THE LAW OF LIBEL AND PRESS FREEDOM IN NIGERIA

BY

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APRIL, 1995

DECLARATION

I hereby declare that this thesis has been produced by me. It has not been presented on any previous application for Higher Degree. All quotations are indicated in the foot notes and sources of information are duly acknowledged by means of references.

- SAMAILA ABDULLAHI BARAU -

CERTIFICATION

This thesis entitled THE LAW OF LIBEL AND PRESS FREEDOM IN NIGERIA by SAMAILA ABDULLAHI BARAU meets the regulation governing the award of Master of Laws of the Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This work is dedicated to my mother and, to the memory of my father late IBRAHIM ALIYU and my first son late AHMAD ISMAIL, May Allah grant them eternal rest ameen.

-ISMAILA ABDULLAHI BARAU -

ACKNOWLEDGEMENT

The most beautiful thanks and praises are due to Allah the Most High; without Whose infinite generous favour this work could not have been possible.

In a work of this nature, a number of suggestions and assistance must have been recieved from scholars of superior status. Thus it is not only proper but necessary that, I place on record my profound gratitude to my supervisors, Mallam MUHAMMAD TAWFIQ LADAN (principal supervisor) and Mallam MUHAMMAD NUHU JAMO (second supervisor), who above all were kind enough to read through the entire script and save me from many errors.

I will be failing in my duty, if I do not express my sincere appreciation to my loving wife Mrs. Salamatu Samaila Abdullahi, my little daughter Hauwa'u Samaila, my two junior brothers Muhammad Rabiu and Iliyasu, for their forebearance in being deprived of my companionship during the course work and writing of this thesis.

I am also indebted to my fine friends and colleagues too numerous to mention for their contributions in one way or the other.

I must also express my profund gratitude to my typist Mr. Sunday O. Abuh, who exhibited profound skill in typing the entire thesis, despite his tight schedules.

To all these fine colleagues and friends I am indebted. I alone however, assume responsibility for any defect that may remain in the work.

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ABSTRACTS

Generally in all societies, great importance is still attached to individual 's reputation and his self esteem. For example the protection of human dignity, the concern which under lies libel law is given special constitutional status in Germany under their basic law and recently a person's reputation was regarded as one of his fundamental liberties protected by the due process clause of the United States Constitution.

Thus any one who is concern about the manifold threats to peoples reputation by a section of the Nigerian press, is bound to ask what safe guards against them are provided by the law.

It is in view of these, that the topic of this thesis namely The Law of Libel and Press Freedom in Nigeria has been choosen.

The research gave with the backing of legal authorities, situations which lacks legal remedies, as a result meets this question in two ways viz :-

(a) The research gave an account of the laws which protects and guarantees freedom of the press on one hand and peoples reputation in various context on the other hand, and cites some recent judicial decisions.

(b) Secondly, the research made a number of suggestions for new legislation.

CHAPTER ONE of the thesis consists of introduction, the historical evolution of the early and modern press in Nigeria; and the meaning of the term press freedom.

CHAPTER TWO examines the constitutional basis of press freedom and proceed to discuss some legal restraints or limitations to press freedom.

CHAPTER THREE focuses on the law of defamatory libel and the press in Nigeria, and also examined the extent to which English defamation laws can be applied side by side with the Customary law of defamation in Nigeria.

CHAPTER FOUR considers the traditional defences available to a defendant of libel suits and the possible remedies available to the successful plaintiff in such action.

CHAPTER FIVE being the last chapter consists mainly of conclusion and suggestions for new legislation.

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CHAPTER ONE

THE CONCEPT OF PRESS FREEDOM IN NIGERIA

1:0 INTRODUCTION

The idea of this research was conceived as a result of manifold threats to peoples reputation occassioned by the Nigerian press. As a result the research proceed on the assumption that:

(A) There exist what is called press freedom in Nigeria.

(B) There exist also, a law that protect peoples reputation untarnished, then

(C) How do we balance these two countervailing interests against injury to peoples reputation now rampant in our print media ?

Hence this chapter is set out to review the history and operation of the 'press freedom in Nigeria'. In the light of this, therefore the chapter is divided into three major parts viz:

The first part is an attempt at tracing the historical development of early and modern press in Nigeria. The second part shall be an attempt to define the term 'press freedom' and the third part will examine whether or not there is the need for the press in democratic Nigeria, under the caption press freedom and democracy in Nigeria.

1:1 THE HISTORICAL DEVELOPMENT OF THE EARLY AND MODERN PRESS IN NIGERIA

Newspapers conducted by the Nigerians appeared for the first time in the 1880's. This development has a complex background, because the indigenous newspapers movement was a direct response to the social and political revolutions-

precipitated by the European Christian Missionaries and British colonial administration in the country.

THE DEVELOPMENT OF THE EARLY PRESS

In the early periods of Nigeria's history, indigenous Nigerian society had no newspaper, but they had agencies and institutions which in several respects serve the same purpose as the present day newspapers.

The desire for information about local people and events, the satisfaction of news stimulated by war and rumours of war, necessitated the spread of information about political and religious decisions and threats to security. The agencies of public communication at that time were operated through informal contacts between individuals. A good example of this is family visists, in wider sphere for example, town and village festivals; similarly news circulate with the greatest rapidity through various process of trading.

In the early and present time, most communities has markets which were not only centres of trade, but also principal means of communications. The market places provides the most convenient forum to meet friends and kinsmen where news and gossip were exchanged freely, like our modern day gossip columnist Except that, the

traditional freedom of expression knew no laws of libel as we have and experienced it today.

The other category of traditional media was concerned with the more systematised dissimination of information between government and people. Here the tools employed were mainly recognisable sounds and signs (like talking drums) and state messenger or town crier, who usually announced the promulgation of laws and regulations.

But the new communication needs in pre literate era began to arise with the coming and expansion of European trade between the fifteenth and eighteenth centuries. With the newspapers already very popular in Europe, the missionaries subsequently decided that, the establishment of newspapers in furtherance of their missionary effort was imperative[1]. This perception led to the establishment of the first known Nigerian newspaper 'Iwe Irohin' on 3rd December, 1859 in Abeokuta the present capital of Ogun state, by Reverend Henry Townsend, an Anglican missionary, published in Yoruba. The newspapers editorial policy was primarily to

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1. (1993) The crisis of Press Freedom in Nigeria, In Constitutional Right Journal; page 10.

propagate the Anglican Faith of Christianity. Barely eight years after it was established, the premises of Iwe Irohin was besieged and burnt down by Egba rioters hence close its chapters in the history of newspapers in Nigeria[2].

After Iwe Irohin came the Anglo-African published and edited by Robert Campbell, in 1863, but because of the precolonial stance of the Anglo-African, it did not enjoy the patronage of the nationalists consequently it did not escape the financial problems which saw its demise in 1865.

From 1880 to 1920[3] Newspapers published in Nigeria includes the Lagos Times, Lagos Weekly Record, the Nigerian Pioneer, African Challenger, the Lagos Observer and the Lagos echo, of all these, the Lagos Weekly Record was the most oustanding in its contributions to the development of modern journalism in Nigeria. Others that follow suits include The Mirror edited by Adolphus Idowu and the African Messenger

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2. Constitutional Rights Project Journal, Ibid., at pp. 10 - 11.

3. Omu F.I.A. (1978) The History of Early and Modern Press in Nigeria, Western Printing Service Ltd., London.

established by Ernest Ikoli, who also contribute to the development of Nigerian journalism.

In deed these nationalist press grow to become a plague to colonialism because of their combative tones toward the administration (colonial) then, the authorities embarked on legislation to control newspapers[4a]. The earliest of such legislation was the 1903 Newspaper Act, which was enacted to regulate and stipulates the pre-requisites of establishing a newspaper. This legislation that appear to be a hindrance to the development of newspapers, became the foundation on which subsequent laws governing the existence of print media in Nigeria was based. Hence in 1909 the colonial administration feel the need to create seditious offences Act, which law still remains in our statute books (with little modification).

Fredrick Lugard, who was the Governor General of the newly amalgamated Nigeria, find this law (seditious) inadequate, hence promulgated the Newspaper Ordinance of 1917; which retains to a large extent the provisions of 1903 law, but added

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4a. Constitutional Rights Project Journal, Ibid., at pg. 12-13.

censorship law in times of emergency. Wherein failure to submit news material for censorship under the ordinance attract a fine of 100 pounds. But the general trent of the Newspaper industry in Nigeria at this period until 1925 was their crude method of production, hence none could go daily.

THE EVOLUTION OF MODERN PRESS IN NIGERIA

This period was marked by the introduction of better production techniques, which saw a number of newspapers go daily with the addition of sports and entertainment coverage as well as the use of photographs.

The first newspaper to go daily was the Lagos Daily News established in 1925 by one Victor Bababomi. The paper was later acquired by Herbert Macaulay, who saw the need for newspaper ownership when an editor refused to published his article for fear of libel. The Lagos Daily subsequently became the official organ of his party, the Nigerian National Democratic Party (N.N.D.P.).

The African Messenger owned by Ernest Ikoli was later acquired by the Nigerian Printing and Publishing Company (publishers of the Nigeria Daily Times) in 1926. By 1936, the Lagos Daily News had

folded up, but next was to see a very memorable event in Nigerian journalism. This was the arrival of Dr. Nnamdi Azikiwe (popularly known as Zik), on the Nigerian journalism scene.

Azikiwe is one of the founding editor of the African Morning Post in Gold Coast (now Ghana). By 1934 he had become a senior editor responsible for the editorial content of the paper. Encouraged by the journalism atmosphere and the growing nationalism (represented by the newspapers) in Nigeria, Zik returned and establish the West African Pilot in 1937.[4b]

The Zik press which published the West African Pilot, later expanded to include a chain of newspapers published in different parts of the country. Such as the Eastern Nigeria Guardian, The Nigerian Spokesman, Southern Nigeria Defender and Comet in Kano. At that time (i.e. 1940) West African Pilot had a circulation of about 30,000 daily which is a significant achievement.

Subsequently, Cheif Awolowo took to journalism also in order to further his political ideas[5]. Hence

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4b. Constitutional Rights Project Journal, Ibid., at page 16.

5. See Constitutional Rights Project Journal, Ibid., at page 16.

establish the Nigerian Tribune in November 1949. His political rivalry with the Azikiwe is said to be the factor responsible for the proliferation of newspapers in Nigeria, because both men ran a chain of newspapers that competed in the same market. Thus by 1959, Awolowo through his amalgamated press had the following newspapers inter alia; The Advocate, Mid West echo, Daily Express and Eastern Observer.

One other important development in the media prior to Nigeria's independence is the advent of the broad casting medias.

Apart from the broad cast media, the 1950's which represented the terminal years of colonial rule in Nigeria, saw further expansion in number of the newspapers published in the country. As a result politicians and governments saw the urgent need to establish media that would advocate their own view points in the run up to the 1959 Independence election. The Northern Regional government had earlier set the pace for government owned newspapers when it established the Nigerian Citizen in 1948, to project its own religious, cultural and political interests that were in rivalry with that of the other regions. This set the pace for what was the dominant trend after Independence of government ownership of the media. Thus in 1961 Federal

government established the Morning Post to combat the influence of the Awolowo newspapers.

With the colonial authorities now out of the way, the politicians used media to attack each others interests, which had now cleavaged into three regional form. Moreover the first decade after Independence witnessed a number of legislation governing the operation of the mass media in Nigeria, since the right to establish a medium of communication was under the concurrent legislative list; there were a variety of laws governing it as both the state and federal legislatures made laws on it. For example, official secret Act[6] Newspaper law of Eastern Nigeria and Newspaper Act and Newspaper (Amendment) Act of 1964.[7]

Today the Nigerian print media is made up of a large, complex of growing number of establishments, which has different owners, publishers and financiers. As at the moment there are about 30 daily newspapers, about 28 weeklies, and more than 60 weekly/monthly magazines and periodicals[8].

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6. See CAP 335 Laws of the Federation of Nigeria, 1990.

7. See CAP 291 Laws of the Federation of Nigeria, 1990.

8. See Democracy and the Law (1991) published by the Federal Ministry of Justice, Laws, Nigeria, p.304.

But each of these papers have a distinct and different background, ideology, world view and perspective on how the nation ought to be run and what the ideal Nigerian society should be. However, government remains the largest owner, financier and operater of media of mass communication. The Federal and State governments own about 55% of the newspapers, while the private investors own roughtly 45%. Some of the notable government newspapers are the New Nigerian, Daily Times and Sketch, etc.

1:2 THE MEANING OF PRESS FREEDOM

The meaning of Press Freedom receive the attention of BLACKSTONE, who defined press freedom as:

> "Liberty of the press, consist in laying no previous restraints upon the publication and not in freedom from censure for criminal matters where published. Every man has the undoubted right to lay what sentiment he pleases before the public ... to forbid that is to destroy the freedom of the press - but if he publishes what is illegal or mischievous he must face the consequences of his own temerity"[9].

This definition is subjected to many criticism inter alia that, it is too broad to allow a mischievous publications.

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9. See Osibanjo, Y and Fogam K, Nigerian Media Law (1991), Lagos Gravitas Publishments, p.1.

Recently a Royal Commission in United Kingdom recommended in their report that,

> "We define freedom of the press as that degree of freedom from restraint which is essential to enable proprietors, editors and journalists to advance the public interest by publishing facts and opinion without which a democratic electorate cannot make a responsible judgement"[10].

On closer observation of this definition one will find it defective also, for restricting the class of persons that are to benefit from the freedom to publish ones opinions and sentiments to only journalists and media owners. It is submitted here that, the better view is that, the general public ought to be protected also. Thus the provision of section 36(1) of the Nigerian Constitution went further than this definition by ractifying its short coming; where it provides:

> "Every person shall be entitled to freedom of expression, including freedom to hold opinions and to recieve and impart ideas and information without interference".

This right granted to the media and other persons, could as well cover all concievable situation of

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10. See (CMND 6870, 1977 Paragraph 2.2. and 2.3).

11. See The 1979 Federal Republic of Nigeria's Constitution.

expressing ones thoughts. We are of the views that, freedom of the press must at all times be exercised within the law, hence the freedom of the Nigerian Press cannot extend beyond the laws. Thus citizens have a role in forcing the press to respect the law by going to court whenever their rights or reputation are trampled upon by the press. In this way society and government through the court system are taking the role in defining acceptable journalistic and publications practice.

Hence press freedom could be defined as:

> The freedom enjoy and protected by law for one to publish his thoughts without fear of restrain or of unreasonable arbitrary punishment for whatever is published.

Going by this working definition of press freedom one may then set out how the press influence our attitudes and opinions by providing a forum for political debate and ultimately shape our choice and how the law affects the medium through which the public is informed and entertained.

1:3 PRESS FREEDOM AND DEMOCRACY IN NIGERIA

It is incontrovertable that, democracy has been the most universally accepted mode of governance in

the world over. Thus democracy as an institution of governance envisage a popular government as practised in ancient Greece, from whence it derived its name demos (the people) and Kretos (rule).

Although in modern state, the condition of direct participation of all people in government of the state is impossible, nevertheless, the concept of democracy still emphasises the rule of the people; where sovereign power is exercised by the people indirectly through a system of representation. Hence in democracy the power resides in the people and belongs to the people.

Thus in a true democracy the people of the country must have the right and have the power by constitutional means of free fair and unfettered election to choose or change the character or form of government under which they are governed. Similarly press freedom and freedom of speech are among the necessary institutions for the existence and survival of true democracy. In the celebrated case of ROTH V. UNITED STATES, Justice Brenman observed[12]

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12. 354 U.S. 476 (1957).

> The protection given to speech and press was fashioned to assure unfettered inter change of ideas for the bringing about of political and social changes desired by the people. To achieve this all ideas, having even the slightest redeeming social importance unorthodox ideas, controvertial ideas, even ideas hateful to the prevailing climate of opinion have the full protection of the guarantees (of the 1st amendment), unless execusable because they encroach upon the limited area of more important interests ... the fundamental freedom of speech and press have contributed greatly to the development and well being of our free society and are indispensable to its continued growth ceaseless. Vigilance is the watch word to prevent their erosion by congress or by the states. The door barring Federal and State intrusion into this area cannot be left ajar, it must be kept tightly closed and opened only to the a lighted crack necessary to prevent encroachment upon more important interests".

In the same vein it has been rightly pointed out that:[13]

> "In democracy the individual is entitled to express his opinion on all matters, and more especially, public matters, as every public decision affects him in one or the other way. Without expression there is no social life at all, because communication is the very essence of social life"

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13. See LADAN M.T. article 'Press Freedom and Democracy' published in New Nigeria's Newspaper of 10th and 11th January, 1990 at page 7.

Today not only is a considerable amount of our time spent in reading newspapers and other communication media, but we have also come to rely upon the press as the major sources of information and knowledge about the society we live in, hence, the media influence our attitudes and opinions, it also provides a forum for political debate and thus ultimately shape our choice.[14]

Therefore any attempt by the government to suppress ideas, and free speech can be counter productive; because freedom to think as you will and to speak as you think, are still the proper and more effective means indispensable to the discovery of political truth. Hence the need for press in a democracy. Since in a democracy there should be the right to free expression of opinion and of opposition and criticism of the government of the day. Every government need such criticism in order to walk straight and keep on an even keel. It is only when and where there is free trade in the market of ideas that truth will grapple with the falsehood. Thus the press in Nigeria has a very vital role to perform in

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14. See RONOLD F. STORETEE, 'Frredom of the Press', Harvard International Journal Vol.8 at page 366.

democracy since the survival of democracy is dependent on free press; especially now that the press is playing a very vital role of disseminating information to the public, thereby enabling the public to form their views and opinions on events around them. Indeed the press is one of the bulwarks of democracy because a country with a free press is most able to thwart tyranny and provide opportunity for ventilation of ideas in achieving national development.

Thus the current democratic surge in Africa, Nigeria inclusive; as a result the role of the press is becoming increasingly important. A free press will be able to provide to the people a true account of goings - on in governmnent and the society at large and act as a watchdog of the people's rights against governmental abuses.

SUMMARY

In conclusion, this chapter has survey the historical development of the early and modern press in Nigeria. Where it was revealed that, the history of the print media is in a sense the history of modern Nigeria because when the

emerging educated elites began to establish their own newspapers they turned it to nationalist purposes and demanded for self rule; it was also revealed that, the concept 'press freedom' requires that journalist and members of the public should have the freedom to publish what ever sentiments or opinion without hindrance or constraint.

It was also revealed that press freedom is a corollary to freedom of expression without which a genuine democracy cannot thrive. Thus the right of the people to freely express themselves and comment on the affairs of state and conduct of government is an essential part of democracy, which of course demands accountability of rulers and public officials to the citizenry.

The next chapter will among other things consider the constitutional basis of press freedom in some countries world over and in Nigeria as contained in our three years constitutions.

CHAPTER TWO

THE CONSTITUTIONAL BASIS AND LIMITATIONS OF PRESS FREEDOM IN NIGERIA

2.1 INTRODUCTION

The concept of press freedom is a deliberate arrangement to create a structure of rights, privileges and obligations including right to be informed and to express opinions about matters of public interest within the context of accepted rules and norms. These rights cannot be properly exercised in the absence of appropriate public institutions for generating and sharing information among which the print media or press occupy a prominent place[1].

But the ability of the press to function in broadening the base of information sharing, and in democratising the public consciousness is determined by a number of factors, many of which are outside the press control.

Hence in recent years, discussions about the constitutional role and limitations of press freedom in Nigeria centre around the independent existence and influence of the print media while on the other hand is the view that, the print medias are the creature subservient to the powers that be[2]. Whatever views one may have, the fact still remains, the freedom to publish and disseminate news enjoyed by the press in Nigeria

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1. ONUORA E.N. (1985) Mass Communication in Nigeria, Fourth Dimension Publishers, pp.197.
2. ONUORA, E.N. Ibid, at pp.194.

is given a constitutional backing under the 1960 - 1979 Constitution, that accords the same right to other individuals in a qualified form. Hence, the discussion in this chapter will be devoted on the analysis of the constitutional basis and limitations of press freedom in Nigeria. As a result, the chapter is divided into five major parts. The first part is an introduction, it is them followed by the second part which is an attempt to evaluate the constitutional basis of press freedom under the Nigerias 1960, 1963 and 1979 constitutions. The third part is devoted on the examination of the constitutional role of the press in the light of decided cases; while the fourth part is an attempt to analyse the constitutional limitation of press freedom in Nigeria, whereas the fifth part will take a look at the other legal restraints or limitations on the press freedom.

2:2 CONSTITUTIONAL BASIS OF PRESS FREEDOM IN NIGERIA (1960 - 1979)

Press freedom is undoubtedly one of the most fundamental rights of every citizen. It is ones freedom to publish ones thoughts without fear of restraint or of unreasonable or arbitrary punishment for whatever is published. Consequently,

people and nations worldwide always guarantee this indispensable right to every person in their constitutions. In a country where press freedom is constitutionally protected, it means the right of individuals to gather, publish and disseminate information and opinions through such media as the pamphlet, the newspaper and magazines[3].

(A) HISTORICAL GENESIS OF CONSTITUTIONALISATION OF PRESS FREEDOM

Sweden is believed to be the first country in the whole world to constitutionally guarantee press freedom. The Press Act in Sweden was enacted by its parliament in 1766 as part of its constitution. Later on France includes press freedom as part of its Declaration of Rights of Man in 1789, and some years later, the United State of America includes press freedom in the first amendments to its constitution of 1817.

Great Britain also granted legal recognition to press freedom as early as the late 18th century, when the then Chief Justice of England Lord Justice, Eyre pronounce in the famous Hardy's case of 1794 that:

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3. See BAYO, O. (1993) "The Constitutional basis of Press Freedom in Nigeria (1960-1992) In 'Constitutional Rights Journal', pg.24.

> "the power of communication of thoughts and opinions is the gift of God and the freedom of it is the sources of all science, the first fruits and the ultimate happiness of society; and therefore it seems to follow that, human laws ought not to interpose, hay cannot interpose, to prevent the communication of sentiments and opinions in voluntary assemblies of men"[4].

Hence, almost every social convenant today whether in the form of written constitution as in the case of United State and Nigeria or drived from the case of customs as in United Kingdom, acknowledge the fundamental nature of this right.

It is an axiomatic fact to say that, even states with the most widely differing social, political and economic policies find it necessary to recognise press freedom in some form in their constitution.

(B) HISTORICAL BASIS OF PRESS FREEDOM IN NIGERIA

Press freedom became constitutionalised in Nigeria on the recommendation of the minorities commission, which was set up on the eve of Nigeria's Independence to examine, how the rights and interests of Nigerian minorities can

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4. (1974) 24, Howell State Trails.

be preserved in the emergent nation. The commission (Minorities Commission) recommended the guarantee of fundamental human rights which includes the freedom of expression to be incorporated into the Independence Constitution. Thus section 24 of the 1960 Nigeria's Constitution is the first constitutional basis of press freedom in Nigeria. The section provides:-

> "(1) Every person shall be entitled to freedom of expression including freedom to hold opinions and to recieve and impart ideas and information without interference".

Except the substitution with 'the state' and 'the Federation' for the Crown, section 24 of the 1960 Constitu that depicted the then dominion status of Nigeria, the constitutional provision, guaranteeing press freedom under the 1963 Nigeria's constitution is a word for word reproduction of the 1960 Nigerian constitutional provision.

Between 1963 and now, Nigeria has had only one constitution, namely the that of 1979.

(C) PRESS FREEDOM UNDER THE 1979 CONSTITUION

The 1979 Nigeria's constitution when compared with the 1960 and 1963 constitutions, (the 1979 constitution) provides, Nigerians with a higher

degree of press freedom in three respects viz:-

(i) The first provision created in chapter two (Fundamental objectives and directive principles of State policy) under section 21, form of obligation for the Nigerian Mass Media that:

> "The press, radio, television and other agencies of the media shall at all times be free to uphold the fundamental objectives contained in this chapter and uphold the responsibility and accountability of the government to the people".

From the letters and spirit of this section is a broader freedom for the Nigerian press in the rightful conducts of its duty, particularly in its relationship with the government.

(ii) The second provision is that, which enlarged press freedom in Nigeria is contained in section 36(2) of the 1979 Constitution. The section while repeating in subsection (1) and (3) of section 36, the freedom of expression provision of the 1960 and 1963 constitutions, conferred in subsection (2), the right to 'own, establish and operate any medium for the dissemination of information, ideas and opinions' on every Nigerian except with a proviso that:-

> "No person other than the government of the Federation or of a State or any other person or body authorised by the President, shall own, establish or operate a television or wireless broadcasting station for any purpose whatsoever".

Worthy of examination here is the meaning of the word 'medium' as contained in the media ownership provision. This word is interprited to go beyond the conventional mass communication media in Okogie and Others v. Attorney General of Lagos State[5]. Where the court held :

> "The word medium under section 36(2) of the 1979 Constitution is not limited only to the orthodox mass communication media but reasonably includes schools. Accordingly, any statutory abolition of private primary schools in Lagos State would constitute a violation of the right of the proprietors of these schools to freedom of expression".

(iii) While the third provision is that of section 41 of the 1979 Constitution, which is impari material with the provision of section 24(2) of the 1960 Constitution, which generally provides for the derogations from five of the eleven fundamental rights provisions of the constitution. The section establish in subsection (1) of the 1979 that:

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5. (1981) 1 NCLR 105.

"(1) Nothing in sections 34, 35, 36 (Freedom of expression and the press) 37 and 38 shall invalidate any law that is reasonably justifiable in a democratic society;

(a) In the interest of defence, public safety, public order, public morality or public health or for the purpose of protecting the rights and freedom of other persons".

It would be observed that, the wordings of the section offers a wider latitude for state regulation of the press freedom provision constitutionally guaranteed in sections 21 and 36 of the 1979 constitution, under the guise of 'public defence', 'public safety', 'public order', 'public morality', 'public health'. These omnibus concepts, could be the genesis of all forms of legal restraints on the press freedom under the Military administrations.

2:3 THE CONSTITUTIONAL ROLE OF THE PRESS IN NIGERIA, IN THE LIGHT OF DECIDED CASES

Although every fresh entrant into journalism is taught that his duty is to inform, to educate and entertain. But the 1979 Constitution's provision on the role of the press puts it rather differently when it created in chapter II (Fundamental Objectives and Directive Principles of State Policy) in section 21 thus:-

> "The press, radio, television and other agencies of the media shall at all times be free to uphold the fundamental objectives contained in this chapter and uphold the responsibility and accountability of the government to the poeple".

Evidenc in the letters and spirit of this provision is a broader freedom for the Nigerian press in the rightful conduct of its duty and particularly in its relationship with the government.

On the other hand Justice Balogun of the Ikeja High Court observed in the case of Adikwu v. Federal House of Reps.[6] that;

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6. (1982) 3 NCLR 394.

> "The newspapers are the agents so to speak of the public to collect information which it is in the public interest to make known, and to tell the public of ...".

Hence, to expose corruption in government was regarded as a service to the public in the case of Tarka v. Sketch[7], where Ademola J as he then was held inter alia:

> "The issue of corruption by a public office holder is a matter of public concern and interest and any publication by a newspaper exposing such corrupt public officer is a service to the public and as long as the facts on which comments are based are correctly stated substantially by the newspaper there is a complete defence of fair comment to a libel brought by such public office holder".

It is pertinent to note that, although newspapers or press are regarded as the agents of the public to collect information of public interest such freedom does not extend to inventing false stories and news. In the case of Bulus v. Sulaiman[8], it was decided that:-

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7. (1978) 2 CCHCJ 263.

8. HJ/136/1981 decided on 28/July, 1982.

> "It is not proper for the press to invent or falsify stories and news. It should regard its role as a moral and social duty to report events factually no matter whose ox is gored".

For the press to continue to hold ideas, impart and dessiminate them to the public as one of its major constitutional role, through publication and entertainment on one hand and for the society on the other to continue to have its own freedom under the constitution guaranteed, a balance has to be struck. Hence the need to control press liberty, by inhibiting act, that could lead to their liberty (press freedom) of action from being abused. Thus what is required is certainly not liberties for some at the expenses of others, but equal liberties for all.

It has been rightly observed that 'press freedom and democracy', is

> "The right of freedom of expression and the right of press freedom guaranteed ... under the constitution of the Federal Republic of Nigeria ... is meant to guarantee to every person and the press, freedom to express and communicates ideas without interference. Wgilst under the constitution there is no difference whatsoever between the right of those who seek to recieve or disseminate ideas and information, by way of a newspaper and those who give lectures and speeches and seek to enlarge the

> audience by publication and wide dissemination, the purpose of that section is to guarantee to each of them and every person the fundamental right to do so without interference ...".[9]

It is only when press exercises restraint in its own liberty, to freely express its opinions and impart ideas and information constitutionally guaranteed that, the social and legal relationship can mix happily. A situation may arise where the press may transgress in to areas outside its limitations, there by bringing legal prohibition or control into play; hence the need for the press to be responsible[10].

From our discussion it may be recalled that the press not only has a constitutional duty to fulfil in the society but, also has a responsibility to bear. Professor Yemi O. and K. Fogan[11] observed that :-

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9. Ladan, M.T., Press Freedom and Democracy, New Nigerian Newspaper, Kaduna, Wednesday, January 10 - 11, 1990, p.7.

10. See Omolowo v. Punch KWS/OK/6/84 decided on 14th November, 1985.

11. In their book : Nigerian Media Law (1991), Lagos Gravitas Publishments, p.8.

> "The press must not over extend its freedom by dangering or destroying other fundamental principles, but it should operate within the frame work of the law. The constituional guarantee of freedom of the press is not a suicide pact. What is meant by freedom of expression (and consequently freedom of press or speech) is really freedom under the law. Since the press finds its ultimate freedom and protection in the law, it must also conform to the boundaries established by the law".

In short no one should be free to abuse freedom. The crucial point here is the criterion by which we decide what constitutes abuse in this sense.

2:4 THE CONSTITUTIONAL LIMITATION OF PRESS FREEDOM IN NIGERIA

For the press to continue to hold ideas, impart and dessiminate them to the public through information and entertainment; and for the society to have its freedom constitutionaly guaranteed, a balance has to be struck, hence the control of press liberty by inhibiting conduct aimed at preventing their liberty of action from being abused. Since what is required is not liberty for some at the expense of others; thus the need for equal liberties for all. But, if equal

liberty for all is not to degenerate into anarchy, there must be some restriction or limitations. In short no one should be free to abuse freedom. The question that will readily come to mind is the criterion by which we decide what constitutes 'abuse of press freedom'. It is hoped that this part will do just that.

However 'control of liberty' or 'control of freedom' is a contradiction in terms, for where there is prohibition there is no liberty or freedom, since to prohibit is to limit the very existence of liberty. So prohibition is better expressed in terms of limitation rather than 'control' of liberty, hence the choice of this sub-head. 'The constitutional limitation of press freedom in Nigeria'.

A situation may arise where the press may transgress into areas outside its limitations, thereby bringing legal prohibition or control into play.

Section 36 of the 1979 Nigeria's Constitution states:-

"(1) Every person shall be entitled to freedom of expression, including the freedom to hold opinions and to receive and impart ideas and information without interference".

The section guarantees in clear terms the right to hold opinions and expression freely. This right is qualified by the provision of subsection (3) there of and that of section 41.

Section 36(3) of the 1979 Constitution provides:-

"(3) Nothing in this section shall invalidate any law that is reasonable, justifiable in a democratic society.

(a) For the purpose of preventing the disclosure of information received in confidence, maintaining the authority and independence of courts or regulating telephone wireless broadcasting, television or the exhibition of cinema tography films".

This qualification is further re-enforced by section 41 of the 1979 Constitution which state inter alia:-

"Nothing in sections 34, 35, 36, 37 and 38 of this constitution invalidates any law that is reasonably justifiable in a democratic society.

(a) In the interest of defence, public safety, public order, public morality or public health or

(b) For the purpose of protecting the rights and freedom of other persons".

It appears however that this provision is subject to judicial review of legislative action, in the process of interpretation of the reasonableness

of actions taken[12]; thus the same could be invalidated if found to unreasonably derogate from other fundamental rights, such as freedom of expression. Thus the constitution that grants us the right to know has also limit it.

On close observation of the wordings of this sections, one would see that, they offer a wider latitutde for state regulation of the press freedom guaranteed in sections 21 and 36 of the constitution 1979, under the guise of 'public order', 'public morality' or 'public health'. These omnibus concepts, could enable the government either by commission or omission enact repressive legislations to suppress immediate or potential expressions allowed by sections 21 and 36, or take steps that could be inimical to the established process of media operation, so long as the executive and the legislatures consider such laws or actions reasonably justifiable in a democratic society. A case in point is section 120 of the 1982 Electoral Act, a press censorship clause, which for the purpose of elections put all the mass media controlled by the Federal and State

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12. See Alhaji D.S. Adegbenro v. A.G. Federation (1962) WNLR 169.

governments under the National Advisory Council, three months after election.

According to the Act, the National Advisory Council consisting mainly of representatives of political parties shall let the programme appears on television network and on the radio broadcasting to ensure a free and fair election.

Hence, one could be right to say that, freedom of the press in Nigeria is freedom from primary restraint and not immunity from ordinary laws of the land subsequent to publication. Despite the judicial role of co-ordinating the organs of the government, and the guardian of our fundamental rights constitutionally guaranteed, our courts still pass as valid the exercise of legislatives and the executive powers where they impose limitations on these freedoms through various enactments.[13] Thus, the term press freedom is not absolute, but a subjective one, then, what are those ordinary laws that restrict the freedom of expression after publication? In other words what laws should come to the mind of the (say) lecturers, newspaper editor(s) prior to publication?

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13. See sections 36(3) and 41 of the 1979 Constitution, Decree Nos.4 of 1984, Decree No.43 of 1993. See also Adikwu v. House of Representative (1982) 3 NCLR 394.

2:5 OTHER LEGAL RESTRAINTS ON PRESS FREEDOM IN NIGERIA

press freedom is one of the pillars of all freedoms; in Nigeria as (indeed) in any other democratic society, the purpose of section 36 of the 1979 Nigerian Constitution observed Justice Balogun of the Ikeja High Court[14], is

> "... is not to erect the press into a privileged institution, but it is to protect all persons (including the press) to write and to print as they will and to gather news for such publication without interference".

But the tragedy of the Nigerian press has worsened during the Military administration of General Ibrahim B. Babangida, especially after the promulgation of Decree No. 35 of 1993 News (Proscription) Decree and followed by Decree No. 43, known as the Newspapers Decree of 1993. The cummulative effects of these Decrees is the introduction of certain key elements into the system which are capable of undermining the independence and vigour of the press by putting them under the thumb of the government.

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14. In the case of Adikwu v. Federal House of Representatives (1982) 3 NCLR 394.

It is pertinent to note that today some degree of legal control over expression has been sought and permitted even in the freest socieities of the world, such as the laws of Defamation, sedition, contempt of court, obscence publications, laws and copy rights to mention just a few. It is submitted here that this is consistent with the principles of press freedom, since the press not only has a duty to fulfil in the society, but it also has a responsibility to bear[15].

(A) THE CONSTITUTIONALITY OF SEDITION LAWS

Sedition is committed by any one who publishes a seditious writing or utters seditious words with a seditious intention. The offence of sedition is defined in section 416[16] of the Penal Code; For a person to be guilty of sedition he must be shown to have acted with a seditious intent. Reasonable criticism however is lawful.

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15. See Omolowo v. Punch KWS/OK/6/84 decided on 14th November, 1985.

16. "Whoever by words, either spoken or reproduce by mechanical means or intended to be read, or by signs ... excite or attempt to excite the feelings of disaffection against the Government or constitution of Nigeria or any Region thereof or against the administration of justice ... shall be punished with imprisonment ...".

It is a question of degree for one to distinguish such reasonable criticism from seditious utterances. In D.P.P. v. Chike Obi[17], the following statement was (unfortunately) considered seditious.

> "Down with the enemies of the people, the exploiters of the weak and oppressors of the poor! .... The days of those who enriched themselves at the expense of the poor are numbered. The common man in Nigeria can today no longer be fooled by sweet talk at election time only to be exploited and treated like dirt after the booty of office has been shaved among politicians".

However, complaints about a class enjoying monopoly would not be guilty of seditions. The law of sedition in Nigeria although one of the laws that derogate from the freedom of expression and speech constitutionally guaranteed is not intended to punish or prevent candid, full and free discussions of any public matter, which is the right of every Nigerian, unless the discussion takes place in circumstances calculated or intended to cause tumult. To prove seditious intent, the accused will be presumed to intend the natural consequences of his acts. Hence the intention will have to be descerned from the words

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17. (1961) 1 All NLR 184.

publish. Consequently sedition is similar to defamation, and some times it has been termed "public defamation." Thus it is an essential element of the offence that, it must be published before the conduct is censored.

From the case of Chike Obi it is revealed that what may be seditious would among other things depend on the class of persons published to and the state of public feelings in the topic at the time of publication.

The fear now entertained in some quarters is that, the law of sedition is a deadly weapon at the will of a corrupt government or a tyrant[18]. Hence the decision of Kolawole J. of the Abeokuta High Court in the case of Onabanjo v. Concord Press Limited[19] that:-

> "The fundamental right to freedom of expression and to disseminate and impart information is not a license to defame. It does not confer right on the press to disparage the character of any public officer. No special privilege attaches to the position of a newspaper reporter or editor to defame any one".

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18. See M.I. Ladan's Article, 'Press Freedom and Democracy' published in New Nigerian Newspaper of Wednesday, January 10, 1990 at pg.7.

19. (1982) 2 F.N.R. 75.

The provision of sections 21 and 36 of the Nigerian constitution, 1979, when viewed, it presupposed absolute freedom for the press and citizens generally to hold, recieve, and impart opinions, ideas and information without interference. Thus a person may publish whatsoever he desires except that, after the publication he has to take the legal consequences of what he published when sued for libel or sedition.

Therefore Justice Olatawura of the Court of Appeal was right when he said[20]:-

> "The decision of the funding fathers of the present constitution which guarantees freedom of speech which must include freedom to criticize should be praised and any attempt to derogate from it except as provided by the constitution must be restricted. Those in public office should not be intolerant of criticism. Where a writer exceeds the bounds there should be a resort to the law of libel. Where the plaintiff must of necessity put his character and reputation in issue. Crititism is indespensable in a free soceity. In view of the freedom of speech and of the press, those who occupy sensitive posts must be prepared to face criticism in respect of their office so as to ensure that they are accountable to the people. They should not be made to feel that they live in an ivory tower and therefore belong to a different class. They must develop thick skin

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20. In the case of Nwankwo v. State F.C. A.E./111/83 decided on 27th July, 1983.

and where possible plug their ears
with wool if they feel too
sensitive or irascible".

(B) OTHER RESTRICTIVE LAWS

(i) State Security: There is no doubt that, the freedom of press (or of expression) must necessarily be curtailed, in certain circumstances for the public good.

The existence of all freedoms as guaranteed by all laws presuppose the existence of a state. The need therefore for the state to protect its own existence against the indiscretion of the press is also protected by the law. As earlier stated in this chapter, freedom is often controlled so that other freedom are not abused. Little wonder that section 41 of the constitution allows for democratically justifiable laws to protect the entity and sanctity of the state.

The section further provides for laws justifiable during period of emergency hence the National Assembly may make laws derogating from the rights guaranteed. A situation arose during the first Republic and state of emergency was declared in 1962 in the then 'Eastern Region' which has the effect of suspending all freedoms guaranteed by the constitution.

The official Secret Act 1962, punishes the transmission of any classified matter to a person to whom it/he is not authorised on behalf of the government to transmit or obtained. The provision of the Act are mainly to ban the indiscretion of the press that may jeopardise the Nation as an entity. Thus the Newswatch (Proscription and Prohibition from Circulation) Decree of 1987 draws its validity from section 36 subsections (1) (3) and section 41 of the Nigerian Constitution 1979.

Similarly the press has no absolute right to confidentiality of its sources of information in appropriate circumstances[21].

(ii) The 1982 Electoral Act, also contained what we may rightly be regarded as press censorship clause in section 120 thereof. The section put all the mass media control by the state and Federal government during election under the National Advisory Council three months after election.

The section permit only the Representatives of the Political Parties (forming National Advisory Council) to let the programmes appear on such mass media. Similarly the tragedy of the Nigerian freedom of expression constitutionally guaranteed

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21. See the dictum of Balogun J. in the case of Oyegbemi v. Attorney General of the Federation (1982) NCLR 895.

worsened during the Military administration, especially in 1984 when Decree that muzzle the press freedom were enacted, it is then followed by other decrees and edicts mainly aimed at press censorship. Inter alia, Decree No.35 of 1993, known as News (Proscription) Decree and Decree No.43 which is known as Newspaper Decree. All of which has the cummulative effect of putting all private media under the thumb and control of the government. In other words their publication and expressions has to be dictated by the power that be at that time.

Although it is our view that some degree of legal control over expression is consistent with the press freedom. What is meant here, is a situation where press freedom is only limited by laws which are necessary to safeguard the freedom.

In the final analysis it is submitted that, the principles which all countries that lay any claim to freedom of expression should observe is plain enough:

> "The restrictions imposed must be laid down clearly by laws passed by the legislature and enforced in the ordinary courts. No advance imprimatur should be required; no censorship proposed; no arbitrary or executive action taken. If

> what is published contravened the law, the offence should be dealt with in the ordinary courts of the country, and there should be no seizure; confiscation or prohibition except in accordance with the order of a court"[22].

(iii) Other extra Legal Restraints:

Apart from the decrees cited in this chapter, here the patterns are mainly in the nature of attacks, closure of media houses, arrest and detention of journalists without following the due process of the law. The practice has even extend to seizures of newspapers, magazines, seminar papers and hand bill by law enforcement agencies. A good example that readily come to mind is the closure of 'Good Times Glamour monthly magazine' over its June 1st Election of 1993 with the title 'Civil War Again?' Generals lace their boots'; and some of its employees were arrested and detained. This extend to magazines like the Analyst, the Reporter Newspaper and The Guardian Newspaper to mention just a few.

It is pertinent to note that in all these situations, none of the private media establishment involved were given the benefit of defending the allegations against them. Hence the government was

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22. See Oloyede B. (1990), Dismantling the Culture of Silence" in The Attorney Law Journal, Vol.5 of June 10th at page 177.

the accuser, the prosecutor, and the judge in its own court. This in essence has the impact of derogating from the constitutional provision guaranteeing the right of expression and press; because newspapers, magazines and editors will find it necessary to see that their stories are censored in order to avoid running foul of the undisclosed laws and be shut down. In effect the constitutional basis of press freedom will be lost.

SUMMARY

The discussion in this chapter has highlighted the constitutional basis of press freedom, where it is revealed that it is one of the fundamental right of every Nigerian to publish his thoughts without fear of restraint or unreasonable punishment. It is also revealed that, for the society to have its freedom under the constitution guaranteed, a balance has to be struck in the nature of controlling the freedom of expression by inhibiting acts that could lead to the liberty of action been abused. Since what is required is not liberty for some at the expense of others; but equal liberty for all.

In order to avoid a situation where the press may transgress into areas outside its limitations there by bring legal prohibition or control into play; like the law of defamation (mainly libel and slander with respect, the next chapter would discuss just that) there is the need to limit press freedom by the constitution and other laws such as that of libel.

CHAPTER THREE

THE LAW OF DEFAMATORY LIBEL AND THE PRESS IN NIGERIA

INTRODUCTION

If free speech is conceived of as freedom to utter anything one pleases with impunity, then the first and most important qualification on this freedom imposed by the law of tort is the duty not to make 'false' defamatory statements of identifiable people. The qualification 'false' is added because defamatory statements need not be true, the term includes statements, which tend to lower a person in the estimation of right thinking members of the community[1].

Against true defamatory statements the defamed person has no remedy, under the Nigerian Law of Tort[2]. So far as this law is concerned there is complete freedom to publish statements defamatory of others, so long as they are true and you can prove it to be so, because:

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1. Sim v. Stretch (1936) 2 All ER 1237 at 1240.
2. Onwuchekwa v. Onovo (1974) 2 CCHCJ 1919.

> "The law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess".

Per Littledale J. In Mpherson v. Daniel[3].

In the same reasoning Kassim J. said in Onwuchekwa v. Onovo that:

> "The law will not allow a man to recover damages for injuryt to a character he is not entitled to bear".[4]

The object of this chapter is to examines the law of defmatory libel and the press in Nigeria in a multidemensional way. For instance the historical evolution of defamatory libel will be discuss, the significance of defamatory law will also be briefly analysed. An attempt will also be made to appraise the meaning and kinds of defamation. The discourse will be incomplete without considering the proof of defamation.

3:1 HISTORICAL EVOLUTION OF DEFAMATION

Even though, in many ways defamation is unique among torts, it is equally true to say that, one cannot comprehend the present law without a

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3. (1829) 10 BZC 263 at 272.

4. (1974) 2 CCHCJ 1919.

knowledge of its historical development, so that, the difficulties with which it is beset can best be explained - only in the light of its history.

The origins of the laws relating to defamation (in England) of which libel and slander are the twin components, date back as far as King Alfred the Great, who in the ninth century, decreed that slanderers should have their tongues cut out. Ironically, when Williams Caxton set up the first British Printing Press in West Minster, in 1476 his printing persuits were restricted only by his imagination and ability. In other words, there is no law(s) governing what he could or could not print, he was completely free.

Soon afterwards the British government realized that unrestricted publication and printing could seriously delute its own power. Since information is a very powerful tool in any society and the individual or individuals who controls the flow and content of the information recieved by the people exercise considerable control over those people, therefore control of printing was essential and necessary.

Until the sixteenth century, general jurisdiction over defamation was exercised by the

Ecclesiastical Courts, later the Common law courts developed an action on the case for words, which gained ground in action for slander where 'temporal' as distinct from 'spiritual' damage could be established.

During the Stuart Period (1488 to 1641) the court of Star Chamber assumed criminal jurisdiction over all types of libels, later the Common law courts succeeded to this jurisdiction on the abolition of that court in 1641. The Common law courts established a distinction between libel and slander. On the basis that damage would be pressumed in libel, but the plaintiff would have to prove special damage before, slander would lie.

In the late nineteenth and early twentieth centuries, liability in defamation was extended because of the menace to reputation occasioned by the popular press with its mass circulation[5].

Although in the early period of Nigeria's history most communities apply their native laws and customs to deal with cases of defamation e.g. where a person has been found guilty for using slanderous words/publicly, in addition to paying a small fine by way of compensation to the aggrieved person. he is bound to retract his words

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5. See generally; HOLDSWORTH : History of English Law, Vol.8, pages 333-378.

But the law of defamation as we know it today in Nigeria is primarily based on the Common law of England and statutes of general application in force in England on January 1st 1900[6]. Its contents are therefore not only contained in the English Statutes, but also in the decissions of English Court.

Subsequently the law of defamation was modified and improve by our local laws; although the local statutes followed in the main, the provisions of the English Defamation Act of 1952[7].

3:2 SIGNIFICANCE OF THE LAW OF DEFAMATION

The tort of defamation occupies a prominent position in Nigeria's law, as it did in the laws of most African countries in which the English Common law applies. The post independence period in Nigeria was characterised by serious political activities supported by an articulate and free press. In the early 1960's most of the plaintiffs

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6. Thus the English libel Act of 1843 and Law of Libel (Amendment) Act of 1888 were held to be statutes of general application in force in Nigeria.

7. See Nigeria's Defamation Act of 1961, as amended by the 1963 Act and Defamatory and Offensive Publication Act of 1966 and 1984.

in defamation actions were leading political personalities of the time, as a result, hardly could one find a national newspaper that was not a defendant in atleast one such action during the period; and the trent had not materially change; except that, most defamation actions (in Nigeria) today are without political significance; although with the present plan to return the country to a democratically elected government the situation may change to, what obtains in the early 1960's[8].

The significance of the law of defamation is primarily the protection of the interest in reputation which every person enjoys[9]. As a result there is, therefore no tort unless there has been a communication of the defamatory matter to a third party. Since it is the opinion held of the person defamed by others that matters[10]. Thus, insults directed to the plaintiff himself do not in themselves constitute defamation, since the tort is not concerned with the plaintiffs wounded feelings.

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8. See generally : KODILINYE : The Nigerian Law of Torts (1987), Sweet and Maxwell, London, pp. 131-140.
9. See MARGARET BRAZIER : Street on Torts, (1988), 8th edition, chapter 23.
10. See The Definition of Defamation infra at p.53.

Hence Shakespeare neatly summed those principles in Othello :

> "Who steals may purse steals trash;
> 'tis something, nothing; ...
> But he that fitches from me my
> good name, Robs me of that which
> not enriches him, and makes me
> poor indeed".[11]

Thus, a good name is among a man's priceless possessions, it gives him the respect and love of his family, the honour, esteem and confidence of his community. The legal rationale was expressed with the greatest clearity by Justice POTTER STEWARD of the American Supreme Court in 1966, where he said:-

> "The right of a man to the
> protection of his own reputation
> from unjustified invasion and
> wrongful hurts reflects no more
> than our basic concept of the
> essential dignity and worth of
> every human being a concept at
> the root of any decent system
> of liberty".

It is now clear in our minds that the primary function of the law of defamation is the protection of reputation and character. In affording such protection it also tend to protect, even though indirectly a dignitary interest, this is so, because, often a man's dignity is upheld by protecting him from defamatory statements about

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11. Quoted from TOM CRONE (1991) Law and the Media, 2nd edition, Butherworth, page 1.

himself.

3:3 THE MEANING AND KINDS OF DEFAMATION

Defamation is one of the legal concepts that defies a single comprehensive legal definition - from text writers and jurists. This could be supported by statement of Professor Osinbajo that:-

> "There seems to be no precise definition of what is defamatory. Legal writers and courts of law have, however propound various tests from which it can be deduced that, publication of a statement which adversely reflects on personal reputation is defamatory".[12]

In our bids to defined what defamation is? The classic formula devised by Baron Parke in the case of PARMUTER V. COUPLAND[13] could be of assistance. It was stated in this case that, defamatory statement is one which injures some ones reputation 'by exposing him to hatred, contempt or ridicule'.

Around 1920's judges and legal writers realised that this definition was too narrow, after all, it was easy to damage a man's reputation

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12. See YEMI O. and KEDINGA F., Nigerian Media Law (1991) Gravitas Punlishment, Lagos, p.158.

13. (1840) 6 M & W 105 at 108.

say in his business dealings, by statements which would provoke neither hatred, contempt nor ridicule. Lord ATKIN therefore set out another alternative test in 1924[14] thus:-

> "... would the words tend to lower the plaintiff in the estimation of right thinking members of his society generally?"

The definition certainly cures some of the defects of the earlier one; except that, the expression 'right thinking members of society' is ambiguous; since it was established that, it is defamatory to say that a person is insane[15], and or to say that, it seems she has been raped[16]. The question that needs be answered here, is, does right-thinking persons think less of the unfortunate persons? Or on the other hand, what of where ones associates think less well of him as a result of a statement? This alone perhaps may not necessarily make the statement defamatory; hence this definition is also defective in this respect.

The learned authors of corpus juris[17] defined defamatory words as:-

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14. In Touriner v. National Provincial and Union of England (1924) 1 KB 461 at 486-487.
15. Morgan v. Lingenn (1863) 8 LT 800.
16. Youssouoff v. Metro-Goldwyn-Mayer Pictures Ltd. (1934) 50 TLR 581.
17. The Legal Encyclopedia, p.934.

"... words which have the tendency to disgrace or degrade, the person or hold him up to public hatred, contempt, ridicule or cause him to be shunned and avoided; the words must reflect on his integrity, his character, and his good name and standing in the community .... The imputation must be one which tends to affect the plaintiff in a class of society whose standard of opinion the court can recognize. It is not sufficient, standing alone, that the language is unpleasant and annoys and irks plaintiff and subject him to jests or banter, so as to affect his feelings".

Similarly the American Law Institute defines defamation as:-

> "... a communication which has the tendency to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating with him"[18].

In 1975, the Faulke's Committee on defamation, sought to give the issue of definition its final burial, when it proposed a single statutory definition, although the proposal is not implemented by the British Parliament, but when consider along with other definitions it will surely serve as a useful guide to jurists and scholars; the definition reads:-

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18. In 'Restatement of the Law of Torts', 2nd ed., (1975) American Law Institute, Philadelphia.

> "Defamation shall consists of the publication to a third party of matter which in all the circumstances would be likely to affect a person adversely in the estimation of reasonable people generally".

This definition suffer from the same defects as the previous, moreso, the meaning of the expression 'reasonable people' is subjective rather than objective. And it is essential to always bear in mind that, in different sets of circumstances, all the above tests or definitions might be applicable and it will serve no useful purpose for us to pretent that, one or more of these definitions is or will be exhaustive enough. As such we are inclined to agree with Pollock, when he said:-

> "there is ... rather too much talk about definitions. A definition, strictly speaking is nothing but an abbreviation in which the user of the term defined may pleased himself"[19].

In the final analysis one would see that each of the preceding definitions tends to reveals a common and important elements of defamation viz:

(i) Defamation is a communication that damages the reputation of a person, but not necessarily the individuals character. Thus, your character is what

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19. Book review (1931) 47 LQR 588 (Extracted from Streest on Torts, Eight edition, at page 3).

you are; while your reputation is what people think you are; and it is the reputation that the law of defamation protects, therefore a person without reputation cannot be libelled.[20]

(ii) For a defamation to be actionable the wrods must actually damage a reputation. Thus there must be some harm done to the individuals reputation.

(iii) At least a singificant majority of the community must believe that the plaintiffs reputation has been damaged provided the reaction is not plainly anti-social or irrational then a statement is defamatory.

From our discussion of what defamation is, one can rightly see that, defamation law, deals only with damage to reputation, with the injury done to the individual in his external relations to the community, by lowering him in the estimation of his fellows. The matter published of him, however widely circulated, and however unsuited to publicity, must, in order to be actionable, have a direct tendency to injure him in his inter course with others, and even if in writing or in print,

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20. See Onwuchekwa v. Onovo (1974) 2 CCHCJ 1919. See also, Mpherson v. Daniels (1829) 10 B & C 263.

must subject him to the hatred, ridicule, or contempt of his fellowmen the effect of publication upon his estimate of himself and upon his own feelings not forming an essential element in the cause of action.

KINDS OF DEFAMATION

English law provides two seperate civil actions in respect of the publication of defamatory matter. The action for libel and action for slander. As a result actionable defamation may take the form of libel and/or slander.

Thus libel, generally is in a written form, while slander which in general is oral. In some respects different rules are applicable to each. Although both protect the interest in reputation which every living person enjoys.

The learned authors of Street on torts defined libel as anything communicated in a form of a permanent character and is visible to the eye as libel, and anything temporary and merely audible is slander. Hence, books, newspapers, letters and even effigies were held to be libels in MONSON V. TUSSAUDS LTD.[21] Whereas spoken words are slander. But what is uncertain however, is whether matters

21. (1894) 1 QB 671. See also Nigerian case of ASIODU V. ABODUNDE CCHCJ/1/78 at pg.75.

that are permanent, and only audible or visible but permanent constitute libel.

In the celebrated case of YOUSSOUPOFF V. METROGOLDWYN-MAYER PICTURES LTD[22], Slesser L.J. state the ratio decidendi of the case as:

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

This decision does not settle the question of whether a defmatory anecdote in a film is libel. Although there are obiter dicta in MONSON V. TUSSAUDS LTD Per Lopes L.J. suggesting that permanency is enough, where he says:-

> "Libels are generally in writing or printing, but this is not necessary; the defmatory matter may be conveyed in some other permanent form. For instance, a statue, a caricature, signs or pictures may consistitute a libel".

However, sensible such a test might be the question remain unsettled. It is extreemly difficult

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22. (1934) 50 TLR 581 E.A. at 587.

if not impossible, then to say into which category tape recording, talking parots, deaf, and dumb signs and sky writing will fall.

It is however, settled that, dictation of a defamatory letter to a typist is only a slander[23], while forwarding the typed letters that contained the defamatory statement is undoubtedly libel.

In the final analysis, libel could be defined as a defamatory statement made or conveyed by printed or written words or in some permanent form published of and concerning the plaintiff without a lawful justification or excuse[24], while slander on the other hand could be defined as a defamation in spoken words or other transitory form whether visible or audible without lawful justification or excuse.

3:4 PROOF OF DEFAMATION

Before the law recognised a statement as civil defamation, the statement or words on which the plaintiff base his claim must be examined by the court in order to find out whether or not the words are capable of being defamatory (libel or slander) of the plaintiff. The approach which the court should apply in deciding whether or not

23. Osborn v. Thomas Boulter & Son (1930) 2 KB 226 per Slesser & Sutton L.J.

24. See CATHERINE ANEKE V. STAR PINTING AND PUBLISHING CO LTD. Suit No. E/33/77 of January 1979.

the words are capable of being defamatory was outlined by ADEFARASIN J. In OMO OSAGIE V. OKUTUBO[25] thus:-

> "The judge ... has to consider what is the natural and ordinary meaning in which these words would be understood by reasonable man to whom they were published. In determining whether the words are capable of a defamatory meaning the judge should construe the words according to the fair and natural meaning which would be given them by reasonable persons of ordinary intelligence who are neither unusually suspicious nor unusually naive".

For one to succeed in an action for Defamation he must prove.

(A) Defamatory Meaning of Words

The question of determining the defamatory meaning ascribed to the words published of and concerning the plaintiff was settled by the Nigerian Supreme Court decisions in the celebrated case of MAURICE DUMBO & ORS V. CHIEF STEPHEN IDUGBOE[26], where it was held that

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25. (1969) 2 All NLR 175 at page 199.
See also ISHOLA DINA V. NEW NIGERIAN NEWSPAPER LTD. (1986) 2 NWLR PT 22 at 353 as per A.B. Wali J.C.A.

26. (1983) 1 SC NLR 29.
See also BENDELE V. DAILY TIMES CCHCJ/6/74 pg. 755.

> "In deciding whether words published are capable of conveying defamatory meaning, the court will reject those meanings which can only emerge as the product of some strained or forced or utterly unreasonable interpretation. The judge will construe the words published according to the fair and natural meaning which would be given them by reasonable persons of ordinary intelligence. The test or reasonableness guides the court. The reasonableness is that desirable for a 'reasonable man' ...".

Even though it is the function of the judge on such matter to decide what meaning the language used could reasonably be held to convey to persons to whom the communication was addressed, still the question of 'reasonableness' is a subjective and difficult one; despite the decision in ONABANJO V. CONCORD[27], where it was decided that:-

> "In action for libel the question is what the words would mean to the ordinary man. It is not one of construction in the legal sense. It is a question of fact for the judge sitting as a jury. The plaintiff cannot call witnesses to prove what they understood by the words complained of, nor will it avail the defendant to call any number of witnesses to say that they did not believe the imputation carried by the words complained of".

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27. (1982) 2 F.N.R. 75.

Still the question of reasonable man is unsettled; because of the difficulty of determining the characteria of reasonableness in different set of circumstances.

However where the words complained of are clearly libellous on their face, the task of the judge will be comparatively simple. In the present circumstance, there are two kinds of defamatory words viz:

(i) The first kind consists of words that are defamatory (libel or slander) on their face; for example words like thief, corrupt, traitor, whore and the likes are capable of damaging the reputation of a person, as such defamatory per se. In such instances the plaintiff needs prove nothing more than their publication. Otherwise the general burden of proof is on the plaintiff to show that the words complained of convey a defamatory imputation.

It should be emphasised here that words like quack lawyer[28], accusing a teacher of having an illicit sex with his student[29], accusing university

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28. In OGBUATU V. DAILY TIMES (1976) 2 FNR 185.

29. NTHENDA V. ALADE (1974) 4 EC SLR 470.

lecturer of shallowness, immorality and corruption[30], allegation of fraud[31], calling author a liar[32], misuse of language[33]; if published without lawful excuse are defamatory per se; but no action can be brought when these words are spoken in a jest or used as a mere insult or vulgar abuse, and are so understood by those who are present when they are used.

An issue of policy which should be resolved in Nigeria now is whether or not the tort of defamation (libel and slander) should be made to protect dignity and freedom from insult, in addition to the common law and our present law concern with the interest in reputation alone.

In an action for defamation in Nigeria, where the English common law has been held to be the applicable law, the value judgement reflected in the decision of JIBOWU C.J. in the case of BAKARE V. ISHOLA[34] that,

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30. OBANBAMU V. MID WEST CORPORATION CCHCJ 16/74.
31. ADAMOLEKUN V. AFRICAN NEWSPAPERS NIG LTD (1982) 2 FNR 87.
32. AWOLOWO V. WEST AFRICAN PILOT LTD (1962) WNLR 29.
33. KUYE V. NIGERIAN NATIONAL PRESS LTD (1963) LLR 58.
34. (1959) WNLR 106 at 107. See also OLAKUN ORI V. OLUJATIN (1971) 1 UILR 226.

"It is a matter of common knowledge, of which this court takes judicial notice, that people commonly abuse each other 'Ole! Elewon!' (thief! ex convict) which abuse no one takes seriously as they are words of heat and anger".

Has been imported intact without any critical discussion of its compatibility with the average Nigerian temperament before its acceptance. Unlike the decision of Apaloo J. of the Ghanian High Court in the case of WANKYIWA V. WEREDUWA[35], where he rightly concieved of the customary law (of tort) of defamation (libel and slander) as ginving protection to freedom from insult be sides its protection of the interest in reputation when he said:

> "... the question whether customery law provides a remedy for mere vituperation which falls short of slander as defined by Sabah. I cannot think of any reason why on principle there should be none. The fact that the law of England provides no remedy is quite besides the point. The society of England is different from the society of Ghana. In this country where words of abuse are taken seriously, it would in my opinion be socially intolerable, if customary law provided no sanctions against a man who finds pleasure in injuring the feelings of his neighbour by vituperation .

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35. (1963) 1 G LR 332.

> ... I am prepare to hold that abuse by itself is a wrong redressible by damages according to customary law. The fact that the words of abuse were spoken in the heat of quarrel is not doubt a matter that the good sense of tribunal would take into consideration as a mitigating factor, but it does not by itself negative liability" (underlining is mine).

What should be pointed out here is that, refusal to provide a tort remedy for insult in Nigeria will not necessarily make Nigerians less sensitive to insult; it may merely lead to a situation where insulted persons take the law in to their own hands or atleast speak ill of the law and judges for not given just redress to their felt grievances.

Vulgar abuse will serve as a defence only when the defamatory words are unwritten or unprinted. Otherwise the defence will fail, on the reasoning that, the defendant ought to have had enough time to reflect on what he was writing[36]. In other words vulgar abuse as a defence is not applicable in libellous situation.

(ii) The second kinds of words are those that are ambiguous; in that they are capable of either innocent or defamatory meaning. The task of the judge in deciding which of the two meanings they convey to those whom they were published is indeed a difficult one;

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36. See BENSON V. WEST AFRICAN PILOT LTD (1966) NMLR 3.

for example to say that "Hajia Koko has a baby" appears to be safe. But if the reader knows that Hajia Koko is not married, then the words are defamatory. Although in certain instances, words may in their natural and ordinary meaning be defamatory, the context in which they are used may not convey a libellous imputation, for example the words may be understood by all those to whom they were published as a joke.

Therefore in considering whether a publication is defamatory or not, it should be borne in mind that, it is the broad impression conveyed by the publication to the ordinary man that is relevant, not the meaning of each word used in the publication[37]. This issue came up for consideration before the Nigerian Supreme Court. In the case of DUMBA V. IDUGBO[38]. The respondent in this case was the Chairman of the Board of Directors of a company (Oil Field Supply Centre Ltd.). Because of the suspected fraud and stealing of the company's funds, the Respondent made a report to the police.

The police on investigation initiated criminal proceedings against the other Directors.

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37. See OKOLO V. MIDWEST NEWSPAPER CORPORTATION (1977) 1 SC 33.

38. (1983) 1 SC NLR 29. You may also see DINA V. NEW NIGERIAN NEWSPAPER LTD (1986) 2 NWLR Pt 22 at p.328.

The appellant, one of the Directors, circulated a notice for an extra ordinary general meeting of the share holders. The only item on the agenda was the removal of the respondent from the Board of Directors. The meeting was held and Respondent removed. Subsequently the appellant caused to be published in Nigerian Tide; a daily newspaper the following notice:-

> "At the Extra Ordinary Meeting of share holders of Oil Field Supply Company held at the Company premises in Warri today, 10th September, 1976, it was resolved that Chief Stephen Idugbo a member of the Board of Directors be removed from office and he (Chief Stephen Idugbo) is hereby removed as a member of the Board of Directors of the oil field supply centre Ltd with immediate effect".

The respondent complained that the words 'is hereby removed' are capable of bearing defamatory meaning. The Nigerian Supreme Court held that, the words were defamatory; Removal of persons from position of responsibility and trust, the court reasoned, cannot in normal cause of human behaviour and thinking be regarded by reasonable men as tribute. The words 'removed from office' are very hard words with the imputation that the object or subject is unwanted, undesirable for reasons other than favourable.

The test of reasonableness added OBASEKI J.S.C. is to:-

> "Guides and directs the court in its function of deciding whether it is open to a jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense. In determining whether the words are capable of a defamatory meaning, the judge will construe the words according to the fair and natural meaning which would be given them by reasonable persons of ordinary intelligence and will not consider what persons setting themselves to work to deduce some unusual meaning might succeed in extracting from them. The test is whether under the circumstances in which the writing was published, reasonable men, to whom the publication was made would be likely to understand them in a libellous sense".

However, where the words are defamatory in their natural and ordinary meaning the plaintiff need not give any interpretation of the words; should the plaintiff maintains that, the words have a defamatory sense other than their ordinary meaning, he should plead innuendo.

Innuendo, is said to be a statement by the plaintiff given the meaning which he attributes to the words and proving the existence of facts and circumstances which could convey such meaning to

the person to whom the words were published[39].

In the case of IJEH V. SKETCH PUBLISHING COY LTD.[40] it was held that:

> "If words in their ordinary and natural meaning are not libellous the plaintiff must adduce evidence to show that reasonable people in his community or society might be led to understand the words in a libellous sense. In other words, the plaintiff must allege and prove some "innuendo", i.e. facts and circumstances known to the persons to whom the words were (or publication was) addressed which would make the innocent words bear libellous imputation. If an innuendo is alleged in the plaintiff's statement of claim, the plaintiff is duty bound to prove that innuendo".

An innuendo may be true or false, a true innuendo is one which drives support from extrinsic facts i.e. although the words used are not libellous on their face, but they do convey a libellous meaning to persons to whom they are published, because of certain special facts or circumstances known to them but not set out in the words published.

While a false innuendo on the other hand is that implied from the words themselves. A good

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39. ECONOMIDES V. THOMPOULOS & COY LTD. (1956) FSC 7.

40. (1978) 2 OYSHC (PT.2) 121.

example of false innuendo may arises where a bank wrongfully refuses to honour cheque drawn upon it by a customer who has sufficient money in his account to cover the amount of the cheque. But mark 'R/D' meaning 'Return to Drawer' such statements were held to be defamatory, since it carries the clear innuendo that the customer is not only a bad financial risk, but also dishonest[41].

Another example of successful plea of innuendo was in the case of Mutual Aid Society v. Akerele[42a] where the Nigerian Supreme Court held that, the words were defamatory of the plaintiff since they carry the false innuendo that the plaintiffs property was being sold in exercise of the mortgages power of sale, on account of the plaintiff's default in repaying his debt. The Supreme Court further add that 'such allegation was clearly injurious to the plaintiff's credit'.

The difference that exist between innuendo and Natural and Ordinary meaning of a defamatory publication was settled by the decision in the case

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41. See Ashubiojo v. African Continental Bank Ltd. (1966) LLR 156, See also Adeleke v. National Bank of Nigeria Ltd (1978) 1 LRN 159.

42a. (1966) NMLR 257. See also Karunwi v. Wema Bank Ltd. (1975) 1 SC 15.

of Oloyede v. Sketch[42b] where it was held that:-

> "A defamatory meaning which derives no support from extrinsic facts, but which is said to be implied from the words which are used is not a true innuendo".

The distinction between true and false innuendo are now lossing face, at one time the plaintiff had to prove he/it/they were specifically injured by the words in the second kind usually called libellous per qwod; while damage is presumed from the words in the first kind, usually called libelbus per se. But it appears today that, all plaintiff(s) alleging innuendo be it true or false innuendo, must prove they were libelled or damaged by the publication of the libel. In many jurisdictions courts have erected significant barriers that make it more difficult for persons sueing for false innuendo to win their cases than persons sueing for words that are clearly libellous on their face. It was decided that[43]:-

> "It is settled law that, the question as to whether the words complained are in their natural and ordinary meaning defamatory, is a question of fact for the judge".

42b. (1971) 1 OYSHC (Pt 2) 225.

43. IN Okafor V. Ikeanyi (1979) 3 & $ SC 99 (1966) LLR 110.

Perhaps this could be a deliberate attempt by the courts to discourage or minimised frivolous defamatory suets. Be as it may, the burden placed on the plaintiff sueing on innuendo is to prove special facts or special circumstances known to persons to whom the publication was made which would lead reasonable persons (with knowledge of those facts and circumstances) to infer that the words were understood in a defamatory meaning[44].

(B) REFERENCE OR IDENTIFICATION OF THE PERSON DEFAMED

The second hurdle which every defamation plaintiff must over come after proving the defamatory meaning he ascribes to the words used by the defendant, is, that, the defamatory matter or statement would be understood as referring to him or it. In other words he is identifiable from what has been published and his reputation is likely to be damaged. Most plaintiffs have little problem with this requirement for the simple reason that they have been named or pictured in the newspaper or article (in case of libel) about which they complain.

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44. See Johson v. Daily Times Nig. Ltd. (1966) LLR 110.

However there are occasions when the issue of identity is not so clear enough. In such cases, the question for the court to decide is:

(1) Can the article, having regard to its language, be regarded as capable of referring to the plaintiff?

(2) The second question is, does the article in fact lead reasonable people who know the plaintiff to the conclusion that it does refer to him?

If the first question is answered in the negative, then the second question does not even arise[45].

These requirements were explained by FATAYI WILLIAMS J.S.C. in the celeberation case of Dalumo v. Sketch Publishing Company Ltd.[46], thus:-

> "It is an essential element of the cause of action for defamation that the words complained of should be published 'of the plaintiff' ... It is not necessary that the words should refer to the plaintiff by name. Provided that, the words could be understood by reasonable people to refer to him, and this is the test in every case, it is sufficient. As the law stands the test of whether words that do not specifically name a plaintiff refer to him or not is this : are the words such as

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45. See Awolowo v. Zik Enterprises Ltd. (1955) 14 WACA 696 at p. 699 per Sutton P. quoting Viscount Simonle in Knupffer v. London Express Newspaper Ltd (1944) AC 116.

46. (1972) 1 All NLR 130.

> reasonably in the circumstances, would lead persons who knew the plaintiff to believe that he was the person referred to?"

This test was later simplified by Ayoola J. of the Ibadan High Court, in the case of Oba Solomon A. Oloyede v. Sketch Publishing Company Ltd.[47] thus:-

> "The test by which the person libelled is identified is this : Are the words complained of such as reasonable in the circumstances would lead persons acquainted with the plaintiff to believe that he was the person referred to?"

This requirement will be satisfied not only where the plaintiff is referred to by his correct name[48], which is the most usual case, but also where he is identified for example, by his initials, his nickname, his office, or a photograph, drawing or by reference to a group of persons which he is a member[49]; provided, in all cases that the defamatory words can be reasonably understood as referring to him.

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47. (1977) 10 Y SC (Pt 2) at 225.

48. Also see Bakare v. Oluwide (1969) 2 All NLR 324 See Lardner v. The Sketch Publishing Coy Ltd (1979) 3 LRN 276 at 279.

49. See KODILINYE, generally, op.cit., pp. 147-8. See also, Williams v. West African Pilot (1961) 11 NLR 866.

In The Service Press Ltd. v. Azikiwe (1951) WACA 176, the respondent brought an action against the appellants in respect of a libellous article in the appellant's newspaper concerning a 'Ben Azikiwe.' The West African Court of Appeal (WACA) held that the action must fail as there was 'no proof that Ben Azikiwe referred to in the article was the same person as Nnamdi Azikiwe the respondent.

While in Dafe v. Tsewinor[50], Idegbe C.J. as he then was, held that, certain defamatory statements made about 'a Minister from Aboh in the then suspended Mid-West Government were capable of referring and did refer to the plaintiff who was a Minister of Finance and the only Minister from Aboh in that government. It is now settled that, when a newspaper article is looked at, as a whole and regard is had to the language used in the article, the article can be regarded as capable of referring to the plaintiff if by other related facts it will be reasonable to come to the conclusion that the article refers to the plaintiff[51].

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50. (1967) NMLR 331, See also Bakare v. Oluwide (1969) 2 All NLR 324.

51. See Ukpoma v. Daily Times (1979) 1 - 3, CCHCJ 149.

Defamation of a group or class

One of the most difficult question of identification is where the words complained of reflects on a body or class of persons generally. It was since established that, where defamatory words are written of a whole class of persons, no individual member of that class or goup can sue for libel unless the class or group is so small or so ascertainable that what is published of the class is necessarily said of each and every member of it, or the circumstances of the case indicate that the plaintiff was particularly pointed at.

In all cases of identification, the duty of the court is to determine whether or not the words or articles complained of in a newspaper are capable of referring to the plaintiff in their ordinary and natural meaning.[52]

(C) PUBLICATION OF THE LIBEL

For the purpose of defamation (libel and and slander), publication takes place whenever there is a communication of the defamatory words to some person(s) other than the complainant. The communication to a third party is the very essence of the libel, for it is at this point that the complainant is 'exposed

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52. See Onu v. Agbese (1985) 1 NWLR (Pt 4) at p.704.

to scandal, redicule or contempt'. In the case of Asiodu v. Abodunde[53], ADEFARASIN C.J. of the Lagos High Court held that:

> "In the law of libel, publication is the making known of a defamatory matter after it had been written to some persons other than the person of whom it had been written. Put in another way, to publish a libel is to convey by some means to the mind of another the defamatory sense embodied in the written matter. Publication is effected by any act on the part of the defendant which convey the defamatory meaning of the matter to the person to whom it is communicated".

From the ratio of this case, there can be no action for libel, if the libellous matter is only communicated to the plaintiff alone. Similarly Lord ESHER M.R. defines what is meant by publication in a civil action for libel in the case of Pullman v. Hill and Company[54], thus:

> "What is the meaning of 'publication'. The making known the defamatory matter after it has been written to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written, there is no publication of it; for you cannot publish a libel of a man to himself".

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53. Conch/1/78 at page 75. See also Eda v. Bendel Newspapers Corporation B/227/80 of 18th June, 1982.

54. (1891) 1 QB 524 at page 527.

The value judgement of these decisions why publication to the plaintiff (complainant) alone is not actionable is that, the tort of defamation protects a person from injury to his reputation among other people, and not from injury to his feelings about himself. Accordingly a person may safely write a letter containing any amount of defamatory statements about the addressee provided it remains inside an envelope while in transit, but when such a letter is showned to a third party by the plaintiff there is no publication, and thus no libel action will lie against the writer. In OKOTCHA V. OLUMESE[55], Adefarasin J. held inter alia that:

> "In order to succeed in an action for defamation, a plaintiff must establish that the libel was communicated to some persor or persons other than the the plaintiff himself. In the case in hand it is quite clear that, although the certificate was headed 'To whom it may concern' and that it was required for the purpose of a third party, it was made available only to the plaintiff himself. ... Regarding the communication by the plaintiff to Mr. Hayden, of the character certificate, I am of the view that it was not the act of the first defendant and no action is maintainable against him on that account. ... the communication was made directly to the plaintiff and no-one else".

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55. (1967) F NLR 174 at pg. 176. You may also see Dickson v. Enwere (1967) F NLR 163.

However, the position would be quite different if the same statements were made by way of a telgram or post card. In both cases the contents are presumed to be transmitted to others between dispatch and arrival, thus actionable. As with other elements of libel, it is irrelevant that the defendant did not intend the defamatory words to be communicated to any other person. Provided he is responsible for the relevant publication, he is liable to be sued.

On the other hand, a correspondent to a businessman containing libellous matter sends to his place of business except if marked 'private','personal' or 'confidentail' the addressees Secretary might in the ordinary cause of business open and read it. And in the circumstances the writer will be liable in libel for the publication.

Paradoxically, Winfield and Jolowicz[56] opined that, there is no publication of a libellous matter, if the words could not be understood by the person to whom they are addressed. As such a letter sent directly to a blind or illiterate persons, containing the libellous matter is not actionable; according to them,

This position appears to be contrary to the real position and intent of civil law of defamation

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56. Op.cit., at page 297.

(libel and slander) whose primary object is the protection of reputation of person or persons not based on the opinion of himself. Moreover, it is stated times upon numbered that it is the opinion of the third party or parties on the plaintiff, that the law of defamation (libel and slander) is concerned with, when viewed in this direction. This position seems to have departed from the orthodox stands of the law. It would have been proper and better, if the law is to serve its objectives (protection of reputation), to treat letters containing defamatory statements sent to either illiterate or blind person, as being published for the purpose of civil action for defamation. Since under normal circumstances these persons will surely call in aid the assistance of the third party, who will read and interprit the letter to their hearing. This case appea to be similar to a letter sent to a businessman at his place of business, where his Secretary opens it. The presumption that the sender ought to have foreseen that the Secretary will open it, should also apply in the case of blind and illiterate persons. Since the sender ought to foresee that, it would be read by a third party. Otherwise one may safely say neither of these persons can commit civil tort of libel, since they can neither read nor write.

It could be emphasised here that each communication of a libellous matter is treated as a seperate publication. Thus for example, a letter or circular which is read by a number of different people in turn, a series of publications take place. Therefore, where a libel is contained in a book or newspaper is regarded as seperate publication as a result the libel of this nature makes the following persons liable viz:-

a) The writer of the article or letter circular;

b) The editor;

c) The publisher;

d) The printer;

e) Circulating libraries, book sellers and newspaper boys or vendors.

Communication Between Spouses

The communication of libellous matter by one spouse to another does not constitutes a publication under the common law and Nigerian law (see Marriage Act). Simply because husband and wife were treated as a single person under the Act.

This position of the English law, that is imported into Nigeria without critical appraisal of its usefulness is in fact contrary to the African's culture, which ought to have been done away with

long ago[57]. This legal fiction appear to be losing weight even in England under their law; unlike before a husband and wife now could steal from one another. Moreover under section 1(2)[58], one spouse can sue the other for defamation (either libel or slander) even though, the court is given the power to stay the action, if it appears to it that no substantial benefit would acrue to either party from the continuation of the proceedings. This position does not in any way conform with our culture, and religions. Whereby a person is allowed to marry more than one wife and in some communities as many as he can afford. Therefore, communication of libellous matter to one's wives concerning the other ought to be regarded as a publication for the purpose of civil law tort of defamatory libel in Nigeria.

Proof of Publication

In order to succeed in an action for libel, the plaintiff must prove that the libel has been

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57. See S.A. BARAU, LL.B. Project : 'Parties to an Offence under the Northern Nigeria Penal Code' submitted to the Faculty of Law, Usmanu Danfodiyo University Sokoto, June 1989, unpublished.

58. See The 1962 Husband and Wife Act (English).

published. In the unreported case of Eda v. Bendel Newspaper Company Ltd.[59], it is established that publication for the purpose of proving libel in a court of law, means the making known of the libellous matter after it had been written to some person other than the person of whom it is written. Similarly, in the case of Thievent v. Daily Times[60] it was decided

> "On the authority of AJAKAIYE V. OKANDEJI (1972) 1 SC. 29, in a case of libel, publication of the words complained of must be positively proved. The mere fact that the newspaper containing the words compalined of is admittedly published by the defendant would not constitute "publication" that would ground libel until a third person testifies that he had read the words complained of; or facts adduced from which the irresistible and only inference that could be drawn is that a third party had read the words complained of. For it is not unlikely that persons to whom the document, containing the said words complained of, were allegedly published did not in fact read the said words. It is this likelihood that the law seeks to eliminate in respect of holders, recipients or buyers of the document containing the said words complained of, that at least one and only one of such persons the law requires should testify that he has read the words, complained of. In otherwords, tne plaintiff in a libel case must first establish the fact that the documents containing the words complained of reached a third party thereby establishing prima facie evidence of publication".

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59. B/227/80 decided on 18th June, 1982.

60. LD/1067/79 of October 5th, 1984.

Where the plaintiff relies on an innuendo meaning in respect of matter contained in a newspaper, magazine or book cannot rely on any general presumption of fact that the matter was understood in that meaning. In most cases the plaintiff will have to prove that there were one or more publishees of the article or book or magazine who knew the relevant facts which give the words their special innuendo meaning. In this case therefore, the plaintiff must prove the following in order to succeed in discharging the onus or burden placed on him.

(1) that the newspaper or magazine containing the article circulated among a substantial number of people; and

(2) that the special facts were widely known among persons who were likely to read the article.

Thus JORDAN C.J. in the case of Consolidated Trust Company V. Brownie[60a], simply put the matter thus:-

> "If the matter complained of is ex facie defamatory and refers by name to the person defamed, it is necessary to prove only that, it was published; and publication to one person is enough ... If, however, the matter is not ex-facie defamatory, or does not refer by name to a person alleged to be defamed, and the defamatory character which is attributed to the matter or the

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60a. (1939) 1 All E.R. 788.

> identify of the person defamed would be apparent only to persons who had knowledge of special circumstances, it is necessary, in order to prove publication, to prove that it was published to a person or persons who had knowledge of those circumstances".

(D) Persons Responsible for Libel in the Press

The general rule is that, no living person is excluded from commencing libel proceedings in respect of a libel published of and concerning him against any other person who was the publisher or responsible for the publication of the libellous matter. Thus criminals, children, persons of unsound mind, bankrupt, trading corporations and companies, may all sue to protect their reputations.

Thus the person or persons that are responsible for the publication of a libellous article without lawful justification or excuse, could be sued for libel. Therefore a libel published in a newspaper not only is the writer of the libellous article published liable, but also the following persons are viz:-

(a) Editor, (b) Printer, (c) Publisher, (d) the Proprietor of the newspaper, (e) and subject to certain exceptions newspaper boys or vendors, are all jointly and severally liable[61].

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61. See Okotie Eboh v. The Amalgamated Press of Nigeria Ltd and the Nigerian Printing and Publishing Company (1960) LLR 147.

Therefore the extent of these persons liabilities require individual attention here. But before then, it is pertinent to note that every reprint or republication of the libellous words is considered a fresh publication and give rise to a fresh cause of action. In essence, every one who publish or is responsible for the publication of the libellous matter is answerable for his act in the same degree as the originator of the libel. On the basis of this reasoning persons responsible for the publication or republication of the libellous words could be divided into two classes[62].

(1) The first class are those responsible or concerned with the mere mechanical distribution of the libellous matter; for example, news agents, circulating libraries and book sellers. Any member of this class is presumably liable, although he/they have a good defence if he/they can prove;

(a) that he was innocent of any knowledge of the libel contained in the work disseminated by him.

(b) or that there was nothing in the work or in the circumstances in which it came to him or was disseminated by him which ought to have led him to suppose that it contained a libel; and

(c) that, when the work was disseminated by him, it was not by any negligence on his part

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62. See T.O. ELLIAS: Nigeria Press Law, op.cit., p.24.

that he did not know that, it contained the libel. These requisites were laid down by ROMER L.J. in Vizetelly v. Mudies Selected Library Ltd.[63]

> "Where the proprietors of a circulating library were held liable of libel, because they had not employed a reader to per use the books in their library and had over looked a publishers circular requesting the return of the particular book".[64]

(2) These class consists of those who are primarily concerned with its production, for example, authors, newspaper proprietors, publishers, printers and editors.

These class of persons charged with the production are liable even if they were not negligent in publishing the libellous words[65]. However, the 1961 (Nigeria) Defamation Act and similar states enactments have made a departure from the common law position by providing that the publishers of an 'innocent' defamation' may make an offer of amends and escape liability. The section provides:-

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63. (1900) 2 QB 170 at p.180. You may also see Sun Life Assurance Coy of Canada v. W.H. Smith and Sons Ltd. (1932) All E.R. 432.

64. See Martin v. Trustees of British Museum (1894) 10 T.L.R. 338.

65. See Cassidy v. Daily Mirror Newspaper (1929) 2 KB 331.

> "(a) that he did not intend to publish them of and concerning the complainant, and did not know of circumstances by virtue of which they might be understood to refer to him, or
>
> (b) that the words were not defamatory on the face of them, and he did not know of circumstances by virtue of which they might be understood to be defamatory of the complainant."[66]

In either case, that he exercised all reasonable care in relation to the publication .

Furthermore the defendant is also required under the section to make an offer of amendment[67].

It should be emphasised as a general rule that an action in respect of a libel published of and concerning the plaintiff will lay against any other person who was the publisher or responsible for the publication and the liability even extend to those persons responsible for the circulation or distribution of the libellous matter.

From our discussion, where the essential elements of libel exist, every one that take part in publishing or procurring the publication or republication of the libellous matter in a newspaper

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66. See section 6 of the 1961 Defamation Act, Ibid.
67. See the case of Ross v. Hopkins (1956) CLY 5011, Where an offer made six weeks after complaint of libel had been recieved was held to be too late.

house is prima facie liable for the libel that appears in its columns. It was decided in the case of Akin Taylor v. Daily Times[68], that:

> "For a libellous publication in a newspaper, the editor, proprietor, printer and publisher are equally liable with the author of such libellous publication".

Here the law spreads the net of liability very wide, as a result every one that took part in publishing or procurring the publication containing the defamatory statements is prima facie liable.

The question that readily come to mind is what is the legal position of those persons in a government owned newspaper company?

Some people rightly or wrongly regarded them as public officers, as such personally liable in damages for the tortious act of libel against the aggrieved person; if the action is commenced within the period of three months of the act (of libel) complained of.

At Common law, public officers usually called Crown agents or servants are personally liable as a tortfeasor though acting in the execution of their official function[69]. This common law principles of administratiye law was made applicable

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68. (1976) 5 CCH C.J. 1347.

69. See De Smith, S.A., Constitutional and Administrative Law (1985) 5th ed., p.630 by Harry Street and Rodney Brazier.

to this country by local enactments dealing with the reception of English law in Nigeria[70].

Perhaps the strong reason why the court were ready to hold the public officers personally liable in damage is to obviate the hardships of the doctrine of Crown Immunity from tortious liability. Although the doctrine of tortious immunity of the crown was altered in England by the Crown proceedings Act of 1947 which render the crown now liable in the same manner as a private person of full age and capacity.

In Nigeria the doctrine remained with us until 1979, when the constitution (Nigeria's 1979 Constitution) indirectly abolished it. Thus one can safely say that, prior to 1979, the doctrine of tortious immunity of the state, equally absolve the public officers in Nigeria from liability, the effect of which leave the victim without a remedy in law.

It is in the light of this, there is the need to examined the position of all those persons that could be held liable or responsible for libel in a government owned newspaper company.

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70. See M.O. UNEGBU, 'Towards a new approach to tortious liability of public officers in Nigeria', in Justice of October 1991, Vol.2, No.10.

Who is a Public Officer in Nigeria

The term public officer is defined in section 18 of the interpretation Act[71], thus:-

> "public officer means a member of the public service of the Federation within the meaning of the constitution of the Federal Republic of Nigeria or of the public service of a state".

The term or expression 'public service of the Federation' are defined in section 277, of the 1979 constitution. This definition covers every concievable situation of employment by the state of its citizens ranging from civil service to statutory corporation and companies[72]. In which the state holds majority of shares. Thus editors, printers, publishers and reporters employed in a government owned publishing or newspaper companies are public officers, within the meaning of these section. In the case of Ekemode v. Alansa[73]. It was held that, the term 'public officer' includes all employees of government irrespective of status. As a result the term was applied to road overseer

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71. See CAP 1 Laws of the Federation, 1960, Now CAP 192, Laws of the Federation of Nigeria, 1990.

72. See Utih v. Egorr (1990) 5 NWLR 781.

73. (1961) All NLR 135.

and even to police constable[74].

Thus 'public officers' generally are those persons employed by the state to carry out public duties on its behalf. In administrative law they are referred to as administrative agents with reference to the nature of their calling.

In Nigeria prior to 1979 the state cannot be sued in tort, but the public officer that acted on its behalf could be held personally liable. Though the public officer is not left without a remedy. The law offer him a partial protection in the nature of limitation - of action. The provision of section 2 of the public officers protection law that action must be brought within three months next after the act, neglect or default complained of or, in the case of continuance of damage or, injury, within three months next after ceasing thereof.

The implication of this protection offer to public officers by section 2 in respect of any act done by them in persuance or execution or intended execution of any law or any public duty or authority or in respect of any alleged neglect or default in the execution of any such law, duty or authority perior to 1979, is that, any action against them must be instituted within the period of three months or else the action will be

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74. See Fasoro v. Milbourne (1923) 4 NLR 85, Obiefuna v. Okoye (1961) 1 ALL NLR 357 and Bakrin v. Lagos City Council (1965) LLR 151. Where drivers were regarded as public officers.

statute barred and an order of dismissal will be made.

But where the action is brought within the permissible three months period against the public officer, then it appears that he/they are left without a remedy under the law.

Since the 1979 Constitution of Nigeria has indirectly abolish the doctrine of state immunity from tortious liability; one can rightly say that, public officers acting in the execution of their official duties are now saved the burden of paying damages for libellous publication while on the other hand, the provision leave no one in doubt as to his right to sue the state in tort whenever appropriate. Thus the state can be made liable in damages and the other remedies as any other juristic person or authority. We hope the present constitution in the making (1994) will make a clear provision abolishing the doctrine (of state immunity in tort) completely.

Summary

The discussion in this chapter, has highlighted the origin and nature of the laws relating to defamatory libel and press in Nigeria. The discussion also examines the significance, meaning (kinds of defamation) and proof thereof. The discourse also revealed that, in libel cases, the law presumes that,

the publication has caused damage to the plaintiff and he need not to prove that he has suffered damage in order to establish a cause of action; whereas in the case of slander, the plaintiff has to prove either;

(i) the words are actionable per se, or

(ii) that he has suffered special damage or that he is exempted from proving special damage.

It is also revealed in our discussion that, no living person is exempted from instituting a libel action in respect of a libel published of and concerning him against any other person who was the publisher of the libellous matter or responsible for its publication. Similarly statements made about a very large group of people cannot be used as a basis for commencing a libel suit by a single member of that group. However, if the group is smaller all the members might be able to sue for a libellous comment about the entire group.

It is also settled that any person responsible for the publication or republication of the libellous matter may be sued for damages. Hence any libel publish in a newspaper, make not only the writer of the libellous article liable, but also the editor, printer, publisher and proprietor of the newspaper.

On a final point, the plaintiff bears the initial burding of proving these essential elements

in order to succeed.

a) the defamatory meaning of the words;

b) that the plaintiff was identified; and

c) that the words were published.

It should be pointed here that as society and its moral adopt with the passage of time, so also will the proper standard to be applied in judging what amounts to defamation (mainly libel and slander). After all it is directed towards the thinking of the reasonable men or 'right thinking members of the society'. Moreover what may have been clearly defamatory sixty years ago might not now be regarded as such. Conversely, the increasing complex lives in our society there are new classes of defamatory (libel and slander) inputation and ways to defame a person which did not exist when our great grand parents were born; for example, to suggest now a person is a 419 fraudstar or he has HIV virus or he has aids will always be defamatory. It will similarly be actionable to imputes in competency or lack of qualification to ones trade, office or profession. The particular cirumstances of the plaintiff or complainant will always be very relevant to this class of statements.

It should also be emphasise that it is very possible for a man's dignity to be impared by statements that are not defamatory, for instance

abusive or insulting statements directed at a man may compromise his dignity without necessarily impairing his reputation, since in the eyes of the law, hearers of such statements should recognise that, when uttered in the heat of anger they should not be taken seriously. Furthermore, a defamatory statement that is true may nonetheless encroach on a mans personal dignity. Yet the English Common law and indeed Nigerian law on defamation (libel and slander) would grant such a man no cause of action - against his defamer.

In conclusion, it will be worth emphasising the obvious that, in Nigeria, when it was decided that the Common law is or should be the applicable law to a particular defamation suits, what is applied by our courts is the unreformed common law rules, untouched by the English reform legislation; such as the defamation Act of 1952, and the English Slander of Women Act of 1891.

Hence legislation is clearly called for to modify these Common law rules, whose operation give cause for complaint. It has already been suggested that, such legislation should do no more than merely reform the Common law rules. But it should achieve a merger between Common law and Customary rules. Such legislation, it is submitted here should

countained provision that enables plaintiffs to seek and obtain judicial orders for specific relief in libel cases. In other words, it should contain provisions that aims at restoring the plaintiffs reputation to him.

Finally, the distinctions between libel and slander in civil proceedings in our view, serve little or no practical purpose at all. Hence it is submitted here that, for the purpose of such proceedings the distinction should be abolished and slander assimilated to libel.

CHAPTER FOUR

4:1 DEFENCES TO DEFAMATORY LIBEL

INTRODUCTION

Defence is only resorted to in civil action for defamatory libel, where the plaintiff or complainant has successfully discharge the onus placed upon him by law. In other words the plaintiff (complainant) must have proved a *prima facie* case, by establishing all the legal requirements of the tort discussed in the previous chapter. But where he fails or he is unable to establish a *prima facie* case, his case or complaint will fail without resorting to (by the defendant(s) either of the defences available to all defendants to defamatory libel action.

Thus Defence, in law, simply means, a legal justifiable excuse, available to a defendant or respondent to a civil action for wrong or criminal act.

In this chapter an attempt will be made in analysing four main traditional defences to defamatory libel; to wit

(A) Justification

(B) Fair comment

(C) Privileges and

(D) Apology and offer of amends.

The discourse will also proceed and examined the remedies available to successful plaintiff or complainat in a defamatory libel suits i.e. injunction and damages.

4:2 THE DEFENCE OF JUSTIFICATION

If a defamatory libel is established, the law presumes the falsity and maliciousness of the words alleged; until the contrary is proved.

(A) Then What is Justification? Justification is said to be the technical name for 'truth' in the law of defamatory libel[1]. Hence, the defence of justification or truth is a plea that the words complained of are true in substance and in fact.

In the Nigerian case of Aneke v. Star Printing and Publishing[2], the defence of justification is defined to mean "that the alleged defamatory statement is true". Thus, the defence of justification will only serve as a defence to the defendant of defamatory libel suit, if he is able to prove that the libellous words are true in substance and fact. The legal rationale behind justification as a defence was established as par back as 1829, by Littledale J.

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1. Osinbajo Y., and Fogam K. (1991) Nigerian Media Law, Gravitas Publishments Lagos Nigeria pp. 177.
2. E/33/77 of January 16th, 1979.

in the case of Mcpherson v. Daniel[3] thus:-

> "The law will not permit a man to recover damages in respect of an injury to a character which he does not or ought not to possess".

This position of the law, was further re-stated by Kassim J. in the case of Onwuchekwa v. Onovo[4] where he said:-

> "The law will not allow a man to recover damages for injury to a character he is not entitled to bear".

Ordinary common sense will therefore dictates that the law will surely prevent a man from benefitting from his own wrong. In other words, the publisher of a defamatory libel, that can justifies the truth of it will surely escape liability. This seems to have the support of Babalake J. of the Ibadan High Court, when he said; "A newspaper is not liable for libel if it justifies the truth of the publication"[5].

It should be noted however that an unsuccessful attempt to justify a libel, will only increase the damage[6].

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3. (1829) 10 B & C 263 at 272

4. (1972) 12 CCHCJ 1919.

5. Odukoya v. Sketch Publishing Company (1979) 4 OYSH (Pt.1) pp. 44-71.

6. See Rotimi Williams & Ors v. West African Pilot (1961) 1 All NLR 866.

(B) On Whom the Burden Lies

Once the plaintiff established that, the defamatory words published by the defendant against him(or it) are libellous, the law presumes that, they are false also. Now the onus is shifted to the defendant to overcome the presumption by proving that the defamatory words are true if he can, provided the defendant can prove the truth of the words complained of, even if he published the words with malice or express intent of causing damage to the plaintiff, he will certainly defeat the plaintiff's claim; to borrow the words of Bello S.P.J.; in Nthenda V. Alade that:

> "The plaintiff has no right to a character free from that imputation, and if has no right to it, he cannot in justice recover damages for the loss of it ..."[7].

(C) The Standard of Proof

Under the Common law, a defendant wishing to plea justification or truth to a libel suit, must adduce enough evidence to satisfy the court that, on balance of probabilities the words published are true[8]. This position (of the Common law) appear

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7. (1974) ESC LR 470 at 478.
8. Tom Crone op.cit., pp.20.

to have impossed higher standard of proof for the defendant. Although he (it) is not expected or it is not necessary for him or it to prove the truth of every detail of the words. This was the decision of Burrough J. in the case of Edward v. Bell[9], where he said:-

> "As much must be justified as meets the sting of the charge, and if anything be contained in the charge, which does not add to the sting of it need not be justified".

This common law position seems to have influenced the Nigerian Supreme court decision in the case of Dumbo v. Idugboe[10], where it was held that:

> "To establish a plea of justification, the defendant must prove that, the defamatory imputation is true. The defendant newspaper must justify the precise imputation complained of. In other words, strict proof is demanded. A plea of justification means that the libel is true. The defendant has the onus to prove that the facts are truely stated. It is not necessary to prove the truth of every words in the libel. If the defendant proves that the main charge or gist of the libel is true, he need not to justify the statements which do not add to the sting of the charge". (Underlining min).

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9. (1824) 1 Bing 403 at 409, see also Sutherland v. Stopes (1925) AC 47 at pp. 79.
10. (1983) 1 SC N.L.R. 29.

If our assertion that the Nigerian Supreme Court was influenced by the English court decision, when it sit in judgement in this case, it will appear to us to be a clear case of misdirection by the court in adopting English decisions without regard to our local laws and need of the Nigerian society.

The fact of placing heavy onus of proof on the defendant as did the Supreme Court in this case coupled with the onus of proving the truth of a defamatory statement on the defendant, means in practical terms, the imposition of limitation on freedom of speech constitutionally guaranteed Nigerian citizens under sections 36 and 21 of the 1979 Constitution of the Federal Republic of Nigeria[11]; distinct from the limitation not to publish false statements. In other words, there should be no publication of true statements whose truth cannot be proved in court if need be. Hence a jouranlist, or a researcher that happens to gain access to information about corruption among government officials or politicians, can usually not publish such news because in a libel action, neither the corrupted nor the corrupters nor their accomplices will usually testify on the defendants behalf. This means, the defence of truth or justification

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11. Chapter two, Ibid.

will not avail him in the circumstances.

The practical effects of resting the onus of proving the truth on the defendants seems to have been noted by the United State Supreme Court in the case of Newyork Times v. Sullivan[12] when it held that:

> "... allowance of the defence of truth, with the burden of proving it on the defendant, does not mean that, only false speech will be deterred ... Under such a rule, would be critics of official conduct may be deterred from voicing their criticism even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so ... the rule thus dampens the vigour and limits the variety of public debate".

Similarly, the Kaduna State Defamation Edict No.2 of 1990 which is a word for word reproduction of the following states Defamation Edicts, viz; Oyo, Ogun, Ondo, Bendel, Cross River, River State and Federal Capital Territory Abuja[12a]. Provides that, a plea of justification, shall not fail merely because the article containing the libellous statement contain some inaccuracies.

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12. (1964) 376 U.S. 254 at 279.

12a. See section 11, Defamation Law of Oyo State Cap 34, of 1978, section 11 Cap 33 that of Ogun State, 1978, section 11 Cap 34 of Ondo, Bendel Cap 52 section 11 of 1976, Cross River and River State, Caps 35, section 8 of 1981, and similar provisions in other states law.

Section 6 of the Edict[13] provides:

> "In action for defamation in respect of published matter containing two or more distinct charges against the defendant, a defence of justification shall not fail by reason only that, the truth of every charge is not proved, if the published matter not proved to be true does not materially injure the plaintiff's reputation having regard to the truth of the remaining charges".

The resultant effect of this provision and similar provisions in the laws of other states, is that, the defendant here is no longer required to prove the truth of every libellous word charged but rather to prove the substantial truth of it.

Hence, the present position of the law under Kaduna State Edict and similar provisions in other states enactment, is not far from the Supreme Court position in the case of Dumbo v. Idugboe supra, except that, the law appear to have lower the standard of proof on the defendant, which will help to deter the habit of rumou reporting by those learned in the art of publishing news and information. Because substantial in accuracy that adds to the sting of the libel charged must be proved, otherwise the defence of justification or truth will fail.

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13. Kaduna State Defamation Edict No.2, of 1990.

4:3 THE DEFENCE OF FAIR COMMENT

Fair comment in its simplest form, is a plea that, the defendant of a defamatory libel suit, raised to the effect that, the words complained of as libellous are fair comment. In other words, it is something which is, or can reasonably be inferred to be a deduction, inference, conclusion, criticism, remark or observation made in good faith on a subject of public interests[14].

The origin of fair comment as a defence has been recognised for a long period of time; hence Lord Ellenborough, in Tabarta V. Tipper[15] neatly summed it up in the following words:

> "Liberty of criticism must be allowed or we should have neither purity of taste nor morals. Fair discussion is essentially necessary to the truth of histority and the advancement of science, that publication therefore, I should never consider as a libel which has for its object not to injure the reputation of any individual but to correct misrepresentations of facts, to refute sophistical reasoning, to expose a vicious taste in literature or to ensure what is hostile to morality". (Underlining is mine).

For the purpose of preserving fundamental right of expression or press freedom constitutionally guaranteed in Nigeria, the defence of fair comment

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14. Fleming J.G. (1983) The Law of Torts, 6th ed. pp. 528.
15. (1888) 1 Camp 353 10 r.r. 698.

should not be encroached upon by the law.

Just as freedom to tell the truth is fundamental to democracy so also is the freedom to speak ones mind. In other words to voice an honest opinion, unfettered rights to express true facts and honest comment are essentials of that most cherished of liberties, free speech[16]. Thus honest criticism ought to be, and is, recognised in any civilised system of law as indespensable to the efficient working of any public institutions.

(A) Burden of Proof: Since fair comment was defined by the Nigerian Supreme Court in the case of Gyang v. Tliyasu[17] to mean a dispassionate expression of opinion based on facts correctly stated, then, the burden of proving dispassionate expression of opinion based on facts lay on the commentator, who is usually the defendant in a defamatory libel action. Therefore to sustain this defence, the defendant must establish the following essential requirements to the defence; as established in the Supreme Court of Nigeria's decision in the case of Bakare v. Oluwide[18] that:

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16. Tom Crone, Op.cit., at pp.26.

17. (1977) NNLR 63.

18. (1969) 2 All NLR 324.

> "It is a defence to an action for libel that the words complained of are fair comment on a matter of public interest, but the defendant must prove that the facts on which the comment is founded are true and that the comment on these facts is fair. If the facts upon which the comment purports to be made did not exist the defence of fair comment must fail. Comments based on matter of opinion only which may or may not be true affords no defence".

From this Supreme court decision, the defendant need to show the following in order to discharge the burden placed on him successfully viz:

(1) That the comment must be on a matter of public interest.

Only comments on matters of public interest come within the defence of fair comment; for as Adefarasin C.J. of the Lagos High Court succintly puts it in Eshiet v. New Nigerian Newspapers[19] that:

> "The defence of fair comment is available to any one who has a right of comment on a matter of public interest ..."

It is for the defendant to show that, the matter on which he was commenting was one of public interest. In practice, the latitude allowed by the courts in respect of which matters are legitimate areas of public interest is fairly wide. In the words of Lord Denning M.R.[20]; when he said:

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19. CCHCJ/2/78 pp.279.

20. In the case of London Artists Ltd. v. Littler (1969) 2 QB 375 at 391.

> "There is no definition in the books as to what is a matter of public interest. All we are given is a list of examples, coupled with the statement that it is for the judge and not the jury. I would not myself confine it within narrow limits. Whenever a matter is such as to affect people at large, so that they may be legitimately interested in or concerned at, what is going on or what may happen to them or others; then it is a matter of public interest on which every one is entitled to make fair comment".

It is submitted here that such matters may include inter alia; affairs of the government both national, and locally, administration of justice, managing the affairs of public institutions such as schools, universities[21], hospitals, prisons, etc. Similarly conducts of private business which affect the community[22] at large, published books, and anything which may fairly be said to invite comments or challenge public attention.

(2) The defendant must also established that, the comment must be based on facts truely stated. For a comment to be a fair comment, the statement of the defendant must be based upon true facts in existence when the comment was made. In

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21. In Nthenda v. Alade (1974) 4 ECSLR 470 at 478 where it was held that, for a Newspaper to published without justification that a married lecture of a university had a love affair with his female student is libellous and the defence of fair comment would not avail the newspaper if the basic facts of the love affair could not be established as true.

22. G. Kodilinye, op.cit., pp. 157.

Williams v. West African Pilot[23], Somolu J held:

> "In a defence of fair comment, the facts on which the comment is based must be truly stated otherwise the question whether the comment is fair or is honestly made cannot arise".

The demand of a statement to be based on facts truly stated, in order to qualify as a defence was simplified in the case of Adedoyin v. Nigerian National Press[24] thus:

> "For the pleas of fair comment to prevail it has to be shown that the essential facts are true".

There are several Nigerian decisions in which pleas of fair comment failed because of the requirements led down in the above cases were lacking; among them is the case of Enahoro v. Associated Newspaper[25] were it was held:

> "A newspaer cannot avail itself of the defence of fair comment if the publication by the newspaper is false and the comment unfair. To be fair, the comment must be based on facts accurately stated. It cannot be fair if it is based on the vividness of the defendant's imaginations adorned with dramatic and journalistic flourish".

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23. (1961) All NLR 866.

24. (1964) 2 All NLR pp.9. See also, Bakare v. Oluwide (1969) 2 All NLR 324 at p.332.

25. (1960) WRNLR 219. See Anunobi v. Nigeria National Press Ltd. (1964) LLR 12, and African Press Ltd v. Ikejiani (1953) 14 WACA 386.

Under the common law, what the defendant need to do in order to sustain the defence is the duty upon him to prove the truth of every fact, however minor or unimportant contained in the alleged lible. However, the 1952 English Defamation Act, and Kaduna State Defamation Edict No.2 of 1990[26] have made a radical departure from the Common law heavy burden on the defendant, now, the defence of the defendant will not fail merely because the truth of every allegation is not proved. The section provides:

> "In an action for defamation in respect of a published matter consisting partly of allegations of fact and partly of expressions of opinion a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the published matter complained of as are proved" (underlining is mine).

This position of the Law is also in line with the earlier decision of the Supreme Court in the case of Bakare v. Ibrahim[27], where it was stated:

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26. See Section 7 of the Kaduna State Defamation Edict No.2 of 1990 and similar provisions in the Laws of other states.

27. (1973) 6 SC. 205.

> "For a Newspaper as a defendant to establish the defence of fair comment it is not necessary to prove the truth of every allegation of fact contained in the particulars. What must be established are facts to prove the substratum of the facts of the comment". (Underlining is mine).

It should be borne in mind that a defendant cannot defend a statement if he has not set out the facts on which he based the statement nor, at the least indicated in general terms what those facts were.

(3) The defendant must also establish the fairness of the comment: What is required under this head, is something that can reasonably be inferred as a deduction, inference, conclusion, criticism, remark, or observation made in good faith on a subject of public interest.

It should also be pointed out here that, it is the honesty of the commentator that is the cardinal point. Since an honest man expressing his genuine opinion on a subject of public interest, no matter that his words convey derogatory imputations; no matter that, it was badly expressed so that other people read all sorts of innuendoes into it, never theless he has a good defence of fair comment[28].

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28. Per Lord Denning MR. in Sim v. Daily Relegraph Ltd. (1968) 2 QB 157 at 170.

Justice Umaru Maidama of the Court of Appeal (Kaduna division) succintly puts it in the case of Omotayo v. African Newspapers Nigeria Ltd.[29] where he said

> "In law, where a person relies on a plea of fair comments, all he has to show is that the comments are expression of his honest opinion. It will be fair comment however incorrect the views he expressed or however exaggerated or even prejudice be the language of the criticism. The onus is on the plaintiff to show that it is unfair".

From the wrodings of this decision, so long as the defendant honestly express his real view he has nothing to fear, even though other people may read more into it. On the other hand, criticism cannot be used as a cloack for mere invective nor personal imputation not arising out of the subject matter or not based on fact. The question is not whether the comment is justified in the eyes of the judge, but whether it is the honest expression of commentators real view and not mere abuse or invective under the guise of criticism. But mere violence in criticism does not make a fair comment, unfair. The test of what is fair comment is an objective one and what is required of a judge in the words of Lord Elsher:-

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29. CA/K/38/86 of 18th December, 1986.

> "The question which the jury must consider is this - would any fair man, however prejudiced he be, however exaggerated his views, have said that which this criticism has said".

Although this test has been used by the judges in Nigeria with minor variations, that has the merit of simplicity as that of the learned text writers Duncan and Neill[30], thus:-

> "Could any fair minded man honestly express that opinion on the proved facts?"

(4) Comment must be recognizable as comment; The defence of fair comment undoubtedly gives critics and public commentators a wide license to write or say what ever they think about matters which are in the public eye[31]. It has been observed in the case of Gardiner v. Fair Fax and Sons Property Ltd that:-

> "A critic is entitled to dip his pen in gall for the purpose of legitimate criticism, and no one need to mealy-mouthed in denouncing what he regard as twaddle, daub or discord"[32].

From this observation, what is disallowed is to make derogatory statements of fact in the guide of criticism. Many writers carelessly do so, and

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30. See Duncan and Neill, On Defamation Generally, op.cit.,
31. Tom Crone, op.cit., pp.27.
32. Gardiner v. Fair Fax and Sons Property Lted (1942) 42 S.R. (NSW) 71.

it is a trap which frequently leads to successful libel actions against the author. But, if what is written is deemed by the court to be a factual statement rather than an expression of opinion, then fair comment cannot protect it. In such cases the only defence available is justification (or truth) i.e. proving that the facts stated are true. Fletcher-Mouton L.J. is of the views that:

> "Comments in order to be justifiable as fair comment, must appear as comment and not be so mixed up with facts that the reader cannot distinguish between what is report and what is comment. Any matter ... which does not indicate with a reasonable clearness that, it purports to be comment and not a statement of fact, cannot be protected by the plea of fair comment"[33].

Although complimentary statements with, 'In my opinion, or it is my view, will surely help in identifying them as comments, but it is not always conclusive. Hence it is essential to the defence of fair comments that, the libellous matter must appear on its face to be a comment or opinion, and not a statement of fact otherwise the defence of fair comment will fail. Therefore the defendant will now have to rely on justification as in Nthenda v. Alade. Where Bello S.P.J. rightly observe:-

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33. Hunt v. Star Newspapers (1908) 2 KB 309.

> "The whole of the publication complained of, from its caption to the last sentence, contains salient and plain statements of facts and there is not an iota of comment"34.

(5) The comment must not be actuated by express malice. Although the defendant may have set up a plea of fair comment, by establishing each of the four mentioned ingredients of fair comments, the defence will nevertheless fail, if it is shown that he/she was motivated by express malice. As in the case of Ibe v. Reveille Printing and Publishing[35], where it was held inter alia that:

> "The law is that where in an action for libel the defendant pleads that any of the words or matters complained of is fair comment in a matter of public interest, the plaintiff must if he intends to allege that the defendant was actuated by express malice, deliver a reply giving particulars of the facts and matters from which such malice is to be proved".

From our discussion, it is established that fair comment as a defence to a libel action, provides writers and newsmen with a valuable protection. But for the defendant to succeed he need to establish the above mentioned ingredients however, if it is

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34. Nthenda v. Alade, Ibid.
35. (1975) 5 ECSLR pp.31.

proved that the defendant was actuated by express malice not only will a fair comment as a defence will fail, but also the defence of qualified privilege and one of justification.

It should be emphasised that, malice is an important concept in the law of libel; because it existence as the primary motive for the offending publication will sustained the presumption of the law in favour of the plaintiff. Hence the legal meaning attributted to it in this context is wider than that given to it in popular usage. While it includes what most people recognize as the constituents of malice i.e. spite and/or ill will, it also encompasses any other improper motive such as personal advantage or gain provided it is the dominant motive for the publication. The burden of proving the existence of malice however lies with the plaintiff.

Thus if it could be established that the editor of a paper had published a critical comment solely to discredit a public figure because of personal disagreement or launched a sentimental or sensational attack merely to increase his papers circulation might be taken to constitute malice and vitiate a plea of fair comment. In African Newspapers Ltd. v. Coker[36], evidence of malice was found in the defendants

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36. (1975) 5 SC 257.

persistent campaigning for a governmental investigation into the alleged acts of corruption on the part of the plaintiff, despite the existence of report already published by the government which had exonerated the plaintiff. The Supreme Court further said:[37]

> "Such persistent complaining would inferentially be evidence of malice, sufficient to destroy the defence of fair comment".

4:4 THE DEFENCE OF PRIVILEGE

The defence of privilege is of two kinds (qualified and absolute privileges). Both of which are the result of public policy consideration which recognised that, statements made on certain occasions should be immuned from civil proceedings for libel, even if they are untrue and damaging.

(1) Absolute privilege:- This cover cases in which complete freedom of communication is considered of great importance, that actions for libel cannot be entertained at all. Hence when a person is libelled on an occasion of this nature (absolute privilege) he has no legal remedy; however outrageous the false statement made about him and however malicious the motive of the writer or maker of the statement.

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37. at pp. 396.

The categories of absolute privilege that are likely to affect press freedom are:-

(a) Statements made in the course of legislative proceedings:- The legislatures that make the laws and governed the country decided long ago that, the work they do is in need of protection as that done by their legal friends in court (i.e. lawyers, judges and witnesses). Therefore both the conducts and reporting of legislative proceedings is covered under the defence of absolute privilege against suit for libel.

This kind of privilege (absolute) cover not only words spoken but also written speeches in the house.

The origin of this defence (absolute privileged) can be traced Article 9 of the Bills of Rights (English) which provides:

> "... the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament".[38]

As a result, the parliamentary papers Act of 1840 (English) extended the protection of absolute privilege to all reports, orders and other papers published under the authority of parliament. Hence, proceedings for libel will not succeed in respect of any statements or reports or other official parliamentary documents, for example government white paper, etc.

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38. Bills of Rights of 1688 and Parliamentary Act of 18440 (Both are statute of General Application in Nigeria).

In Nigeria, the privilege cover National Assembly State House of Assemblies and perhaps local government councils (during the second and third republics).

Therefore a witness before the legislatures in sitting or before a committee set up by the legislatures may say whatever he choses in the sure knowledge that he will not be answerable under the law of libel.

(b) Statements made in the course of and with reference to judicial proceedings by any judge; advocate, party or witness.

Absolute privilege is enjoyed for the statement made in the course of judicial proceedings no matter how untrue or maliciously made[39]. This protection extend not only to judges but to advocates, parties and even witnesses. Thus libellous statements contained in a pretrial and trial documents; such as pleadings, affidavit and communications between counsels and their clients are also protected. In Foley v. Asfour[40] it was held inter alia that, an affidavit sworn with reference to and in the course of Judicial proceedings was absolutely privileged, notwithstanding that there was no express reference to the affidavit in the record of the proceedings.

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39. In Goffin v. Dounelly (1881) 44 L.T. 141.

40. (1970) NNLR 74, and Also in Adene v. Oyeyemi (1969) NNLR 37.

It is pertinent to note that this privilege also cover proceedings of Tribunals exercising similar function to law courts (e.g. Military and other Tribunals). However in Majekodunmi v. Olopade[41], it was decided that, defamatory statements made to an anti corruption officer were not protected by absolute privilege defence, because the officer was only performing administrative function and not judicial function.

In the same vein, it was held that the Nigeria medical council[42] or domestic forum that derives its authority from the consent of the parties[43] or a village gathering convened for the purpose of trying the issue of theft with a view of impossing punishment[44] were not Judicial Tribunals, thus not absolutely privileged.

(c) Communications made by one officer of the state to another in the course of his official duty; are also protected by the defence of absolute privilege. The general principle was explained with exactitude by Lord Esher M.R. in Chatterton v. Secretary of State for India in Council[45], in the following words:

41. (1963) WNLR 12.
42. Saraki v. Soleye (1972) 2 UILR 271,
43. Omemewa v. Okonkwo (1963) 2 ENLR 189.
44. Agoaka v. Ejiofor (1972) 2 ECSLR 109.
45. (1895) 2 QB 189 at pp. 191.

> "If an officer of state were liable to an action for libel in respect of such a communication as this, actual malice could be alleged to rebut a plea of privilege, and it would be necessary that he should be called as a witness to deny that, he acted maliciously. That he should be placed in such a position and that his conduct should be so questioned before a jury, would clearly be against the public interest, and prejudicial to the independence confers upon him an absolute privilege in such a case". (Underlining mine).

Accordingly no libel action will lie against an officer of the state for any libellous statement(s) he made to another officer of the state in the course of his official duty.

However the law as to the classess of public servants that are covered by this defence, is unsettled. On the face of this uncertainty, it has been argued that, the defence of absolute privileges in relation to communications made by one officer of the state to another in the course of his official duty should not extend beyond ministerial rank[46]. The better view to us is the submssion made by O. Yemi and F. Kedinga[47], that restricting it to this class of public servant appear to ignore the policy behind the law, which has among its aims, encouraging public officers to exchange views and opinions freely. Thus

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46. In Ikeh v. Kofi (1954) 14 WACA 480.
47. Nigerian Media Law, op.cit., pp.192.

the need to cover all categories of public officers under this head.

(d) Newspaper Reports and Broadcast. The Kaduna State Defamation Edict No.2 of 1990 and similar provisions in other states enactments, provide that, a fair and accurate reports in any newspaper of proceedings publicly heard before any court exercising judicial authority within Nigeria, is, if published contemporaneously with such proceedings, privileged[48], but this does not authorised the publication of any blasphemous or indecent matter. The protection is extended to broadcast reports from broadcasting station within Nigeria, under section 12 of the edict (Kaduna State Defamation Edict No.2).

(2) Qualified Privilege:- This has the capability of covering a wide variety of statements and communications. Occasions to which this defence is attached sometimes are defined with reasonable particularity, but in others rely simply on the existence of some duty or interest in the making of the statement provided he/she or it is acting honestly, the maker will be protected against suit for libel, even if the statement is in accurate

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48. See section 10 of the Kaduna State Defamation Edict, Ibid. Where it provides: "A fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority withing Nigeria shall if published contemporaneously with such proceedings be ....".

and defamatory.

This defence has been developed over the years in order to protect and encourage open and honest communications both of private and public nature. In the case of Olapade v. Sketch[49], it was held that a communication made bona fide upon any subject matter in which the party has an interest, or in reference to which he has a duty is privileged.

The distinctions between qualified and absolute privilege is that, (the defence of qualified privilege) the defence of qualified privilege will fail if the plaintiff can prove that, the defendant was motivated by malice, unlike those occasions where the privilege is absolute. Hence if a person abuse occasions of qualified privilege, he will be liable for the usual liebl penalty. In the case of Awolowo v. West African Pilot[50], it was held inter alia that:

> "Where a Newspaper shows an intrinsic malice in a publication, the defence of qualified privilege is not available to such newspaper".

The categories of statements to which qualified privilege will apply are:

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49. (1978) 1 O.Y.S.H.C. (Part 1) 13.

50. (1962) W.N.L.R. 29.

(a) Statement made in the performance of a duty:- The statements under this heading appear to be endless; because over the years the courts have developed the defence to protect several occasions in every day commercial, public and private life. Thus where information is passed either from a sense of duty or in protection of some valid interest of the informant. This principle was defined with some degree of exactitude by the English Court. Lord Campbell C.J. as he then was said:[51]

> "A communication made bona fide upon any subject matter in which the party communicating has an interest, or reference to which he has a duty is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter which without this privilege would be slanderous and actionable".

This position was further restated in the Nigerian case of Olapade v. Sketch[52]. Therefore it is now settled that any statement made in the course of public or private duty, be it legal, moral or social may be cover, if the communication is made to a person that has corresponding interest in receiving it.

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51. In Harrison v. Bush (1856) 5 E & B 344.

52. Ibid.

It will be consider a duty to speak, if the statement is made in answer to a specific inquiry than voluntarily made; Therefore a former employer for example giving damaging reference to a former servant or employee at the request of a prospective employer is privileged[53].

However, a voluntary statement made in the absence of definite legal relationship between the parties or inquiry by any one, is not privileged. However a communication in the form or nature of warning by a parent to his daughter as to the character of her suitor is privileged[54].

(b) Statements between parties with common interests:- Where a statement is made to some other person by another, with an interest in common and as a result have the same or corresponding interest in recieving the statement is privileged in the circumstances. For example communication between share holders in relation to their company's affairs was held to be privileged in the English case[55]. A mutual interest could also arose from professional associations. In fact it will be impossible for

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53. See Ayoola v. Olajure (2977) 3 CCHCJ 315 and also Okotcha v. Olumese (1967) FNLR 174.

54. In Adams v. Coleridge (1884) 1 TLR 84.

55. Nevile v. Fine Arts and General Insurance Company (1897) A.C. 68.

one to attempt the classification of such circumstances. The question of whether such interests exist or not is that of law to be decided by the court. But, it suffice to say that, in all cases the mutual interest must be 'real and direct personal, trade, business or social concern'[56].

(c) Statements made in persuance of a private interest:- Any statement made in the protection of existing lawful interest of the maker is privileged. As a result a statement made in self defence are privileged, if made in reply to attacks on one's reputation or character. In the case of Osborn v. Boutler[57], a publican in England complained to the brewers, who supplied him with beer that, it was of poor quality. The brewer replied that, they had hard rumours that the poor quality was due to its being watered down by the publican. This statement was published to a third party and the publican brought an action in defamation. Where it was held that, the statement was qualified privilege. Since it was made in defence of the defendant's own property and reputation.

It should be emphasised here that the privilege is extended, so as to enable only persons to repute

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56. Osinbajo Y. and Fogan K, op.cit., at p.197.
57. (1930) 2 KB 226 and also Adams v. Ward (1917) A.C. 309.

the charge brought against him and not to bring fresh accusations against his adversary[58].

(d) Statement made in pursuance of a public interest:- Public interest in this connection refers to those matters which are of legitimate concern to the community as a whole, because they materially affect the interest of the community. It should be borne in mind that, it is not all publications that are of interest may materially affect the public; because the public may be interested in some matters purely as a matter of gossip or curiosity[59]. Therefore there is the need for one to know that newspapers or any one else is not privileged to publish defamatory matter merely because public would like to read it.

Hence the press and individuals are privileged to give information to the proper authorities in order to readress any misconduct or negligence of duty. On the part of public officer or employee for any public abuse of duty. As a result any complaint or information as to this misconduct, neglect of duty or abuse of it, is privileged, provided that, it is made in good faith to the

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58. Osinabjo Y. and Fogam K. Op.cit., pp.196.
59. Osinbajo Y. and Fogam K. at pp. 198.

person or body that has the power or duty to remove it. In the case of Saraki v. Soleye[60], it was held that a letter from the defendant addressed to the Nigerian Medical Council concerning alleged malpractices in the plaintiffs hospital, was protected by the qualified privilege because:-

(i) The matter was one of public concern;

(ii) The council had the power to set in motion the machinery for investigating the complaint; and

(iii) The defendant had a duty to make the communication.

(e) Fair and accurate reports of judicial and legislative proceedings:- The defence of qualified privilege is available to those persons that publish fair and accurate reports of proceedings in either House of Assemblies (National, State and Local Government Councils in Nigeria) or any proceedings in a court of law in Nigeria. In the case of Daily Times v. Williams[61], it was held that

> "A newspaper is entitled to a defence of qualified privilege for the publication of all documents and their contents filed in court and read in open court".

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60. (1972) 1 UILR 271.

61. (1986) 4 NWLR (Pt. 36) 526.

The question one could ask here is what will be the position of a newspaper publication of tribunals proceedings. It appears the above decision seems to ignore it, especially under the current dispensation of military and administrative tribunals; this issue is put to rest in another decision[62]. Where it was held inter alia that:-

> "The publication of judicial proceedings (before a properly) constituted court) by a newspaper without malice of a fair and accurate report of those proceedings, is privileged".

Hence from the wordings of this decision newspaper report of tribunals proceedings is unprivileged. Then the next question is what is the meaning of fair and accurate report? In the celeberated case of Oweh v. Amalgamated Press of Nigeria Limited[63] the issue was rised, where Abbort J. said:-

> "I must now consider, if the report is fair and accurate".

He further say:

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62. In the case of Dina v. New Nigerian Newspapers (1986) 2 NWLR (Pt.22) 353.

63. (1957) L.L.R.6_.

> "It is not necessary that, it should be verbatim. An abridged or condensed report will be privileged, provided, it gives a correct impression of what took place. It is sufficient to publish a fair summarised account. If the whole report is a substantially accurate account of what took place, the fact, that there are a few slight inaccuracies or omissions is immaterial. But where the inaccuracy is of a substantial kind the report is not privileged, although the publisher exercised reasonable care, and diligence in endeavouring to assertain the facts and though the mistake was an honest mistake ... It is clear that a report of parliamentary proceedings which states that a speaker said things which were not said at all is not a fair and accurate report".

It therefore follows that, where a repor states (injudicial proceedings) a Judge or Counsel said things which were not said at all, could not be a fair and accurate report; as evident in the above decision.

Similarly in the case of Omosagie v. Okutobo[64], for example, the Lagos Weekend Newspaper published a report of certain matrimonial proceedings in Lagos High Court under the caption : Chief Justice tells teacher, 'you are a bad woman'. Adefarasin J. held in this case that since the evidence showed that C.J. never used these words, the report was not fair and accurate.

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64. (1969) 2 All NLR 175.

(f) Statements privilege under[65] Kaduna State Defamation Edict No.2 of 1990 (there are similar provisions in other states of Nigeria). The schedule to the Edict, list a number of statements that are to be qualified privileged when published in a newspaper. These are divided into two classes:

(i) Statement privileged without explanation or contradiction and

(ii) Statement privileged subject to explanation or contradiction.

(i) Statement privileged without explanation or contradiction, for example fair and accurate report of proceedings of legislatures of any part of the Common Wealth outside Nigeria. And fair and accurate report of proceedings of an international court or of a court in any part of the Common Wealth outside Nigeria do not give any right on the complainant to publication of a statement by way of explanation or contradiction of the report provided, it is fair and accurate, and not published maliciously.[66]

(ii) Statements privileged subject to explanation or contradiction : All statement set out in Part II to the schedule, for example, fair and accurate

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65. Specifically section 11 thereof.

66. See part one to the schedule (Kaduna State Defamation Edict of 1990).

reports of the findings or decisions of various associations formed in Nigeria for the promotion of art, science, religion or learning or for the promotion of any trade, business industry or profession; fair and accurate reports of the proceedings of any local authority, commission of inquiry or tribunal; fair and accurate reports of the proceedings of any notice or other matter issued for the formation of the public by or on behalf of any government department, officer of state, local authority or inspector general of police give right to a complainant to publication of a reasonable statement by way of explanation or contradiction of the report, and if the newspaper refuses or neglects to publish such statement after having been requested to do so, or does so in an unreasonable or inadequate manner, the newspaper will lose the protection provided by the statutes.

In all these situations, the privilege will be lost, if it is exceeded or abused. Thus the privilege could be said to be a bused where:

(a) it is exceeded or,

(b) the defendants statement was attuated by malice.

In considering whether or not a statement published attract the defence of qualified privilege, it is necessary to consider at all time the overriding

provision of section 11 subsection (3)[67] which withdraw the protection from any matter the publication of which is prohibited by law or any matter which is not of public concern and the publication of which is not for the public benefit.

The onus of proving qualified and absolute privilege is always on the defendant. In the case of Dina v. New Nigerian Newspapers[68], it was held that:

> "Where in an action for libel the defendant relies on defence of qualified privilege which he must have plead, it is for him to allege and prove all such facts and circumstances, which are necessary to bring the words complained of within the privilege unless such facts are admitted before or during trial".

For the defendant in civil action for libel to successfully raised the defence of qualified privilege, he need to state the particulars and nature of the duty he owes to make such publication. In the case of Gwangwada v. Benue Printing and Publishing[69], it was pointed that:

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67. See Kaduna State Defamation Edict 1990) (a similar provision in other states).
68. (1986) 2 NWLR (Pt.22) 353.
69. MD/187 M/85 of 12th June, 1986.

> "For the defence of qualified privilege to be properly raised, particulars of the nature or type of duty the newspaper owes to make the publication must be clearly stated".

Since qualified privilege is a complete defence in civil proceedings for libel, it will remove the sting from the allegation that the words are false and maliciously published. As in Obikoya v. Nigerian National Press Ltd.[70], privilege be it qualified or absolute can be eroded or forfeited, if it is exceeded or it is abused.

Privilege whether absolute or qualified is said to be exceeded, if the libellous words complained of are published more extensively than the occasion requires[71]. Therefore if the privilege is limited to publication to certain class of persons only, publication to a wider readers will surely not be protected. This is so whether the excess of the privilege is intentional or negligent. For example if a confidential report is sent to the proper authority, it will be privilege but if published in a newspaper will be unprivileged.

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70. LD/501/70 of 22nd February, 1971.

71. K. Gilvert, op.cit., pp.173,

Although publication of libellous statement when made to a third party under the normal course of business is not consider as excess even not authorised to receive it[72].

On the other hand privilege is consider abused, where the defendants statement was actuated by malice.

Malice in this context means the use of a privileged occasion for some improper purpose. In Oweh v. Amalgamated Press of Nigeria Ltd. For example Abbott[73] J. said:-

> "Actual malice does not necessarily means personal spite or ill will, and it may exist even though there be no spite or desire for vengeance in the ordinary sense. Any indirect motive other than a sense of duty is what the law calls malice. Malice means making use of occasion for some indirect purpose".

Just as malice on the part of the defendant destroys the defence of fair comment, so will it destroy qualified privilege. Evidence of malice may either be intrinsic i.e. found in the words themselves or extrinsic i.e. found in the external circumstances unconnected with the publication itslf.

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72. See the English case of Edmoudson v. Birch and Coy Ltd (1907) 1 KB 371 and Nigerian Case of Aruna v. Taylor (1977) 1 CCHCJ 15.

73. Ibid.

Intrinsic evidence of malice could be found where the language used by the defendant is violent[74]. However, in a siatuion where the defendant honestly and reasonably believe that his words were true and necessary for his purpose, he will not lose the protection of privilege merely because he express himself in strong language.[75]

Whereas extrinsic evidence of malice, could be found where the defendant knew that he published the statement falsely or he was indifferent to its truth or falsity[76]. In Obayiuwana v. Muhammad[77], it was decided that defence of qualified privilege is not available as a defence to a newspaper which publishes a false allegation of commission of a criminal offence in which an innocent person is said to have been arr4sted in connection with a suspected fraud involving ₦4 million.

It should be emphasises here that mere carelessness as to the truth of the statement published is not in itself evidence of malice as

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74. See African Press Ltd. v. Ikejiani (1953) 14 WACA 386.
75. See Keh v. Kofi (1954) 14 WACA 480 at 483.
76. See Ajala v. Showmmi (1977) 1 CCHCJ 25 at pp.29.
77. B/127/84 of 2nd September, 1986.

decided in Mutual Aid Society v. Akerele[78]. But what the law requires here is the privilege used honestly? and not carefully[79]. Although a proof of bad relationship between the defendant and plaintiff before the making of the statement may be taken as extrinsic evidence of malice as in the case of Ibrahim v. Bakare[80].

However, where a libellous statement is jointly published by many persons on a privileged occasion, or where several persons such as the author, printer, and publisher of a newspaper took part in its dissemination, only those among them, whose actual malice is actually proved that will be liable for the libel. This was decided in the case of Egger v. Chelmsford[81] that expressly over ruled the earlier decisions to the contrary in the case of Smith v. Streatfield[82].

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78. (1966) NMLR 257 at p.261.

79. Kodilinye G., op.cit., pp.175.

80. (1970) 1 UILR 244 at pp. 252.

81. (1965) 1 QB 248.

82. (1913) 3 K.B. 764.

4:5 APOLOGY AND OFFER OF AMEND

Although this is strictly speaking not a defence to libel action. Because apology and offer of amends constitutes an admission that the matter published was wrong and possibly libellous[83]. In the case of Edukugbo v. Sunday Times[84], it was held that an apology is not a defence to a claim for libel but a mitigation of damages. The court further said in page 215 thereof:-

> "For an apology to be effective in mitigating damages, it must be made at the earliest opportunity after the newspaper's attention had been drawn to the libel".

The fact of an apology and offer of amend shortly after the purported libel will surely help in mitigating the damages to be awarded against the defendant as pointed out in the above decision.

However, where offer of amends and apology are not properly made cannot be accepted in mitigation of damages. In the case of Nasamu v. Herwa Press Ltd., it was held that:

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83. Osinbajo Y, and Fogam K., Op.cit., at p.209.

84. (1958) WRNLR 215, and see section 14 of the Kaduna State Defamation Edict 1990 (where offer of apology is admissible in mitigation of damages).

> "To merely publish an apology for libel without prior intimation of the person defamed and in another newspaper which is different from thaw which contains the libel and which is inserted in an obscure portion of the newspaper cannot be accepted in mitigation of damages"[85].

Section 13[86] of the Kaduna State Defamation Edict (there are similar provisions in the laws of other state in Nigeria) allow a publisher of innocent libellous matter to make an offer of amends under the section. The section further defines what offer amends means in subsection (3) thereof, where offer of amends is said to mean in paragraph (a) that:

> "In any case, to publish or join in the publication of a suitable correction of the matter complained of, and sufficient apology to the party aggrieved in respect of the matter".

From the letters of this section, an apology or amends which does not contain offer of a withdrawal of the sinister imputation or regret for its publication is inadequate; this is further emphasised in the case of Adetona v. Drum publication[87].

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85. B/11/80 of 20th July, 1981.
86. Edict No. 2 of 1990.
87. (1972) NMLR 4.

Thus from our discussion it is pointed out that apology and offer of amends are not defence in strict sense, but rather an admission by the defendant that the matter published by him/or it is wrong and possible libellous, but seeking to reduce the amount of damages that might likely be awarded against it or escape liability in totality; if his offer was accepted by the plaintiff.

4:6 REMEDIES

Remedy in civil action is a means by which the violation of a right is prevented, redressed or compensated. The general rule is that, in an action for libel as in other actions for tort, the only relief or remedy which the plaintiff can obtain from the court in approprate circumstances are mainly two: i.e. either for an injunction to prevent the repetation of the libel or damages.

(A) Injunction: The court has jurisdiction to either grant an injunction either before or at the trial to prevent any further publication by the defendant of the libel which the plaintiff complained of[88]. This kind of injunction is called inter locutory injunction, which is an injunction granted by the court during the pendency of an action.

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88. Duncan and Neill, op.cit., at pp. 138.

Where the libellous matter was published, what the plaintiff should do is to prevent any further publication first; since the court has jurisdiction to grant injunction to prevent any further publication. In the case of Jegede v. Daily Times[89], it was pointed out that:

> "An injunction is granted for prevention and where there is no ground for apprehending the repetition of the libel there is no ground for an injunction".

But where there is a strong apprehension of repeting the libel by the defendant, the court will only grant an injunction to prevent further publication, if the plaintiff establish the following:-

(i) prima facie case of libel,

(ii) that the defendant threatens or intends to make further publication, and

(iii) that, if further publication is made the plaintiff will suffer an injury which cannot be fully compensated in damages.

It is essential to note however that even where these conditions are satisfied, the court may refuse an injunction, if there is any doubt as to whether the words are libellous or where the defendant swears that he will be able to justify

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89. (1980) FNR 224.

the words complained of, or the defendant(s) swears that he intends to rely on any other recognised defence discussed above. As a result of this, therefore, the usefulness of an injunction as a remedy against the purported libellous publication is doubtful. More over where the injunction is granted, except if it is in the nature of a final order, the plaintiff is required as a condition to give an undertaking as to damages. The purpose of this undertaking is to provide a sort of security out of which the defendant, could be compensated for any loss he might sustained as a result of the injunction.

It is our submission that, this area of the law if it should answer the name of remedy or relief to the will be plaintiff it need be developed so as to take account of the interest of the plaintiff it purported to grant relief to or protect.

(B) Damages:- The general rule is that in an action for libel, as in other actions for tort, the only relief or remedy which the plaintiff can obtain from the court, a part from an injunction in appropriate circumstances to prevent repetition of the libel is an award of damages.

When the court reach the point of assessing damage in libel suit, it is certain that the plaintiff has successfully discharge the onus placed on him and none of the defences outlined above worked. The damages are usually assessed on compensatory basis, and in certain circumstances however, exemplary (or punitive) damages can be awarded to the plaintiff. Thus the issue of damages will be better analysed, if examined under the following two headings namely:-

(1) Exemplary or Punitive damages. In the case of Asiodu v. Abodunde[90], it was held that punitive or exemplary damages are awarded whereby the publication, the defendant newspaper profitted from its own wrongdoing in publishing the libel. Similarly in the case of Awolowo v. Kingsway[91] it was held that:

> "Compensation is the normal basis of damages for libel and that punitive and exemplary damages should only be awarded in the case of a defendant who profited from his own wrong doing in publishing the libel".

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90. (1979) 10-12 CCHCJ 159.

91. (1968) 2 All NLR 217.

From the wordings in both decisions exemplary (or punitive) damages may be awarded in either of the following circumstances or all:-

(a) Where the defendant has deliberatly committed a tort with intention of gaining some advantages, which he will be made to pay to the plaintiff by way of compensation.

(b) where the law expressly provides for it.

(c) where the plaintiff has been injured by oppressive, arbitrary action of the government employee or civil servant.

This principle of (exemplary) damages was succintly explained by Lord Devlin in the case of Rookes v. Barnard[92] in the following words:

Cases in the first category are those in which the defendant(s) conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. It is a factor also that is taken into account in damages for libel, one man should not be allowed to sell another man's reputation for profit. Where a defendant with a cynical disregard for a plaintiffs rights has calculated that the money to be made out of his wrong doing will probably exceed the damages at risk, it is necessary for the

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92. (1964) AC 1129.

law to show that it cannot be broken with impunity. This category is not confined to money making in the strict sense. It extends to cases in which the defendant is seeking to gain at the expenses of the plaintiff some object perhaps some property which he covets - which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Examplary damages he furhter said, can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.

Since exemplary damages is designed to punish defendants for their misconduct and to warm other persons not to act in a similar manner, it appear to us that, the restriction of exemplary damages to pecuniary award is insufficient. What could perhaps be more effective is the traditional way of awarding examplary damages to the slanderer i.e. by way of canning. Since no matter the status of a person if he is subjected to it, will surely deter other persons from committing similar wrong with the aforementioned motives. And in case of corporations and companies, under our present Companies Act, companies and corporations are now liable for criminal offence in the same manner as an individual[93]. The question that could be

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93. See section 65 of Companies and Allied Matters Act, Cap 59 Laws of the Federation 1990.

raised here is who is to suffer the pain in cases of companies and corporations? This seems to be answered , now that Directors were regarded as the brain of the company or corporation. In a situation where such companies or corporations happen to be guilty of libel with all the requisite elements discussed present, common sense will of course suggest that the managing or executive directors should be made to suffer the pain. This to us will surely be more efficatious way of awarding exemplary (or punitive) damages.

(2) Compensatory Damages:- The basic rule under the Common law is that in civil actions damages are awarded as compensation for injury, not as punishment for wrong doing. Accordingly im most actions, for libel the damages have to be assessed on comepnsatory basis[94]. In the case of Dina v. New Nigerian Newspapers[95], it was decided that:-

> "In assessing the amount of damages payable in an action for libel, a court is entitled to take into consideration such factors as the conduct of the plaintiff, his position and standing, the nature of the libel, the mode and extent of publication, the absence or refusal of any retraction or apology

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94. Duncan and Neill, Op.cit., at pp. 124.
95. (1986) 2 NWLR (Pt. 22) 353.

> and the conduct of the defendant from the time of publication of the libel right to the time of judgement".

The purpose of awarding compensatory damage observed Lord Blackburn, is to restore the plaintiff as far as money can do so; to the position he would have been if the tort had not been committed. In the case of Livingstone v. Rawyards Coal Company[96] where it was decided that:-

> "Where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which would put the party who has been injured, or who has suffered in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation".

Although the subjective elements in an award of damages in libel action makes it impossible to put forward any objective standards by which to gauge the right figure in any particular case. Nevertheless, it is possible to identify the factors to be taken into account in assessing damages. The seriousness of the libel is of course always a relevant issue for consideration; other factors includes:

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96. (1880) 5 A.C. 25 at pp.39.

(a) injury to the plaintiffs feelings including aggravating factors.

(b) extent of the publication

(c) mitigating factors, and

(d) special damage, which for our purpose may mean any material or temporal loss which is either a pecuniary loss or is capable of being estimated in money.

When determining the mitigating factors, the court should take note of the following factors viz:-

(i) the reputation of the plaintiff

(ii) any apology tendered by the defendant;

(iii) the behaviour of the plaintiff towards the defendant and in the action.

(iv) other factors negativing malice on the part of the defendant.

(v) Sums recieved by the plaintiff in respect of similar publication if any.

See Onabanjo v. Concord[97]

Despite the fact that in many action for tort the principles of restitution is an adequate guide in the estimation of damages; when the damaged suffered can be estimated in relation to some material loss.

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97. (1982) 2 FNR 75.

But the question that remained to be answered is that, in an action for libel or personal injuries, the assessment of damage will include a substantial subjective elements, since neither physical pain nor damages to reputation are convertible by the use of any yardstick into a sum of money. Hence the question of damage serving as a remedy to vindicate the character of the person libelled still remains unaswered. In the light of these we are inclined to agree with Sarbah[98] in a passage quoted with approval by the Ghanaian Court of Appeal in the case of Attiase v. Abobbtey that[99],

> "... the real concern of a plaintiff in an action for defamation under customary law is to vindicate his character and not merely to make money. That being the case the most satisfactory relief which traditional courts could give a plaintiff in such a case is to get the defendant proved guilty of defamation to withdraw his words in the same manner and with the same publicity as he published them so as to eradicate from the minds of the public the injury he did thereby to the reputation and good name of the plaintiff".

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98. In this book, Fanti Customary Law (1968) 3rd edition, pp. 110-114.

99. Unreported, court of Appeal (Ghana) 29th July, 1969.

The Ghanaian Court of Appeal describe further the customary law remedies for defamation (mainly libel and slander) in the following words:

> "Where a person has been found guilty for using slanderous words he is bound to pay a small fine by way of compensation to the aggrieved party".

Hence since the English Customary rules (popularly known as Common law) remedies of damages to the injured plaintiff appears to be inadequate even in England, it is submitted here that, the Nigerian courts should as a matter of policy device another methods of compensating or restoring the reputation of the plaintiff devasted of it (reputation) by the defendants publication. As such the adequate remedy could be the traditional approach of canning and compelling the defendant, in the word of Ollenu J.A. of the Ghanaian Court of Appeal in the case of Attiase v. Abobbtey above:

> "to recant his base falsehood and confess his disgraceful behaviour".

This remedy, we are convinced will surely be efficacious and in comformity with most of the customary law of libel in Nigeria.

SUMMARY

In the third chapter an attempt was made in highlighting the fact that, in libel liability is extremely easy to incure by those learned in the art of writing.

While the discussion in this chapter is confined to defences available to defendant (s) in libel suits and remedies available to successful plaintiff in such action.

The first defence among the three traditional defences is justification (or truth) where it is noted that, the law especially that of libel has an extra-ordinary regard for truth, As such makes a person immuned in respect of black truth. Truth here is a total defence in the sense that it rebuts the presumption that what the defendant said was false. Moreover it is irrelevant why the defendant published the unplatable fact, since the plaintiff has no right to a reputation based on concealment. In other words, the public has the right to know all.

Secondly, if matters are of public interest, every one is free toexpress his opinion on them. However daft his opinion may be and however prejudicial to others. Public discussion of

matters of public interest are encouraged here, but not public error. Thus the defence of fair comment applies only to comments not to facts. Therefore, if one gets his facts wrongly he is strictly liable for stating them, but if the facts are right then an honest comment is protected. The test here appears to be whether a person would suppose that he is given a piece of information or a personal value judgement.

There is then the defence of privilege. In some cases communication is so important that, its flow must not be impeded by fear of law suits. Thus in legislation and courts, speech is absolutely privileged, therefore an action in respect of words spoken there is privileged absolutely. While in other cases communications are protected only if they were made bona fide. Thus the privileged here is qualified in the sense that, it is open to the plaintiff to show if he can, that the occasion was abused. Of course, the defendant will be liable where he was using the occasion just to hurt the plaintiff maliciously.

It appears that this Common law privilege will be of little use to newspapers companies, since hardly any of what they publish nowadays is of interest to the whole country. However they

have statutory privilege to publish fair and accurate reports of the proceedings and decisions of various public bodies and meetings, and to communicate notices from certain public servants. Sometimes this statutory privilege to publish fair and accurate reports is subject to publication of reasonable statement by way of explanation or contradiction.

There appear to be a growing dissatisfaction among litigants and others that the present state of the law even in England is unsatisfactorily because, it seems to give too much protection to reputation and impose too great restrictions on the freedom of speech and the press. Perhaps the defect of the present law arises (on the question of remedies) because it principally uses a single remedy to the libelled plaintiff's i.e. the action for damages in order to perform three major purposes[100] viz:-

(1) to permit people to clear their reputations from unfounded allegations.

(2) to repress gratuitous vituperation, surrilons, disparagement and malignant calumny and;

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100. See Weir, T. (1979) A Case Book on Tort, 4th edition at pp. 432.

(3) to allow people to claim compensation for the harm they suffer because others have abused their freedom of speech.

Here it is only the third that damage is the appropriate remedy and for the first and second, we need a procedure for retraction or correction as discussed earlier on; which we strongly believe will surely charter for both arms of the issues.

CHAPTER FIVE

INTRODUCTION

The discussion in this chapter been the concluding chapter, shall mainly be on the future of libel law and press freedom in Nigeria on one hand and suggestions on the other.

5:1 THE FUTURE OF LIBEL LAW AND PRESS FREEDOM IN NIGERIA

This thesis is primarily concerned with freedom of expression on public affairs through the press, television and on the platform of political party rallies, seminars, lectures and at various celebrations and so on.

There is a policy reason why discussion of public matters should be distinguished from other forms of discussion. The social interest to which the law of libel gives legal protection is that of preserving the individuals reputation untarnished. While the social ~~and~~ interest in the promotion of free speech and comment is however, a countervailing interest. These two interests have to be balanced against injury to individuals reputations. Which of the two interests should be given prominence is an issue of policy. Our views on this policy issues is that the encouragement of serious public discussion in a country such as Nigeria now is more important

than the protection of individuals reputation, particularly if those individuals occupy public positions. In this we find support from Chief Justice Cockburn when he said:-

> "Those who fill public positions must not be too thin skinned in reference to comments upon them"[1].

While on the merits of whether the social interest in public discussion of public affairs justifies the relaxation of the rule that, a libeller must either be able to prove the truth of his libellous publication or face the full rigour of the law.

Let us look at the issue from the point of view of the mass information media. A little observation reveals that, since it is the functions of these mass information media to disseminate news items and comment on them, while they are still new, there is a limit to the time and opportunity that journalist have to check the absolute accuracy of all news items that they dessiminate. These mass information media may sometimes therefore accidently publish statements which they honestly believe to be true, but which in fact are false. Now, what should the law's response be to such factual situations? The response

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1. In the case of Seymour v. Butterworth (1862) 3F and F at pp.377.

of the Nigerian law in fact, is that the journalist or researcher who has innocently published false libellous matter about any body is strictly liable and cannot escape liability because he did not intend to libelled the person libelled. Thus the Nigerian law insists that journalists, researchers, etc. should be insurers of the truth of all statements that they publish. Although, it is true that, the defence of qualified privilege protects fair and accurate reports of proceedings in law courts and legislative houses, but such reports represent a very small proportion of the daily news.

The other relevant defences available under the Nigerian law are those of justification and fair comment. Yet both require the proof of the truth of the facts alleged to be true. In certain situations, the practical realities prevent such proof. This means the researcher, journalist and his employer became liable to pay damages to the person alleged to be libelled.

The possible justification for this rule has been expressed thus; since the newspaper industry is conducted for profit and is better placed to obsorb and distribute losses than the victim of its accidental libel. On the other hand, there are reasons for criticising the present Nigerian

rules. It is our belief that it is proper to encourage and protect the news media in the dissemination of information and ideas by eliminating their liability for unintentional and non-negligent libel. The public interest in quick dissemination of news of public importance outweigh the occasional injury caused unintentionally and non-negligently to private honour by false news items. The injury to reputation occasioned by such innocent libel, may with justice be regarded as a foreseable and almost inevitable hazard of living in a democratic society with a free press.

It must be clear by now that at least on the discussion of matters of public interest the limitation on free speech imposed by the fact that journalists have the onus of proving the truth of statements published by them and which are libellous of others in our view, an undesirable limitation on free speech (press freedom). How then should the law be reformed? In New York Times v. Sullivan[2], the United State Supreme Court laid down a rule prohibiting in their words:-

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2. 376 U.S. 254 (1964).

> "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice - that is, with knowledge that it was false or with reckless disregard of whether it was false or not".

Now would such a rule be suitable under the Nigeria's circumstances?

It is essential where such persons have made efforts to check their facts and any reasonable Nigerian would consider their efforts to be diligent then; if after publications the facts are in fact found to be false there should be no liability imposed on them - provided the facts related to official and not private conduct. Moreover the person holding a public position who alleges his official character has been libelled must bear the onus of proving the falsity of the libellous statements. While the alleged defendant must however, bear the burden of proving his due diligence and lack of negligence in checking his facts.

Hence, it appear to us the prospects for the future of both areas of law (i.e. the law of libel on the one hand and press freedom in Nigeria on the other) are as complex as they are fluid. In the words of Malam Adamu Circoma[3]:

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3. Professionalism and the Nigerian Mass Media New Nigerian Newspaper of Tuesday, 12th April 1994

> "The freedom of crude tasteless often libellous references to individuals in and out of public office".

May lead one to conclude that their future is not quite clear. It hang between reforming the present law and complete rejection of certain aspects of it.

5:2 CONCLUSION AND SUGGESTIONS

From our discussion it is pointed that action for defamation (mainly libel and slander) invariably involves statements which are both false and damaging. There is no truth in the converse; and it is not every false and damaging statement that will enable a person to sue for libel or slander; for such a course of action to arise, the plaintiff must be the victim of false words which have a damaging effect on his/her or its reputation. In addition no action will lie in respect of any words defamatory, except if it is shown that the words complained of were published to a third person. This means that, publication made only to the plaintiff is not sufficient publication to make the libel actionable. Moreso, it is settled that the question whether words

which are complained of are capable of conveying a libellous meaning is a question of law and is therefore one calling for the decision of the court.

In concluding our discussion it is worthwhile to restate the fact that, at present many people are dissatisfied by the current law of defamation. In England and Nigeria as well, simply because it seems to give too much protection and at the sametime impose too great a restriction on press freedom constitutionally guaranteed. Reputation, the causin of respectability is now regarded as less important than it was. Since one is not supposed to care what other people think. And freedom of expression on the other hand, is now regarded as more important than it was.

It seems likely therefore that the basic structure of the present law of libel in Nigeria will be with us for the foreseable future, but from our discussion, there appears to be a general agreement that, the structure needs some wide spread renovation and refurbishment. By way of comparison and adoption we cited many of the Faulks committees in England proposals for reforms and which are referred to at the appropriate point in the thesis. Despite that however, it is submitted here that, a part from company secretary, there should be a law to make it imparative for

newspaper companies to have their legal officers who shall liaise with the company solicitors with regard to legal matters affecting the company. In addition a legal editor is equally necessary and essential to curb or reduce to the bearest minimum the incidence of libellous publications in newpaper. The legal editor in conjunction with two or more legal practitioners (engaged as full time staff in the news room section of the publishing company) must of necessity go through or scrutinize all materials billed for publication to ensure that all traces of libel are removed before publication is made.

It is our belief that such safeguard will enhance the profit base of the company, since the money used in prosecuting libellous cases can be invested in other gainful ventures. This will in turn help decongest our courts and reduced the work-load of our judges.

Since the future forecast for the development of libel laws in Nigeria is bleak, especially in the present situation, Where most of the elites in Nigeria were inspired by English Common law with their egoistic feelings and some sections of the Nigerian society yearning for Customary law, and the majority for the Shariah. Hence the necessity for a unified acceptable law in the area is daily becoming more

than obvious; especially under the present day sporadic lawlessness of newspaper companies and the helpless position of certain section of the country and the Nigerian masses generally. On the whole there is a serious need to develop a law in the area in order to sustain the present freedom of expression and the press in our constitution on one hand and the law of libel on the other.

As a remedy to people to whom honour is at least as important as life, as rightly pointed out by Ollennus J.A. in the Ghanian case of Attiase v. Abobbtey[4] that:

> "The real concern of a plaintiff in an action for defamation under Customary law is to vindicate his character and not merely to make money. That being the case the most satisfactory relief which traditional courts could give a plaintiff in such a case is to get the defendant prove guilty of defamation to withdraw his words in the same manner and with the same publicity as he published them so as to eradicate from the minds of the public the injury he did thereby to the reputation and good name of the plaintiff".

In addition to this Customary remedy, there is the need to introduce the traditional remedy of canning, especially where the defendant is actuated by express malice in publishing the libellous article. This will surely serve as a deterrent at the sametime

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4. Ibid.

allowing for the constitutionaly guaranteed freedom of expression and the press on issues that the publisher or author honestly belive in its truth.

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