

Freedom of Speech, Human Reputation and Human Rights under Scotland and Nigeria Legal Systems

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ABSTRACT

This paper examines essential and fundamental crucible of war between freedom of speech and human reputation in the overall effect on established human rights law dealing with the concept of defamation both in Scotland and Nigeria legal systems. Plausible areas of conflicts as well as agreements in contextual interpretation and application were identified and discussed. Practicable solutions were duly recommended for the purpose of unification of the law of defamation, with due consideration given to the divergent nature of these jurisdictions (Scotland and Nigeria), when considering the global best practice. It is concluded that defamation law in Nigeria need to be codified and backed up by an act of parliament through well thought out legislation separately from criminal law. The court must provide the balance needed to distill measurable differences between freedom of speech and human reputation under the fulcrum of established human rights law. It was also concluded that both Scotland and Nigeria Law Reform Commission should as a matter of urgency conduct reforms in defamation law to unify the concept of threshold and legal personalities involved in litigation and adjudication in defamation in courts of competent jurisdictions. The paper will be useful for policy formulation, knowledge sharing and decision-making.

Keywords: *Freedom of speech, human reputation, human rights, defamation*

INTRODUCTION

The legal issue of serious consideration lies in the crucibles of war between freedom of speech, respect for human reputation and its implication on human rights. Where there arose a seemingly defamatory situation and for public interest, should there be a sacrifice in favour of human reputation in society and against preference for human rights. The fundamental crucible is in balancing the container between freedom of speech and human reputation. Must human reputation be crucified on the altar of freedom of speech for the law to take its proper place or vis-a-vis? A crucible is a container where two or more substances interact and are subjected to severe trials

leading to the creation of something new or alteration of the initial content¹ of each of the substance in reaction. This is liken to the reaction and interaction between freedom of speech and human reputation under the defamation law – the crucible, and the consequences on established human rights law either to melt or lose its content from judge's interpretation of the law base on the prevailing circumstances.

However, even where such incidences of human rights appear to be compromised, there is always a question of who takes responsibility in the context of freedom of speech or human reputation in the face of blame game and denial in complex legal interpretation and divergent societal demands both in Scotland and in Nigeria jurisprudence. Notwithstanding the enormity of the concept under consideration, it is essential to establish that both Scotland and Nigeria legal systems are products of common law of the British colonial empire and by extension, the modern-day United Kingdom. Under the common law, the Law Commissions² is expected to work out processes of law reform to deepen jurisprudence in areas of complicity and uncertainty in case laws and statutes in order to provide better understanding, clarity and interpretation without ambiguity. One of such areas is in seeking to establish the law of defamation and malicious publication under Delict³ or Torts⁴ which apparent aim is to frozen the heighten protection of human reputation against freedom of information, clarify conflicting judge's decision by enacting statutes that would make the law to be easily understood from the legislative perspective, strengthen existing legal defences, raise the threshold for defamation action and close the floodgates of litigations.

Interestingly, the dual legal systems under review make the concept of uniformity of the law, in most, cases complex and practically unachievable. Consequently, this article attempts a comparative analysis of the the law of defamation under the Scotland and Nigerian legal systems

Conceptual Review

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¹. 'Meaning of Crucibles' <www.google/search/oxford.language> accessed 20 January 2021.

². 'Scottish Law Commission' <<http://www.scotlawcom.gov.uk>> accessed 20 January 2021.

³. Under the Scott Legal Regime.

⁴. Under the Nigerian Legal Regime.

There is the tall need to give clarity in meaning and application to some legal glossary of terms germane to the topic under review. Accordingly, terms such as “pursuer or claimant,” “defendant or appellant” under both legal systems connote the same meaning respectively. Libel is defamation in visible permanent printable or recorded form with the defamed as the target and connotes the same meaning in both jurisdictions. Slander is statement or comment made in transitory form or simply stated as by words but could be interpreted as libel for claims of damage to apply when it imputes crime of serious harm⁵ to the defamed. Historically, defamation law is a product of common law, with some element of criminal law inherent in applicable interpretation, derived from customs as well as case laws developed in courts by judges. In Scot’s law, defamation is part of the law of delict, while it is received into the law of Tort in Nigeria. While defamation has been codified in several statutes in Scotland, for instance Defamation Act,⁶ the Nigerian criminal defamation is codified in the Criminal Code Act⁷ and the Penal Code Act.⁸ This is fundamental to the comparative study being examined in this article because it is often stated that a crime must be properly defined, and its penalties prescribed by a written law without ambiguity.⁹ Where the law is codified, its applicability to the circumstance is important to the courts globally, and in the two jurisdictions under review.

Defamation Law under the Nigerian Jurisprudence

Defamation law in Nigeria is a product of common law, derived from customs and case laws developed by the courts. Defamation is a branch of Torts law and in most cases, considered as part of criminal law codified in the Criminal Code Act¹⁰ and Penal Code Act¹¹ respectively. The challenge in criminal defamation law in Nigeria is in the diversity in application with diverse interpretation. For instance, the Criminal Code Act, states that it is immaterial if at the time of publication of the defamatory

⁵. E. Malemi, *Law of Torts* (Princeton Publishing Co Ltd, 2008) 23. The meanings of both words are the same under the Scott and Nigerian Legal Systems respectively.

⁶. 1957, 1966 and 2013 respectively.

⁷. CCA Cap 38 LFN 2004.

⁸. PCA Cap 89 LFN 2004.

⁹. Constitution of the Federal Republic of Nigeria 1999 (Herein CFRN 1999), s. 36(12).

¹⁰. CCA (n.7); *Nsirim v Nsirim* (1990) 3 NWLR (Pt.138) 285; *Mamman v Salaudeen* (2006) 135 LRCN 859.

¹¹. PCA (n.8).

matter, the defamed is living or dead; whereas, in the penal code states that it might amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to hurt the feelings of the family or estate or near relatives as applicable in the north.¹² It therefore becomes necessary to unify the law of defamation in Nigeria so that the North will have the same practice and principles as the South.

Furtherance to the assertion above is the fundamental right of freedom of expression, which the law of defamation appears to becloud. The African Charter on Human and Peoples' Right¹³ provides for the right to freedom of expression. It provides for the right to receive information and the right to express and disseminate opinions within the law. The Constitution of the Federal Republic of Nigeria¹⁴ protects the right to expression. It provides that a person can own, establish and operate any medium for the dissemination of information, ideas and opinions, though even although the right is not absolute. This was adopted in the case of *Okogie v Attorney General Lagos*.¹⁵ A person has the right to hold their perspectives on any matter regardless of who he interacts with. Article 9 of the Charter provides that such expression or dissemination of information must be within the provision of the extant law, which the Nigerian Constitution in section helped to clarify, stating that the right of freedom of expression can be derogated from in the protection of the right of another – a major crucible of war in defamation law.

Interestingly, the court appears to favour the fundamental rights of persons against the principle of protection of human reputation in defamation. For instance, in *Olawoyin v Attorney General of Northern Nigeria*,¹⁶ it was held that courts are appointed to watch over the fundamental rights secured to the people by the Nigerian Constitution, and to guard against any infringement. The Nigerian Constitution equally creates for access to courts when there seems to be infringement on the right of a person.¹⁷ Moreover, in the protection of the right to expression versus the protection of a person's reputation before the right-thinking members of society, the court usually gives preference to the

¹². CCA (n.7), s. 373.

¹³. African Charter on Human and People's Right, 1981, art. 9.

¹⁴. CFRN (n.9) 1999, s.39 (2).

¹⁵. (1981) 2 NCLR 625 HC.

¹⁶. Case No; SC. 290/1960

¹⁷. CFRN 1999 (n.9), s. 46.

fundamental rights, hence the provision of defence of fair comment. This aspect of the law needs to be balanced in the light of contextual conflict between defamation and human right. However, section 45 of the same Constitution provides for derogation for public morality¹⁸ which implies that the conduct of a person must be seen to conform to ethical and societal standards.

Flowing from the above, the Nigerian Law Reform Commission has the enabling power to carry out law reforms in Nigeria. For the purpose of synchronizing the law with elements of globalization, the three years limitation period for action for defamation need to be reviewed. For instance, the Law Reform (Torts) Law¹⁹ provides for three years from the time the pursuer becomes aware or should have become aware of the torts (delict) under the Act. Again, when a public officer has defamed another, the defamed can only bring an action within three months from the date of the act, which include publication or letter to the defamed properly communicated.²⁰ It implies then that the claim for defamation must be instituted within the time allowed by statute of limitations in Nigeria in other not to be statute barred.

Scot Law of Defamation Examined

The Scots' Court clarifies this position in the case of *Tamiz v Google Inc*²¹ in favour of the publisher based on public interest. Since the right of expression is not absolute, unguided statements and comments are defamatory and the pursuer must seek for claims of damage within the Scot jurisdiction. Defamatory statement or comment should be treated as reasonably foreseeable dents on the pursuer. Whether the defender's intent was aggravated by issues of internet communication and fraud or not, the law should help to make the defender take responsibility and be accountable. This is crucial to the expected reform process on defamation law in the growing era of social media and internet transaction globally.

Consequent upon the need for law reform, it is expedient that such reform should aim at bringing out essential elements that are substantially linked with causes of serious

¹⁸. (n.9), s. 45(1).

¹⁹. LRTL, 2004, s. 24.

²⁰. Public Officers Protection Act P41 LFN 2004, s. 2(a).

²¹. *Tamiz v Google*; [2013] EWCA Civ 68; [2013] 1 W.L.R 2151, [2013] E.M.L.R 14.

harm to human reputation through the exercise of caution, armed with the knowledge that freedom of speech is not absolute. The individual or group must consciously act with caution not to negate factually public acceptable standards²² because freedom of speech exists in human society to “communicate statements” when and where appropriate and not to the detriment of any party. For instance, in the case of *Maasie v McCaig*,²³ it was held that where facts, public interest and comments matter in society, the weight or substance of the defamatory comment will be examined in detail for the court to give a verdict.

Looking at the definition of defamation as stated in *McManus*,²⁴ the two-way approach might be necessary to strike a balance in Scot’s jurisprudence on the subject matter for global acceptance. Such details are in the elements of defamation which include: the statement must be about the pursuer, the statement must be defamatory, the statement must be false, there has been communication of words or something else, and the communication of the statement must have been malicious. The common law position as it where, seems to have fundamental and detailed definition on defamation in the case of *Sim v Stretch*²⁵ when Lord Atkins posited that defamation means lowering the reputation of the pursuer in the estimation of right-thinking member of society. It is a matter of interpretation and largely subjective. However, defamation law itself is derived from certain sources in the United Kingdom, which Scotland is a functional part. For instance, the *Defamation Act*²⁶ was largely repealed by the *Defamation Act*²⁷ that protects secondary publishers and privileges to preclude the defenders from defamatory libel in Scotland. The *Defamatory Act*²⁸ that includes rules which extend qualified privilege on scientific and academic defamatory activities is limited in scope and application in Scotland. The Scottish Parliament essentially invoked the use of *Legislative Consent Motion*²⁹ to limit the scope of application of the 2013 Act on the ground that Scotland has robust law on defamation and tourism libel cases do not exist in Scotland.

²². *Munro v Brown*; 2011 S.L.T 947. [2011] CSOH 117, 2011 Rep. L.R 103.

²³. *Maasie v McCaig* 2013 SC 343, 2013 S.L.T 373, 2013 CSIH 14.

²⁴. M. Francis, *Delict Essential*, (3rd edn., Edinburgh University Press 2017) 73–76.

²⁵. *Sim v Stretch* (1936) 2 All.E.R 1237; (1936) 7 WLUK 52.

²⁶. Defamation Act 1952.

²⁷. Defamation Act 1966.

²⁸. Defamation Act 2013.

²⁹. In 2012; Angus Evans and Abigail Bremmer, 2017: Defamation and Malicious Publication (Scotland) Bill.

The *European Union E-commerce Directives*³⁰ as implemented in the UK provides for defences and protects internet intermediaries especially hosts and transmitters of third-party contents. This was necessary to sustain emerging business of social media and website development in the United Kingdom and Europe. Again, the *European Convention on Human Rights*³¹ affected defamation actions in courts, especially the aspect that relates to Articles 8 and 10 of the convention laws. These controversies need reform to harmonize defamation law in the United Kingdom in general and Scotland in particular.

Accordingly, there are foundational changes to existing laws on defamation that the *Defamation and Malicious Publication (Scotland) Bill*³² seeks to address and as proposed viz: statutory definition based on common law test; statement need to be communicated to third party; serious harm to the reputation need proof; action for defamation can start from the first publication; the limitation period is one year from the date of first publication; complete defence is in not being the author, editor or publisher of the statement; and the remedies are introduced to harmonize the position of the law as it is in England and Wales.

Flowing from the above, the Bill is necessary to address vital harmony in several common law statutes hitherto which were not in place in the past. This is predicated on the *Scotland Report on Defamation*,³³ which at the circumstance is fundamental to address crucial issues associated with societal dynamics such as online publication and most recently, the effect of Corona Virus, (COVID-19) pandemic, the new normal in modern society which has affected the mode of communication globally.

The *European Convention on Human Rights*,³⁴ and the *Scot's Human Rights Act*,³⁵ stipulated the rights to respect to private life and property³⁶ and the right to freedom of expression.³⁷ These two articles are in serious crucible of war in delict (defamation)

³⁰. 'European Union E-Commerce Directives' < [www.https://www.scotlawcom.gov.uk](https://www.scotlawcom.gov.uk)> accessed 19 December 2020.

³¹. European Convention on Human Rights, 1988.

³². DAMPB, 2019.

³³. Scotland Report on Defamation, 2017.

³⁴. 1998.

³⁵. 1998.

³⁶. *Ibid.*, art. 8.

³⁷. *Ibid.*, art. 10.

–the essential reason for the reform. The convention human right laws and other laws that protect the society from criminality and public absurd will be strengthened through the defamation amendment law. Hence, either a legal or natural personality, operational or behavioral trend should follow actions or omissions that conform to societal standards. Such actions and omissions are in checks by those empowered by law to make statements such as journalists, publishers, the parliamentarians and government officials. They are in need of protection from defamatory actions to function in the interest of the public.

Another aspect of the law of defamation that needs reform is that which seek to harmonize criminal law with delict. For instance, revenge is a criminal offence in the criminal law jurisprudence because the principle of “*actus reus*” and “*men’s rea*” must be tested and examined to not violate the principle of assault and self defence. However, in the delictual jurisprudence, fair comment is considered as a complete defence as decided in *Curran v Scottish Daily Record Sunday Mail Ltd.*³⁸ Both physical and emotional or psychiatric injuries are harmful to the legal or natural personality and should be treated equally in law. When B retaliates to what A had said as a way of replying to unfair comments that is done consciously and should be seen to be verbal retaliation and criminal in nature. It should attract commensurate action for damages and compensation in law.

The law should not protect those who would hide under the pretension of error and misunderstanding to make defamatory statements or comments that could harm the pursuer’s reputation. This is so because what had been communicated is hardly commonly retractable from the larger society. Accordingly, the intention clause should be treated as irrelevant insofar as the comment or statement is satisfied as defamatory as demonstrated in the case of *Waterson v Lloyd*³⁹ which centred on scandal without intention.

Commenting on the need to reform defamation law, Graham Horsman stated that “defamation action is not an area of law litigated with great vigour in the Scottish Court.” However, he referred to the case of *Heather Hiram Safe & Sound Hound v Alana Mulle & Pilrig Paws*⁴⁰ that was awarded three thousand pounds in damage to

³⁸. 2012 S.L.T 359, 2012 Rep. L R 30, 2012 C.L.Y 3954.

³⁹. (2013) EWCA CIV 136, 2013 E.M.L.R 17; (2013) 2 WLUK 758.

⁴⁰. 2020 SC Edin.23, 2020 S.L.T (Sh.Ct) 135.

reflect the willingness of members of the public and business owners to seek to protect the reputation of both legal and natural personality in society. The implication of the reform process is to clarify the law and improve its accessibility which currently, is spread across common law and several pieces of legislation, thus making access to jurisprudence incoherent, remedies and limitations on defamation actions inappropriate.

Further concern on the need to have third party communication is apt and concise to avoid situations of frame-up and denials under cross examination. Therefore, the communication to third party should be upheld as pivotal component of the law of defamation. The story of “one man seeing a snake that is longer than ever imagined” could be avoided if the third-party witness is allowed. The case of *Reynolds v Times Newspapers*⁴¹ is quite instructive here. A single communication will destroy evidence in Reynolds’ defence. The internet service providers must be protected.⁴² This will reduce the defamation cycle and establish as illegitimate, the tendency to spread falsehood and irretrievable damage to reputation where applicable. This will be contrary to the current position of the Scot’s law of defamation that stipulates that “defamation can arise if an imputation is communicated merely to the person who is the subject of it, in other words, if it is seen, read or heard only by its subject and no one else”. This is the position as contained in the Scottish Law Commission Discussion paper on Defamation.⁴³

It is a common knowledge that cases of defamation should involve mostly solicitors and where necessary, advocates in lower courts. This is quite discriminatory in this area of jurisprudence where reputation and freedom are in the rings of boxing regularly to wear a crown. Defamation cases in my opinion should start at the lower courts and proceed to the highest court in the land, the Supreme Court where applicable. Both the solicitors and the advocates should be involved, and the cost of litigation borne by the litigants. It is not cheap, and this area of the law is not substandard either. Legal practitioners in the area of delict should have to develop the

⁴¹. 2001 AC 127, [1999] 3 W.L.R 1010, 2000 E.M.L.R 1.

⁴². K. Burden; ‘Damned for Defamation: Liability for ISP’s for Third Party Postings to Newsgroups’(1999)(15(4)
Computer Law and Security Report, 260 -262.

⁴³. 2016, Para 3.2.

law from the lower courts to the highest court through gradual but incremental improvement in the legal history for the growth of society. All legal charges applicable in criminal and constitutional law cases in Scotland should be made to apply under the circumstances.

Furthermore, the reform is expedient in view of the fact that Scotland need to have definite defamation law on serious harm threshold. The position of the faculty of advocates against the statutory harm test which introduce the serious harm threshold might constitute serious legal and administrative problems in the future. Civil society awareness is increasing, volume of e-commerce is on daily rise, telemedicine has taking roots in society and the COVID-19 pandemic debacle has reduced most activities to online communication and transaction and so on. There will come a time of upsurge litigation of irrelevant claims that might resurface in most courts. The only way to prevent or at best minimize it is to have a threshold to dispose of trivial defamation cases and reduce the burden of “unwelcomed volume of cases of dubious merit.” The question of “*Why so serious?*” posted by Thomas D.C. Bennet⁴⁴ on the subject matter on threshold of serious harm in the 2013 Act is imperative.

To deepen the principle of threshold, it might be expedient to give prescription and limitation clause to the intended reform on defamation law. The provision in the *Prescription and Limitation (Scotland) Act*,⁴⁵ stipulates that the pursuer has 20 years and 3 years respectively⁴⁶ following the period that the pursuer is reasonably made to be aware of the loss.⁴⁷ The loss must be seen to have been caused by an identifiable person. Besides, action for defamation must exclude a deceased person. The dead cannot talk nor make statement and, even though such statement or comment was made by the deceased, the defamation action ends with the deceased.

⁴⁴. T D.C Bennet; *Why So Serious? Lachaux and The Threshold of Serious Harm; Defamation Act 2013*, s. 1;

Journal of Media Law, J.M.L 2018, 10(1) 1 -16.

⁴⁵. Prescription and Limitation Act, 1973, s.17.

⁴⁶. *Ibid.*, s. 17.

⁴⁷. *David Morrison & Co Ltd & Gael Home Interior v ICL Plastics Ltd* 2014 UKSC 48, 2014 S.L.T 791, 2014 S.C.L.R 711.

A Comparative Analysis

Interestingly, defamation law either in Scotland or Nigeria has fundamental similarities in the elements that characterize uniquely, the jurisprudence in common law. These elements include that defamatory statement or comment must be seen to be defamatory and directed at the pursuer (defendant); must be false and maliciously communicated to cause serious harm to the reputation of the pursuer. It is also expected that claim of defamation must be proven by the pursuer within an acceptable jurisdiction while the defendant is under obligation to defend same before a competent court. Defamation law in each jurisdiction is a common law developed and expounded by judge's decision overtime. In deciding cases of defamation, the court will usually consider public interest over and above individual reputation either in Scotland or in Nigeria. Reform of defamation law must go through the law commission and enacted by an Act of parliament for it to take effect. The application of the human rights law in preference to defamation or reputation is fundamental regional interpretation similar in both jurisdictions as seen in European Convention on Human Rights⁴⁸ and the African Charter on Human and Peoples' Rights.⁴⁹ Both Scotland and Nigeria uphold the principle that defamatory statement must be false to the extent of inferring malice. This was the position of Kudirat Kekere-Ekun JSC in *Mainstreet Bank Ltd & Anor v Binna*⁵⁰ with similar verdict in *Halsey v Brotherhood*.⁵¹ Malice must be seen as a statement made in want of *bona fide* in defamation claims.

On the other hand, Scotland defamation laws are clearly codified and established in Acts of parliament namely: Defamation Acts⁵² contrary to the Nigeria scenario where defamation law is not clearly and separately codified except in the Criminal Code Act⁵³ and the Penal Code Act.⁵⁴ This situation makes interpretation by judges to be subjective and highly dissenting in most cases. Secondly, e-commerce trade laws that protect internet publications and online transactions are robust and well developed in Scotland than in Nigeria. This aspect of the Nigerian jurisprudence needs urgent reform to enable businesses to comply with global best practices and create the right

⁴⁸. (n.31).

⁴⁹. (n.14).

⁵⁰. 2016.

⁵¹. (1881) 19 CH D 386 CA.

⁵². (n.26); (n.27); and (n.28) respectively.

⁵³. (n.7).

⁵⁴. (n.8).

environment for smart-tech development. Thirdly, Scot's law upholds and stipulates that action for defamation could be initiated against a defender if an imputation is communicated directly to the defamed, whereas in the Nigerian legal system, defamation case can only be established upon a third party communication⁵⁵ with evidence adduced, which help to reduce the tendency to spread falsehood and endless litigation. Fourthly, Scotland upholds that defamation claim threshold is one year from the time the defamed is aware or made to be aware of the defamatory statement or comment but, in Nigeria, the threshold period is three years as enshrined in the Law Reform (Torts) Law⁵⁶ of Nigeria and decided in *Kennaway v Thompson*.⁵⁷ However, the two jurisdictions uphold three months limitation period for public officers.

CONCLUSION AND RECOMMENDATIONS

This article discussed the concept of defamation in the light of the triplet concepts of freedom of speech, human reputation and human rights. In the light of that discourse, it is foundational to have clear definition of defamation that is devoid of subjective interpretation. It is also imperative for the reform process to reduce the crucibles of war between freedom of speech and the exercise of caution on human reputation, and the conflicting interpretation that might ensued from the human rights law. The courts therefore have an important role to play in ensuring that there exists a balance in the conflict that is visibly foreseeable between freedom of speech and human reputation and the overall implication on human rights law. Another conflict is between revenge in criminal law and fair comments in delict (torts) law, both of which can inflict injury on the natural or legal personality, and demand urgent needs to be clarified and harmonized. There is equally the need to harmonize the law with the intent to ensure compliance with global interpretation on principles and applications. The effect of COVID-9 and the consequences of increased online transaction and communication would necessitate the need for reform.

All courts of competent jurisdictions, solicitors and advocates should entertain cases of and be involved in the administration of justice on matters of defamation in Scotland, Nigeria and other parts of the World. There shouldn't be a discriminatory

⁵⁵. *Iwueke v IBC* 17 NWLR (Pt 955), 449.

⁵⁶. (n.19), s. 24.

⁵⁷. 1980 3 All ER 329.

approach to the types of solicitors, advocates or judges and lower courts to entertain cases of defamation. Defamation is such a cardinal aspect of law that has to do with human reputation, human rights and fundamental freedom, and should be seen to be at the nerve center of human existence. Specialized lawyers should be encouraged to take defamation as core specialties such as criminal or constitutional lawyers. However, every trained and certified lawyer should be seen as competent to adjudicate, solicit and or advocate on defamatory cases in any court of competent jurisdiction both in Scotland and in Nigeria. Defamation is for the living and should be seen to apply not to the dead with a threshold prescription and limitation period of 20 years and 1year respectively. Defamation should gain recognition and litigation with vigour both in Scotland and Nigeria to protect and ensure compliance with fundamental human rights and dignity of the citizens.