatisfaction against the administration of justice in the territory, for the purpose of promoting UNIP’s policy of making the territory ungovernable.

The law criminalizing defamation of the president which up to now is incorporated under section 69 of the Penal Code soon came into effect. This law was meant to protect the integrity and reputation of the Governor. Consequently, any document or political utterance which sort to bring the colonial government into ridicule or contempt was criminalized with maximum imprisonment of two (2) years.¹¹

¹⁰ (1962) R and N.L.R. 344

¹¹ Jere, F. (2004) Obligatory Essay Lusaka: UNZApress p.13

NECESSITY OF CRIMINAL DEFAMATION

It has been shown that the law on defamation aims principally to protect the reputations of the president. It must however be examined whether an individual who comments positively or otherwise questions certain decisions commits the offence of defamation. The president as the number one leader should be held accountable to the people who he governs and from whom he derives legitimacy. The individuals must be free to challenge him or her over decisions and actions that he or she undertakes without being threatened with criminal sanctions.

The law criminalizing defamation should therefore, not be implemented harshly as doing so would result in good governance, transparency and accountability suffering under the guise of protecting the president. This law may in the light of democratic values be perceived as not necessary. Other commonwealth jurisdictions have declared a similar provision not necessary and an impediment to freedom of expression and information.

In **Chief Arthur Nwako v The State**¹², the appellant had been convicted of publishing and distributing a book accusing the governor of Anambra State of being a thief who steals public money and uses it to import arms in the state. The court unanimously held that the pertinent Sections of the Criminal Code, which were similar to those of Zambia, were invalid because they violated right to freedom of expression guaranteed by the constitution and were not saved by the constitutional provisions which permitted.

¹² FCA/E/111/883 (1985) NCLR 228

derogations from the right to freedom of expression in the interest of public order and safety. The court found the provisions unsatisfactory because they did not provide guidelines as to what constitutes a defamatory matter, nor were they reasonably justifiable in a democratic society.

Similarly, in **Hector v The Attorney General of Antigua and Bermuda**¹³, the judicial committee of the Privy Council held that a criminal law provision violated the Constitution of Antigua and Bermuda to the extent that it made the printing or uttering of any word, either spoken or written, a criminal offence. The court reasoned that it would be a great impediment to the freedom of the press, and hence freedom of expression if those who were critical of public authorities could do so with impunity that is with freedom from punishment or harm.

CONCLUSION

The need to protect the expression of thoughts of individuals is important. This ensures that individuals contribute effectively to the governance process. There then is the requirement on the part of government to guarantee freedom of expression in an effort to ensure good governance and accountability. The use of criminal defamation as shown by decisions from other commonwealth jurisdictions is outdated and not tenable in a democratic society that is supposed to embrace values of free speech. Criminal defamation being a law that was used to suppress the indigenous people during the colonial era has out lived its usefulness in this age and era.

¹³ (1990) 2 AC 313

CHAPTER TWO (2)

IMPORTANT FUNCTIONS OF FREEDOM OF INFORMATION AND EXPRESSION

INTRODUCTION

The right to be free to receive and transmit information and to express one self is undeniably a very important one. This importance is reflected in national, regional and international human rights instruments that promote and encourage freedom of information and expression.

For instance, the right to freedom of information and expression is enshrined in the European Human Rights Charter, the African Charter on Human and Peoples' Rights and the Inter-American Charter on Human Rights.¹⁴

HISTORICAL DEVELOPMENT OF FREEDOM OF EXPRESSION IN ZAMBIA

As has been illustrated in chapter one, the natives in Northern Rhodesia were denied their basic human rights as compared to the human rights that were guaranteed to their white counter-parts. Africans were in this regard evidently discriminated against in terms of civil, economic and political rights guarantee and protection.

Under the Constitution which established self-rule, a Bill of Rights was introduced for the first time in Northern Rhodesia in 1963. Freedom of expression was guaranteed under Section 22.

¹⁴ Anyangwe, C. (2004) Introduction to Human Rights and International Humanitarian Law
Lusaka: UNZApress

The Section expressed freedom of information and expression in the following terms:

“To hold opinions without interference, freedom to receive ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with one’s correspondence.”

Despite the Constitutional guarantee of freedom of expression, this freedom was however not absolute. Section 22(2) in this regard provided limitations or derogations to this right. These derogations were justified if there were reasonably required in the interests of defense of, public safety, public order, public morality or public healing, or if they are reasonably required for the purpose of protecting reputations, rights and freedoms or other persons or the private lives of persons concerned in legal proceedings preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating educational institutions in the interests of persons receiving instructions therein, or relating to the technical operations of the telephone, telegraphy, postal, wireless broadcasting or television, or if such derogations impose restriction upon public officers.

Leading constitutional law scholar Chanda, A.W.¹⁵ has criticized the permitted derogations for being too wide as to render the guaranteed freedom almost meaningless. He contended that the only test the derogations needed to meet was that it was had to be reasonably required in a democratic society and that almost any law or practice could be made to fit within one of the derogations. He further argued that a serious defect in Section 22 was that freedom of the press was not expressly protected, and therefore, in contradiction with the notion that freedom of the press is indispensable for the operation of any democratic system of Government. The lack of such freedom had serious consequences in Zambia as Government could not know the actual

¹⁵ (1992) Zambia: A Case Study in Human Rights in Commonwealth Africa. A Thesis submitted to the University of Zambia Law faculty Pp 85-87

opinions of the people about their respective representatives who are in lawful public offices. This meant that there was little difference in the freedom of expression in Zambia vis-à-vis little difference in the protection of human rights between the colonial period and the post independence period, notwithstanding the Bill of Rights in the latter period.

The Bill of Rights incorporated in the 1963 constitution was reproduced in the 1964 Independence Constitution, in the One-Party Constitution of 1973 and the 1991 Constitution.¹⁶

Despite the significant changes and developments in the political system since independence, the form and content of most of the enshrined provisions remained unchanged.

CURRENT COSTITUTIONAL GUARANTEE OF FREEDOM OF EXPRESSION

Under the 1996 Constitution, freedom of expression is guaranteed under Article 20. The Article provides for:

“Freedom to hold opinions without interference, freedom to receive ideas and information without interference, whether the communication be to the public generally or to any person, and freedom from interference with his or her correspondence.”

PERMITTED DEROGATIONS OF FREEDOM OF EXPRESSION

Uncontrolled liberty may lead to anarchy and disorder as well as the infringement of the rights of others. For this reason freedom of expression is subject to restrictions. Jere, F.¹⁷ indicates that the Constitution attempts to strike a balance between individual liberty and social control. Freedom of information should therefore, not be an excuse for injuring the reputations of others. Chanda,

¹⁶ Bill of rights was enshrined between Articles 13 to 25

¹⁷ (2006) Critical Analysis of Section 69 of the Penal Code Lusaka: UNZApres p. 21

A.W. stated that like any other right, freedom of expression is not absolute and is therefore entitled to be placed under some legitimate restrictions on its exercise. This is so in order to prevent its abuse. Such restriction must however, meet a three-part test in order to be valid. First, any restriction must be provided by law. Second, it must serve one of the legitimate purposes expressly provided or enumerated in the text. Finally, any restriction must be shown to be necessary.¹⁸

According to the case of **Sunday Times v UK**, to be necessary, a restriction does not have to be indispensable but it must be more than merely reasonable or desirable. A pressing social need must be demonstrated and that restriction must be proportionate to the legitimate aim pursued, and the reasons given to justify the restriction must be relevant and sufficient. Any public interest of the case must be considered in order to justify the restriction.¹⁹

A restriction must also be reasonably justified in democratic society.

With this view in mind it becomes imperative to curtail or limit freedom of expression and not guarantee it rigorously.

In this regard Article 20(3) (a) provides that:

“Anything contained in or done under the authority of any law shall be held inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision...

(a) that is reasonably required in the interests of defense, public safety, public morality or public health... and except so far as that provision or, thing done under the authority

¹⁸ (1992) Zambia: A Case Study in Human Rights in Commonwealth Africa. A Thesis Submitted to the University of Zambia Law faculty p. 85

¹⁹ (1979) Series A No. 30 paragraph 49

thereof as the case maybe is shown not to be reasonably justifiable in a democratic society.”

Derogations or limitations to be valid must be provided by law and must be reasonably required in any of the interests enumerated in clause (a) to (c).

In addition to this constitutionally guaranteed derogation, the law under the Defamation Act, under Section 69 of the Penal Code and under the Public Order Act may be interpreted as providing derogations or limitations to freedom of expression. The Zambian courts have had occasion to interpret the aspect of derogations balanced against the freedom of expression.

In the case of **The people v Fred M'membe and Bright Mwape**²⁰ the Zambian Supreme Court declared that freedom of expression is not absolute. It is subject to derogations as stipulated under the Constitution. The appellants in this case were prosecuted under Section 69 of the Penal Code for a story in the Post newspapers entitled “*Chiluba the twit.*”

IMPORTANT FUNCTIONS OF FREEDOM OF EXPRESSION AND INFORMATION

Freedom of information and expression are important in a number of ways. These freedoms obviously enable the public to receive information. They are basic tenets in a country that wishes to propel itself to progress socially, politically and economically. This is because people are kept informed of the various happenings which may just be the rightful precipitates to achieving progress in addition to affording them an opportunity to contribute fearlessly.

Sokoni, K²¹. states that while a freedom of expression and information law might seem like a

²⁰ SC/38/1996

²¹ "Freedom of Information Law" Volume 35 2003 p. 23

primarily political tool, guaranteeing the public access to government records it serves an even broader purpose. It ensures that members of the public who have a need for public information can access it, irrespective of the purpose.

In **Indian Express Newspaper v Union of India**²², the Supreme Court of India held that freedom of expression serves four broad purposes.

The first purpose it serves is that it helps an individual to attain self-fulfillment. Second, it assists in the discovery of the truth. This entails the right of the public to know is assured where freedom of expression is guaranteed without vague criminal sanctions. The third important and function of freedom expression is that it enhances the capacity of an individual to participate in a democratic society. The fourth importance is that it provides a mechanism through which a reasonable balance stability and social change can be established.

In **Whitney v California**²³ Justice Brandeis of the United States Supreme Court aptly stated the importance of freedom of expression by stating that it was the life blood of democracy by declaring:

“That those who won independence believed that the final end of the state was to make the citizens free to develop their faculties and that the deliberate forces should prevail over the arbitrary. They valued liberty both as an end and as a means to an end. They believed that freedom to think is a means indispensable to the discovery and spread of political truth, that without free speech and assembly, discussion would be futile, that with them, discussion affords ordinary adequate protection against the dissemination of noxious doctrine, that the greatest menace to freedom is an inert people, that public discussion is political duty and that this should be a fundamental principle of American

²² 91986) SC 515

²³ (1992) 274 US 357

Government.”

Lastly, freedom of expression enhances the capacity of an individual to participate in a democratic society. This freedom is not only essential to individual choice and development of a person's rational faculties, but also effective Government, which is the proclaimed intent of democracy.²⁴ Jere, F. comments that the essence of such is that when men govern themselves, it is them and no one else who must pass judgment upon non wisdom and unfairness including danger. The consequence of this is that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, and dangerous as well as safe. Political actions, decisions and pronouncements must therefore, be subjected to objective standards and not determined subjectively through the threat of unwarranted legal sanctions when in fact the actions, decisions and pronouncements are for the public benefit.

CONCLUSION

Freedom of information and expression are important ingredients in a country and in Zambia their current Constitutional guarantee owes its origin to the pre- independence Bill of Rights. Just as this Bill of Rights provided derogation that have been criticized for being too wide as to render the right granted meaningless, the current guarantee under the Constitution is equally marred by the same meaningless guarantee. It can be argued that even the law under Section 69 of the Penal Code takes away the right to information and expression rendering the guarantee

²⁴ Meiklejohn, A. (1976) "Political Freedom," Volume 1 of Political Rights in the United States 4th Ed. Boston: Little Brown p. 9

under the constitution merely academic. Freedom of information and expression play important functions as regards the benefits it is capable of bestowing on people. Such benefits should therefore, be guaranteed to the people by avoiding unwarranted infringement of these freedoms by way of legislation that is not in the interest of promoting and protecting these freedoms such as that under Section 69 of the Penal Code.

CHAPTER THREE (3)

INTRODUCTION

The aim of the following chapter is to outline the link between democracy and freedom of information and expression. It will also attempt to state the link between human rights vis-à-vis instruments guaranteeing human rights and freedom of information and expression that is, freedom of information and expression as a fundamental human right.

CONSTITUTIONAL BASIS OF DEMOCRACY IN ZAMBIA

The preamble of the constitution of Zambia upholds the values and tenets of democracy by expressly declaring that Zambia shall uphold the values of democracy, transparency, accountability and good governance.

EXPLANATION

It is undeniable that democracy is guaranteed under the Zambia legal system owing to its constitutional origin. In order for this important factor to be nourished and continue to flourish, there is need to ensure that people participate in governance. This can be achieved by cultivating a culture of allowing the free flow of information and equally allowing or permitting expression

but obviously subject to democratically permitted derogations.

For democracy to flourish in any country there must be guarantee of freedom of information and expression. According to Mendel, T.²⁵, freedom of information and expression are important in themselves for the fulfillment of other rights and as an underpinning of democracy.

It is perhaps as an underpinning of democracy that freedom of information and expression are most important. Information held by public authorities is not acquired for the benefit of officials or politicians but the public as a whole. Unless there are good reasons for withholding such information, everyone should have access to it. More importantly, in a democracy, these freedoms are key components of a transparent and accountable government. They play a key role in enabling citizens to see what is going on within government, and in exposing corruption and mismanagement. Open government is also essential if voters are to be able to assess the performance of elected officials and if individual are to exercise their democratic rights effectively, for example through timely protests against new policies without being faced with criminal sanctions such as defamation of the president.

It is increasingly being recognized that states are under an obligation to take practical steps including through legislation to give effect to the right to freedom of information.²⁶ States are under an obligation to guarantee citizens a right to freedom of information. Arguably, the most sensible source of this obligation is part of the guarantee of freedom of expression.

²⁵ <http://www.article19.org> P.1

²⁶ Op Cit p. 1

Democracy demands that government is open and entertains criticism. Indeed the Indian Supreme Court in the care of **S.P Gupta V. The president of India and others**²⁷ held that “the concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression... disclosure of information in regard to the functioning of government must be the rule and secrecy an exception justified only where the stickiest requirement of public interest so demands”.

In that case, the Supreme Court held that where the non-appointment of an additional judge for a further term was challenged, correspondence between the law minister, the Chief Justice of the High court, the State Government and the Chief Justice of India should be disclosed.

In a closely related development, the Supreme Court of Sri Lanka in **Fernando V. Sri Lanka Broadcasting Corporation and Others**²⁸ noted that a right to freedom guarantee of information, while not necessarily included with the guarantee of speech, for that “would be to equate reading to writing, and listening to speaking,” may we be part of the guarantee of freedom of thought and opinion. The case related to the abrupt cancellation of a regular programme in order broadcast by the state broadcaster, the Sri Lanka Broadcasting Corporation, which included material critical of government.

The petitioner claimed that his freedom of speech as a listener had been infringed by the

²⁷ (1983) Air SC 149 at 234

²⁸ 30 May 1996, SC application No. 81195 at 16

stoppage in as much as the government had limited his access to information. The court observed that, “information is the staple food of thought, and that the right to information, simplister, is a corollary of the freedom of thought.

The right of freedom of information should be read into the guarantee of freedom of expression. More importantly is the centrality of freedom of information to the key underlying rationales for freedom of expression in the first place. The importance of freedom of expression has been explained in three key ways, an aspect of human dignity, as the best means of ascertaining the truth and as a fundamental underpinning of democracy.²⁹

Freedom of information plays an important role in the above factors but it is an aspect of democracy that is perhaps more crucial. Democracy can not flourish if governments operate in secrecy, no matter how much open discussion and debate is allowed.³⁰ Indeed, the very nature and quality of public discussion would be significantly improvised without the nourishment of information from public authorities. In this case both freedom of information and expression would be guaranteed as only guaranteeing either as Mandel, T. observes would merely be a formal exercise, denying both effective expression in practice and a key goal which free expression seeks to serve.

At a more principled level, democracy is quintessentially about ensuring that governments perform in accordance with the will of the people. This sort of accountability is clearly

²⁹ <http://www.article19.org> p.4

³⁰ Op Cit p. 4

impossible unless governments operate in open, transparent fashion, including curiously people to access the information they hold and also comment on it without fear of criminal sanctions. Democracy is also about government's responsibility to the people and the idea that civil servants really should serve the public. This includes the idea that public authorities have, in principle, no right to keep information they hold from the people, unless there is some overriding public interest reason to justify this.

FREEDOM OF INFORMATION AND EXPRESSION AS FUNDAMENTAL HUMAN RIGHTS

The right of freedom of information and expression as fundamental right is beyond question. In its very first session in 1946 the limited Nation's General Assembly adopted Resolution 59 (1) stating:

“Freedom of information is a fundamental human right and the touchstone of all the freedoms to which the United Nation is consecrated.”³¹

Indeed, Hussein, A. the United Nations Special Rapporteur on freedom of opinion and expression, elaborated this in his 1995 Report to the United Nations Commission on Human Rights, stating:

“Freedom will be bereft of all effectiveness if the people have no access to information. Access to information is basic to the democratic way of life. The tendency to withhold information from the people at large is therefore to be strongly checked”.³²

³¹ <http://www.article19.org> p.1

³² Ibid p. 1

The above quotations go a long way to illustrate the importance of these two freedoms and why they must not be taken away easily. Government must allow people to comment on the activities of the president without threat of criminal sanctions as the rights to information and expression are fundamental.

National courts in a number of countries, particularly in Asia, have held that access to information held by public authorities is a fundamental human right. As early as 1969, the Japanese Supreme Court established the principle, in two high profile cases, that the guarantee of freedom of expression found at Article 21 of the Japan's Constitution. Included a 'right to know' (Shiru Kenri).³³

INTERNATIONAL AND REGIONAL INSTRUMENTS GUARANTEEING FREEDOM OF INFORMATION AND EXPRESSION.

Almost all human rights instruments guarantee and protect freedom of information and expression. In Africa, the regional human right instrument, the African charter on Human and people's rights protects these two fundamental freedoms. In Europe the European Convention on Human Rights equally protects these inputs. Finally, the inter-American Charter of Human Right protects these freedoms.³⁴

³³ Rapeta, L. Local Government disclosure Systems in Japan, National Bureau of Asian Research, Paper Number 16 October 1999 p.3

³⁴ Anyangwe, C. (2004) Introduction to Human rights and International Humanitarian Law Lusaka: UNZApress

Internationally, the International Covenant on Civil and Political Rights (ICCPR) protects freedom of information and expression. Article 19 protects the right to access information held by public authorities.

The United Nations Special Rapporteur on Freedom of opinion and expression in its annual report in 1999 to the United Nations Commission on Human Rights stated clearly the right to information as provided under article 19 when it stated:

“The Special Rapporteur expresses again his view, and emphasizes, that everyone has the right to seek receive, and impart information and that this imposes a positive obligation on states to ensure access to information, particularly with regard to information held by government in all types of storage and retrieval systems – including film, microfilm, electric capacities, video and photographs – subject only to such restriction as referred to in the article19”.³⁵

These views have been welcomed by the 53 member states composing the United National Commission on Human Rights.³⁶

Mendel, T. Expresses that there are a number of good reasons both practical and principled why the right to freedom of information should be read into the guarantee of freedom of expression, at least as spelt out in Article 19 of the ICCPR. He notes that it is arguable that freedom to receive information prevents public authorities from interrupting the flow of information to individuals and that freedom to impart information applied to communications by individuals. It

³⁵ UN Doc. E/CN. 4/1999/64 para. 12

³⁶ Revolution 1999/36 para 2

would then make sense to interpret the inclusion of freedom of seek information particularly in conjunction with the right to receive it. As placing an obligation on government to provide access to information it holds.³⁷

CONCLUSION

The preceding chapter has shown the linkages between freedom of information and expression with democracy and human rights. Democracy it has been shown is important for the observance of freedom of information and expression. Indeed for freedom of expression and information to flourish, democratic values must be upheld. This means ensuring that the constitutional guarantee of these freedoms are protected and promoted. Neither information nor the people's expression should be denied under the guise of protecting the president's reputation. In a democratic society, commenting on the president's activities and even decisions should not be taken away rigorously.

Freedom of information and expression are further more guaranteed as fundamental rights. This calls for their protection and only taken away under the permitted derogations. These freedoms are further recognized and even protected at both regional and international level. States are therefore under an obligation to ensure that these freedoms are respected especially without the use of criminal sanctions.

³⁷ <http://www.article19.org> p.7

CHAPTER FOUR (4)

CRITICAL ANALYSIS OF SECTION 69 VIS – A- VIS ITS IMPACT ON FREEDOM OF INFORMATION AND EXPRESSION.

INTRODUCTION

The following chapter aims at identifying the negative aspect of section 69 of the Penal Code particularly its adverse impact on freedom of information and expression. It shall also analyze whether it is required in a democratic nation. The chapter shall endeavor to determine the section in the light of decided cases and proceed to analyze the wording of the section and determine its relevance to Zambia as a democratic nation.

As stated in chapter two (2), the Zambian Constitution protects and guarantees freedom of speech and freedom of the press under Article 20. In this regard it provides a fundamental source of freedom of expression and that of the press. The concept of freedom of expression as known in recent times has developed from a background of open and unrestricted speech as was advocated for by such documents as the English Bill of Rights, 1689 from which emerged the Universal Declaration of Human Rights (UDHR), 1948.³⁸ The importance of freedom of

³⁸ Hiebert, R.E. (1991) Mass Media New York: Longman p. 499

expression in a democratic society is that an individual is given as much latitude to express his thoughts and ideas as he desires without any unjustified restrictions. Freedom of expression embodies two ideas; freedom to impact ideas and secondly that of receiving such ideas. The decision in **Handyside V. United Kingdom**³⁹ shows also that freedom of expression includes press freedom as it is through the medium of a free press that the individual is assured of the most effective way of influencing the president. A democratic country ensures that freedom of the press is free so that it fosters free speech because if the press has no freedom to inform the public about the actions of the president, then the public have no freedom of speech.⁴⁰ A good democracy allows not only information and ideas that are favorably received or regarded as inoffensive or as a matter of indifference, but also those that offend shock or disturb the state or any section of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there can be no 'democratic society'.

ROLE OF THE STATE IN PROMOTING AND PROTECTING FREEDOM OF INFORMATION AND EXPRESSION

Freedom of expression like any other civil and political right is absolute and immediate that is, the state is required to guarantee it absolutely and with immediacy.⁴¹ Further more, this right only requires negative obligations on the part of the state. The meaning of this is that the state

³⁹ (1975) European Human Rights Report 737

⁴⁰ Professor Brendt head of Media law of London University quoted from Musonda, P. Freedom of expression. A serious misunderstanding or a fanatic. Fiction in a brief comparison of the UK, USA and Zambia situations.

⁴¹ Anyangwe, C. (2004) p. 23

only has an obligation to refrain from interfering with this right and not a positive one in favour of the right. By contrast, cultural economic and social rights require the state to take up an active role in ensuring their enjoyment such as by providing finances, infrastructure or services.

Even though the state is required to take a negative approach, it is still faced with challenges of ensuring the realization and guarantee of civil and political rights such as freedom of expression. The state in ensuring the guarantee of freedom of expression and information must either refrain from interfering with their enjoyment or should take up a further step by ensuring that there is a conducive environment for the exercise and enjoyment of these rights.

Clapp, R. put it more clearly when he stated that the enjoyment of these freedoms is to a greater degree dependent on the state's positive engagement and sometimes financial outlay.⁴² National courts must take cognizance of the positive obligations on the part of the state to take steps to guarantee further aspects of freedom of expression. According to Montel, T.⁴³ such measures or obligations include properly investigating legislation which has a chilling effect on the freedom of expression and also an obligation to provide for balance and impartiality on state funded broadcasters including an obligation on public authorities to provide access to the information they hold.

In the case of **Oropeza V. Mexico**⁴⁴, the commission on Human Rights concluded that the states

⁴² "Challenging the Traditional Conception of Civil Rights; Positive Obligations of the state under Freedom of expression." Zambia Law Journal Volume 33, 2001 Lusaka: UNZApress p. 52S

⁴³ Article 19, the virtual Freedom of Information Handbook at <www.article19.org> p.9

⁴⁴ Inter American Court of Human Rights 19th November, 1999 Report No. 130/99 Case No.11

failure to investigate and criminally sanction the perpetrators of an assassination was a violation of the right to public and free expression of information. In this case, the anonymous victim had criticized the authorities in his newspaper column and denounced close links between drug traffickers and local police. The complainant alleged that the victim had been killed in order to silence his criticism and that the authorities did not conduct an effective investigation, having put at the helm the very person criticized by the victim and actively blocking progress of the investigation. Even after eight years no person had been convicted of murder. The Inter-American Commission found in favour of the complaints that the state had not conducted an effective investigation into the murder.

A democratic society is one which to a large extent will afford ideas to flourish and the truth discovered. The United Nations has made a positive step towards democracy because of its effective mechanism in ensuring that people participate in their government through freedom of expression, speech and the press. In this regard, the 2001 report of the United Nations Rapporteur on freedom of opinion and expression observed that even in the most difficult prevailing social and economic situations, democracy ensures that justice is done for victims of human rights violations as regards freedom of opinion and expression.⁴⁵

The value of free expression in any democratic nation is that it assures the individual of self-fulfillment and it also serves as a means of attaining the truth. Free speech in addition creates a method of security for the participation of the members of a society in political and social decision making and it further serves as a means of maintaining the balance between stability

⁴⁵ Op cit

and change in a society. The fundamental principle of the people's right to know can therefore, only be achieved if freedoms of expression, speech and the press are given a favorable platform to be freely exercised.⁴⁶

Even though freedom of expression and information are very important they are not in any way absolute freedoms. They are in this case bound to be restricted in their application. In exercising freedom of expression therefore, there is need to protect the reputations of other persons. The law of defamation is important as it is aimed at protecting the reputations of other persons. The constitution of Zambia under Article 20 (3) (b) recognizes the need to protect reputations. Freedom of expression should not be an excuse or a scape goat for infringing the reputations of other people.

The question however, is whether criminalizing defamation of the president under Section 69 of the Penal Code falls within the protection of reputations envisaged by Article 20 (3) (b). It is the author's view that the Section rather than protecting the reputation of the president, to a large extent impinges on freedom of expression and information.

DESIRE TO PROTECT REPUTATIONS VERSUS FREEDOM OF EXPRESSION AND INFORMATION.

There is on one hand the political desire to protect the reputation of the president as a public official and on the other a growing desire to promote freedom of expression and information.

⁴⁶ Indian Express Newspaper v Union of India cited at p. 22

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⁴⁶ Indian Express Newspaper v Union of India cited at p. 22

The guarantee of these two rights may require the digging into the activities of the president and commenting on such findings. There is a public interest to allow citizens to express their thoughts and ideas about the president. However, most of the time such expression of thoughts and ideas including decisions can be faced with the threat of criminal sanctions.

It is in this regard that section 69 is seen as a hindrance to effective expression that ought not to be entertained in a democratic society. The following points are illustrative of the fact that section 69 acts as a fetter on freedom of expression and information. The points shall be based on the decision in **M'membe and Mwape V. The People**⁴⁷. In this case the appellants were journalists from the Post Newspapers and were accused of defaming the former President Chiluba under section 69 of the Penal Code which provided that any person who with intent to bring the President into hatred, ridicule or contempt, Publishes any defamatory or insulting matter by writing, print, word of mouth or in any other manner, is guilty of an offence and is liable on conviction to imprisonment for up to three years. The appellants petitioned the High court under Article 28 of the constitution, challenging the constitutionality of section 69. The High Court dismissed the petition and thus the appeal to the Supreme Court, which upheld the decision of the lower court. It is the decision of the Supreme Court which forms the subject matter of this analysis.

1. **Section 69 is Vague**

One of the issues that arose in the case was that the wording of section 69 was nebulous and that

⁴⁷ SC 138/ 1996

in effect it did confer on the police too much discretion to decide what was defamatory or not and that in the process it can catch and criminalize even legitimate criticism of the President. The chief Justice in reacting to this argument stated the position on behalf of the court in the following words: "I do not myself subscribe to the view that section 69 is over board or vague." He further stated that defamation is a well known subject and that the Penal Code is to be interpreted in accordance with the principles of legal interpretation obtaining in England. The reasoning of the court did not take into account the fact that section 69 deals with a public figure who is also the president thus the fact that principles of interpretation obtaining in England can be applied to section 69 is not enough to prevent the inhibiting effect that it has on freedom of expression and press freedom. The police often employ section 69 to cramp on journalists who merely do their work of informing the public. In mind is the case of four People Newspaper journalists who in 2002 published a story that the president had Parkinson's disease. The president lodged a complaint and the four were arrested and charged with defamation under section 69. In most cases however, journalists are charged even without the President necessarily lodging a complaint. Vagueness in the wording of section 69 is a danger to freedom of expression and information particularly the press and that its wondering tentacles can catch and criminalize almost any sentiment that reflects negatively on the president.

Leading constitutional academician Chanda, A.W. in his handbook on Media Laws in Zambia, commenting on the vagueness of section 69 and its undesirability in a democracy stated that the provision has the effect of stifling freedom of speech and that of the press.

In the case of **Christine Mulundika and seven (7) others v The people**, the court struck down

for unconstitutionality from the Public Order Act a provision, which gave subjective discretion to a police officer. The court never – the – less tried to distinguish the case at hand from the Mulundika case. The distinction is not very sound although it is appreciated that the facts are not the same. The important factor however, emanating from the Mulundika case is the observance by the court that discretion without proper circumference is unconstitutional and that any provision that purports to confer any such discretion cannot stand in the face article 1(3) of the constitution which proclaims that “the constitution of Zambia is the supreme law of the land and if any other law is inconsistent with it, it shall be void to the extent of its inconsistency.” The court in this regard departed from the progressive principles it espoused in Mulundika.

Section 69 confers subjective discretion on the police as it provides no guidelines as to the determination of matters that fall within or under its scope. The Malone case, which was cited in the decision perhaps gives an insight to this problems; “even though it is impossible to have absolute precision in drafting a law, it should nevertheless indicate the scope...and manner or its exercise with sufficient clarify.” Kafunda, C. Indicates that section 69 does not in any way come close to the test established in Malone. Instead its vague wording facilitates for an oppressive order of previous restraint, which is counter, the interests of democracy and human rights for all.⁴⁸

2. Public Officials to be protected.

⁴⁸“ Critic and comment of the decision in M'membe and Mwape v the people” Legality Journal 2002 p.47

In the case of Sata V. The Post Newspapers, the court held that there is an 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.

According to the court such public interest was even greater where the President is involved and that since section 69 seeks to protect his character and honour from destructive attacks, then such public interest justifies its existence. It is however, worth to note that the Sata case the court relied upon as authority in the M'membe case is very restrictive as regards facilitating freedom of expression and information. This is because the Sata case refused to adopt progressive principles which were espoused in New York Times V. Sullivan that promoted and protected these two freedoms. This case placed a heavy burden of proof upon public officials in cases of libel in an attempt to protect freedom of expression and information.

Chanda, A.W. commenting on the Sullivan principles stated that it is clear that these principles are very protective of freedom of the press and go a long way in promoting public debate and scrutinizing of public officials and public figures and on the decline by the Zambian Court to align itself with these progressive principles he lamented that it is a setback for freedom of expression and the press in particular.⁴⁹

3. **Protection of Public Order**

⁴⁹ Quoted by kafunda, C. in Critic and comment of the decision in M'membe and The people Legality journal 2002 Pp 48-49

The court stated that it was necessary to have section 69 in the interests of Public order and that the constitution allowed its existence by its derogating clause 3 of Article 20. The court reasoned that there would be a break down of Public order if section 69 was removed because people defaming the president would ‘annoy’ his supporters. These supporters may in turn attack them and cause public disorder or chaos. Section 69 was thereby seen as a means of maintaining public order. This reasoning invites the suggestion that section 69 can actually be done away with but for the likelihood that some minions of the president would most likely break the law. This startling reasoning goes further to show that law abiding citizens would suffer loss and denied an opportunity to express themselves and receive information because the determination of a defamatory matter is left to those who break the law. In **Resident Doctors Association and 51 Others V. The Attorney General**⁵⁰. Judge Chitengi concerning the argument that doctors were denied their right to freedom of assembly and expression because some cadres or supporters of a certain political party would have attacked them stated that:

“It has never been the law that people engaged in lawful pursuits should be stopped to do so in order to appease and please those who want to break the law. The law does not glorify criminality and criminals.”

It is shocking that the same judge in the M’membe case sought to praise criminals at the expense of lawful activities of members of the public in their quest to express themselves and inform the public accordingly in addition to promoting and protecting freedom of expression and information.

4. Section 69 is Discriminatory

⁵⁰ (1997) HC 23

One of the arguments by the appellants in the M'membe case was that section 69 was discriminatory and therefore unconstitutional for breach of Article 23 of the constitution because it conferred privileges on the ground of the President's political opinions when all should be equal before the law. The court held that the President is not equal to at law with other citizens because of the special immunities granted to him by the constitution. According to the court, the constitution elevated him above everyone else. In any case however, the court did not fully address itself to the argument that section 69 endeavors to protect the president in his personal capacity and that this was not necessary as there was enough civil recourse available to him just like any other citizen when his reputation has been injured.

Renowned constitutional academician Nwabueze points out that the aim of constitutional immunities is not to set the President above all citizens as an individual rather, the immunities are meant for the President to perform his duties smoothly; immunities are for the office, and not for the man, that the special protection is needed.⁵¹ When such factors are taken into account it becomes reasonable to conclude that section 69 is discriminatory. It seeks to provide additional protection to the president as an individual and this removes the section from the legitimate class of immunities and privileges bestowed on the President by the constitution and other legislation.

5. The subjective determination of a democratic society

The court in its decision under review stated that in order to determine whether or not a law is

⁵¹ 1978) Presidentialism in Commonwealth Africa London: Longman 432

reasonably justifiable in a democratic society, the test is objective but that such an objective test must be in regard to the local conditions and level of democracy in Zambia. It is the author's opinion that such a test even though not expressly stated by the court is in essence a subjective one. In Patel V. Attorney General⁵² where the same question across Magnus, J. put the issue as follows:

"I accept the argument that some distinction should be made between a developed society and one which is still developing, but I think one must be able to say that there are certain minima which must be found in any society; developed or otherwise, below which it cannot go and still be entitled to be considered as a democratic society."

Given the importance of freedom of expression and information in any democratic society regardless of its level of development, the test as established in the above case if it were applied in the M'membe case would have found section 69 wanting. This is because freedom of expression and information are minima in all true, open and democratic societies, regardless of level of development.

The respondents in their arguments contended inter alia that Zambia is underdeveloped; that it will take some time to build up democratic institutions and that the standard of journalism is poor and needs improvement. Counsel argued that it was these conditions that warranted the existence of section 69. The court agreed with the respondents and held that recourse should be had to the Zambian conditions when determining democratic society.

It can be stated here that the adoption of this position by the court amounts to the removal of

⁵² (1987) ZR 103

fundamental freedoms from the ambit of internationally acceptable standards and an endorsement of the notion that Zambians did not have the right to enjoy these freedoms in their fullest manifestation. The justification for such an assertion is really difficult to find, taking into account the fact that when Zambians demanded for democracy in 1990, they demanded it will all the incidents that so with such a system, where it is truly practiced.

Based on the decision of the Zambian court, Kafunda, C.⁵³ Observes that it is at variance with the developing jurisprudence in most commonwealth countries concerning the issue of international human rights standards and the importance courts should give to them when making decisions that have a significant bearing on human rights. He further adds that Zambia is a party to a number of international treaties on human rights and this fact alone means that Zambia has a duty to adhere to principles that ensure greater liberties for its peoples in accordance with acceptable international human rights standards. With the world moving closer to globalization and the universality of human rights, Zambia should not be seen to come up with principles that seem to be devoid of the element of universality when it comes to issues of human rights.

In the decision that is the subject of this discourse, the Chief Justice made reference to issues of legal technicalities as to the question whether the courts are legally bound to conform to international treaties and precedents set in pursuant to such. It is important to note that in Zambia unless international treaties and instruments are domesticated, that is, incorporated into domestic law by parliament, they remain unenforceable. The decision in **Felona Nazaluka V.**

⁵³ Legality Journal (2002) p. 52

Zambia Sugar Company Limited where the complainant sought to rely on an international treaty that was not domesticated and the court held that it can not be used is clearly illustrative of this fact. However, Honorable Justice Kirby, M.N. of Australia argues that:

“The traditional view of most common law countries has been that international law is not part of domestic law. More recently however, a new recognition has come about of the use that may be made by the courts to give them content and effect”.⁵⁴

Indeed jurists from all over the commonwealth countries proclaimed in the Bangalore statements that the judiciary in commonwealth countries has a duty to interpret and apply national constitutions; ordinary legislation and the common law in the light of the universality of human rights.⁵⁵

Apart from the decision in **M'membe and Mwape V. The people** raising the above issues as being the reasons for the chilling effect section 69 has on freedom of expression and information, other scholars have outlined certain other factors.

Anyangwe, C⁵⁶. Observed that:

“As long as section 69 or its wording continue to appear in the statute book, the Zambian society will never evolve, yet evolution is an essential feature of every society. This is because by virtue of the said section, citizens do not enjoy freedom of expression, speech and the press to enable them make sound judgment about the actions of the president. The section does not only violate the citizens' right to freedom of expression, but also the collective right of others to receive any information whatsoever about the president and

⁵⁴ Op cit p. 52

⁵⁵ Ibid p. 52

⁵⁶ (1998) The Right to Dissent (A paper presented at the Human Rights and Law Seminar at the Zambia Institute of Advanced Legal Education (ZIALE), 13th – 17th July, Lusaka. P. 4

their ability to access thoughts expressed by others.”

Jere, F⁵⁷. Adds to the negative effect of section 69 by stating that:

“Section 69 stifles freedom of speech and the press and has a cloudy effect on freedom of expression. This is why in Zambia good governance, transparency and accountability by the president has highly been undermined, as the press, for example, may not publish certain information for fear of legal suits. Also because of the same section, the citizens are reluctant to provide information to the press or authorities for the same reason. Therefore, the provision under section 69 hinders public debate of national issues, and it is a clear indication that the government, particularly the legislature has failed to stick an optimum balance between the legitimate interests of the president not to have his reputation tarnished and the interests of the public to have access to relevant information so that the actions of the president are subjected to unilateral debate.”

Freedom of information and expression are fundamental rights as shown in chapter three and further democratic principles demand that these two freedoms be protected and promoted. However, with section 69 in place, these two freedoms are not guaranteed and there is a great departure from democratic principles.

CONCLUSION

It is clear that the wording of section 69 is problematic as it is a hindrance to freedom of expression and information. Furthermore, the section acts as a fetter on democratic principles. The test of what is defamatory is left to the subjective determination of police officers and as has been shown a law that permits subjectivity is a bad law. In as much as the law on defamation of the president is required for the protection of the reputation of the president, it none the less

⁵⁷ Obligatory Essay (2006) p. 41

emphasizes on the protection of the individual rather than the office which should not be the case. The law under section 69 is in this case undesirable. The next chapter will therefore, offer recommendations on how section 69 can be dealt with.

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CHAPTER FIVE (5)

RECOMMENDATIONS AND CONCLUSIONS

INTRODUCTION

This is the concluding chapter of the research paper. Under this chapter, I shall highlight by way of summary what has been discussed in all four chapters and ultimately suggest recommendations on what would arrest the problem of continuing having Section 69 on the Statute books.

The first chapter started by identifying the need to promote free expression of ideas and thoughts by the citizens in a country. It established the fact that citizens must be allowed to freely comment on governmental actions and decisions without being threatened with criminal sanctions. Such criminal sanctions must further not be implemented rigorously that is, harshly without paying attention to the need to promote and protect fundamental freedoms these being freedom of expression and information.

The chapter also pointed to the fact that protection of these freedoms was essential for the people to ensure accountability and transparency of the officials in government more especially the president from whom he draws his legitimacy. Freedom of information and expression therefore, ensures that the public is informed of the actions of the president to ensure transparent

governance. If the actions are arbitrary the public can then criticize the president without any fear especially the threat of criminal sanctions under Section 69 of the Penal Code.

The chapter went on to show the meaning and nature of defamation in law and the Penal Code provision criminalizing defamation of the president. Further the historical development of the law on criminal defamation was traced dating back to the colonial era. The chapter concluded by showing the undesirability of having the law criminalizing defamation. Indeed the cases of **Chief Arthur Nwako v The State**⁵⁸ and **Hector v The Attorney General of Antigua and Bermuda**⁵⁹ referred to in chapter one are illustrative of other commonwealth jurisdictions that have repealed the law on criminal defamation from their statute books.

Criminal defamation is in this regard not appropriate even under the Zambian law as like other countries Zambia too can afford to do away with this seemingly outdated law that acts as a fetter on the freedom of expression and information.

Chapter two introduced the principles freedom of expression and information. It established that these concepts are important as reflected under various International and Regional Human Rights instruments. These instruments are important sources and in certain cases oblige a country to adhere to and observe guaranteed rights. Historical development of these two freedoms was also highlighted ending with the current constitutional provisions. The constitution of Zambia guarantees these freedoms and equally provides derogations or limitations to these freedoms that is, when and how these freedoms can not be upheld or even sacrificed for some other factor.

⁵⁸ FCA/E/111/ 883 (1985) NCLR 228

⁵⁹ (1990) 2 AC 313

The chapter has shown that during the colonial period the permitted derogations were so wide as to render the freedom of expression and even information almost meaningless. Up to now not only are the derogations a hindrance to protecting these freedoms, but laws such as the law on defamation of the president that prevents criticism of the actions of the president as a hurdle to the full fulfillment of these freedoms. This is because even positive criticism can be seen as defamation as the test is subjective. Citizens are denied the chance to make critical opinions about the president. This is even worse when the press that has a duty to inform the public is denied this chance as the people who are to be informed are thereby denied the opportunity to be informed of critical issues. It is even worse off when personalities in the media fraternity are charged with criminal defamation. This most likely can send shivers to others not to report about the president in a critical fashion thereby undermining media independence and professionalism.

The chapter has shown that freedom of information and expression are not absolute thus there are necessary restrictions that they must be subjected to, yet these must be in accordance with the law and must be reasonably justified in a democratic society. The extent to which a law can be derogated from must in accordance with internationally set standards as has been shown.

Important functions of freedom of expression and information were also outlined. The four broad purposes which these freedoms serve were identified based on case law jurisprudence. In addition other functions were also identified. It was established for instance, that freedom of

expression and information act as the life blood of democracy⁶⁰ and should in this case be protected for any democracy such as Zambia's to grow and ultimately be able to flourish.

Chapter three outlined the aspect of a democratic society particularly the link between democracy and freedom of expression and information. It established that democracy is a value protected under the constitution. Freedom of information and expression are important virtues for the enjoyment of democracy. In a way these two are important prerequisites for any democracy. In fact it was shown that these two freedoms are underpinnings of democracy. For democracy to be effective, governments can not afford to operate in secrecy. Public authorities must feed the people with information in addition to allowing them to express themselves and contribute to effective governance vis-à-vis democracy. Countries are under the obligation to ensure that there is legislation to protect these freedoms for an effective democratic system.

Democracy being government by the people entails that the people have a say in the manner of operation of the government. The most effective way of doing so is by allowing them to express themselves about matters of governance without being unduly impeded through the use of laws such as criminal defamation. The president being the leader of government is prone to a lot of criticism about his actions and such should be accepted and not unnecessarily and hurriedly charge people with defamation of the president.

The chapter went on to show that both freedom of information and expression are fundamental

⁶⁰ As established in the case of *Whitney v California* (1992) 274 US 357

human rights. The United Nations in its very first General Assembly as was shown affirmed this particular fact so have national courts in a number of countries. Further regional and international human rights instruments declare the fact these two freedoms are fundamental rights. The fact that they are fundamental rights indicates that they are very essential for the existence of mankind and should be natured and not sacrificed for the good of the president. The International Covenant on Civil and Political Rights (ICCPR) was highlighted as one of the instruments guaranteeing freedom of information and expression that most countries recognize.

Chapter four offered a critical analysis of Section 69 of the Penal Code in the light of the tenets of freedom of expression and information and democratic principles. The analysis was based on need for the state to protect these rights and the role it has to play in ensuring that these freedoms are protected. The role of the state was identified as that of ensuring that these freedoms are guaranteed absolutely and immediately as opposed to relatively and progressively.

Most of the analysis as to the undesirability of Section 69 was based on the decision in **Fred M'membe and Bright Mwape v The People**. This case is illustrative of a number of shortcomings of Section 69 and why it is not in the interest of protecting freedom of information and expression including democracy to continue having it on the statute books.

Section 69 has a negative and chilling effect on freedom of information and expression and no doubt counters against the virtues of a democratic society that preach the protection of these freedoms.

RECOMMENDATIONS

After the analysis it is clear that Section 69 is a hindrance to freedoms guaranteed by the constitution and indeed democratic principles. People should be allowed to speak out on the actions of the president and so should the media be allowed to report objectively and restrictions on freedom of information should not be wide to take away the entire freedoms. In terms of Section 69 therefore, the following are the proposed recommendations on what can be affected to protect freedom of expression, information and promote democracy.

In the first place there is need for the judiciary to interpret cases involving the Section 69 liberally and not in favour of the state. The judiciary should ensure that they uphold ethics and be political in their judgments. Indeed this has been the case. In fact a former judge of the High Court, Justice Chanda, K. notes that in matters between an ordinary citizen and the state, or between an opposition party and the state, the courts have invariably, decided in favour of the state even in cases where evidence clearly showed that the private citizen or organization deserved justice. He concludes that the courts have not been a dependable sentinel of the sanctity of justice.⁶¹ There is therefore the need for change by the judiciary especially as regards Section 69. The arguments against the decision in M'membe are illustrative of the retired Honorable Judge's sentiments.

⁶¹ Quoted from Kaunda, C. "Comment and critic of M'membe and Mwape v The people" p. 53

Secondly, the vagueness under Section 69 should be removed so as to clearly state what constitutes a defamatory matter. Even though defamation is a well known subject and there is general by most writers as what constitutes a defamatory statement, the trend i⁶²n Zambia has been to employ the law under Section 69 even where the comment is merely a criticism of the president. There then is a need to state what constitutes a defamatory matter against the president. Such vagueness even gives the police the wide latitude to decide what is defamatory and they go ahead and arrest especially journalists who merely perform their noble duty of informing the public about the president. The wording of the section should thus be clarified to properly circumscribe what a defamatory remark really is and not leave this to the whims and caprices of either the police or the president himself. Further more in reforming the law as it is now there is need to state what is defamatory as against the president in his official capacity that is, as head of state and government rather than as an individual as it is currently.

As was shown under chapter four, the law under Section 69 is discriminatory as it elevates the president above any other person when this should not be the case. There is then the need to treat defamation of the president just like any ordinary person. In this regard civil law as opposed to criminal law should be employed.

As much as the president is the head of state and should enjoy certain privileges, such privileges should not be at the expense of other people and more importantly constitutionally guaranteed rights as he is not above the law. The public is denied the chance to criticize the president

because of the harsh law. Bringing defamation of the president under civil law would most likely help in promoting freedom of information and expression. In fact other jurisdictions in the commonwealth such as Nigeria and Antigua and Bermuda have done so in an attempt to foster freedom of information and expression. If other countries can do away with this retrogressive criminal provision surely Zambia can do the same.

The legislature should be robust in ensuring that this law is either substantially altered to counter its negative attributes such as its vagueness or repeal it completely.

CONCLUSION

The law criminalizing defamation of the president is imbedded in the Zambian laws under the Penal Code. The constitution equally guarantees freedom of expression and information. However the enjoyment of these freedoms is in certain cases restricted by the defamation law. It is clear from the discussion that Section 69 limits the exercise of freedom expression and information. The media has in most cases been unduly persecuted under this law for merely being critical of the actions or decisions of the president. This has affected the accountability of the president and transparency of the president has equally suffered. There then is the urgent need to revisit this law in an effort to guarantee these freedoms and also promote democracy. This law is not reasonably justified in a democratic society. If the wording Section 69 is not altered to remove the vagueness then it should altogether be repealed and the president can have recourse to civil law in matters of defamation

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