THE LAW OF DEFAMATION

Challenges In The Face Of Rapid ICT Developments

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Challenges in the Face of Rapid ICT Developments

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Chapter 5

TOWARDS A REFORM OF THE NIGERIAN LAW OF DEFAMATION: LOOKING FORWARD AND LOOKING INWARD

By
John Oluwole A. Akintayo
and
Afolasade A. Adewumi

INTRODUCTION

Communication is critical to human existence. Without it, the human race would have been extremely poorer. In fact, it is difficult to imagine how the human race could have fared without a system of communication. As stated elsewhere:

> The ability to communicate is no doubt a feature of all living things but it is most developed in man. Man perhaps has the most developed means of information dissemination. Information technology has opened new doors of opportunities, which in the past could hardly be contemplated. All these however have legal implications for the disseminator, the recipient and the means or medium by which the information is disseminated.

Ability to communicate has come with its challenges because of the limitless capacity of man to use the divine gift of communication to build and to destroy. The Holy Writ declares:

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> Let no corrupt communication proceed out of your mouth, but that which is good to the use of edifying, that it may minister grace unto the hearers.[1]

The law has had to grapple with the challenge of keeping natural communication devoid of the deployment of the tools of technology within its boundaries. Developments in information and communication technology have aggravated this challenge and it is imperative for law as an instrument of social control to rise to the occasion to maintain its relevance in the society.

In this chapter, we intend to explore the constitutional foundation of the Law of Defamation. This exercise will lead to a juxtaposition of the right to freedom of expression guaranteed to every person and the right to the protection of one's reputation. We shall thus be able to situate this discourse in its proper context, as it will bring to limelight the tension between the right to freedom of expression and the legitimate restriction on the enjoyment of this right especially in this Information age. Two principal features of the information age are the volume of information available and the ease of transmitting this huge volume of information. The Internet is at the heart of this unprecedented development in human history.

This work begins with an examination of the constitutionally guaranteed right to freedom of expression and the constitutional basis of the Law of Defamation. After a brief review of basic defamation issues, such as the difference between libel and slander, factors a claimant must establish

[1] *The Holy Bible*, King James Version, Ephesians 4:29

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and available defences, we examine how the various branches of the law approach defamation. Our preliminary observation is that all major branches of the law have recognised the need to place some justifiable limits on the right to freedom of expression. In this regard, we shall highlight how statutory law including the criminal law, common law and customary law have approached the subject of defamation. Then we shall highlight issues that are unique to defamation on the Internet including determining which court should take jurisdiction. We shall then consider the provisions of the Evidence Act in relation to proving defamation communicated by means of the Internet or social networks. In our conclusion, we shall harp on the imperative of harnessing the contributions of the various branches of the law in our plural legal system to reform our Law of Defamation.

ANALYSIS OF CONSTITUTIONAL PROVISIONS

Constitutional Provisions on Communication

The Constitution of the Federal Republic of Nigeria 1999 devotes its fourth chapter to Fundamental Rights. Section 38 provides for the right to freedom of thought, conscience and religion while section 39 relates to the freedom of expression. These two provisions are closely related for one leads to the other: before the expression of an opinion is worthy of constitutional protection, the law must permit holding such opinion. Let us examine the two provisions one after the other.

Section 38 states *inter alia* as follows:

> Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to

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manifest and propagate his religion or
belief in worship, teaching, practice
and observance.

The primary focus of the above provision is freedom of thought, conscience and religion. Though the above constitutional provision is often invoked in defence of religious liberty, it is much more embracing and applicable in other spheres. There are three liberty rights combined in the above provision; namely, the freedom of thought, freedom of conscience, and religious freedom. In effect, it is preferable to consider the three words "thought", "conscience" and "religion" separately to achieve a robust interpretation of the constitutional provision. Freedom to change one's religion or belief is exercisable within the context of religion and in other areas of human life. For instance, every individual is entitled to hold political, scientific, social, cultural views and beliefs and is free to abandon them at will. The scope of freedom of belief is, perhaps, limitless: an individual may believe anything even if it is most unreasonable or incredible. Freedom to manifest and propagate one's religion or belief essentially concerns religion but it is not limited to it. However, one may not freely manifest or propagate all thoughts. For example, an individual may honestly believe in anarchy as a philosophy of governance but there is no constitutional protection for the manifestation or propagation of such a belief.

James W. Nickel has contended that the freedom of religion is protected through the contributions of many basic liberties, and that interpreting freedom of religion will often require understanding the meaning and roles of several basic liberties.[2]

[2] Nickel, J. W., "Who needs Freedom of Religion?" (2005) 76 *University of Colorado Law Review*, pp. 941 - 964 at p. 951.

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He identified the following nine general liberties as working together to provide full protection for freedom in the area of religion. These are:

> 1. Freedom of belief, thought, and inquiry; 2. Freedom of communication and expression; 3. Freedom of association; 4. Freedom of peaceful assembly; 5. Freedom of political participation; 6. Freedom of movement; 7. Economic liberties; 8. Privacy and autonomy in the areas of home, family, sexuality, and reproduction; 9. Freedom to follow an ethic, plan of life, lifestyle, or traditional way of living.[3]

Section 39 of the 1999 Nigerian Constitution elaborates on the right to freedom of communication and expression identified by Nickel above. It states as follows:

> Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.
>
> Without prejudice to the generality of subsection (1) of this section, every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions:

[3] Nickel, J. W., *ibid.*, p. 943

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Provided that no person, other than the Government of the Federation or of a State or any other person or body authorised by the President on the fulfillment of conditions laid down by an Act of the National Assembly, shall own, establish or operate a television or wireless broadcasting station for any purpose whatsoever.

Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society-

for the purpose of preventing the disclosure of information received in confidence, maintaining the authority and independence of courts or regulating telephony, wireless broadcasting, television or the exhibition of cinematograph films; or

imposing restrictions upon persons holding office under the Government of the Federation or of a State, members of the armed forces of the Federation or members of the Nigeria Police Force or

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> other Government security services or agencies established by law.

There are three specific rights subsumed under the right to freedom of expression in Section 39(1) above. First, is the ***freedom to hold opinions***. Opinions held by an individual may be a product of internal reflection (or no reflection at all!) or information received from other sources; the basis is immaterial. With respect to freedom to hold opinions, sections 38 and 39 of the Constitution coincide. Second, is the ***freedom to receive ideas and information***. Third, is the ***freedom to impart ideas and information***.

The provisions of the two sections quoted above are not absolute. Whereas section 38 is subject to only one layer of derogation clause, the main provisions of section 39 are subject to two species of derogation clauses. There is an inbuilt derogation clause in subsection (3) of section 39 set out above which qualifies the scope of the constitutional right of freedom of expression. A reasonably justifiable law is not limited to enacted laws; common law principles and ethical rules of professional groups whether enacted or not which seek to protect the giving and receiving of confidential information come within the category of reasonable laws.
The general derogation clause is contained in section 45(1) of the 1999 Constitution and it states as follows:

> Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society-

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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.

We may make the point at this stage that the Law of Defamation as a limitation on the right to freedom of expression is justified by the constitutional purpose of protecting the rights and freedom of other persons.

The rationale for our examination of the constitutional provisions on the right to freedom of expression is partly to identify the beneficiaries of the provisions as well as the groups of persons who might take benefit of the restrictions on the exercise of this right in view of the fact that the right to freedom of expression is not absolute.

There are diverse means of giving expression to thoughts, ideas and opinions. One may make his or her thought or feeling known in words or by gesture or conduct etc. The dissemination of ideas, news, and information may take the form of printed word in newspapers, pamphlets, books, and periodicals, as well as the spoken word conveyed by radio, in speeches, by television, opinions expressed through social networks and in motion or still pictures uploaded to the Internet. The Internet represents the most vibrant means to date of exercising the right to ***freedom to receive*** and the right to ***freedom to impart*** ideas and opinions. It is incomparable with any other source before it. The exercise

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of their constitutional right to freedom of expression is the means by which the generality of the people may participate in government, in addition to their right of franchise. This enables citizens and others to freely make comments or air their views or opinions on the activities of government. The right to freedom of expression emphasises the function of the public in the task of governance. The global press, which Internet users represent, is the most veritable and potent means of performing this function. The word 'press' is not specifically mentioned in the provisions of the section 39.

However, the widely held belief is that the same section secures the freedom of the press in Nigeria. The cases of *Tony Momoh* v. *Senate of the National Assembly & ors*,[4] and *Innocent Adikwu (Editor, Sunday Punch Newspapers) & Ors*. v. *Federal House of Representatives of the National Assembly & Ors*.[5] confirm this position. The question that arises is whether there is any difference between freedom of expression (or freedom of speech) and freedom of press. Zechariah Chaffe has attempted to answer the question from the American perspective as follows:

> I have not found the courts mentioning any significant difference between these two freedoms. There is, however, a difference in fact so far as governmental control is concerned, for newspapers are more vulnerable than speakers. The government (unless checked by the Constitution) can impose restraints on them which would not be applicable to orators...[6]

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[4] *Tony Momoh* v. *Senate of the National Assembly & ors* (1981) 1 NCLR 105.
[5] *Innocent Adikwu (Editor, Sunday Punch Newspapers) & Ors*. v. *Federal House of Representatives of the National Assembly& Ors* (1982) 3 NCLR 394.
[6] Chaffe, Z. *Government and Mass Communications*, Chicago, University of Chicago Press, 1947, pp. 34-35.

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The U.S. Supreme Court, according to William A. Hachten, never forgets that freedom of the press belongs to every citizen of the Republic.[7] The rationale for this is predicated on the fact that the press is only a medium for dissemination of ideas and opinions primarily held by an individual. In *Archbishop Okogie* v. *The Attorney-General of Lagos State*,[8] the Court of Appeal in Nigeria *per* Nassir P. said:

> From the wording of both Subsection (1) and (2) of Section 36 of the Constitution [same as Section 39 of the 1999 Constitution] I have no doubt in reaching the conclusion that Section 36 of the Constitution is intended to cover all persons and organisations who may not have any direct connection with the press. It therefore follows that I must give the 'medium' its ordinary and wide meaning.

However, in modern democracies the press plays a public role and it is gratifying that some court decisions, both Nigerian and foreign, have emphasised this point. In *Innocent Adikwu Case*, A.L.A.L. Balogun J. said:

> It must be remembered at all times that a free press is one of the pillars of freedom in this country as indeed in any democratic society. A free press reports matters of general public importance, and cannot, in law be under an obligation, save in exceptional circumstances to disclose the identity of the persons who supply it with

[7] Hatchen, W. A. *The Supreme Court on Freedom of the Press: Decisions and Dissents*, Ames, (Iowa), Iowa State University Press, 1958, p. 8.
[8] *Archbishop Okogie* v. *The Attorney-General of Lagos State*, (1981) 2 NCLR 337 at 353

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the information appearing in its report. Section 36 Constitution [of 1979 Constitution, now section 39 of the 1999 Constitution] which guarantees freedom of speech and expression (and press freedom) does provide a constitutional protection of free flow of information. In respect of the press, the editor's or reporter's constitutional right to a confidential relationship with his source stems from that constitutional guarantee. It is the basic concern that underlies the constitutional guarantee of freedom of speech and expression. If this right does not exist or is not protected by the courts when contravened or when there is likelihood of its being contravened, the press's sources of information would dry up and the public would be deprived of being informed of many matters of great public importance. This must not be allowed to happen in a free and democratic society. In a country with a written Constitution which establishes a constitutional structure involving a tripartite allocation of power to the legislation, the executive and the Judiciary as coordinate organs of government, the judiciary as the guardian of the fundamental law of the land has the role of passing on the validity of the exercise of power by the Legislative and Executive and to require them to observe the Constitution of the land.[9]

[9] *Innocent Adikwu Case* (1982) 3 NCLR 394 at p. 417.

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In *British Steel Corporation* v. *Granada Television Ltd.*,[10] Lord Denning also put the basis for a free press admirably in the following words:

> The public has a right of access to information which is of public concern and of which the public ought to know. The newspapers are the agents, so to speak, of the public to collect that information and to tell the public of it. In support of this right of access, the newspapers should not in general be compelled to disclose their sources of information. Neither by means of discovery before trial. Nor by questions or cross-examination at the trial. Nor by subpoena. The reason is because, if they were compelled to disclose their sources, they would soon be bereft of information which they ought to have. Their sources would dry up. Wrongdoing would not be disclosed. Charlatans would not be exposed. Unfairness would go unremedied. Misdeeds in the corridors of power, in companies or in government departments would never be known. Investigative journalism has proved itself as a valuable adjunct of the freedom of the press.

In this information age, the Internet should be regarded as playing a similar role as the traditional press. Some judicial authorities have in addition, emphasised the responsibility

[10] *British Steel Corporation* v.. *Granada Television Ltd.* [1981] 1 All ER 417 at 441

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that attaches to the freedom of the press. In *Pennekamp* v. *Florida*, Justice Frankfurter of the U.S. Supreme Court observed as follows:

> A free press is vital to a democratic society because its freedom gives it power. Power in a democracy implies responsibility in its exercise. No institution in a democracy, either governmental or private, can have absolute power. Nor can the limits of power which enforce responsibility be finally determined by the limited power itself. In plain English, freedom of the press carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise... The public function which belongs to the press makes it an obligation of honour to exercise this function only with the fullest sense of responsibility. Without such a lively sense of responsibility a free press may readily become a powerful instrument of injustice.[11]

In *British Steel Corporation v. Granada Television Ltd*. Denning MR also underscored the responsibility of the press when he said:

> In order to be deserving of freedom, the press must show itself worthy of it. A free press must be a responsible press. The power of the press is great. It must not

[11] *Pennekamp* v. *Florida* 328 U.S. 331 (1946) cited in Hachten *op. cit.*, p. 12.

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> abuse its power. If a newspaper should act irresponsibly, then it forfeits its claim to protect its sources of information.[12]

From the foregoing, it is apparent that the State is the principal beneficiary of the right to freedom of expression guaranteed to every person under the 1999 Nigerian Constitution. The State in this sense refers to the entire public, that is both the Government and the governed who make up the society. It is to further the cause of good governance therefore that the National Assembly has specifically enacted the Freedom of Information Act 2007. The primary aim of the Freedom of Information Act (FOI Act) is to give expression to the constitutional right to ***freedom to receive ideas and information*** contained in section 39. The long title to the FOI Act states as follows:

> An Act to make public records and information more freely available, provide for public access to public records and information, protect public records and information to the extent consistent with the public interest and the protection of personal privacy, protect serving public officers from adverse consequences disclosing certain kinds of official information without authorization and establish procedures for the achievement of those purposes and; for related matters.

The provisions of Section 1 of the FOI Act are quite apposite:

> (1)Notwithstanding anything contained in any other Act, law or regulation, the right

[12] *British Steel Corporation v. Granada Television Ltd.* [1981] 1 All ER 417 at p. 441.

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> of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency *or institution howsoever described*, is established.
>
> (2) An applicant under this Act needs not demonstrate any specific interest in the information being applied for.
>
> (3) Any person entitled to the right to information under this Act, shall have the right to institute proceedings in the Court to compel any public institution to comply with the provisions of this Act.

Section 39 of the 1999 Nigerian Constitution guarantees the right to freedom of expression to every person. The implication is that both Nigerians and non-Nigerians are entitled to the benefit of this provision. The FOI Act does not consider it necessary to limit the beneficiaries of its provisions because of citizenship status. Section 1(1) FOI Act establishes the right of any person to access or request information as a statutory right to complement constitutional provisions on the right to freedom of expression. Based on the statutory right of access to information created by Section 1 (1), an applicant for information who is denied this right is granted access to court to secure compliance with the FOI Act by a public institution in custody of the information requested for. The significance of Section 1(2) goes beyond its direct application between an applicant and the public institution requested to provide information. It effectively abolishes the requirement of *locus standi*[13] in the likely event

[13] See generally on *locus standi Adesanya* v. *President of the Federal Republic of Nigeria* (1981) 2 NCLR 358 contrast: *Fawehinmi* v *Akilu (No. 1)* [1987] 4 NWLR (Pt 67) 797.

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the applicant institutes a court action to compel a public institution to make available or grant access to the information requested for and introduces something close to the Roman *actio popularis*.[14] It will be ridiculous to demand that an applicant who approaches the court must have *locus standi* when he "needs not demonstrate any specific interest in the information being applied for" at the time of making a request for information.

On the other hand, the law imposes some restrictions on the exercise of the right to freedom of expression. The restrictions serve the ends of both public law and private law. The public law aspect is hinged on the need to preserve the collective interests of the State. The private law dimension brings to fore the constitutional rights to human dignity and the right to privacy. In this sense, we see the role of the law in providing compromise solutions.[15] In his discussion of the right to freedom of expression, and the derogation provisions, T. O. Elias captured the broad spectrum of the impact of the derogation clause on the freedom of expression when he remarked that "everyone is free to say or write what he likes so long as it is not defamatory, seditious, obscene or blasphemous."[16] To B. O. Nwabueze, the problem of free speech is one of "reconciling the legitimate interests of the individual and those of the public administrators."[17]

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[14] See generally *Attorney-General (Bendel)* v. *Attorney-General Federation and 22 others* (1982) 3 NC
LR 1 at 84 *per* Obaseki JSC

[15] Lusk, H. F. *et al*, *Business Law, Principles and Cases*, 3rd U.C.C. ed., Homewood (Illinois), 1974, p. 10

[16] Elias, T. O. *The British Commonwealth: The Development of its Laws and Constitution*, *Volume 14: Nigeria*. London, Stevens & Sons, 1967, p. 151; see also Adeyemi, A. A. "Obscene and Indecent Publications" in T. O. Elias (ed.), *Nigerian Press Law*, Lagos & London, University of Lagos and Evans, 1969, p. 109.

[17] Nwabueze, B. O., *Constitutional Law of the Nigerian Republic*, London, Butterworths, 1964, p. 365.

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Right to human dignity as a Constitutional Basis for the Law of Defamation

Section 34 of the 1999 Nigerian Constitution guarantees to every person the right to dignity of human person. The opening paragraph in Section 34(1) states: "Every individual is entitled to respect for the dignity of his person..." The provisions of paragraphs (a) to (c) of Section 34(1) on torture, inhuman or degrading treatment; slavery or servitude and forced labour are merely indicative of circumstances when the right to human dignity may be breached. Though Section 10 of the Constitution of the Republic of South Africa 1996 states: "Everyone has inherent dignity and the right to have their dignity respected and protected", there is practically no difference between the scopes of the two provisions. Under the two constitutional texts, the right to human dignity is non-derogable.[18]

In *Isenalumbe* v. *Amadin*,[19] a fundamental rights enforcement action instituted by a lawyer who was detained for three hours and was physically assaulted by the respondents who were members of the Nigeria Police Force, the learned Judge, S. J. Adah J. of the Federal High Court Benin, Edo State said:

> The nature of the assault on the person of the Applicant in this case shows clearly a degrading treatment. For the avoidance of doubt, Black's Law Dictionary, 6th Edition defines the word degrading to mean:

[18] See S. 37(5) of the South African Constitution and the Table of Non-Derogable Rights. S. 34 of the 1999 Nigerian Constitution is excluded from the ambit of S. 45 on restriction on and derogation from fundamental rights.

[19] *Isenalumbe* v. *Amadin* [2001] CHR 458

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> "Reviling, holding one up to public obloquy; lowering a person in the estimation of the public, exposing to disgrace, dishonour, or contempt."

> For a lawyer returning from the Court to his office to be pounced upon, kicked and dragged to the Police Station in the manner described by the Applicant in the Statement is in every sense a deprivation of his dignity and has exposed him to disgrace, dishonour or contempt. There is no other element of degradation that has not featured prominently in the treatment meted out to the Applicant in this case. I hold in the circumstance that the act of the Respondents in assaulting the Applicant is unlawful and a violation of section 34(1) of the 1999 Constitution."

It is instructive that the learned judge adopted the interpretation of the expression "degrading" supplied by *Black's Law Dictionary*. Defamation of a person has the same effect on the dignity of a person as the degrading treatment meted out to the lawyer in the above case, though in the case of defamation, it needs not be accompanied by physical assault. A defamatory statement seeks to injure the dignity of a person, lower a person in the estimation of the public (right thinking members of the public) and seeks to expose a person to disgrace, dishonour or contempt. Based on this analysis, we contend that the right to the dignity of a person may also serve as the constitutional basis of the law of defamation.

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Writing on dignity as a legal concept from the perspective of South African law, J.C.W. Van Rooyen said:

> Dignity, as a legal concept, has its roots in Roman law and has been developed in such a fashion that it has led to sprouts in the form of privacy and reputation, as independent rights of personality ... In essence, dignity is the sense of self worth that an individual has.[20]

The perception of Justice O'Regan of the South African Constitutional Court of dignity is broader. Nigerian judges can take a cue from his approach. The learned Justice emphasised the nature of dignity as an all-important constitutional right in *Khumalo and Others* v. *Holomisa*[21] when he said as follows:

> In the context of the *actio injuriarum*, our common law has separated the causes of action for claims for injuries to reputation (*fama*) and *dignitas*. *Dignitas* concerns the individual's own sense of self-worth, but included in the concept are a variety of personal rights including, for example, privacy. In our new constitutional order, no sharp line can be drawn between these injuries to personality rights. The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an

[20] Van Rooyen, J.C.W., 2011, 'Dignity, religion and freedom of expression in South Africa', *HTS Teologiese Studies/Theological Studies* 67(1), Art. #1030, 6 pages. doi.10.4102/hts.v67i1.1030http://www.hts.org.za/index.php/HTS/article/view/1030/1519

[21] *Khumalo and Others* v. *Holomisa* 2002 [5] SA 401 [CC] at para [22]

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> affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual.

Nigerian case law following the received English law recognises the public's estimation of the worth or value of an individual through the law of defamation but generally ignores an individual's self-worth which South African jurisprudence protects through the law of insult. Though a Roman origin is ascribed to the law of insult in South Africa there is no doubt that it reflects defamation as understood in African customary law.

The case of *Bolekwa Nokere* v. *Minister of Safety and Security & Inspector Jara*[22] is apposite here. The plaintiff sued the defendants for damages arising from an alleged assault on her, an insult uttered to her shortly after she was arrested and an unlawful arrest. We shall limit our consideration to the insult claim. The Plaintiff's case was that when Inspector Jara and Constable Robiyana got into a vehicle conveying her to the Police Station, Inspector Jara told her that she was 'going to shit', that he was going to teach her a lesson and that she was going to respect policemen. He told her about

[22] *Bolekwa Nokere* v. *Minister of Safety and Security & Inspector Jara* Case No: 1089/07 Judgment of Plasket J. delivered on 9/5/08 (High Court of South Africa (Transkei Division))

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someone who was 'rotting in jail' for fraud as a result of his work. The learned Judge quoted the views of Neethling, Potgieter and Visser who wrote:[23]

> A person's dignity embraces his subjective feelings of dignity or self-respect. Infringement of a person's dignity accordingly consists in *insulting* that person. There are an infinite number of ways in which a person may be insulted. Any insulting words or belittling or contemptuous behaviour may be included here. Since one is concerned with a person's opinion of himself and not with the opinion of others, as in the case with defamation, publication of the insulting behaviour to third persons is unnecessary to constitute an *iniuria*: publication to the plaintiff alone is sufficient.

The court at Paragraph 103 considered the factors that are relevant to determining quantum in defamation matters and stated as follows quoting *Visser and Potgieter's Law of Damages*:

> In general, regard is had to the seriousness or triviality of the insult and the extent to which the plaintiff feels insulted, as well as factors such as the following: the plaintiff's social status, the degree of publicity to outsiders of the insulting behaviour, provocative conduct by the plaintiff, the absence of an apology or

[23] Neethling, Potgieter and Visser *Law of Delict* (4 ed) Durban, Butterworths: 2002, 353.

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regret on the part of the defendant, the truth or untruth of the offending remarks ...[24]

The Court held the insult was an actionable impairment of the plaintiff's dignity and she was awarded damages in the amount of R5 000.00.

APPROACHES TO DEFAMATION IN DIFFERENT BRANCHES OF LAW

Defamation at Common Law

The aim of the Law of Defamation is to balance two often-competing interests: protection of the reputation of individuals and organisations, and protection of freedom of speech. The basis of the tort of defamation is that every person has a right to the protection of his good name, reputation and the estimation in which he stands in the society of his fellow citizens.[25] Anybody who publishes anything injuring that good name, reputation or estimation commits a legal wrong. In private law, this is the tort of libel (if written) and slander (if oral).[26] In the words of Gatley, "a man commits the tort of defamation when he publishes to a third person words (or matter) containing an untrue imputation against the reputation of another."[27] The tort of defamation whether libel or slander relates essentially to damage to the character of the person.[28]

A key challenge in defamation cases is balancing the competing values of freedom of expression and an individual's

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[24] Visser, Potgieter, Steynberg and Floyd *Visser and Potgieter's Law of Damages* (2 ed) Cape Town, Juta and Co: 2003, 465.

[25] *Skye Bank Plc & Anor* v. *Chief Moses Bolanle Akinpelu* [2010] 3 SC (Pt.II) 29; *Sketch Pub. Co. & Anor* v. *Alhaji Azeez A. Ajagbemokeferi* [1989] 2 SC (Pt. II) 73

[26] *Sketch Pub. Co. & Anor* v. *Alhaji Azeez A. Ajagbemokeferi, (supra)*

[27] McEwen, R.L and Lewis, P.S.C., *Gatley on Libel and Slander,* 6th ed., London, Sweet & Maxwell, 1967, p. 2.

[28] *V. M. Iloabachie* v. *Benedict Iloabachie* [2005] 7 SCM 109

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right to his or her reputation. In *Hill* v. *Church of Scientology of Toronto,*[29] the Canadian Supreme Court said:

> Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.

In view of the adequate treatment of the elements of defamation and the distinction between libel and slander in other chapters, we do not intend to go into an extensive discussion of this subject. However, the observation of Best CJ in *De Crespigny* v. *Wellesley*[30] is pertinent. The learned judge said that publication in a newspaper may "circulate the calumny through every region of the globe." The effect of this is very different from that of the repetition of oral slander. According to the learned judge:

> In the latter case, what has been said is known only to a few persons, and if the statement be untrue, the imputation cast upon anyone may be got rid of; the report is not heard beyond the circle in which all

[29] *Hill* v. *Church of Scientology of Toronto* [1995] 2 S.C.R.1130 at para. 108.
[30] *De Crespigny* v. *Wellesley* (1829) 5 Bing 402, cited in *Gatley on Libel*, para 145

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> the parties are known, and the veracity of the accuser and the previous character of the accused will be properly estimated. But if the report is to be spread over the world by means of the Press, the malignant falsehoods of the vilest of mankind, which would not receive the least credit where the author is known, would make an impression which it would require much time and trouble to erase, and which might be difficult, if not impossible, ever completely to remove.

To succeed in an action of libel, the claimant must prove three fundamental elements of defamation constructively:[31] (a) That there is the publication of the material complained of by the defendant; (b) that the publication refers to no other person but the claimant conclusively; and (c) that the publication is defamatory of the claimant. We shall highlight a few points on the above elements.

That there is the publication of the material complained of by the defendant –

It is not the mere writing of libelous matter complained of that is important; it is the publication of the libel which in itself gives the cause of action. By publication is meant the making known of the defamatory matter to some person other than the person of whom or about whom it is written.[32] This proof must be given by admissible evidence.[33] The writing of a libel to the person or party libeled does not constitute

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[31] *Skye Bank Plc & Anor* v. *Chief Moses Bolanle Akinpelu (supra)*
[32] *John Ebosede Emiantor* v. *The Nigerian Army & 4 Ors* [1999] 9 SCNJ 52
[33] *Chief O. N. Nsirim* v. *E. A. Nsirim* [1990] 5 SC 94

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publication for the purpose of a civil action.[34] A statement on the Internet, available without restriction qualifies as having been published.

That the publication refers to no other person but the claimant conclusively

In an action for libel, it is not necessary that the words should refer to the claimant by name provided that the words would be understood by reasonable people to refer to him. As the law stands, the test of whether words that do not specifically name a claimant refer to him or not is this: Are the words used such as, reasonably in the circumstance, would lead persons who know the claimant to believe that he was the person referred to? [35]

That the publication is defamatory of the claimant

In defamation or libel cases, what is important is the action of a third party to the publication complained of. It is not what the claimant thinks about himself, but what a third party thinks of the claimant as regards his reputation.[36] For a plaintiff to succeed in a defamation action, there must be proof by evidence of a third party of the effect of the alleged publication on him i.e., the reaction of a third party to the publication. [37]

Context is important to consider in ascertaining the effect of the statement. The notion of context includes the factual background of the publication, the medium through which it is presented and the manner in which it is communicated. Context may increase the sting of the defamation by the use

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[34] *Ibid.*

[35] *S. B. Dalumo* v. *Sketch Publishing Co. Ltd.* [1972] 5 SC 194

[36] *Skye Bank Plc & Anor* v. *Chief Moses Bolanle Akinpelu* [2010] 3 SC (Pt. II) 29

[37] *Iwueke* v. *Imo Broadcasting Corp.* [2005] All NLR 251

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of bolding or facial expression, or voice intonation, but it may also reduce the degree to which a statement may be considered defamatory.

A defendant in a defamation action has the following defences open to him: Truth/Justification, Fair Comment, Jest, Statutory Immunity, Privilege - Absolute and Qualified and Responsible Journalism

Statutory Law of Defamation

There are two main areas of statutory intervention in defamation law. Defamation is one of the wrongs that constitute both a crime and tort at the same time and there are statutory enactments that regulate the two areas of law. Whereas statutory intervention in the private Law of Defamation is a supplement or a codification of common law rules, criminal defamation stands on its own. This is because of the constitutional principle which prohibits unwritten criminal offences.[38] Okonkwo,[39] quoting Lush J in *R* v. *Holbrook* has explained the rationale for the criminalisation of defamation as follows:

> It is ranked amongst criminal offences because of its supposed tendency to arouse angry passion, provoke revenge, and thus endanger the public peace... [40]

However, he quickly added:

> The offence is not frequently prosecuted because it is usually treated as a tort. The

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[38] See S. 36(12) of the 1999 Nigerian Constitution and the case of *Aoko* v. *Fagbemi* [1961] 1 All NLR 400

[39] Okonkwo, C.O., *Okonkwo and Naish: Criminal Law in Nigeria*, 2nd ed., Ibadan, Spectrum, 1980, p. 279

[40] *R* v. *Holbrook* (1878) 4QB 42 at 46.

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topic is therefore usually dealt with in greater detail in textbooks dealing tort than crime.

Section 373 of the Criminal Code:

> Defamation matter is matter likely to injure the reputation of any person by exposing him to hatred, contempt, or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation.
> Such matter may be expressed in spoken words or in audible sounds, or in words legibly marked on any substance whatever, or by any sign or object signifying such matter otherwise than by words, and may be expressed either directly or by institution or irony.
> It is immaterial whether, at the time of the publication of the defamatory matter, the person concerning whom such matter is published is living or dead:
> Provided that no prosecution for the publication of defamatory matter shall be instituted without the consent of the Attorney General...

Section 375 prescribes the punishment of one year for publishing any defamatory matter and two years imprisonment for publishing a defamatory matter knowing it to be false. Section 376 deals with publishing defamatory matter with intent to extort. It provides:

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> Any person who published, or threatens to publish, or offers to abstain from publishing or offers to prevent the publication of defamatory matter, with intent to extort money or other property, or with intent to induce any person to give, confer, procure, or attempt to procure, to, upon, or for, any person, any property, or benefit of any kind, is guilty of a felony, and is liable to imprisonment for seven years.

The Criminal Code also states that the publication of defamatory matter is not an offence if the publication is, at the time it is made, for the public benefit, and if the defamatory matter is true.[41] In addition, there are defences of absolute privilege,[42] conditional privilege.[43] Innocent distribution of defamatory is not considered as publication for the purpose of the Criminal Code.[44]

The possibility of criminal sanction for publication of a defamatory matter concerning a living or dead person appears to be consistent with African philosophy. The position of English tort of defamation that a dead man has no reputation to protect does not accord with African culture. Many Africans would refrain from taking legal actions to defend themselves but would spare no effort to protect the good names of their parents. This is an important contribution of criminal defamation in the quest to formulate a homegrown defamation law for Nigeria.

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[41] S. 377 Criminal Code
[42] S. 378 Criminal Code
[43] S. 379 Criminal Code
[44] S. 381 Criminal Code

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The Defamation Law deals with civil aspect of defamation; it specifically excludes criminal defamation.[45] The law is essentially a codification of common law principles on the tort of defamation and a modification of the common law in some respects.[46] Different defamation statutes are in force throughout the Federation. For the purpose of this work, we adopt the Defamation Law of the former Western State. The law applies to proceedings after 1959 in the States in the former Western State of Nigeria. Section 5 of the Defamation Law provides:

> Where a defamatory matter concerning a person is published, the person shall have a right of action against each publisher of the defamatory matter.
>
> Defamatory matter is defined as published matter concerning a person which tends:
> to affect adversely the reputation of that person in the estimation of ordinary persons;
> to deter ordinary persons from associating or dealing with that persons; or
> to injure that person in his occupation, trade, office or financial credit.[47]

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[45] S. 3(2) of the Defamation Law, Cap. 39 Laws of Osun State

[46] Kodlinye G., and Aluko O., *The Nigerian Law of Torts*, 2nd ed. Ibadan, Spectrum, 1999, p. 144. The Defamation statutes in Western Eastern and Lagos States contain provisions modelled on S. 2 of the English Defamation Act 1952 which makes any words spoken of the plaintiff which are reasonably likely to injure him in his office, profession, calling trade, or business actionable *per se*.

[47] S. 4 of the Defamation Law, Cap. 39 Laws of Osun State of Nigeria 2002.

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Defamation Law in England is undergoing periodic review in light of new experiences. Most Defamation statutes in Nigeria are based on the English Defamation Act of 1952. [48]

Defamation in Customary Law

Defamation as a right of action predated the coming of the Europeans to Africa, Customary law being a fully developed system of law, which met the basic requirements of pre-colonial Africa, protected the reputation of individuals. The reason for the existence of customary defamation is not far-fetched. As it has been observed:

> Customary law and institutions constitute comprehensive legal systems that regulate the entire spectrum of activities from birth to death. Once the sole source of law, customary rules now exist in the context of pluralist legal systems with competing bodies of domestic constitutional law, statutory law, common law and international human rights treaties.[49]

Elias has dealt with the argument that African law did not make a distinction between civil and criminal wrongs.[50] There is no unanimity on the definition of crimes among many writers and jurists. As Elias noted, "no absolutely satisfactory

[48] The most recent of the review is the Defamation Act 2013 which came after the Defamation Act 1996. Section 1 of the 2013 Act makes,provisions serious harm or likelihood of causing serious harm an important element of defamation. It provides:(1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.(2) For the purposes of this section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss.

[49] Fenrich, J., Calizzi, P. and Higgins, T.E., (eds.) *The Future of African Law,* Cambridge, 20 11, p. 2

[50] Elias, T. O., *The Nature of African Customary Law*, Manchester, Manchester University Press, 1956, p. 110 *et seq.*

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definition has been put forward by any jurist - so intractably subtle is the distinction between civil and criminal offences even in developed systems."[51] He went further to state as follows:

> In thus holding that African law, like any other law, differentiates between offences that must be punished by society at large and those that should be left to private redress, we are not by any means suggesting that there is, therefore, no difference between the African and a more developed legal system like the English.[52]

The Media Foundation for West Africa has made the following observations about customary law defamation:

> Customary law defamation is in respect of spoken defamatory words that cause injury to the reputation of another. If false, they are actionable. Unlike common law slander that, as a general rule, requires proof of special damage or injury to be actionable, customary law defamation is actionable per se, that is, without proof of any specific damage, provided the words injure the reputation of the person in society. There is, in addition, a twist to customary law defamation, namely that mere vituperative words spoken in the heat of anger or a quarrel which are insulting and injure the feelings of the other party are actionable. The fact that the words are

[51] Ibid p. 119
[52] Ibid p. 121

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> spoken in the heat of a quarrel may only go to the quantum of damages awarded.[53]

G. Feltoe also noted as follows:

> In customary law, defamation consists of a false accusation that P [i.e. Plaintiff] behaved in a certain way or spoken words by D [i.e. Defendant] which could cause P suffering or disturb the peace. The lowering of the status or reputation of P in the estimation of the public....[54]

Jill Cotrell's view is that "... malicious statement whether spoken or written, alleging evil conduct on the part of any person constitutes *defamation*."[55]

The law of defamation has to be considered in its cultural context; what is defamatory in one jurisdiction or cultural environment may not be defamatory in another place. For obvious reasons, customary law did not distinguish between slander and libel. Roman law and the systems of law based on it did not also make that distinction. However, in contemporary Nigeria, the fact that a breach of customary law of defamation is contained in a written document does not necessarily make customary law inapplicable.[56] Since statutory law has not directly abolished customary law defamation or by necessary implication, it follows that it is

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[53] Media Foundation for West Africa, *A Critical Review of the Defamation Bill, 2006*, Legon, 2008, p. 10

[54] Feltoe, G., *A Guide to the Zimbabwean Law of Delict, Harare, Legal Resources Foundation, 2006, p. 66*

[55] Cottrel, J. *Law of Defamation in Commonwealth Africa*, Ashgate Publishing, 1998, p. 22.

[56] See generally *Rotibi* v. *Savage* (1944)17 NLR 117. The court refused to abandon the application of customary law on the ground that written documents were involved.

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available as an alternative cause of action for a claimant where customary law is also applicable. The rules of customary law defamation are not repugnant to natural justice, equity and good conscience; [57] they cannot therefore be invalidated on that ground.

Customary defamation has developed at different paces in various modern African legal systems. Gordon R. Woodman has identified customary defamation as one of the few areas where state institutions apply customary tort law in addition to matters related to family relations such as seduction.[58] In Southern Sudan, customary defamation has been codified.[59] It is a developed branch of customary law in South Africa although its existence as part of the Eastern Cape's official customary law was denied for hundreds of years.[60] Nigerian case law is not rich in this area of the law, possibly because such cases generally terminate at the level of customary courts. Courts adjudicating on customary law defamation may apply the customary law of the area of jurisdiction of the parties or the customary law binding on the parties. Section 16(3) of the Customary Court Law on appropriate customary law states *inter alia*:

> Subject to the provisions of subsection (1) and (2) of this section-
> in civil causes or matters where –

[57] S. 15 (a) Customary Courts Law, Cap 37 Laws of Osun State of Nigeria 2002; S. 15(a) Customary Courts Law, Cap 41 Laws of Oyo State of Nigeria 2000

[58] Woodman, G. R., "How States Create Customary Law in Ghana and Nigeria" in Woodman G.R., & Morse, B.W., (eds.) *Indigenous Law and The State*, Dordrecht, Foris, 1988, p. 26

[59] Fadlalla, M. H., *Customary Laws in Southern Sudan:Customary Laws of Dinka and Nuer*, Bloomington, (IN), Universe, 2009

[60] Illiffe, J., *Honour in African History*, Cambridge University Press, 2005, p. 156

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both parties are not natives of the areas of jurisdiction of the court; or

the transaction the subject matter of the cause of matter was not entered into in the area of jurisdiction of the court; or

one of the parties is not a native of the area of jurisdiction of the court and the parties agreed or may be presumed to have agreed that their obligations should be regulated, wholly or partly, by the customary law applying to that party, the appropriate customary law shall be the customary law binding between the parties.

....

in all other civil causes or matters the appropriate customary law shall be the law of the area of jurisdiction of the court.

Many factors account for the decline in the popularity of customary law defamation. The first explanation is the perception of customary law as law for the rural people or for the uneducated. Ajomo has rightly observed that the relegation of customary law as the law that applies to the

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rural people alone had affected its growth and vitality.[61] In essence, no conscious effort has been made to enhance the growth of customary law defamation.

The philosophy that drives modern defamation actions is at variance with African traditional legal system. The golden philosophy of African traditional legal system is reconciliation and not necessary using the court as a means of amassing wealth. Asiwaju, writing on African judicial system, observed:

> Reconciliation of parties to a dispute was the ultimate objective of the judicial process...the primary goal of law in precolonial society was "to assuage injured feelings, to restore peace, to reach a compromise acceptable to both disputants".[62]

The fact that defamation suits may involve parties who are almost complete strangers to each other makes it unnecessary to seek to restore any pre-existing relationship. Mokgoro J. in the South African case of *Dikoko* v. *Mokhatla*[63] which involved a claim for damages based on defamation recognised that the law of defamation is based on the Roman *actio injuriarum*. The important goal of defamation in traditional law and culture, according to the learned judge, is to restore

[61] Ajomo, M. A. "Comparative Analysis of Customary Laws in Nigeria" in Osinbajo, Y., (ed.) *Integration of the African Continent Through Law*: First Ever All Africa Law Ministers' Conference Abuja, Nigeria November 27th - 29th 1989, Lagos, Federal Ministry of Justice 1990, pp. 100-115 at p. 110.

[62] Asiwaju, A. I., "Law in African Borderlands: The Lived Experience of the Yoruba Astride the Nigeria-Dahomey Border" in Mann, K., and Roberts, R., (eds.) *Law in Colonial Africa*, Portsmouth (NH), Heinemann Educational Books, & London, James Currey Ltd, 1991, 224-238

[63] *Dikoko* v. *Mokhatla* [2006 (6) SA 235 [CC] cited by Van der Merwe, C. G., "The Republic of South Africa" in du Plessis, J., de Waal, M., Zimmermann, R., and Farlan, P., *Mixed Jurisdictions Worldwide: The Third Legal Family*, 2nd ed., Cambridge, Cambridge Univ. Press, 2012., p. 95 at pp. 201

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harmonious human and social relationships "where they have been ruptured by an infraction of community norms." The implication of the Law of Defamation is that it should pursue the "re-establishment of harmony in the relationships between the parties, rather than to enlarge the hole in the defendant's pocket, something more likely to increase acrimony, push the parties apart and even cause the defendant financial ruins. In practical terms, it means that at times more should be done to facilitate an apology which could do more to restore the plaintiff's dignity than an award of damages.

The boundaries of customary law defamation are not clearly defined.[64] It is natural for claimants to base their actions on well-established principles so that they can assess the likelihood of succeeding in court.

Lawyers do not have a right of audience in Customary Courts.[65] Once a client briefs a lawyer in a defamation action, the natural inclination is for the lawyer to consider instituting an action in the English-type courts. The limit on the monetary jurisdiction of Customary Courts makes it unattractive for a claimant interested in substantial damages to institute a defamation action in these courts. Claimants who are primarily interested in monetary compensation and counsel who want adequate compensation for their efforts and trouble are not likely to approach customary courts or base their claim in the superior courts on customary law.

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[64] It is difficult to draw a line between defamation and insult in some systems of customary law.
[65] In States where legal qualification is not required for President or members of Customary courts lawyers are not usually given a right of audience: see generally S. 27(1) of the Customary Courts Law of Ogun State, Laws of Ogun State of Nigeria 2006. Contrast: Customary Court Law, Laws of Edo State of Nigeria 2005 and the Customary Court Law, Cap 41 Laws of Oyo State of Nigeria 2000

INTERNET DEFAMATION

Some Unique Issues

The Internet has created a new means of communication and this development has made defamation easier to commit and its impact more profound because of its wide reach which has enhanced almost limitless publication. The Internet is accessible to millions of people. You could be anywhere in the world and say or write (type) anything about anybody to an audience of millions. Users find a voice in a variety of Internet venues including blogs, chat rooms, personal or corporate websites, news websites, bulletin boards and so on. Matthew Collins has put it in this way:

> The Internet represents a communications revolution. It makes instantaneous global communication available cheaply to anyone with a computer and an Internet connection. It enables individuals, institutions, and companies to communicate with a potentially vast global audience. It is a medium which does not respect geographical boundaries. Concomitant with the utopian possibility of creating virtual communities, enabling aspects of identity to be explored, and heralding a new and global age of free speech and democracy, the Internet is also potentially a medium of virtually limitless international defamation.[66]

The seemingly limitless, global medium of communication through the Internet has posed unique problems for defamation

[66] Collins, M., *The Law of Defamation and the Internet* (Oxford University Press, 2001), at para. 24.02, as cited in *Barrick Gold Corporation v. Lopehandia*, 2004 CanLII 12938 (Ontario Court of Appeal.)

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law. For example, the geographic scope has created challenges in determining where the defamed person might sue and this raises conflict of laws issues. The Conflict of Laws, also known as Private International Law, according to Graveson, is that branch of law which deals with cases in which some relevant fact has a connection with another system of law on either territorial or personal grounds. A conflicts case raises a question as to the application of one's own or the appropriate alternative usually foreign law to the determination of the issue, or as to the exercise of jurisdiction by one's own or foreign courts.[67]

There is support for the view that a claimant in a defamation action may sue the publisher for damage to his/her reputation in the courts of different countries where there is damage to his reputation apart from the courts of the country where the publisher is established.[68] There have also been challenges to Internet Service providers who might inadvertently become defendants in defamation actions.

The development of the Internet has influenced globalisation, revolutionised communication, learning, business, human interaction, research and access to information. It has affected the development across the broad spectrum of the law including, but not limited to, the law of defamation.[69]

Some competing values inherent in discussions of Internet publications and the law of defamation are:

Characteristics of the Internet such as universality, anonymity, user friendliness and ease of access allow

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[67] Graveson, R. H. *Conflict of Laws: Private International Law*, 7th ed. Sweet & Maxwell, London, 1974, p. 1

[68] Clarkson, C. M. V. & Hill, J., *The Conflict of Laws*, 3rd ed., 2008, Oxford, Oxford University Press, p. 80

[69] Wotherspoon, D., & Taylor, L., *Internet Defamation & the Defence of Responsible Journalism: Protecting Professionals and Amateurs Alike?*, Fasken Martineau DuMoulin, LLP DM_VAN/900298-00007/7205834.7

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all sorts of people to voice opinions without fear of retaliation or discrimination.

The potential audience of an unrestricted website is vast and encompasses potentially every Internet user in the world - billions of people. Thus, the potential damage of a defamatory statement is enormous.

The Internet is a unique mode of communication that is resistant to our traditional methods of categorising defamation as libel or slander on the basis of the form of publication. Although statements posted on the Internet share some characteristics with more traditional communications, there are other distinguishing characteristics about them. For example, the Ontario Court of Appeal, in the recent decision of *Toronto Star Newspapers Ltd. et al.* v. *Canada*,[70] noted that the efficacy of and the ability to enforce publications bans in the context of criminal trials has been undermined by the Internet. Not only is it difficult to restrict the communication of information on the Internet, but once posted, it has a level of permanence and accessibility unique among media types.[71] On the other hand, communications posted on the Internet can also be removed leaving no trace behind.

Lidsky identified the lack of formality in Internet discourse compared to traditional written communications, noting that, "In the real world, the author is separated from her audience by both space and time, and this separation interposes a formal distance between author and audience, a distance reinforced by the conventions of written communication."[72] He further

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[70] *Toronto Star Newspapers Ltd. et al.* v. *Canada* 2009 ONCA 59 (CanLII) at p 29

[71] See also *Warman* v. *Grosvenor*, [2008] O. J. No. 4462 at para. 55.

[72] Lidsky, L. B., "Silencing John Doe: Defamation & Discourse in Cyberspace" (2000) 49 *Duke Law Journal* 855 at p. 862 cited by Wotherspoon, D., & Taylor, L.,*Internet Defamation & the Defence of Responsible Journalism: Protecting Professionals and Amateurs Alike?, op. cit.*

hypothesised that the lack of comparable formality in Internet communications is due to the priority of values such as speed and immediacy of information communication. The consequence of this prioritization affects the form, structure and content of Internet publications. This has created, according to some commentators, a sort of virtual Wild West, "a frontier society free from the conventions and constraints that limit discourse in the real world."[73] The use of hyperbole and exaggeration, statements written entirely in capital letters, the lack of grammar, poor spelling, and the use of abbreviations are all examples of acceptable and common characteristics of Internet postings.[74]

Lidsky also discussed the particular importance of protecting speech on the Internet, in that it enables a unique demography.

> The promise of the Internet is empowerment: it empowers ordinary individuals with limited financial resources to "publish" their views on matters of public concern. The Internet is therefore a powerful tool for equalizing imbalances of power by giving voice to the disenfranchised and by allowing more democratic participation in public discourse. In other words, the Internet allows ordinary John Does to participate as never before in public discourse, and hence, to shape public policy. ... [However], defendants like John Doe typically lack the resources necessary to

[73] *Ibid.*
[74] *Ibid.*

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> defend against a defamation action, much less the resources to satisfy a judgment. Thus, these Internet defamation actions threaten not only to deter the individual who issued from speaking out, but also to encourage undue self-censorship among the other John Does who frequent Internet discussion fora.[75]

The above supposition lacks evidence and it may well be wrong as many outspoken bloggers on the Internet do not appear to be deterred.

Another characteristic of Internet communication is its pervasiveness. Statements posted in cyberspace are potentially accessible to millions of people worldwide, and once they have been published, the capacity of the Internet to replicate, forward, and republish statements through its power of penetration to anyone with a computer and a connection is unparalleled. "The extraordinary capacity of the Internet to replicate almost endlessly any defamatory message lends credence to the notion that "the truth rarely catches up with a lie." "[76]

> The nature of the Internet has precipitated a variety of unique issues in the context of defamation law some of which are highlighted below:

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[75] *Ibid*; Organisations such as RAWA (Revolutionary Association of the Women of Afghanistan), which have operated under extremely dangerous
conditions for almost thirty years, can now publicise their cause to a potential worldwide audience, through their website http://www.rawa.org/. The Internet gives RAWA the opportunity to deliver their message unfiltered, raising not only their international profile, but also encouraging moral and financial support.
[76] *Ibid*.

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Jurisdiction

On the issue of jurisdiction, in the Australian case of *Dow Jones & Company Inc* v. *Gutnick*[77] the court held that regardless of their jurisdiction of origin, statements are actionable in the jurisdiction of publication and damage to reputation. The court commented that traditionally defamation occurs at the place where damage to reputation occurs. Harm occurs where and when the material is read. Jurisdiction, therefore, can be established at that location in a defamation action.

> In the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on to the computer of a person who has used a web browser to pull the material from the web server. It is where that person downloads the material that the damage to reputation may be done. Ordinarily then, that will be the place where the tort of defamation is committed.[78]

The Texas case of *Braintech, Inc*. v. *Kostiuk*[79] addressed the issue where the defendant's only connection with the jurisdiction was a passive posting on an Internet bulletin board. The court held that:

> The complainant must offer better proof that the defendant has entered Texas than the mere possibility that someone in that jurisdiction might have reached out to

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[77] *Dow Jones & Company Inc* v. *Gutnick* [2002] HCA 56 (10 December 2002).

[78] *Ibid.* at para 44. See Clarkson and Hill, *The Conflict of Laws*, *op cit*.

[79] *Braintech, Inc*. v. *Kostiuk* 1999 BCCA 169 (CanLII), leave to appeal to S.C.C. refused (2000), 182 D.L.R. (4th)vii

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> cyberspace to bring the defamatory material to a screen in Texas. It would create a crippling effect on freedom of expression if, in every jurisdiction the world over in which access to Internet could be achieved, a person who posts fair comment on a bulletin board could be hauled before the courts of each of those countries where access to this bulletin board could be obtained....The allegation of publication fails as it rests on the mere transitory, passive presence in cyberspace of the alleged defamatory material. Such a contact does not constitute a real and substantial presence.[80]

Publication

Publication is relevant to the issue of establishing jurisdiction. However, the issue of publication is also relevant to determining whether the limits of the defence of qualified privilege have been exceeded, or whether this element of defamation can be presumed.

The defence of qualified privilege cannot be relied upon where over-publication has been an issue. Where a defendant has exceeded the limits of the duty giving rise to the privilege, or where the communications were not appropriate or necessary, then the defence of qualified privilege may be defeated.[81] This has been an interesting issue in the context of the Internet because of its unique accessibility issues. Internet sites can

[80] *Ibid,* at para. 62-65.

[81] *Botiuk* v. *Toronto Free Press Publications Ltd.,* [1995] 3 SCR. 3 at 29, *per* Cory J.

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have various levels of accessibility. At one end of the spectrum, sites can allow open access: postings and comments from general members of the public with varying degrees of anonymity. At the other end of the spectrum, sites can allow restricted access, available only to specific authorised users. Other alternatives include subscription access, which requires registration to enable usage, and combination access, which restricts portions of a site to registered, subscribed, or otherwise authorized users.[82]

Republication

The issue of republication has been considered in the context of archiving. Republication is approached differently in various common law jurisdictions. In the United States, many jurisdictions have adopted legislation which imposes a "single publication rule" to discourage repeated litigation arising from the same material.[83] England and Australia have rejected this approach, specifically in the context of Internet publications.[84] The English case of *Loutchansky* v. *Times Newspapers Ltd.* addressed the issue of republication on the Internet.[85] Commenting on the balance between the social utility of archiving material, and the protection of reputations under the circumstances, the court held that, "Archive material is stale news and its publication cannot rank in importance with the dissemination of contemporary material."[86] Ultimately, to adopt a single publication rule, would necessitate a change in the Law of Defamation.

[82] *Dow Jones*, *supra* at para. 83

[83] See *Firth* v. *State of New York*, 775 NE.2d 463 (Ct. App. 2002), as cited in *Carter v. B.C. Federation of FosterParents Association*, 2005 BCCA 398 (CanLII) at para. 18.

[84]See *Loutchansky* v. *Times Newspapers Ltd. (Nos. 2-5)*, [2002] QB 783 at 813, per Lord Phillips MR (CA.), and*Dow Jones & Company Inc.* v. *Gutnick*, [2002] HCA 56

[85] *Ibid*, at para. 74.

[86] *Bahlieda* v. *Santa* (2003), 64 OR (3d) 599 (SCJ)

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Proving Defamation in the Cyber Space

Proof of defamation in the cyber space raises a number of challenges. First is that in the borderless world in which we live it raises conflict of laws issues. Knowledge of the governing requirements of principles under more than one system of law may be relevant. The law in Nigeria is similar to the position in England in this connection. This is because notwithstanding the attempt to modernise English conflict of torts laws, defamation continues to be governed by the traditional common law rule by virtue of section 13 of the Private International Law (Miscellaneous Provisions) Act 1995. The rationale for excluding defamation from the liberal web of the new choice of law rules and adopting the double actionability rule is to avoid undermining press freedom.[87] This is in spite of the criticism that the modern law of defamation has been narrower than the traditional grounds of actions which should be cognisable under the same head like insults etc.

Another challenge is the mutability of the Internet. In a situation where the object of defamation has been removed from the cyber space, except it was printed or downloaded by the third party that gained access to it, the claimant may not be able to prove his case and recover damages under the law as the evidence he is left with may now fall under the category of hearsay evidence which is generally not admissible[88] except it can be subsumed under the exception to the hearsay rule which has to do with the contemporaneity of the defamatory act with the reaction/response to it by the third party.

[87] O'Brien, J., *Conflict of Laws*, 2nd ed., London, Cavendish Publishing, 1999, p. 404.
[88] S 41 Evidence Act, 2011

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In situations where the defamatory object has not been deleted, computer generated evidence is admissible under the Evidence Act 2011 either as documentary evidence or as real evidence. In *R* v. *Spicy*[89] and *R* v. *Neville*[90] the Court of Appeal in England confirmed that computer evidence is real evidence and not documentary evidence although the Police and Criminal Evidence Act 1984 defines a document to include computer and tape recording.[91] The definition of document in Nigeria's Evidence Act Section 258(1)(d) follows after the English enactment above as it includes:

> Any device by means of which information is recorded, stored or retrievable including computer output.
>
> Real evidence has been defined in the same subsection asanything other than testimony, admissible hearsay or a document the content of which are offered as evidence of a fact at a trial, which is examined by the court as a means of proof of such fact.

However, due to the fact that electronic evidence is subject to manipulation, to be sure that the defamatory words/object did not occur as a result of a distortion of an original work, section 84(1) - (5) of the Evidence Act 2011[92] have made provisions which must be followed, as a way of laying foundation for admissibility, to the effect that the integrity of the document (against manipulation) is guaranteed.

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[89] *R* v. *Spicy* [1990] 9 Cr Appeal Rep. 186
[90] *R* v. *Neville* [1991] Cr. L. R. 288
[91] See generally, Anah, C. O., "Is the Nigerian Law of Evidence Decadent?" [2003] *Ibadan Bar Journal* Vol. 2, pp. 30-33
[92] Evidence Act, 2011

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Also, section 153(2) of the Evidence Act [93] makes it possible for the courts to presume that an electronic message sent by the originator to the addressee is the same message the originator sent. The use of the word 'may' shows that the presumption is a rebuttable one because it puts into consideration the fact that electronic documents can be manipulated.

CONCLUSION

A reform of Nigerian Law of Defamation calls for a deep reflection. This entails looking forward to ensure the law addresses the challenges of the information age. On the other hand, we must look inward to examine if the received English Law of Defamation truly addresses our deep concerns as a people and if not attempt to formulate a new Law of Defamation that will address our African values.

The laws that protect our rights of free speech and our rights to privacy and protection of reputation, which are fundamental values in our society, must change as global communication changes and develops. Professionals like newspaper publishers who publish their online version must be aware that they are subject to stringent rules perhaps at a higher degree if they host defamatory contents on their sites. Amateur publishers like bloggers who use social network sites must acknowledge that their newfound opportunity to publish almost without censorship also calls for responsibility in the light of the legal consequences of their action. With the new Evidence Act 2011, even though the change is not fast taking place in Nigeria as it is in the developed countries, at least one is comfortable with the fact that if cases involving defamation in the cyber

[93] *Ibid.*

space should occur, injured persons will have a right to redress, as regards the admissibility of the evidence involved, in our courts. The courts in Nigeria must bear in mind the views expressed by the old Court of Criminal Appeal in *R* v. *Masqud Alli; R* v. *Asiq Hussain*[94] that with regard to admissibility of a tape recording:

> ...it does appear in this court wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the voices recorded properly identified; provided also that the evidence is relevant and otherwise admissible.

The observation of the Media Foundation for West Africa on the law of Ghana is largely true of Nigeria. The Foundation in its view on the Defamation Bill 2006 in Ghana observed: "Historically, it is to be noted that defamation in Ghana has been governed by a system of duality: customary law defamation and English common law defamation."[95] The Foundation noted: "To the extent therefore that the Bill seeks to unify these two strands of defamation in our jurisprudence it is to be welcome, provided the reform is consistent with the provisions of the Constitution and promote free expression." [96]

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[94] *R* v. *Masqud Alli; R* v. *Asiq Hussain* [1965] 2 All ER 464 at 469

[95] Media Foundation for West Africa, *op cit*, p. 10.

[96] That objective of unifying the two strands of law is consistent with the definition of the common law of Ghana in the Constitution of the Republic of Ghana 1992. Article 11(2) defines the common law of Ghana to "comprise the rules of law generally known as the common law, the rules generally known as the doctrine of equity and the rules of customary law including those determined by the Superior Court of Judicature." The Defamation Bill incorporates the customary law grievance of injury to feelings arising out of insults and vituperative words uttered in the heat of a quarrel. This is ordinarily not available at common law. The Media Foundation had expressed its reservation on inclusion of the customary wrong of insults as follows: "While it may be argued that this satisfies a felt need in the culture of large sections of Ghanaian society, we are not that sure that it is a matter that public policy should encourage in the form of legislation. It is likely to encourage frivolous suits directed at protecting injured feelings caused by insults in the course of neighbourhood quarrels. We are sure that our courts have more than enough serious matter to deal with without this addition. What is more, this may excite long-harboured resentment or feuds among members of communities." Media Foundation for West Africa, *op cit*, p. 23.

Both the common law (as supplemented by statutory provisions) and customary law regulate defamation in most states of the Federation. Nigeria must attempt to unify the two strands of defamation also. The Nigerian Law Reform Commission[97] can provide leadership in this area in view of the fact that the National Assembly and the 36 Houses of Assembly may legislate on defamation. This is one area where the enactment of a Model law proposed by the Commission and enacted by the National Assembly that the States could subsequently adopt, and adapt if need be, would be desirable.

[97] The Nigerian Law Reform Commission is established under Cap N118 LFN 2004.

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