

**BALANCING FREEDOM OF EXPRESSION AND THE RIGHT TO
REPUTATION UNDER THE LAWS OF MALAWI**

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DECLARATION

I, **ANASTANZIO ALIBERITO SITOLO**, do hereby declare that this research project is my original work and has not been submitted to any institution for the award of a diploma, degree or post-graduate qualification.

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This research project has been submitted with my knowledge and approval as the University Supervisor.

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DEDICATION

This work is dedicated to my late beloved parents, Aliberito and Elena Sitolo, who brought me up and laid the foundation for my education.

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LIST OF ABBREVIATIONS

AG	Attorney General
CSOs	Civil Society Organisations
DPP	Democratic Progressive Party
KTN	Kenya Television Network
MACRA	Malawi Communications Regulatory Authority
MBC	Malawi Broadcasting Corporation
MCP	Malawi Congress Party
MISA	Media Institute of Southern Africa
MWHC	Malawi High Court
NDA	National Democratic Alliance
NTV	National Television
PP	People's Party
SADC	Southern African Development Community
TV	Television
TVM	Television Malawi
UDF	United Democratic Front
UDHR	Universal Declaration of Human Rights
UN	United Nations
USA	United States of America
ZBC	Zodiak Broadcasting Corporation

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ABSTRACT

Free speech and reputation occasionally come into conflict which requires balancing. Although the 1994 Malawi Constitution has strong provisions on free speech, nevertheless it does not have a provision on reputation or a specific limitation clause. At the same time, although the Constitution promotes free speech, there are several statutory provisions in Malawi which are not in accord with the constitutional provisions on free speech and unjustifiably limit free speech. This research argues that the lack of provision on the right to reputation and a specific limitation clause to free speech in the Constitution of Malawi 1994 is contributing to the increase in defamation cases in Malawi. The research further argues that continued existence of statutory provisions which are not in accord with free speech provisions in the 1994 Malawi Constitution infringes free speech in Malawi. To arrive at the assertions above, the study has applied mixed methods comprising doctrinal research methodology, case studies of Malawi laws and qualitative methodology. The analysis of international, regional and Malawi laws shows that free speech is sometimes limited to safeguard other societal values and other people's rights including reputation. Free speech is provided for in the laws as a conventional right but reputation is not. This fails to protect free speech and reputation equally. Further, the analysis of Malawi laws also shows that there are various statutory provisions which are not in accord with constitutional provisions on free speech and are used by Governments of Malawi to infringe free speech. Therefore, the research investigates how to balance the laws on free speech and reputation in Malawi.

Key words: freedom of expression, free speech, reputation, defamation

CHAPTER ONE

INTRODUCTION

1.0 Background to the Study

Free speech is considered a fundamental right for the success of any democracy in the world.¹ The right to free speech also fosters the realisation of other liberties and rights.² Considering its relevance, freedom of speech is guaranteed by international³ and various domestic laws. Despite its importance, most human rights instruments restrict free speech to protect other societal values or rights.⁴

Malawi currently enjoys free speech as enshrined in the 1994 Malawi Constitution.⁵ Prior to the introduction of a multi-party democracy in 1993, freedom of expression was suppressed by the colonial Government and the post independence first President, Dr Hastings Kamuzu Banda. The new Constitution which was adopted in 1966 under Kamuzu Banda did not contain a bill of rights,⁶ which formed the basis of human rights violations. Kamuzu Banda ruled the country with an iron fist and had his opponents arrested, exiled or even killed.⁷ He successfully imposed on Malawians a culture of silence⁸ so that his human rights abuses could not be criticized. During his reign, telephones were tapped and mail opened to get the people who were against him. The Malawi Broadcasting Corporation (MBC) was the only radio in Malawi and was tightly controlled by the State.⁹ Government further controlled the press tightly.¹⁰ During Banda's presidency, Malawi had no private radio station, newspaper or a television station.

¹ United Nations General Assembly, Resolution 59 (1), 14 December 1946; Alexander Meiklejohn, *Free Speech and its Relation to Self-government* (1948), reprinted in A Meiklejohn, *Political Freedom: The Constitution and Protection of the People* (1960).

² <http://www.article19.org/pages/en/freedom-of-expression.html> (accessed on 10th August 2018).

³ Universal Declaration of Human Rights 1948, art 19; African Charter on Human and Peoples' Rights 1981, art 13; European Convention on Human Rights 1950, art 10; American Convention on Human Rights 1978, art 9; Arab Charter on Human Rights 2004, art 32.

⁴ International Covenant on Civil and Political Rights 1948, art 19 (3); Universal Declaration of Human Rights 1948, art 12.

⁵ Constitution of Malawi 1994, s 35.

⁶ Msaiwale Chigawa, *The Fundamental Values of the Republic of Malawi Constitution of 1994* (Faculty of Law, University of Malawi 2006) 1-10.

⁷ Malawians such as Kanyama Chiume went into exile; Dr Attati Mpakati was killed; Chakwamba was arrested and spent life in prison for more than 20 years.

⁸ Africa Watch, *Where Silence Rules: The Suppression of Dissent in Malawi* (New York : Africa Watch, October 1990).

⁹ Cammack, "At the Crossroads: Freedom of Expression in Malawi," *Malawi Election Media Monitoring Project* (1999)11.

¹⁰ *ibid.*

Banda's human rights abuses necessitated calls for change of Government, which occurred in 1993 when Malawians had a referendum and overwhelmingly chose a democracy of many parties. The subsequent general elections in 1994 saw Kamuzu Banda lose the presidency to Bakili Muluzi, a former minister in Banda's Government. The choice of the multi-party democracy resulted in law reform including adopting a new Constitution in 1994. The section providing for life presidency for Banda was removed.¹¹ Controversial Acts of Parliament were repealed, namely, the Decency in Dress Act 1973 and the Forfeiture Act 1966. The section of the Penal Code which banned Jehovah's Witness Sect was amended.¹²

The emergency of the democratic dispensation and the presence of a new constitution brought a new era of free speech in Malawi. The 1994 Malawi Constitution contains a comprehensive Bill of Rights including free speech.¹³ Since 1994, Malawi has seen the emergence of numerous television stations, radio stations, newspapers and magazines. More civil rights groups have appeared to promote liberties and rights contained in the Constitution.

However, the new era of free speech in Malawi has led to the unprecedented increase of defamation in Malawi.¹⁴ The Constitution provides for free speech but has no specific clause to limit the same; nor does it mention reputation as a conventional right or legitimate limiting factor to free speech. Further, despite free speech provisions in the Constitution, the country has not amended various statutes which were made in colonial era times and during the one-party State of Hastings Kamuzu Banda which continue to suppress free speech. This research therefore seeks to balance the laws on free speech and reputation in Malawi.

1.1 Statement of the Problem

Although the 1994 Malawi Constitution has strong provisions on free speech, it does not have a provision on reputation or a specific limitation clause, which might be leading to the increase of defamation cases in the country. The Constitution promotes free speech but there are

¹¹ Msaiwale Chigawa, *The Fundamental Values of the Republic of Malawi Constitution of 1994* (Faculty of Law, University of Malawi 2006) 10.

¹² Penal Code 1929, s. 70 (2)(ii).

¹³ Constitution of Malawi 1994, s 35.

¹⁴ See Marco Namwawa, "The Rise of Defamation Cases in Malawi Media Industry and Ways of Avoiding Defamation" (Friday, 16th September 2016), available at: <http://mmnwawawa.blogspot.com/2016/09/the-rise-of-defamation-cases-in-malawi.html> (accessed on 10th August 2018).

several statutory provisions in Malawi which are not in accord with the constitutional provisions on free speech and unjustifiably limit free speech.

1.2 Hypothesis

The research argues that the lack of provision on the right to reputation and a specific limitation clause to free speech in the Constitution of Malawi 1994 is contributing to the abuse of free speech and increase in defamation cases. If reputation is provided for in the Constitution as a conventional right and a limiting factor to free speech, this may help reduce defamation cases. Further, the research also argues that the continued existence of statutory provisions which are not in accord with free speech provisions in the Constitution suppresses free expression in Malawi. Thus, amending such statutory provisions will help reduce infringement of free speech.

1.3 Objectives of the Research

The study has the following general objectives:

1. To bring a balance between reputation and free speech in the laws of Malawi through amendments or repeal of some sections of the law.
2. To reduce defamation cases and violations of free speech in Malawi.
3. To educate the public in Malawi to enjoy free expression responsibly.

The specific objectives of the research are:

1. To examine the legal regime regulating free expression and reputation in Malawi.
2. To analyse how the courts of Malawi interpret free speech and reputation.
3. To find out the extent of the abuse and violation of free speech in Malawi.
4. To make recommendations on how to balance free speech and reputation under the laws of Malawi.

1.4 Research Questions

The following are the research questions that this research paper seeks to answer:

1. Which laws regulate free speech and reputation in Malawi?
2. How do Malawi courts interpret free speech and reputation?
3. To what extent is freedom of expression abused and violated in Malawi?
4. Which measures can be taken to balance free speech and reputation under the laws of Malawi?

1.5 Justification of the Study

This research is important because it seeks to balance free speech and reputation in Malawi. Currently, Malawi Constitution provides for free speech but not reputation as a conventional right. The research will help to campaign for a constitutional provision on the right to reputation. The study will also advocate for amendment of statutes which unjustifiably limit free speech.

The study will benefit many people in Malawi. It will be an eye opener to Malawi's legislative body to begin thinking of amending the Constitution to accommodate reputation as a conventional right because it is equally important. It will also help Parliament to consider putting a specific limitation clause containing legitimate interests to limit free speech. Further, the research will help the legislature to consider amending sections of the statutes which unjustifiably violate free speech. The study is also significant for Malawi courts because it will facilitate the efforts of the courts to balance the conflict between reputation and free speech. Further, it will help media practitioners to reflect on whether they practice professionalism.

Moreover, the research will bring awareness to religious leaders who are victims of defamatory statements by the media to know the law relating to defamation and assert their right to reputation by seeking remedies in the court of law. It will also be important for political leaders in the country who are also often victims of defamation by fellow political competitors. The research will also be helpful to business and professional people who suffer defamation and lose their jobs or business to challenge such abuse of freedom of expression in the courts.

1.6 Theoretical Framework

This research is hinged on four theories, namely, natural law, libertarianism, and positivism and rights theories (interest and will theories). The theory of natural law was postulated by Sophocles and Aristotle and was later expounded upon by various scholars including Cicero, Thomas Aquinas and John Locke.¹⁵ According to Aristotle, there exists a 'natural moral order' which is the basis of justice and standards against which man-made laws must be measured.¹⁶ Cicero, on the other hand, stated that natural law is 'right reason in agreement with nature'¹⁷ and

¹⁵ Other early proponents of natural law theory include Carricles, Plato, St Augustine, Stoics, and Thomas Hobbes.

¹⁶ Andrew Fagan, "Human Rights" (United Kingdom, University of Essex)12, available at": www.iep.utm.edu/hum-rtts/ (accessed on 15th November 2017).

¹⁷ Cicero, Book 1, Ch. 1, Sect. x, 1 cited in Jeremy Waldron, *Theories of Rights* (Oxford University Press 2009) 26.

that it applies to all persons; it is unchangeable, eternal and given by God.¹⁸ According to Aquinas, man-made laws must be consistent with natural law, divine law and eternal law.¹⁹ Grotius, a modern natural law theorist, propounded a natural law theory which is separated from religion. For him, natural law is a “dictate of right reason” and that whatever conforms to the rational social nature of human beings is just. He further stated that whatever is contrary to social harmony is wrong and unjust.²⁰

The theory of natural law gave rise to natural rights theory which stipulates that rights are inherent in men and women.²¹ The major proponent of natural rights theory is John Locke who argues that life, liberty and property pre-exist the state and that the duty of Governments is to recognize the rights.²² Jeremy Bentham has criticised natural rights theory and natural law as ‘ambiguous, sentimental, figurative and anarchical.’²³

Natural rights theory is relevant to free speech and reputation because it conceives rights as natural and therefore applicable to everyone even before a government acknowledges those rights. This is important because it helps individuals to enforce reputation or free speech even if the particular right may not be expressly provided for in the Constitution, statutes or judicial precedents. Further, natural rights theory helps us to understand that rights are equal.

Another important theory on which the research is embedded is libertarianism. The theory of libertarianism postulates that individuals have a right to live in the manner they desire in so far as they respect other people’s rights.²⁴ Libertarian theorists argue that government must preserve and enhance liberty as well as protect the citizenry from infringement of their rights.²⁵ One of the proponents of this theory is John Stuart Mills. While promoting autonomy and liberty of the individual, Mills argues that individuals should not ignore the happiness of other people as they

¹⁸ *ibid.*

¹⁹ St Thomas Aquinas, *Summa Theologica*, Lib. II, pt. II (1475) cited in Morris Mbondenyi, *International Human Rights and their Enforcement in Africa* (LawAfrica: Nairobi 2011) 24.

²⁰ Hugo Grotius, *De Jure belli et Pacis* (Book 1, 1689) cited in Morris Mbondenyi, *International Human Rights and their Enforcement in Africa* (LawAfrica: Nairobi 2011)25.

²¹ Jeremy Waldron, *Theories of Rights* (Oxford University Press 2009).

²² John Locke, *Two Treatises of Government* (1688).

²³ *ibid.*

²⁴“Libertarianism” (2014) <https://plato-stanford.edu/entries/rights> (accessed on 8th December 2017).

²⁵ *ibid.*

enjoy their rights.²⁶ He states that enjoyment of liberties which causes harm to others must be restricted.²⁷ Therefore, speech can be limited if it causes harm to other people.²⁸ Feignberg criticizes Mills for giving the impression that the harm principle is the only ground for limiting free speech.²⁹ He believes his offense principle can also justify limiting free speech.³⁰

The positivist theory, on the other hand, asserts that law is a product of human action and that human rights are provided for by the laws which are enacted by the State and have sanctions attached. Most positivists argue that morality is distinct from law.³¹ The critique to positivism is that it removes the moral basis of liberties and rights.³² The theory encourages obeying laws which are immoral and infringe personal liberties. The example of such laws are Nazi laws which fueled the killing of Jews but they were obeyed despite being immoral.³³ Positivism has also been criticized for undermining international basis of human rights since it advocates for the supremacy of national sovereignty in enactment of laws and considers international law as mere rules of positive morality or mere opinion.³⁴ Positivism should also be criticized for stating that rights exist only when they are granted by the State through the laws. In that case, it would be impossible to enforce whatever is not contained in the laws. Despite the criticisms, positivism is still important in promoting rights. When the rights are clearly provided for in the laws of the country, it becomes easier to enforce them.

The interest and will theories of rights express functions of rights. According to the interest theory, rights serve the interest of the person who is entitled to the right.³⁵ Joseph Raz argues that if a person has a right it means his interest is a sufficient ground to subject someone to a duty

²⁶ John Stuart Mills, *On Liberty* (1978).

²⁷ *ibid* 9.

²⁸ *ibid* 11.

²⁹ "Freedom of Speech" (2002) <https://plato.stanford.edu/entries/freedom-speech/> (accessed on 10th January 2018).

³⁰ *ibid*.

³¹ John Austin, *The Province of Jurisprudence Determined* (1984).

³² J Shestack, "The Philosophic Foundations of Human Rights" in R McCorquodale, *Human Rights* (2003) 209.

³³ W Enno, "The African Commission on Human and Peoples' Rights as an Instrument for the Protection of human rights in Africa" in Morris Mbondenyi, *International Human Rights and their Enforcement in Africa* (LawAfrica: Nairobi 2011) 29.

³⁴ J Shestack, "The Philosophic Foundations of Human Rights" in R McCorquodale, "Human Rights" in Morris Mbondenyi, *International Human Rights and their Enforcement in Africa* (LawAfrica: Nairobi 2011) 31.

³⁵ Andrew Fagan, *Human Rights* (United Kingdom: University of Essex) 12, available at: www.iep.utm.edu/hum-rts/ (accessed on 15th November 2017).

which will serve that interest.³⁶ The interest theory has been criticized by Lyons who argues that it is not every interest that amounts to a right.³⁷ Second, Lyons argues that someone may also have a right to something without necessarily having any interest in such a thing.³⁸ Lastly, interest theory is faulted for basing the idea of rights on individual rights only.³⁹

The interest theory applies to free speech and reputation. Although all interests may not be rights but both free speech and reputation are legitimate interests.⁴⁰ Each person has the right to reputation just as he or she has the right to free speech and both rights need equal protection by the Malawi Constitution and statutory provisions.

The will theory, on the other hand, asserts that rights have corresponding duties and give the person who is entitled to the right control over other's duties. As Hart argues, a right makes the right-holder "a small scale sovereign,"⁴¹ who is able to decide what others may do or not do concerning her right. One of the critics of the will theory is MacComick who says that the will theory does not provide for unwaivable rights such as the right not to be enslaved⁴² and does not also provide for rights of incompetent people such as infants and lunatics.⁴³

The will theory also applies to free speech and reputation because it promotes the idea that enjoyment of rights has a correlative duty. Free speech is often in conflict with reputation and therefore legitimate restrictions can be made on it.⁴⁴ Democracy does not exist to promote only the right of the individual to free speech but also other people's liberties and rights. Malawians have the duty to respect the reputation of other people as they enjoy free speech.

³⁶ Kaelan Unrau, *Joseph Raz, Liberalism and the Nature of Human Rights* (accessed on 8th December 2017). <https://kaelanunrau.com/2014/06/05/joseph-raz-liberalism-and-human-rights/>.

³⁷ David Lyons, *Rights, Welfare, and Mill's Moral Theory* (Oxford University Press 1994) 36-46.

³⁸ *ibid.*

³⁹ R.S. Bhalla, *Concept of Jurisprudence* (Nairobi University Press 1990) 68.

⁴⁰ Reputation is safeguarded under article 12 of the Universal Declaration of Human Rights 1948 and article 19 (3) of the International Covenant on Civil and Political Rights 1966.

⁴¹ H.L.A. Hart, 'Legal Rights' in *Essays on Bentham* (Oxford: Clarendon 1982) 183.

⁴² Neil MacCormick, *Law, Morality and Positivism* (MacCormick (1977) 197).

⁴³ *ibid* 154-166.

⁴⁴ See the restrictions made on several international and regional legal instruments like article 12 of the Universal Declaration of Human Rights 1948; International Covenant on Civil and Political Rights 1966, art 19 (3); African Charter on Human and People's Rights 1981, art 27; See also European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 10 (2); American Convention on Human Rights 1978, art 13 (2). The restrictions on free speech are made to protect other societal values and rights namely, reputation, national security, public order, public health or morals, privacy and human dignity.

The four theories above have been of great help in answering the research questions. Natural rights theory conceives rights including free speech and reputation as inherent and equal and therefore need to be protected equally. The theory is helpful in analyzing whether the laws and the courts protect free speech and reputation equally. Positivism is also important because it reveals the existing laws and precedent on free speech and reputation. The libertarian theory and theories of rights (interest and will theories) are helpful in answering the research questions on whether free speech and reputation are infringed and the measures taken to balance free speech and reputation. The idea of the will theory that rights have a correlative duty and the libertarian concept that enjoyment of rights should not infringe other people's rights call for responsibility in the exercise of rights.

1.7 Research Methodology

The study applies mixed methods comprising doctrinal research methodology, case studies and qualitative methodology. It is a doctrinal research because it is concerned with locating and analyzing the laws on free speech and reputation. It is a case study because it focuses on the laws of Malawi. It is a qualitative research because the process of analyzing the laws is in itself a qualitative process.

The sources of this doctrinal research include primary sources such as Constitutions, Acts of Parliament, international legal regime, and judicial precedents on free speech and reputation. The study also uses secondary sources such as books, journals, encyclopedias, law reviews and articles from the library and the internet. The research does not depend on primary data but secondary data since the researcher was not able to do field work because of the limited time for the research.

1.8 Literature Review

The rights to free speech and reputation have been discussed by many authors but the researcher discusses four authors: Msaiwale Chigawa, Fidelis Kanyongolo, Eugene Brouillet and Dario Milo. Msaiwale Chigawa and Fidelis Kanyongolo are chosen because they are renowned Malawian authors on the subject and the research is on Malawi laws. Dario Milo is chosen because he is an author in the Southern Community Development Community (SADC), the block to which Malawi belongs. The research also discusses Eugene's work because he makes a comparative

analysis of the laws of defamation of Canada, United States and Quebec. The United States is one of the countries with strong provisions on free speech.

In his report on the review of the Constitution of Malawi 1994, Msaiwale Chigawa⁴⁵ talks of amending sections of the statutes which are not in consonance with the Constitution on freedom of speech. However, he does not mention any of the sections which require the amendment and does not state the exact problems with such sections. Further, Chigawa does not discuss balancing free speech and reputation. Chigawa also discusses the universality of human rights⁴⁶ but does not discuss the inherent nature of rights which requires equal protection in the laws.

On free speech, Chigawa notices that the Constitution of Malawi 1994 provides for free speech⁴⁷ but no special restrictions. He observes that restrictions are possible through the general limitation clause which can be made to the bill of rights⁴⁸ and through the common law.⁴⁹ However, it is clear that he prefers promoting free speech to reputation. At the end of giving the permissible restrictions Chigawa adds, “It is always important to ensure that the courts of law are seen to protect free speech and not going further than is absolutely necessary to control or limit the exercise of this right.”⁵⁰ Chigawa does not analyse whether the limitation clause in the Malawi Constitution is sufficient to stop the abuse of freedom of expression.

Fidelis Kanyongolo seems to favour freedom of expression to reputation. He wrote the *Report on Laws that Restrict Freedom of the Press in Malawi*⁵¹ Kanyongolo mentioned that the Constitution expressly provides for free speech but he does not mention that the Constitution does not give any express provision on limiting freedom of expression nor does he suggest to make reforms to the Constitution to provide expressly for rights such as reputation. He does not discuss whether the Constitutional provisions on free speech are sufficient to protect free speech and

⁴⁵ Msaiwale Chigawa, *The Fundamental Values of the Republic of Malawi Constitution of 1994* (Faculty of Law, University of Malawi 2006).

⁴⁶ Msaiwale Chigawa, *The fundamental Values of the Republic of Malawi Constitution of 1994* (Faculty of Law, University of Malawi, 2006) 19.

⁴⁷ Constitution of Malawi 1994, ss 34-37.

⁴⁸ Constitution of Malawi 1994, s 44 (2).

⁴⁹ *Chihana v Rep* (Crim App Case) No 9 of 1992; *Attorney General v The Editor of the Malawian Newspaper et al* (Misc Civ. Cause) No 16 of 1994 HC (LL) (unrep) MSCA (nrep); *Mwaungulu v Malawi News et al* (Civ Cause No. 518 of 1994 HC (unrep).

⁵⁰ Msaiwale Chigawa, *The fundamental Values of the Republic of Malawi Constitution of 1994* (Faculty of Law, University of Malawi 2006) 19.

⁵¹ Fidelis Kanyongolo, *Report on Laws that Restrict Freedom of the Press in Malawi* (Zomba).

reputation. Law reforms suggested by Kanyongolo are largely on statutory provisions and not the Constitution itself. His suggestion that Malawi should rethink the defamation principles of common law to adopt United States defamation law on the defence of fair comment on public officials⁵² is a manifestation of preference for freedom of expression to reputation. Kanyongolo does not discuss balancing laws on free speech and reputation.

Eugenie Brouillet discusses free speech and reputation in Quebec, Canada and the United States of America.⁵³ Brouillet observes that free speech is provided for in all the Constitutions of these countries but reputation is provided for only in the Quebec Charter. The Quebec Charter would be a good example for Malawi to follow. The equality of rights calls for equal protection by legislation.

Brouillet observes that Canada, despite not providing for reputation in its Constitution, in fact protects reputation more than free speech because the common law of Canada presumes that the defendant in a defamation action produced false statements⁵⁴ and therefore it is the defendant's responsibility to prove the truth of his or her statements. Eugene Brouillet further observes that American and Quebec Laws are similar and tend to promote free speech more than reputation. It is the duty of the plaintiff to show that the defendant is at fault.⁵⁵ The plaintiff must prove that his or her reputation has suffered injury.⁵⁶ Like the Canadian laws, the defamation laws of Malawi favour reputation more than free speech because they presume the falsity of defamatory statements. Brouillet compares the defamation laws of America, Canada and Quebec but does not discuss the balancing of free speech and reputation.

Another author, Dario Milo, analyses free expression and the right to reputation in England, America, Australia and South Africa.⁵⁷ Milo believes the defamation laws of England, South Africa and Australia favour reputation more than freedom of expression because of presumption of falsity and damage. The laws presume that what has been published about the plaintiff is false

⁵² *ibid* 23.

⁵³ Eugenie Brouillet, *Free Speech, Reputation and the Canadian Balance* (Faculty of Law, Université Laval).

⁵⁴ PH Osborne, *Law of Torts* (2nd edn, 2003) 370.

⁵⁵ In *Philadelphia Newspapers Inc v Hepps* (1986) 475 U.S. 767, 777, the U.S. Supreme Court held that, when a newspaper published matters of public concern, a private plaintiff cannot recover damages without proving that the statements are false.

⁵⁶ *Prud'homme*, (2002) S.C.R. 663, 698; *Soci'et'e Radio-Canada* (1994) R.J.Q. at 1820.

⁵⁷ See Dario Milo, *Defamation and Freedom of Speech* (Oxford University Press 2008).

and that the plaintiff's reputation is injured.⁵⁸ As for America, Dario thinks the defamation law there prefers freedom of expression to reputation. Claimants who are public officials must prove falsity and actual malice. Private people who sue in relation to a public speech must prove falsity, fault and actual malice.⁵⁹

Dario is against presumption of falsity found in English, South African and Australian laws. He seems to favour the approach that the United States of America adopted. Further, Dario does not discuss balancing free speech and reputation. So the researcher has to explore the means to balance free speech and reputation. All the authors above do not discuss how to balance free speech and reputation.

1.9 Limitations of the Study

This research focuses on balancing free speech and reputation under the Malawi laws. The research excludes the study of the right to privacy which is known to have a connection to the right to reputation.⁶⁰ The study does not also discuss defamation on the internet. Further, the study is done within a busy schedule of doing course work and therefore the researcher is not able to do field work. This means the study does not rely on primary data but secondary data including books, journals, articles, encyclopedias, statutes, and law reviews.

1.10 Chapter Breakdown

This thesis contains five chapters. The First Chapter is the introduction comprising background to the study, problem statement, hypothesis, research objectives, the questions guiding the study, significance of the research, theoretical framework, research methodology, literature review, limitations of the study and chapter breakdown.

The Second Chapter discusses the international, regional and Malawi laws on freedom of expression and the right to reputation. The Chapter briefly mentions the origin of the right to free speech and then discusses the scope, justification, and restriction to free speech. It further deals with safeguarding reputation and the defences available in a defamation lawsuit.

⁵⁸ *ibid* 283.

⁵⁹ *Ibid*.

⁶⁰ See *Chauvy v France* (2004) Application no. 64915/01 (ECtHR).

The Third Chapter analyses the courts' interpretation of reputation and free speech at the international, regional and national levels. It discusses how the courts interpret the conflict between free speech and reputation and the restrictions made on free speech. The Fourth Chapter makes a contextual analysis of the enjoyment of free speech and reputation in Malawi. The Chapter discusses the various means free speech is unjustifiably infringed as well as how free speech is also abused through breach of morals, hate speech and violation of reputation. The Chapter finally recommends the use of the *Brems Model*⁶¹ to balance the conflict between free speech and reputation.

The Fifth Chapter consists of conclusion and recommendations. The researcher gives the recommendations to various people and institutions such as the executive, the legislature, the judiciary, political, religious leaders and professionals who face defamation, the media and all Malawians in general. There are both long term and short term recommendations.

⁶¹ See Eva Brems, *Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 27 HUM. RTS. Q. 294, 303 (2005).

CHAPTER TWO

LEGAL FRAMEWORK ON FREEDOM OF EXPRESSION AND THE RIGHT TO REPUTATION IN MALAWI

2.0. Introduction

The Constitution of Malawi 1994 has a Bill of Rights providing for various rights and freedoms including the right to free speech. Malawi has also many statutes which provide for free speech and grounds for limitation. Other applicable laws on free speech include international and regional human rights instruments to which Malawi is party. This Chapter therefore discusses the international and regional human rights instruments and constitutional and statutory provisions on free speech and reputation. It analyses whether the existing laws are effective to balance free speech and reputation. In addition, the Chapter analyses the scope of free speech, its justification and grounds for restrictions. Prior to dealing with the legal regime, the Chapter gives a brief history of free speech development.

2.1 Origins of the Right to Freedom of Expression

Freedom of expression existed way before modern human rights instruments. It has origins in Ancient Greek which had a democratic government and promoted education, theatre, literature etc, all of which required some exercise of free speech.⁶² There were also traces of free speech during the Roman Republic manifested both in formal institutions such as the senate and the courts as well as informal institutions including arts.⁶³ In modern times, free expression was explicitly enshrined in the English Bill of Rights of 1688 which provided for free speech in Parliament⁶⁴ but was extended by the courts to include free speech for private persons.⁶⁵

France also guaranteed free speech as follows: “The unrestrained communication of thoughts or opinions being one of the most precious rights of man, every citizen may speak, write,

⁶² David Smith, “Timeline: a history of free speech,” *The Guardian* (London, 2006).

⁶³ Kurt Raaflaub, Josiah Ober and Robert Wallace, *Origins of democracy in ancient Greece* (University of California Press 2007) 65; see also <https://scielo.conicyt.cl/pdf/rehj/n31/art04.pdf> (accessed on 11th November 2018).

⁶⁴ English Bill of Rights 1688 in Musaiwale Chigawa, *The Fundamental Values on the Republic of Malawi Constitution of 1994* (Faculty of Law, University of Malawi 2006) 26.

⁶⁵ See Musaiwale Chigawa, *The Fundamental Values on the Republic of Malawi Constitution of 1994* (Faculty of Law, University of Malawi 2006) 26.

and publish freely, provided he be responsible for the abuse of this liberty, in the cases determined by the law.”⁶⁶ Under this provision, free speech has limitations. Citizens must enjoy the right with due regard to the rights of other people and societal values. Restrictions may be allowed on free speech but they should be provided by law. The provision spells out the scope of the right as to include spoken, written and published material.

The United States Constitution is also among the earliest documents to provide for free speech when it stated that “Congress shall make no law...abridging the freedom of speech, or of the press.”⁶⁷ This provision stops American legislature from making any law which will stifle the exercise of free expression in US. Unlike the French provision on free speech, the US Constitution does not envisage limitation on free speech for the sake of other societal values and rights of other people such as reputation. It is pure absolutism which advocates for the ‘unwavering protection for all speech’ and considers free speech to be superior to other rights.⁶⁸ However, such a position is unrealistic and contrary to the principle that human rights are ‘indivisible’ and equal.⁶⁹ Equality of rights implies that no human right is superior.

2.2 Legal Regime on Freedom of Expression

The right to free speech is now enshrined in both international and domestic laws. Both the Universal Declaration of Human Rights 1948 and the International Covenant on Civil and Political Rights 1966 provide for free speech.⁷⁰ The ICCPR captures the scope of the right to free speech as follows: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice.”⁷¹

⁶⁶ French Declaration of the Rights of Man and of the Citizen 1789, art 11.

⁶⁷ First Amendment to the United States of America Constitution 1791.

⁶⁸M. Voslo, ‘When Political Expression turns into Hate Speech: Is Limitation through Legislative Criminalisation the Answer?’ (2011) 21 in Nelson, *Beyond the First Amendment: The Politics of Free Speech and Pluralism* (2005) 33.

⁶⁹ *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, Vienna, 14-25 June 1993, UN Doc A/CONF. 157/23 (1993); 32 IML 1661 (1993) 1.5.

⁷⁰ Universal Declaration of Human Rights 1948, art 19; International Covenant on Civil and Political Rights 1966, art 19 (2).

⁷¹ International Covenant on Civil and Political Rights 1966, art 19 (2).

Regional human rights instruments also provide for free expression. The African Charter on Human and People's Rights 1981 provides that "every individual shall have the right to receive information."⁷² The African Charter also states that everyone has "the right to express and disseminate his opinions within the law."⁷³

The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 provides for free speech as follows: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."⁷⁴

The American Convention on Human Rights 1978 provides that "Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice."⁷⁵

Malawi also cherishes freedom of speech. The Constitution of Malawi 1994 guarantees freedom of expression,⁷⁶ opinion,⁷⁷ and press.⁷⁸ The provision on press freedom resulted to the enactment of statutes promoting freedom of expression including the Communications Act 1998 which regulates the media. The Constitution also provides for 'academic freedom'⁷⁹ and 'access to information'⁸⁰ and under this provision, Malawi enacted the Access to Information Act 2017.

2.2.1 The Scope of the Right to Freedom of Expression

International and domestic law express the scope of free speech. Free speech applies to everyone without any distinction.⁸¹ Further, freedom of expression also protects opinions,⁸²

⁷²African Charter on Human and People's Rights 1981, 9 (1)

⁷³ Ibid art 9 (2).

⁷⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 10 (1).

⁷⁵ American Convention on Human Rights 1978, art 13 (1).

⁷⁶ Constitution of Malawi 1994, s 35.

⁷⁷ ibid s 34.

⁷⁸ ibid s 36.

⁷⁹ ibid s 33.

⁸⁰ ibid s 37.

⁸¹ International Covenant on Civil and Political Rights 1966, art 2 (1).

⁸² ibid art 19 (1).

‘information and ideas of all kind,’⁸³ including subjective ideas⁸⁴ and opinions of the minority.⁸⁵ Not only is freedom of opinion important for academic discourse but also in democratic governance because it promotes free discussion or criticism of views and policies. Free speech covers ‘academic freedom and scientific research’.⁸⁶ Further, free opinion is beneficial to the media because it enables the media to comment on matters which are of interest to the society.⁸⁷

Free speech covers medium of any type including oral, written, print, or art forms.⁸⁸ This element of the scope of free speech is not expressly provided for in the free speech clause under the 1994 Malawi Constitution. Under this element, individuals have the right to use the means they deem appropriate to deliver their message. This includes both written and spoken speech.⁸⁹ Free speech includes protection of the material itself and the means through which the content is conveyed.⁹⁰ It also includes non-verbal expression like dress and hairstyles.⁹¹

Freedom of expression includes cultural, religious⁹² and artistic manifestations.⁹³ It includes various forms of symbolic communication such as dance, music, painting and sculpture.⁹⁴ In *Muller et al. v Switzerland*,⁹⁵ the applicants produced arts showing sodomy and bestiality. He was sued for producing obscene paintings. The European Court stated that free speech includes ‘artistic expression’. However, the Court stated that it was justifiable to limit free expression of the artist to safeguard public morals.

⁸³ Ibid art 19 (2).

⁸⁴ See *Ballantyne and Davidson v Canada*, Communication No. 359/1989.

⁸⁵ See *Hertel v Switzerland*, 25 August 1998, Application NO. 25181/94, para. 50.

⁸⁶ See Constitution of Kenya 2010, art 33 (1) (c); Constitution of South Africa 1996, s 16 (1) (d).

⁸⁷ “Limpit Law,” *J Media Law Handbook for Southern Africa* (Vol 1, 2012)204.

⁸⁸ International Covenant on Civil and Political Rights 1966, art 19 (1).

⁸⁹ “Limpit Law,” *J Media Law Handbook for Southern Africa* (Vol 1, 2012)165.

⁹⁰ A. Puddephatt, *Freedom of Expression: The Essentials of Human Rights* (Holder Arnold, 2005) 128.

⁹¹ See *Guidelines for Consideration of Governing Bodies in Adopting a Code of Conduct*, G.N. 776 of 1998 published in *Government Gazette* (No 18900, 15 May 1998).

⁹² See *Ross v Canada*, Human Rights Committee, Communication No. 736/97, adopted on 18 October 2000.

⁹³ See Constitution of Kenya 2010, art 33 (1) (b); Constitution of South Africa, s 16 (1) (c).

⁹⁴ See *Tinker v Des Moines School District*, 89 S. Ct. 733 (1969); *Street v New York*, 89 S. Ct. 134 (1969); *United States v O’Brien*, 88 S. Ct. 1673 (1968); See also “Limpit Law,” *J Media Law Handbook for Southern Africa* (Vol 1, 2012)165.

⁹⁵ (1988) European Court of Human Rights, Application No. 10737/84; see also *Shin v Republic of Korea*, Human Rights Committee, Communication No. 926/2000, adopted on 16th March 2004.

The African Commission on Human and Peoples' Rights stated that the right to free speech includes political expression. In *Law Offices of Ghazi Suleiman v Sudan*, the Sudanese Government barred Ghazi Suleiman from giving a public lecture on human rights under the pretext of national security. The African Commission held that free expression is important in the formulation of political parties and promotion of public opinion.⁹⁶

To promote political expression in Malawi, the Government should provide access to the public broadcasters, MBC Radios I and II and Television, to all political parties in the country. So far Government monopolises the use of these media houses and yet they are run on tax-payers money. MBC has often been used to castigate opposition parties. Opposition parties are rarely given the opportunity to air their views on MBC.

Free speech also covers media freedom.⁹⁷ The word 'press' used in the Constitution of Malawi includes journalists and media outlets.⁹⁸ However, the media need independence in order to promote democratic governance.⁹⁹ The media should be free from external interference such as political interference, and free from fear of reprisal and persecution.¹⁰⁰ There is also need for a 'pluralistic media', that is, a multiple number of newspapers, magazines, periodicals, televisions and radio stations.¹⁰¹ This would likely represent the widest range of opinion in the country¹⁰² rather than having only state media which are in most cases biased for the government as was the case in Malawi during the one-party era of Hastings Kamuzu Banda. Currently, Malawi has a pluralistic media.

⁹⁶*The Law Office of Ghazi Suleiman v. Sudan*, African Commission on Human and Peoples' Rights Communication No. 228/99, Sixteenth Activity Report 2002-2003, Annex VII; see also *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Articles 13 and 29 of the American Convention on Human Rights), Inter-American Court of Human Rights, Advisory Opinion OC-5/85, Serie AN5, November 1985 at para 70.

⁹⁷ See Malawi Constitution 1994, s 36; Constitution of Kenya 2010, art 34; Constitution of South Africa 1996, art 16 (a); See First Amendment to the US Constitution of 1787.

⁹⁸ W. D. Chirwa, *Human Rights under the Malawian Constitution* (1stedn., 2011) 361.

⁹⁹ Morris Kiwinda Mbondenyi and John Osogo Ambani, *The New Constitution of Kenya: Principles, Government and Human Rights* (Nairobi: LawAfrica 2013) 197.

¹⁰⁰ "United Nations Educational, Scientific and Cultural Organisation," *Freedom of Expression Toolkit: A Guide for Students* (UNESCO 2013) 16.

¹⁰¹ *ibid.*

¹⁰² *ibid.*

Furthermore, free speech covers giving and receiving information.¹⁰³ This element is also not expressly provided for in the free speech clause in the 1994 Malawi Constitution. In *Mavlonov v. Uzbekistan*,¹⁰⁴ the United Nations Human Rights Committee held that by denying to give a license to a newspaper to operate, the Uzbek Government infringed the right to free speech of the newspaper owners and the reader of the newspaper.¹⁰⁵

This means, for example, that when a government shuts down newspapers or televisions, or radio stations, both the rights of the owners of these media houses and the citizens who benefit from the information are violated. In Malawi, for example, Capital Radio was shut down by MACRA, the regulatory body of the media, for live coverage of the July 20, 2011 demonstrations against Bingu wa Mutharika's Government.¹⁰⁶ Recently in Kenya, the Government shut down some Television stations- Citizen Television, Kenya Television Network (KTN) and National Television (NTV) - after these stations defied the order by Government not to cover the swearing-in of the opposition leader, Raila Odinga, on 30th January 2018 as the people's president. In these circumstances, it was not only the rights of the media houses' owners which were infringed but also the rights of the citizens to be informed.

The scope of free speech includes 'access information'.¹⁰⁷ Malawi should be commended for passing the Access to Information Act 2017. Under the Act, the Government has to ensure that Malawians are able to access certain information which the State holds. This includes public bodies allowing access to their meetings and relevant places to obtain information.¹⁰⁸ It also involves giving access not only to favourable news but also information which is embarrassing to the

¹⁰³ International Covenant on Civil and Political Rights 1966, art 19 (2).

¹⁰⁴ *Mavlonov v Uzbekistan*, 27 April 2009, Communication No. 1334/2004, para. 8.4.

¹⁰⁵ See also *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Articles 13 and 29 of the American Convention on Human Rights), Inter-American Court of Human Rights, Advisory Opinion OC-5/85, Serie AN5, November 1985 at para 30.

¹⁰⁶ "Malawi – IREX" available at: <https://www.irex.org/sites/default/.../media-sustainability-index-africa-2012-Malawi-pd> (accessed on 10th January 2018).

¹⁰⁷ International Covenant on Civil and Political Rights 1966, art 19 (2); American Convention on Human Rights 1978, art 13 (1).

¹⁰⁸ K. Sentala, "Access to Information Legislation in Malawi: A Paper Presented at the African Network for Constitutional Lawyers Symposium on Access to Information" (17-18 June 2008) available at: [http://www.public.uct.ac.za/usr/public law/.../ppai.doc](http://www.public.uct.ac.za/usr/public%20law/.../ppai.doc) (accessed on 10th January 2018).

State.¹⁰⁹ Any refusal by Government to provide information must be stipulated in the law.¹¹⁰ It is also important that fees to be paid for requesting information as stipulated under the Act and to be decided by the Minister¹¹¹ should not be too high. It was a positive step for Malawi to pass the Access to information Act 2017 but its implementation is yet to be seen.

2.2.2 Justification for Freedom of Expression

There exist various theories to justify freedom of expression. These theories include the truth argument and the argument from democracy. One of the major proponents of the truth theory is John Stuart Mill who argues that free speech is important because it helps one to discover the truth.¹¹² He also supports protecting personal opinion, whether it is true or false.¹¹³ Although John Stuart Mill was a champion in promoting individual liberty including freedom of expression, he still accepted that restrictions were possible where one's enjoyment of rights caused harm to other people's rights or societal values.¹¹⁴

Milton had the same view as Mill that free speech helps one to know the truth and advance knowledge.¹¹⁵ For Milton, both truth and falsehood are important in any debate.¹¹⁶ However, Milton argues that it is on truth that free speech is based and therefore any speech which is not true may be restricted. John Milton's truth argument extends to his argument about the 'market place of ideas' from which truth is discovered.¹¹⁷ In *Abrams v United States*, Justice Oliver Wendell Holmes confirmed the concept of the 'marketplace of ideas' by stating that "...the ultimate good desired is better reached by free trade in ideas...The best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out..."¹¹⁸

¹⁰⁹ WD Chirwa, *Human Rights under the Malawian Constitution* (1st edn, 2011) 365.

¹¹⁰ "Misa Research Report: Obstacles to Access to Information in Malawi" (2012) 13.

¹¹¹ Access to Information Act 2017, s 8 (h).

¹¹² John Stuart Mill, *On Liberty* (1859).

¹¹³ *ibid.*

¹¹⁴ *ibid.*

¹¹⁵ Dario Milo, "Defamation and Freedom of Speech" in TI Emerson, *Toward a General Theory of the First Amendment* (1963) 72 Yale LJ 877, 881.

¹¹⁶ Dario Milo, "Defamation and Freedom of Speech" in *Areopagitica: A speech for the Liberty of Unlicensed Printing, To the Parliament of England* (1644).

¹¹⁷ Dario Milo, "Defamation and Freedom of Speech" in J Pole, *Freedom of Speech: From Privilege to Right* in R Cohen Almagor (ed), *Challenges to Democracy: Essays in Honour and Memory of Isaiah Berlin* (2000).

¹¹⁸ (1919) 250 US616, 630.

Criticisms have been labeled against the truth argument of the ‘marketplace of ideas’. The theory is criticized for assuming that all persons have access to the market, that truth always exists among the ideas in the marketplace, and that everyone is able to know the truth.¹¹⁹ Certainly not everyone has access to all communication in the world; nor is it true that people are always able to know the truth. There are times when it is very difficult to know what is true. It is also not necessarily true that from unlimited exchange of ideas emerges the truth always. It is not always the case that freedom of expression leads to the truth. Some speech may not be true at all.

Further, if truth is the only thing that is valued, then censorship is justifiable. In that case, freedom of speech which is false would justifiably be limited.¹²⁰ For example, where one makes false allegations against someone, such speech would be restricted by defamation laws to protect the reputation of other people. It is for this reason that many countries consider the truth argument an important defence in a defamation suit. In *Graham v Ker*,¹²¹ the court held that true statements of facts promotes knowledge and that the emphasis on truth in defamation suits ensures that the plaintiff should enjoy only the reputation which he or she deserves and not otherwise.

On the other hand, the argument from democracy contends that free speech is fundamental in any democracy. In his ‘Political Freedom’,¹²² Alexander Meiklejohn, one of the leading scholars of this argument, defines democracy as self-government by the people. According to Meiklejohn, a democratic government serves the citizens’ interests. Therefore, in order for the government to act democratically, the citizens must be accorded the chance to speak on matters that affect them. This is possible through freedom of expression.

However, Meiklejohn argues that not every speech is worth protecting; only speech that deals with public matters should be protected and such speech is absolute. Speech that deals with private matters need not be protected.¹²³ Meiklejohn has been criticized for saying that public

¹¹⁹ W. Wat Hopkins, *The Supreme Court the Marketplace of Ideas* (J & MC Quarterly, Vol. 73, No.1, Spring 1996) 44.

¹²⁰ See Richard Moon, “The Scope of Freedom of Expression,” *Osgoode Hall Law Journal* 23.2 (1985) 331-357 available at <http://digitalcommons.osgoode.yorku.ca/ohlj> (accessed on 13th July 2018).

¹²¹ (1892) 9 SC 185, 187.

¹²² See Alexander Meiklejohn, *Political Freedom* (1965).

¹²³ *Ibid.*

speech cannot be limited and that private speech cannot be protected. Limitations to safeguard other important societal values and rights including reputation are necessary.¹²⁴

The courts have acknowledged the important role of free speech in promoting democracy. In *Regina v Secretary of State for the Home Department, Ex parte Simms*,¹²⁵ the Court stated: “Freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate... It acts as a brake on the abuse of power by public officials.” In *Hustler Magazine Inc v Falwell*,¹²⁶ the US Supreme Court recognised “the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.” It is therefore important for Governments not to restrict free speech arbitrarily so that democratic governance flourishes.

2.2.3 Restrictions on the Right to Freedom of Expression

While the rights enshrined in various international treaties, charters, and constitutions are fundamental to democracy, most rights can be limited¹²⁷ to realise other equally important societal values like national security, public morals, public health, public order and other people’s rights including reputation.¹²⁸ Human rights instruments usually impose a limitation clause which empowers legislatures, the executive or the courts to limit rights in some cases.

International law provides for limitations to free speech but the restrictions must be legitimate. The Universal Declaration of Human Rights 1948 provides that free speech can be limited to protect morality, public order, and other people’s rights.¹²⁹ The UDHR further provides that one should not interfere with privacy and reputation of other people as he or she enjoys the right to free speech.¹³⁰ The ICCPR contains a specific limitation clause to free speech which provides that free speech “carries with it special duties and responsibilities” and has limitations as “provided by law and are necessary” to protect other people’s reputation or rights and also safeguard national

¹²⁴ Richard Moon, “The Scope of Freedom of Expression,” *Osgoode Hall Law Journal* 23.2 (1985):331-357 available at <http://digitalcommons.osgoode.yorku.ca/ohlj> (accessed on 13th July 2018).

¹²⁵ (1999) HL.

¹²⁶ 485 US 46 (1988).

¹²⁷The International Covenant on Civil and Political Rights 1966 mentions the following rights as absolute rights: freedom from torture and other cruel, inhumane or degrading treatment or punishment (art 7); freedom from slavery and servitude (art 8); freedom from imprisonment for inability to fulfill contractual obligations (art 11), among others.

¹²⁸ See International Covenant on Civil and Political Rights 1966, art 19 (3).

¹²⁹ Universal Declaration of Human Rights 1948, art 29 (2).

¹³⁰ *ibid.*

security, public order, public health and public morals.¹³¹ Further, the ICCPR prohibits hate speech.¹³²

Under the ICCPR, three conditions must be met to make a legitimate limitation to free speech: first, the restriction should be “provided by law” which is made by a recognized law-making body and it must be clear and precise.¹³³ Second, the restriction should protect a legitimate interest.¹³⁴ Third, the restriction should be ‘necessary’, that is, there has to be a ‘pressing need’ and that the limitation should be the ‘least intrusive measure’ available.¹³⁵

Regional human rights laws also provide for limitations to free speech.¹³⁶ The African Charter, for example, permits limitations in these terms: “Every individual shall have the right to express and disseminate his opinions within the law.”¹³⁷ The expression “within the law” indicates limitation of free speech. As one enjoys his or her right to freedom of expression, he or she should not do so by breaking other laws such as provisions on the right to privacy, reputation, or dignity of others. The African Charter provides that enjoyment of rights must be accompanied by duties.¹³⁸ This means that a citizen should respect societal values and rights of others as he or she enjoys his/her rights.

Despite having no specific limitation clause to free speech, limitation to free speech is possible under the 1994 Malawi Constitution. The Constitution provides for rights which may not be restricted¹³⁹ and the right to free speech is not among them.¹⁴⁰ Free speech can be limited under

¹³¹ International Covenant on Civil and Political Rights 1966, art 19 (3).

¹³² *ibid* art 20.

¹³³ See *Sunday Times v United Kingdom*, 26 April 1979, Application No. 6538/74, para. 49.

¹³⁴ Legitimate interests include national security, public order, public morality, public health, rights of others including reputation. These interests are mentioned in article 19(3) of the International Covenant on Civil and Political Rights 1966.

¹³⁵ “Report of the Special Rapporteur on the Promotion and Protection of the Rights to Freedom of Opinion and Expression,” Frank La Rue, Human Rights Council, May 16, 2011, at para. 24; See *Mukong v Cameroon*, para. 9.7 (UN Human Rights Committee).

¹³⁶ See European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 10(2); American Convention on Human Rights 1978, art 13(2); African Charter on Human and Peoples’ Rights 1981, art

¹³⁷ African Charter on Human and Peoples’ Rights 1981, art 9 (2).

¹³⁸ *ibid* arts 27-29.

¹³⁹ Examples of rights which cannot be derogated are the right to life; prohibition of torture and cruel, inhuman or degrading treatment or punishment; the prohibition of genocide; the prohibition of slavery, the slave trade and slave-like practices; the right to equality and recognition before the law; the right to freedom of conscience, belief, thought and religion and to academic freedom; the right to habeas corpus, among others.

¹⁴⁰ Constitution of Malawi 1994, art 44(1).

the general limitation clause to the Bill of Rights.¹⁴¹ The general limitation clause ensures flexibility in the interpretation of the right but its non-specific nature also means it can either allow too much limitation on the right or very little limitation depending on the attitude of the courts.¹⁴² General limitation clauses give the legislature and the courts wide discretion. They are suitable for countries which have strong democratic institutions and good human rights record.¹⁴³ A country which has a strong, pluralistic and independent legislature as well as a strong, vibrant and independent civil society can have general limitation clauses. A parliament which is working for the good of the people would resist any moves to make arbitrary restrictions on rights. On the other hand, for countries which have fragile democracies, for example, countries which have a weak civil society and a legislature which is influenced greatly by the Executive, general limitation clauses may not be recommended.¹⁴⁴

In addition, general limitation clauses on human rights require an independent judiciary. They need a judiciary which has a tradition of respecting human rights and is independent from the influence of the other arms of government and high profile figures. The citizenry should have the trust in the judges that they are capable of interpreting the limitations to the rights correctly.¹⁴⁵

Some have argued that Malawi does not yet have a strong democracy. In that case, a general limitation clause to the rights may not be the best for the country. Malawi faces issues of poor governance, endemic corruption, limited transparency, inadequate accountability and lack of political will.¹⁴⁶ Blessings Chisinga calls Malawi a ‘defective democracy’ whose institutions are not effective.¹⁴⁷ For example, Malawi’s parliament has not always discharged its duties in the interest of Malawians.¹⁴⁸ Most Malawian MPs tend to serve the wishes of their parties more than the common good or the interests of their constituencies.¹⁴⁹ For example, In order to advance the

¹⁴¹ *ibid* s 44(2).

¹⁴² “Limitation Clauses”, *International Institute for Democracy and Electoral Assistance (International IDEA)* (2nd edn, 2014).

¹⁴³ *ibid*.

¹⁴⁴ *ibid*.

¹⁴⁵ *ibid*.

¹⁴⁶ *ibid*.

¹⁴⁷ “Towards Consolidation of Malawi’s Democracy,” *Konrad-Adenauer-Stiftung* (Occasional Paper No. 11, Malawi, 2008).

¹⁴⁸ *ibid*.

¹⁴⁹ *ibid*.

agendas of the ruling party, MPs have sometimes passed strange laws which violate human rights. For instance, the Malawi Parliament passed a new injunction law which prohibited instituting civil suits against Government officials.¹⁵⁰

This demonstrates that the Malawi Parliament is not generally independent and may not always be committed to protecting liberties. If the Parliament is given wide discretionary powers through the general limitation clause to make laws to limit the rights, it is possible for such a Parliament to make laws that infringe the rights of Malawians to promote the agenda of their parties. In such cases, right-specific limitation clause to the rights such as freedom of expression which are tightly-worded would be advisable.

As for Malawi's judiciary, generally it is perceived to be independent. The World Justice Project ranks the independence of Malawi's judiciary fourth in sub-Saharan region only after Botswana, Ghana and South Africa.¹⁵¹ Since the emergence of multi-party government in 1994, the judiciary has been a core stabilizing institution for Malawi's democracy.¹⁵² It has been a very important institution providing checks and balances on Parliament and the Executive through its bold judgments. For example, the Malawi courts overturned Joyce Banda's unconstitutional attempt to nullify the 2014 presidential election results. Around 2008 the Court stopped former President Bakili Muluzi from contesting as president in the 2009 general elections because he had already served two terms (from 1994-2004). In 2006 the Court held that Section 65 which prohibits crossing the floor was constitutional and therefore could not be repealed as President Bingu wa Mutharika prayed for. The Malawi Courts have also been very important in adjudicating other cases relating to general elections; it has been instrumental in solving intra-party political disputes; and defending freedom of private radio stations to broadcast.¹⁵³

Malawi's judiciary has generally been independent but its independence is threatened by several factors. A 2003 report by Fidelis Kanyongolo, a renowned Malawian lawyer, observed that several challenges rock the judiciary in Malawi.¹⁵⁴ Despite improvements in judges' salaries and

¹⁵⁰ See "Malawi," *Human Rights Watch*, (January 2012); Further, in 2011 Malawi Parliament amended section 46 of the Penal Code 1929 which gave powers to the police to search without a warrant.

¹⁵¹ Rachel Ellet, "Politics of judicial independence in Malawi," *Freedom House*

¹⁵² *ibid.*

¹⁵³ *ibid.*

¹⁵⁴ See Edge Kanyongolo, "State of Judicial Report: Malawi 2003," *IFES* (2004)

resources for the Court, Malawi's judiciary continues to suffer acute underfunding through inadequate budget.¹⁵⁵ Lack of sufficient resources for the judiciary has the potential of making the institutions run slowly and inefficiently and can also demoralize the staff and judges. Insufficient funds for the judiciary may also be the contributing factor to the insufficient judicial security at the judges' residences and the court. This threatens the lives of the judges.¹⁵⁶

Malawi's judiciary also faces political interference, which comes in various forms including resentment and the issuing of threats to judges who make decisions against government. For example, when the Court held that section 65 was constitutional and that it could not be repealed, President Bingu wa Mutharika showed resentment of the court for the decision. In another case, when the Court uplifted the ban which President Muluzi made against holding rallies or protests against his third term bid, Muluzi began a process of dismissing the judges although he never succeeded due to internal and external pressure. Appointment of judges has also sometimes been perceived to be politicized. Presidents tend to appoint judges who will sympathise with government or those who come from their regions.¹⁵⁷

Although Malawi's judiciary has been lauded for its independent decisions, it operates in a fragile environment which has the potential of undermining its operations and independence. The lack of funds for its operations makes the court to have a backlog of cases which denies litigants timely delivery of justice. Lack of legal representation and legal information, and the expensive court fees have a bearing on the delivery of justice to Malawians, most of whom are poor. The constant interference of the Executive in the judiciary compounds the problems. Considering all these factors, it is better for Malawi to have tightly-worded specific right limitation clauses, rather than a general limitation clause to the rights. Freedom of expression provision must contain its specific limitations because that will help to expressly provide for the scope of the right to all Malawians, not only the Court. When the limitations are not spelt out, the ordinary Malawian may not be aware of the kind of limitations involved. Even if some limitations are spelt out in statutes, generally people are more aware of constitutional provisions than the statutory provisions.

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid.*

¹⁵⁷ *ibid.*

The bulk of the statutes has the potential of making it difficult to follow what they contain unlike the Constitution which is a single document.

The general limitation clause in the 1994 Malawi Constitution provides that limitations on free speech or any other law must meet the conditions expressed in section 44 (2) of the Constitution, namely, they should be provided for in the Constitution, must be reasonable, and must be in consonance with international law. The restrictions should also be “necessary in an open and democratic society.”

These conditions for limitation of rights are important to avoid arbitrary restrictions by Malawi Government. They ensure that Parliament does not make unnecessary laws to curtail freedom of speech. Any law limiting free speech but does not satisfy the requirements set under section 44 (2) is void.¹⁵⁸ The fact that the Constitution is the highest law of the land justifies why important rights such as reputation should be included in the Constitution so that they can clearly be seen and enforced. If rights are not included in the Constitution, they are left at the mercy of the Courts and that will depend on the preferences of each judge.

The 1994 Malawi Constitution further provides that free speech can be restricted during a state of emergency. The President may declare a state of emergency “in times of war, threat of war, civil war or widespread natural disaster.”¹⁵⁹ In such circumstances, certain rights such as free speech may be derogated from provided the derogation is not contrary to international standards.¹⁶⁰ Governments should not hide under state of emergency in order to suppress human rights. Further, free speech is restricted by interpretation of certain rights enshrined in the Constitution including dignity¹⁶¹ and privacy.¹⁶² Both infringement of dignity and privacy can be raised in defamation cases.¹⁶³

In spite of the possible limitations which may be made on free speech, the Malawi Constitution lacks express provisions to limit freedom of speech like the way it is done under

¹⁵⁸ *ibid* s 5.

¹⁵⁹ *ibid* s 45 (2).

¹⁶⁰ *ibid* s 45 (3).

¹⁶¹ *ibid* s 19(1).

¹⁶² *ibid* s 27.

¹⁶³ *J.K. Khamisa v AG* (Civil Cause No. 565 of 1994) (2002) MWHC 35 (18 September 2002).

international and regional human rights instruments. The Malawi Constitution fails to mention reputation anywhere within its provisions. The Constitution seems to give preference to free speech as compared to reputation.

2.2.3.1 Grounds for Limiting Freedom of Expression

Human rights instruments do not generally consider freedom of speech as an absolute right. Therefore, they include limitation clauses to balance free speech with other rights and societal values. As Roscoe Pound observes in his book ‘A Survey of Social Interests’, a society has various interests such as individual, public and social interests which are equally important.¹⁶⁴ Usually there are conflicts between these various interests and the function of law is to balance the interests.¹⁶⁵ For example, a person’s right to free speech may be in conflict with national security (that is, private interest vis-à-vis public interest). Tensions can also arise between competing rights of individuals, for instance, one’s right to free speech can be in direct conflict with another person’s right to reputation or privacy. Thus limitations clauses are included in human rights instruments to balance these competing interests.¹⁶⁶

A person can also forfeit the right to free speech where he or she has assented to do so. Employees may, for instance, pledge in a contract not to divulge certain information to the public about the workplace or company. Where the person has bound himself or herself in such contracts, he or she cannot subsequently backtrack and reveal the information in the name of freedom of expression unless there are serious grounds to do so.¹⁶⁷

Legitimate objectives for limiting free speech include protection of public morals, national security, public order, public health, and other people’s rights including reputation.¹⁶⁸ The State can make laws to limit free for the sake of morals. Obscenity laws, for example, seek to protect the citizens from material that can corrupt them. However, the controversy surrounds defining what is obscene or indecent because this may vary from society to society. In *R v Hicklin*,¹⁶⁹ the

¹⁶⁴Roscoe Pound, “A Survey of Social Interests” 57 *Harvard Law Review* (1943) 99.

¹⁶⁵ *ibid.*

¹⁶⁶ For more details on absolute rights and rights which can be limited, see “Limitation Clauses” available at www.constitutionnet.org/sites/default/files/limitations_clauses.pdf (accessed on 2 March 2018).

¹⁶⁷ Kivutha Kibwana, *You and the Law: Fundamental Rights and Freedoms in Kenya* (Oxford University Press 1990) 41.

¹⁶⁸ International Covenant on Civil and Political Rights 1966, art 19 (3).

¹⁶⁹ (1868) LR 3 QB 360.

court stated that material is obscene if it tends to “deprave and corrupt” people. In trying to explain the meaning of the phrase “the tendency to deprave and corrupt’, the court stated in the case of *R v Martin Secker and Warburg Ltd*¹⁷⁰ that “to deprave and corrupt” means more than to “shock or disgust.”

However, restricting free speech of adults to safeguard public morals in certain matters has sometimes been contentious. Liberals, for example, would argue for the repeal of laws which are against adult pornography. They dismiss any prohibitions of adult pornography as the practice of moral paternalism by the state.¹⁷¹ Nevertheless, the argument changes when it comes to children. Most people are of the view that children should be protected from harmful and indecent material because they are a vulnerable group.¹⁷² Most jurisdictions pass laws criminalizing child pornography or protecting children from exposure to obscene and pornographic material. International law also obliges States to make laws and policies for the protection and well-being of children.¹⁷³

The courts have acknowledged limitations on free speech to safeguard public morals. In *Handyside v The United Kingdom*,¹⁷⁴ the applicant authored the ‘Little Red Book’ which contained pornographic material including images of masturbation and homosexuality, among others. The book was accessible to minors. The Court held that the books were obscene and ordered the books to be forfeited and destroyed by the police.

The relevant Acts which protect morality in Malawi include the Censorship and Control of Entertainment Act 1968, the Education Act 2012, and the Penal Code 1929. The Censorship Act regulates, among other things, the making of films, public information relating to legal proceedings, State-security related information, and publication contrary to public morals. The Censorship Board has powers to declare any content meant for publication to be ‘undesirable’. A publication is ‘undesirable’ if it is “indecent or obscene, or is offensive or harmful to public

¹⁷⁰ (1954) 1WLR 1138.

¹⁷¹ “Pornography and Censorship,” *Stanford Encyclopedia of Philosophy*, available at: <https://plato.stanford.edu/entries/pornography-censorship/> (accessed on 12th November 2013).

¹⁷² <https://www.oii.ox.ac.uk/archive/downloads/publications/FD17.pdf> (accessed on 12th November 2018).

¹⁷³ Convention on the Rights of the Child 1989, art 3 (2); see also International Convention on Civil and Political Rights 1966, art 24.

¹⁷⁴ European Court of Human Rights, Application No. 5493/72, Judgment of 7 December 1976.

morals.” Criticisms have however been made against the wide powers of censorship which have been given to the board of censors. Such powers are seen to be contrary to international law on free speech.¹⁷⁵ Further, the word ‘obscene’ and the term ‘harmful to public morals’ are too broad and can easily be abused.¹⁷⁶

Section 47 of the Education Act 2012 gives powers to the Minister to determine the material which is ‘unsuitable’ for Malawi schools. Fidelis Kanyongolo criticizes this section because it does not provide the criterion for the Minister to use in making his or her decisions. This gives the Minister too wide discretion which can be abused. Kanyongolo further observes that the word ‘unsuitable’ has not been defined and this makes it difficult to know the interest that the provision seeks to protect.¹⁷⁷

National security is another legitimate interest advanced to limit free speech. Security personnel, for example, may not be permitted to reveal certain matters to the public in the interest of defence. The security of a state can be undermined by any citizen who publishes the secrets of that state. In *Kim v Republic of Korea*,¹⁷⁸ the applicant distributed and read out documents critical of Government and calling for national reunification. He was convicted and jailed for two years. The Human Rights Committee held that although the restriction of the author’s right to free speech was provided by the National Security Law of Korea, the State party had not managed to show that distribution of the documents undermined national security. The Committee concluded that the limitation infringed the author’s right to free speech under the ICCPR.

The Acts of Parliament which protect public order and public security in Malawi include the Preservation of Public Security Act 1960 which gives powers to the Minister to prohibit publication which is “prejudicial to public security.”¹⁷⁹ Provisions like these are too broad and can easily be abused.¹⁸⁰ The African Commission on Human and People’s Rights in Principle XIII (2) of the Declaration of Principles of Freedom of Expression in Africa (2002) stated that free speech

¹⁷⁵ Fidelis Kanyongolo, *Report on Laws that Restrict Freedom of the Press in Malawi* (Zomba).

¹⁷⁶ *ibid.*

¹⁷⁷ *ibid.*

¹⁷⁸ Human Rights Committee Communication No. 574/1994, Views of 3 November 1998.

¹⁷⁹ Preservation of Public Security Act 1960, s 3.

¹⁸⁰ Fidelis Kanyongolo, Report on Laws that Restrict Freedom of the Press in Malawi (Zomba); Badala Tachilisa Balule, Kaitira Kandinji, and Raymond Louw, *Undue Restriction: Laws Impacting on Media Freedom in the SADC* (2004).

should not be limited under the grounds of public order or national security except where a risk exists that a legitimate aim is going to suffer gravely.¹⁸¹

The Penal Code 1929 provides for anti-sedition laws. It is an offence for anyone to do or utter, publish, sell, import or distribute anything seditious.¹⁸² Sedition emerges if a person intends “to bring into hatred or contempt or to excite disaffection against the person of the President or government...”¹⁸³ In *Chihana v R*,¹⁸⁴ the appellant was convicted of importing and possessing seditious publications. The Court held that sections 50 and 51 of the Penal Code 1929 which created sedition were unconstitutional.

Further, section 60 of the Penal Code 1929 provides that it is a crime to publish material that will “cause fear or alarm” to the general public. This provision has on several occasions been used to suppress freedom of the media. In *R v Mabvuto Banda, Raphael Tenthani and Horace Nyaka*,¹⁸⁵ the defendant journalists were arrested for writing that former President Dr Bingu wa Mutharika avoided occupy the newly constructed State House in Lilongwe because he was afraid of ghosts. It was held that the arrest threatened press freedom in Malawi.

The Protected Flag, Emblems and Names Act 1967 provides for insult laws. The Act prohibits saying or publishing anything which insults, ridicules or disrespects the President.¹⁸⁶ Other statutes protecting public order or national security include the Official Secrets Act 1913 which states that it is a misdemeanor for any person to reveal information he or she has by virtue of his or her job in Government,¹⁸⁷ and the Protected Places and Areas Act 1960 which provides for an offence for an individual to be in a protected place without a permit,¹⁸⁸ among others.

Seditious and insult laws can infringe free speech and media freedom. The media may engage in self-censorship which discourages them from commenting on issues of public interest.¹⁸⁹

¹⁸¹ <http://www1.umn.edu/humanrts/achpr/expressionfreedomdec.html> (accessed on 10th August 2018).

¹⁸² Penal Code 1929, s 51.

¹⁸³ Penal Code 1929, s 50 (1).

¹⁸⁴ Criminal Appeal No.2 of 1992.

¹⁸⁵ This was reported by The Nation Newspaper and the BBC, see <http://www.news.bbc.co.uk/2/hi/Africa/4350667.stm>.

¹⁸⁶ Protected Flag, Emblems and Names Act 1967, s 4.

¹⁸⁷ Official Secrets Act 1913, s 4.

¹⁸⁸ Protected Places and Areas Act 1960, s 4.

¹⁸⁹ Media Institute of Southern Africa, 13.

Insult laws tend to protect public officials from criticism and make them to be above the citizens.¹⁹⁰ Seditious and insult laws are expressed in words some of which are ambiguous such as ‘revile’, ‘ridicule’, ‘contempt’, ‘peace and friendship’, ‘disrespect’, and ‘expose to hatred’. These words are not clear and are prone to wide interpretation.¹⁹¹ It is also difficult to decipher the interests that some of the provisions want to safeguard.¹⁹² Seditious and insult laws can be prone to abuse by Government officials to suppress criticism of Government actions and officials or abuse of power.¹⁹³ In the final analysis, seditious and insult laws can promote lack of accountability and transparency in Government and can hamper democratic governance and usher in dictatorial tendencies in Government. It is therefore important for the court to guard against the abuse of these laws.

The ground of national security may undoubtedly be a legitimate interest but it has been faulted for being too broad and thus prone to abuse. Many governments use the ground of national security to suppress dissent. Under the pretext of maintaining peace and order, states can stifle freedom of expression through banning of protests and assemblies and declaration of emergency. It is a ground that government uses very often to silence the opposition parties or suppress the demands of workers, trade unionists and civil society.

The ICCPR provides that free speech does not include hate speech.¹⁹⁴ The provision against hate speech has not been expressly guaranteed in the UDHR, the African Charter, the European Convention, and the American Convention. It is also not contained in the Malawi Constitution or any of the statutes. Considering that issues of ethnicity, region of birth and religion are sometimes sources of conflict in Malawi, it is important for the Constitution to contain provisions against hate speech.

2.3 Protection of the Right to Reputation

Free expression does not include the violation of people’s rights including privacy, human dignity and reputation. The ICCPR, the UDHR, the European Convention and the American

¹⁹⁰ Ibid.

¹⁹¹ *ibid* in Kanyongolo, “Legal Regulation of Freedom of Expression and the Media in Malawi” (2008).

¹⁹² Media Institute of Southern Africa, 14.

¹⁹³ *ibid*.

¹⁹⁴ International Covenant on Civil and Political Rights, art 20.

Convention explicitly limit free speech for the sake of the reputation of other people. Despite failing to explicitly mention reputation as a legitimate ground to limit free speech, protection of reputation under the African Charter can be discerned through the interpretation of the provision which says that free speech may be limited “for the rights of others”.¹⁹⁵ The Constitution of Malawi 1994 also fails to expressly guarantee reputation as a limiting factor to freedom of expression but restrictions are still possible through the general limitation clause to the rights.¹⁹⁶

Protection of reputation is contained in most of the international legal regime on rights but there is no instrument which provides for reputation as a conventional right. By failing to include reputation as a conventional right, it may be argued that those who drafted the UDHR, the ICCPR, the regional instruments on rights, and the Constitution of Malawi all find the right to free speech more important than reputation which comes in only as a limiting factor to free speech.¹⁹⁷

The State is empowered to make laws which protect the privacy or reputation of other people. For example, laws which prohibits one from revealing information which he or she has received in confidence legitimately limits free speech. Privileged information which should not be revealed includes communication between a priest and confessant, patient and his or her doctor, and between a lawyer and his or her client.¹⁹⁸ Keeping confidentiality of the matters involved helps to make the clients free to express themselves without fear that information will be revealed.

In Malawi, defamation law protects the right to reputation. According to the Legal Dictionary, reputation is “a person’s good name, honour and what the community thinks of him/her.”¹⁹⁹ Reputation does not concern itself with the picture that one has of himself or herself but what others think of him or her; and it is for this reason that most jurisdictions require that statements which defame be communicated to another person apart from the plaintiff.²⁰⁰

¹⁹⁵ African Charter on Human and Peoples’ Rights 1981, art 27 (2).

¹⁹⁶ Constitution of Malawi 1994, s 44.

¹⁹⁷ See Steele J., *Tort Law: Text, Cases, and Materials* (3rdedn, Oxford University Press 2014) 746.

¹⁹⁸ Kivutha Kibwana, *You and the Law: Fundamental Rights and Freedoms in Kenya* (Oxford University Press 1990) 42.

¹⁹⁹ “Definition of Reputation”, legal-dictionary.thefreedictionary.com/reputation (accessed on 10th March 2018).

²⁰⁰ Dario Milo, ‘Defamation and Freedom of Speech’ (Oxford University Press, 2008) in P Milmo and WVH Rogers, *Gartley on Libel and Slander* (10th edn, 2004) 141.

The values that are associated with reputation include property, honour, and dignity.²⁰¹ Reputation as ‘property’ is a kind of intangible property which is compared to goodwill and is acquired through a person’s effort and labour. Therefore, if a person loses his or her hard-won reputation through defamatory statements, he or she deserves compensation.²⁰² Courts have confirmed the idea of reputation as property. In *Dixon v Holden*,²⁰³ it was held that the courts’ jurisdiction included preventing people from publishing material that would destroy the claimant’s property or his or her reputation which was more valuable than any other property. Further, in *Jameel v Wall Street Journal Europe Sprl*,²⁰⁴ the Court stated that the reputation of a commercial company is an asset for the company because it attracts customers. The rule that corporations can sue in defamation cases is an example of protecting reputation as property.

Reputation as ‘honour’ contends that one’s reputation depends on his or her role in the community. People have different social status and the higher the status the more the reputation that one has. Thus reputation as honour values the reputation of public officials very highly.²⁰⁵ When assessing damages in a defamation suit, therefore, the court has to consider the status of the plaintiff in society.²⁰⁶ In *Botha v. Pretoria Printing Works Ltd*,²⁰⁷ it was stated that the character of a public man is not only a possession precious to himself but it is also a public asset. Such a statement by the court confirmed reputation as honour. However, the practice in many jurisdictions these days is that public officials are not accorded greater rights than private claimants in defamation suits.²⁰⁸ The new trend is to limit the right of public officials to sue for defamation.²⁰⁹

Reputation as ‘dignity’ arises from full membership in society.²¹⁰ This dignity is maintained by societal rules which must be obeyed by members of that particular community. An

²⁰¹ For the details about reputation as property, honour and dignity see Dario Milo, ‘Defamation and Freedom of Speech’ (Oxford University Press, 2008) 27 in Post R.C., *The Social Foundations of Defamation Law: Reputation and the Constitution* (1986) 74 California LR 691, 692.

²⁰² *ibid.*

²⁰³ (1868-9) LR Eq 488.

²⁰⁴ (2007) AC 359, HL.

²⁰⁵ J. March, *Actions for Slander or Methodical Collection under Certain Grounds and Heads, of What Words are Actionable in the Law, and What Not?* (1648) 17.

²⁰⁶ *ibid.*

²⁰⁷ (1906) TS 710, 715.

²⁰⁸ *Campbell v Spottiswoode* (1863) 3 B & S 769.

²⁰⁹ See *New York Times v Sullivan* (1964) 376 US 254.

²¹⁰ Dario Milo, ‘Defamation and Freedom of Speech’ (Oxford University Press, 2008) 34 in RC Post, *The Social Foundations of Defamation Law: Reputation and the Constitution* at 711 (1986) 74 California LR 691, 692.

individual loses dignity when he or she is apparently excluded from the community through the destruction of his reputation.²¹¹ In *S v. Makwayane*²¹² the Court stated that dignity refers to the worth of every person. In other words, no person should ever be handled as an object of other people.²¹³ Defamation law protects individuals from false statements which destroy their moral integrity and image.

Reputation therefore is an interest worthy protecting in society. It is generally safeguarded by States' defamation laws. Malawi follows the provisions of Chapter XVIII of the Penal Code 1929 and the common law of defamation of England. Winfried has defined defamation as the "publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right-thinking members of society generally or tends to make them shun or avoid him."²¹⁴ Under the Penal Code 1929, a statement becomes defamatory if it is "is 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."²¹⁵

The plaintiff must satisfy three conditions in a defamation suit: he or she must show that the statement has caused injury to reputation; that the statement pointed to him or her; and that at least one person apart from the claimant heard or read it.²¹⁶ The claimant has to show that the statements are defamatory²¹⁷ and the moment he or she does that, the defendant cannot give an excuse that he or she never wanted to defame the claimant or that he or she had taken measures to find out the truth about the statements.²¹⁸ The moment it is shown that the statement is defamatory that gives a *prima facie* cause of action at common law.

Further, the words which are causing injury to reputation should point to the claimant.²¹⁹ The plaintiff need not be mentioned in defamatory words or that all people who hear the words or read them know that they are referring to the plaintiff. It suffices that those who know the facts

²¹¹ *ibid.*

²¹² (1995) 3 SA 391 (CC) (328).

²¹³ O. Schacter, *Human Dignity as a Normative Concept* (1983) 77 AJIL 848, 849.

²¹⁴ Winfield and Jolowicz, *Tort* (17thedn, Sweet and Maxwell 2006) 515.

²¹⁵ Penal Code 1929, s 201; see *Parmiter v Coupland* (1840) 6M & W 105, at 105.

²¹⁶ Winfield and Jolowicz, *Tort* (17thedn, Sweet and Maxwell 2006) 515.

²¹⁷ Murphy J. & Writing C., *Street on Torts* (13th edn, Oxford University Press 2012) 537.

²¹⁸ *E Hulton & Co v Jones* (1910) AC 20, at 23.

²¹⁹ *Knuffer v London Express Newspaper Ltd* (1994) AC 116, at 121.

surrounding the statement believe that it is the plaintiff who is being talked about.²²⁰ In *Dow Jones & Co Inc v. Gutnick*,²²¹ it was stated that reputation is infringed upon if the material is available in comprehensible form. In other words, there must be a kind of publication.

The common law distinguishes two torts under the law of defamation, which Malawi also recognizes: libel and slander. Libel takes a permanent form²²² such as a writing, printed material, a mark, a picture, waxwork, statue, chalk marks on a wall²²³ and a tape recording, that is, a record, audio or video tape or disc.²²⁴ It also includes a film, television, radio programme,²²⁵ and internet.²²⁶ Slander, on the other side, is in temporary form²²⁷ such as spoken words, gestures including the sign language of the deaf and dumb.²²⁸

Libel is more serious because it is permanent in nature and gives opportunity to many people to see it. At common law, ‘libel is actionable *per se*’, that is, it is assumed that the plaintiff has suffered damage. Slander ‘is not actionable *per se*’ but requires the claimant to show ‘special damage’, for example, showing that he or she has suffered financial loss through loss of a job or business.²²⁹ However, some slanders are actionable *per se*. These include words claiming that the plaintiff has committed a criminal offence deserving him or her to be punished corporally,²³⁰ or that he or she has a contagious disease,²³¹ or words undermining the plaintiff’s office, profession, vocation, trade,²³² or claiming that a woman is unchaste.²³³

2.3.1 Defences to a Defamation Claim

The defendant can raise various defences to a defamation suit at common law. The Penal Code 1929 provides for the following defences: truth, absolute and qualified privilege, and fair

²²⁰ *Morgan v Odhams Press Ltd* (1971) All ER 1156.

²²¹ (2002) 210 CLR 575 (116).

²²² *Monsoon v Tussauds Ltd* (1984) 1 QB 671, 692 (Lopes CJ).

²²³ *ibid.*

²²⁴ *Chicken v Harm* (1929) 2 AC 460.

²²⁵ *Yousoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TRL 581.

²²⁶ *Mickelberg v 6PR Southern Cross Radio Pty Ltd* (2001) WASC 150.

²²⁷ *Monsoon v Tussauds Ltd* (1984) 1 QB 671, 692 (Lopes CJ).

²²⁸ *Cook and Cox* (1814) 3 M & S 110, 114.

²²⁹ See *Chamberlain v Boyd* (1883) 11 QBD 407.

²³⁰ *Webb v Beavan* (1883) 11 QBD 609, 610.

²³¹ *Taylor v Perkins* (1791) Cro Jac 144.

²³² *Jones v Jones* (1916) 2 AC 481.

²³³ *ibid.*

comment. Section 203 of the Penal Code 1929 provides for the defence of truth.²³⁴ It is the duty of the defendant to prove that the statements he or she made about the plaintiff are true and once he or she successfully does that, he or she will generally win the case.²³⁵ However, putting the responsibility on the defendant to prove his statements favours reputation more than free speech.

The Penal Code 1929 recognises two kinds of privileges: absolute privilege and conditional privilege.²³⁶ The defence of absolute privilege covers any official document of the President and Parliament as well as communication in the Cabinet and Parliament.²³⁷ In *M Isaacs & Sons Ltd v. Cook*,²³⁸ it was held that a message from the High Commissioner for Australia to his Prime Minister about a matter of commerce which concerned the Government of Australia was held to be privileged. Further, the Penal Code 1929 also protects anything published about someone in the military on his or her conduct.²³⁹ In *Dawkins v. Lord Paulet*,²⁴⁰ it was held that a report on the claimant from his superior officer to his commander-in-chief was protected from a defamation suit.

Publications arising out of judicial proceedings are also absolutely privileged under the Penal Code 1929.²⁴¹ Statements made in proceedings before superior and magistrates' Courts are privileged. Pleadings and affidavits are also absolutely privileged.²⁴² The privilege extends to other tribunals recognised by law²⁴³ as well as bodies such as the disciplinary committee of the Law Society²⁴⁴ and the Courts martial.²⁴⁵ The privilege is also enjoyed by judges,²⁴⁶ counsel²⁴⁷ and

²³⁴ J G Fleming, *The Law of Torts* (9th edn, 1998) 610.

²³⁵ J G Fleming, *The Law of Torts* (9th edn, 1998) 610.

²³⁶ Penal Code 1929, ss 204-205.

²³⁷ Penal Code 1929, s 204.

²³⁸ (1925) 2KB 391.

²³⁹ Penal Code 1929, s 104.

²⁴⁰ (1868) LR 5 QB 94.

²⁴¹ Penal Code 1929 s 204(1)(e).

²⁴² *Lilley v Roney* (1892) 61 LJQB 727.

²⁴³ *Lincoln v Daniels* (1962) 1 QB 237.

²⁴⁴ *Addis v Crocker* (1961) 1 QB 11.

²⁴⁵ *Wilson v Westney* (2001) EWCA Civ 839.

²⁴⁶ *Scot v Stansfield* (1868) LR 3 Exch 220.

²⁴⁷ *Munster v Lamb* (1883) 11 QBD 588.

solicitors²⁴⁸ (advocates), parties to a suit, and witnesses.²⁴⁹ Absolute privilege protects any speech whether it is false or true or is produced in bad faith.²⁵⁰

Section 205 of the Penal Code 1929 provides for conditional privilege. Someone has a conditional privilege if he or she published the defamatory statement because he or she had “a legal, moral or social duty” to publish it for the people who got the message.²⁵¹ However, the statements must be made in good faith.²⁵² In such circumstances, free speech is more important than the claimant’s reputation.²⁵³ However, the defence is lost if the plaintiff proves bad faith.²⁵⁴ Under the Penal Code 1929, the defence of conditional privilege is lost if the defendant reports of a matter which is false and knew that it was false or did not make any effort to find out whether it is true or not or the defendant published the material with the intention just to injure the claimant.²⁵⁵ For example, in *Winstanley v. Bampton*,²⁵⁶ a creditor who wrote a defamatory letter to the commanding officer of the claimant debtor, and believed what he wrote, forfeited his privilege because his indignation and anger had led him to defame the claimant.

The Penal Code 1929 also provides for the defence of fair comment.²⁵⁷ The defamatory statement must concern issues of the general interest. Issues to do with general interest include public conduct of people in public offices but not their private conduct; activities and institutions of Government including local Government; the management of institutions of substantial public concern, such as the media and religious institutions; books, articles, periodicals and newspapers, plays, and radio broadcasts; the work of an architect and the performance of actors in public entertainments, *etc.*²⁵⁸ Finally, the defamatory statement must also be fair. It is a fair comment if the defendant makes the comment on true stories and that the comment represents a legitimate

²⁴⁸ *Mackay v Ford* (1860), 5H & N 792.

²⁴⁹ *Seaman v Netherclift* (1876) 2 CPD 53, at 57.

²⁵⁰ Penal Code 1929, s 204(2).

²⁵¹ Penal Code 1929, s 205; see *Toogood v Spyring* (1834) 1 Cr M & R 181 at 193.

²⁵² Penal Code 1929, s 205.

²⁵³ *Adam v Ward* (1917) AC 309, at 334.

²⁵⁴ *Sun Life Assurance Co of Canada v Dalrymple* (1965) S.C.R. 302.

²⁵⁵ Penal Code 1929 s 206.

²⁵⁶ (1943) KB 319.

²⁵⁷ Penal Code 1929, s 203.

²⁵⁸ For more information and cases provided covering matters of public interest see John Murphy & Christian Witting, *Street on Torts* (13th edn, (Oxford University Press 2012) 588.

opinion honestly held.²⁵⁹ The defendant loses the defense of fair comment if the plaintiff shows that the defendant is malicious.²⁶⁰

2.4 Conclusion

The right to free speech is expressly enshrined in international and regional human rights instruments and also the Malawi Constitution. Freedom of expression covers media freedom, opinion, artistic expression, academic freedom, political freedom, access to information, and the right to 'impart and receive information'. It includes the use of any means of communication. However, the free speech clause in the Malawi Constitution is not able to capture all these elements of the scope of free expression.

Further, freedom of expression is not unlimited under the human rights instruments. It can be limited to protect other equally important societal values and rights of others such as the right to reputation. Human rights instruments provide for free speech as a conventional right but not for reputation. Reputation is mentioned in most regional instruments only as a limiting factor of the right to free speech. The 1994 Malawi Constitution fails to mention reputation as a limiting factor or a conventional right. This gives the impression that free speech is more important than reputation. Equality of rights as propounded by natural rights theory requires that rights be treated equally. The existing laws in international and regional human rights instruments so far fail to protect both free speech and reputation equally. In this case, the laws cannot be effective in balancing free speech and reputation because they have the potential of influencing readers to favour free speech which is contained in the laws as a conventional right, not reputation which is mentioned only as a limiting factor to free speech.

Under the human rights instruments, limitations to free speech are contained either as specific limitation clauses or a general limitation clause to rights. Most of the regional instruments on free speech have specific limitation clauses which spell out the legitimate aims to limit free speech. However, the 1994 Malawi Constitution has a general limitation clause to the Bill of Rights, not a specific limitation clause to free speech. Scholars argue that such limitation clauses are not the best for countries which do not have strong democracies. Malawi has been described

²⁵⁹ PH Osborne, *Law of Torts* (2nd edn., 2003) 372-374.

²⁶⁰ *Ibid.*

by Blessings Chisinga as having a ‘fragile democracy’. This means the general limitation clause may not be effective in balancing free speech and reputation in Malawi.

Free speech limitations in Malawi are mainly contained in the Acts of Parliament, some of which unjustifiably restrict free speech. These laws include public security laws, laws on morality, sedition, insult, and defamation. Some of the provisions on these laws are too broad and give wide powers to the relevant boards or the Minister responsible. Some of the provisions are expressed in ambiguous terminologies. The law which makes defamation a crime amounts to undue limitation on free speech because such matters have sufficient remedies in civil proceedings and do not need prosecution. Seditious and insult laws infringe free speech and media freedom because they discourage journalists from commenting on issues of public interest.²⁶¹ Insult laws tend to protect public officials from criticism and make them to be above the citizens.²⁶² Seditious and insult laws can be prone to abuse by Government officials to suppress criticism of Government actions and officials or abuse of power.²⁶³

Malawi does not have a Defamation Act to balance free speech and reputation. The country uses the common law of England and the few provisions on defamation contained in the Penal Code 1929. The Penal Code 1929 defines defamation and gives the defences but it is silent on remedies. As the provisions stand, they are not sufficient to balance free speech and reputation. Enacting a Defamation Act would help to include both remedies and defences.

²⁶¹ Media Institute of Southern Africa, 13.

²⁶² *ibid.*

²⁶³ *ibid.*

CHAPTER THREE

JUDICIAL INTERPRETATION OF FREEDOM OF SPEECH AND REPUTATION

3.0 Introduction

Having looked at the law relating to free speech and reputation in Chapter Two, the current Chapter analyses the courts' interpretation of the conflict between free speech and reputation. Courts have the duty to enforce and protect liberties and explain their scope. It is the judiciary that helps to balance competing rights. This chapter discusses the interpretation of free speech and reputation by the international courts as well as Malawi courts. It explores how the courts or human rights commissions interpret limitations on free speech. The Chapter seeks to discover whether or not free speech and reputation are treated equally by the courts.

3.1. International Judicial Interpretation of Restrictions on Freedom of Expression

As noted in previous Chapters, despite the fact that free speech fosters democratic Governments,²⁶⁴ it is not an absolute right under any legal system. Legal instruments recognize only very few rights as absolute rights but most of the rights are not uncontrolled.²⁶⁵ In *A.K. Gopalan v State of Madras*, it was held: "Man as a rational being desires to do many things, but in a civil society his desires have to be controlled, regulated and reconciled with the exercise of similar desires by other individuals."²⁶⁶

Thus citizens can enjoy freedom of speech as much as they can as long as their liberty does not infringe the liberties of other people. As John Stuart Mill said in his *On Liberty* individuals are entitled to as much liberty as possible in so far as they do not cause harm to others.²⁶⁷ For instance, to incite a mob towards violence is to cause harm and that form of speech needs to be limited. Free speech which destroys reputation, privacy or honor causes harm to the plaintiffs and should be restricted.

²⁶⁴ Resolution 59 (1), the *United Nations General Assembly*, 14 December 1946.

²⁶⁵ For example, section 44 (1) of the Constitution of Malawi 1994 provides that there shall be no derogation or limitation to the prohibition of genocide; prohibition of torture and inhumane or degrading treatment or punishment; the prohibition of slavery and slave trade; the right to equality and recognition before the law; the right to *habeas corpus*; and the right to life, among others.

²⁶⁶ AIR 1950 SC 27.

²⁶⁷ John Stuart Mills, *On Liberty* (1978).

Feinberg adds the offense principle as another reason to limit freedom of expression. He argues that if an individual is made to suffer an offense by someone's statements, regardless of whether or not actual harm occurs as Mill proposes, such expressions must be limited.²⁶⁸ For instance, while the Danish cartoon mocking Mohammed was an expression of freedom of speech and might not have caused any harm, it was offensive to the Muslim community and such expressions must be restricted.²⁶⁹ While the statement by Israeli Prime Minister Menachem in 1982 that 'Palestinians are beasts that walk on two legs' or South Africa's opposition politician Julius Malema's singing of 'Kill the Boer' might not have caused harm to any one, such expressions are offensive and cannot be tolerated.²⁷⁰ While President Bingu wa Mutharika's calling of the opposition party members as 'hynas' might not have caused harm, that kind of speech is not worth protecting because it is offensive.²⁷¹ Thus some liberties and rights need to be limited to promote other equally important societal values and rights.

Nevertheless, free speech should be curtailed only for legitimate reasons. The standard clause for restricting free speech is contained in the ICCPR and provides that restrictions on free speech are possible in so far as they are "provided by law and are necessary" to protect other rights including reputation and other societal values.²⁷² This clause has been imported by the European Convention, American Convention and the African Charter with a few modifications. For example, the new element added by the American Convention is that it prohibits prior censorship.²⁷³ The European Convention adds that limitations to free speech should be "necessary in a democratic society."²⁷⁴ The ICCPR does not contain the expression "democratic society."

²⁶⁸ "Feinberg's Offence Principle and the Harm Principle", available at: <https://iindabaezothusayo.wordpress.com/2014/11/12/feinbergs-offense-principle-and-the-harm-principle/> (accessed on 16 October 2018).

²⁶⁹ *ibid.*

²⁷⁰ *ibid.*

²⁷¹ Joseph Maere, "The Extent of Hate Speech Politics in Malawi: An Analysis of Proliferation of Hate Speech Ahead of 2009 General Elections," available at: https://www.researchgate.net/publication/309291943_The_Extent_of_%27Hate_Speech%27_Politics_in_Malawi_An_Analysis_of_Proliferation_of_Hate_Speech_Ahead_of_2009_General_Elections (accessed on 6th August 2018).

²⁷² Article 19(3) of the International Covenant on Civil and Political Rights 1966 provides for the following as legitimate interests: rights of others including reputation, national security, public morals, public order, and public health.

²⁷³ American Convention on Human Rights 1978, art 13 (2).

²⁷⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 10 (2).

The three requirements or conditions to be met as provided for in the ICCPR for a justifiable restriction of free speech are as follows:²⁷⁵ first, the limitation should be contained in the law. Courts have stated that term ‘law’ includes administrative laws, civil laws, criminal laws, constitutional law²⁷⁶ and judicial precedent.²⁷⁷ The laws must be made by the legislature and includes delegated legislation.²⁷⁸ However, delegated powers to make laws should not be too wide because that would be prone to abuse.²⁷⁹

The right to free speech cannot be curtailed at the whim of government officials. Limitations to free speech must be done according to the laws of the country which have been passed by relevant legislative bodies. The laws restricting free speech should not be ambiguous. Laws which are vague and whose scope is unknown fail to meet the test and cannot be legitimate. Such vague laws are prone to abuse by government officials because they give them too wide discretionary powers. Ambiguous laws stifle discussions on matters of public interest because citizens are afraid they might say something that is illegal since they are not sure of what the law prohibits.

The second condition is that free speech should be limited to pursue a legitimate interest, that is, rights of other people including reputation, public order, morals, health and the security of the State.²⁸⁰ Regional human rights instruments including the American Convention,²⁸¹ the European Convention²⁸² and the African Charter²⁸³ provide for the same interests for restricting

²⁷⁵ International Convention on Civil and Political Rights 1966, s 19(3).

²⁷⁶ *Refah Partisi (The Welfare Party) and Others v. Turkey*, 13 February 2003, Application Nos. 41340/98, 41342/98, 41343/98 and 41344/98 (European Court of Human Rights), para. 58 *et seq.*

²⁷⁷ See *The Word “Laws” in Article 30 of the American Convention on Human Rights*, Advisory Opinion OC-6/86 of 9 May 1986, Series A, No. 6; *The Sunday Times v United Kingdom*, 26 April 1979, Application No. 6538/74, para. 47; *Observer and Guardian v United Kingdom*, 26 November 1991, Application No. 13585/88, para. 50-53.

²⁷⁸ *ibid.*

²⁷⁹ See *Re Ontario Film and Video Appreciation Society v Ontario Board of Censors* (1983) 31 O.R. (2d) 583 (Ont. H.C.), p. 592.

²⁸⁰ International Covenant on Civil and Political Rights 1966, art 19(3).

²⁸¹ Article 13 (2) of the American Convention on Human Rights of 1978 provides that the exercise of the right to freedom of expression shall not be subject to prior censorship but shall be subject imposition of liability, which shall be established by law to the extent necessary to ensure respect for the rights and reputation of others; or the protection of national security, public order, public health or public morals.

²⁸² See European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 10 (2).

²⁸³ Article 27 (2) of the African Charter on Human and Peoples’ Rights 1981 provides that “the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.”

free speech. Courts therefore consider the purpose and the impact that the limitation will have on free speech to assess its legitimacy and if the goal is to achieve a purpose other than those stated in the laws and constitution, that restriction is not legitimate.²⁸⁴

However, the problem is that some of the aims for limiting free speech are too broad. Free speech may be limited, for instance, to safeguard other people's rights. Does this protect only rights which are protected the laws? One opinion of the courts is that all rights are protected whether or not they are in the laws. In *Casado v Spain*, the European Court banned advertising by lawyers and stated that this was meant to ensure that the lawyers were 'discreet, honest and dignified'.²⁸⁵ The goal for limiting the freedom of speech of the lawyers may be worthy but it is certainly not a fundamental human right. However, another view seems to suggest that where the conflict is a right that is contained in the laws and one that is not, the protected right should take precedence.²⁸⁶

If legal rights take precedence over rights which are not clearly provided for in the laws, as the latter view above advocates for, such a position would justify codifying the other rights of human beings. However, even if the rights are not codified, that is not a legitimate reason to deny someone his or her rights because, according to natural law, rights are inherent to human beings. Despite the assertions of natural rights theory, codification of liberties and rights is still relevant to make the right easily recognized and enforced.

The other protected interest is morality which, as discussed in Chapter Two, is also broad. It is very difficult to define public morals and they change with the passage of time and from place to place. It is hard to know precisely what is being protected by 'public morals'.²⁸⁷ As noted in the previous chapter, for example, laws on obscenity and pornography attract controversy. The *Hicklin case*²⁸⁸ tried to explain that material is obscene if it tends to 'deprave and corrupt' but this is not still clear. The *Martin Secker case*²⁸⁹ further tried to explain that to 'deprave and corrupt' could mean to 'shock or disgust' but these words are not clear either.

²⁸⁴ *R. v Big M Drug Mart Ltd* (1985) 1 SCR 295, 331.

²⁸⁵ (1994) Application No. 15450/89 para 39.

²⁸⁶ See Principle 6 of the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, UN Doc. E/CN. 4/1985/4.

²⁸⁷ See *Jacobellis v Ohio*, 378 US 184, 197 (1964).

²⁸⁸ *R v Hicklin* (1868) LR QB 360.

²⁸⁹ *R v Martin Secker and Warburg Ltd* (1954) 1WLR 1138.

Irrespective of the controversies surrounding public moral issues, there is no question generally that children should be protected from obscene and pornographic materials. The Inter-American Court of Human Rights, for instance, has confirmed the protection of children by allowing prior censorship of materials which may affect children;²⁹⁰ otherwise the American Convention prohibits prior censorship.²⁹¹

The case of *Olmedo Bustos et al. v Chile*²⁹² has analysed the exception to the prohibition of censorship to protect children. The facts are that the Chilean Government had banned the film *The Last Temptation* on the grounds of protecting the morals of minors. The Chilean Government argued that the prior censorship of the film was in consonance with the exception to the prohibition of prior censorship. It was held that the prior censorship by the Chilean Government of *The Last Temptation* for the purported protection of children violated free speech. The Court further stated that there were alternatives to protecting minors like stopping minors from entering halls for cinemas rather than prior censorship of the film.

The ICCPR also mentions national security as a justifiable interest to warrant limiting free speech.²⁹³ For example, freedom of expression can be limited to curb terrorism. In *Zana v Turkey*,²⁹⁴ the applicant politician was condemned for making a speech supporting pro-Kurdish political party at a time when the relationship between Turkish security forces and the Kurdistan political party was sour. It was held that such kind of speech in such scenario could incite violence and had to be limited.

Notwithstanding the fact that national security is a worthy goal for society, it is difficult for many people, including the judges, to know what constitutes national security.²⁹⁵ The secrecy surrounding national security compounds the matter. In *Leander v Sweden*,²⁹⁶ the Government of Sweden terminated the job of the applicant in Government under the pretext of the security of the

²⁹⁰ Article 13(4) of the American Convention on Human Rights 1978 allows prior censorship of material to protect children.

²⁹¹ *ibid*, art 13 (2).

²⁹² (February 5, 2001), Inter-American Court of Human Rights.

²⁹³ International Covenant on Civil and Political Rights 1966, art 19 (3).

²⁹⁴ (25 Nov 1997) ECHR.

²⁹⁵ Tody Mendel, "Restricting Freedom of Expression: Standards and Principles," *Centre for Law and Democracy* available at tody@law-democracy.org (accessed on 1st March 2018).

²⁹⁶ (1987), Application No. 9248/81.

State and declined to disclose the exact reasons for the dismissal. The European Court found that although the claimant's private life was interfered with, the interference was justifiable to safeguard the security of the State. It was however later discovered that the Swedish Government dismissed Leander for her political beliefs. She was paid damages of 48,000 US dollars.

The third requirement for limiting free speech provides that the limitation should be 'necessary' to protect the legitimate interests.²⁹⁷ Courts have stated that the word 'necessary' includes several elements. First, the limitation should be made because there is 'a pressing need'.²⁹⁸ Second, there must be a real connection between the legitimate interest being protected and the limitation.²⁹⁹ Third, the limitation should be the 'least intrusive measure' available.³⁰⁰ In other words, the measure should not restrict free speech broadly or excessively. For instance, closing down a newspaper or Television station for defamation would be too excessive. The plaintiff would better receive compensation for the defamatory remarks. Convicting someone for defamation may also fall in the same category of excessive measures.

The three requirements for limiting free speech were applied by the Human Rights Committee in *Faurisson v. France*.³⁰¹ The applicant denied holocaust. In analyzing the case, the Human Rights Committee stated that it was necessary to limit the applicant's free speech to protect the rights of the Jews. The Committee observed that the limitation on the applicant's free speech was provided for by the Gayssot Act 1990 of France. The Committee further observed that holocaust denial by the applicant infringed the rights and reputation of others because the applicant's statements promoted anti-semitic freedoms. Furthermore, the Committee held that the French Courts applied the Gayssot Act 1990 in a manner that conformed to the provisions of the ICCPR. The Committee's view was that the restriction of the free speech of the applicant was necessary because that France introduced the Gayssot Act 1990 to combat racism and anti-semitism. In conclusion, the Committee stated free speech of the applicant was legitimately restricted.

²⁹⁷ International Convention on Civil and Political Rights 1966, s 19(3).

²⁹⁸ *Lingens v. Austria* (1986), Application No. 9815/82, para 39 (European Court of Human Rights).

²⁹⁹ Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85 of 13 November 1985, Inter-American Courts of Human Rights, Series A, para. 46.

³⁰⁰ *ibid.*

³⁰¹ Human Rights Committee, Communication No. 550/1993, Views of 8 November 1996.

3.2 International Judicial Interpretation of the Right to Reputation

It is a natural inclination that a human being wants to maintain a good image to his or her community. It is for this reason that reputation is deemed a justifiable ground for limiting free speech. The relevant laws to protect reputation are defamation laws. Despite being acknowledged in most international and national laws as a good reason for limiting free expression, reputation is not enshrined as a conventional right.³⁰² There is no human right instrument on record, whether international or national, which explicitly guarantees the right to reputation. Both the UDHR and the ICCPR acknowledge reputation only as a limiting factor to free speech, not a conventional right.³⁰³ The regional laws, that is, the American Convention and the European Convention, also expressly mention reputation as one of the justifiable aims for limiting free speech, but do not grant reputation the same status as free speech.³⁰⁴

The exercise of the right to free speech often comes into conflict with the enjoyment of reputation. For example, free speech as enshrined in the European Convention³⁰⁵ is ordinarily in conflict with reputation guaranteed under article 10 (2) of the Convention. This conflict was acknowledged in *Chauvy v. France*.³⁰⁶ The applicant wrote in his book about the arrest of Jean Moulin by the Nazi army at the time of World War II. Jean Moulin used to be French Resistance leader. It was alleged in the book that Jean Moulin was betrayed by former members of the French Resistance, Mr and Mrs Aubrac. The couple sued the publisher of the book, who was found guilty of defamation. The applicants challenged the judgment at the European Court and argued that their right to free speech was infringed. The Court acknowledged that reputation was in conflict with free speech but emphasized that both rights were important.

Commenting more on free speech and reputation, the European Court has acknowledged that journalists are ‘watchdogs of democracy’.³⁰⁷ In *Prager and Oberschlich v Austria*,³⁰⁸ the applicant journalist was condemned for criticizing a political figure. The European Court stated

³⁰² Steele J., *Tort Law: Text, Cases, and Materials* (3rd edn, Oxford University Press 2014) 746.

³⁰³ Universal Declaration of Human Rights 1948, art 12; International Covenant on Civil and Political Rights 1966, art 19 (3).

³⁰⁴ S. Smet, *The Right to a Reputation under European Convention on Human Rights*, Vol. 26, Issue 1, American University International Law Review (2005).

³⁰⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, s 10(2).

³⁰⁶ (2004) Application no. 64915/01 (European Court of Human Rights).

³⁰⁷ See *Bergens Tidende and Others v Norway* (2000), 26132/95 (2001) 31 EHRR 16, (2000) ECHR 190.

³⁰⁸ (26 April 1995) Application no. 15974/90, European Court of Human Rights.

that free speech was infringed. The Court explained that the media may sometimes have to exaggerate a bit or even provoke in order for them to carry out their duty as a ‘watchdog of democracy’. It also stated that it is not a ‘personal attack’ to refer to a political figure as an ‘imbecile’. Further, the Court said that there is no need for the journalist to prove that his or her statements are true if they are personal opinions.³⁰⁹

The European Court applies the proportionality-based approach to resolve the clash between reputation and free speech as guaranteed in the European Convention. In *Lingens v Austria*, it was held that private individuals should be protected more by defamation laws “because they have not specifically opened themselves up to public scrutiny.”³¹⁰ On the other hand, politicians should accept more criticisms than the rest of the people³¹¹ since a “politician inevitably and knowingly lays himself open to close scrutiny of his every word and deed.”³¹²

The Inter-American Commission is of the same view that public figures should tolerate more criticisms than ordinary people. In *Verbitsky v Argentina*,³¹³ a journalist called the National Supreme Court ‘disgusting’. He was found guilty and given a sentence of one month in prison. The Commission stated that public officials should tolerate more criticisms than ordinary people. Furthermore, in *Derbyshire County Council v Times Newspapers Ltd*,³¹⁴ the European Court held that Government officials should not even institute a defamation suit but they should be as tolerant as possible of public criticism.

Public officials should still be respected and their right to reputation promoted albeit the fact that they have accepted to be leaders and therefore open to scrutiny. Unjustified remarks on public officials and public officers such as politicians and religious people cannot be tolerated simply because they chose to take up such positions. They do not lose their rights to honor, privacy and reputation by becoming leaders. Further, to say that public officials are not entitled to

³⁰⁹ *ibid.*

³¹⁰ (1986) 8 EHRR 407, ECtHR.

³¹¹ *ibid.*

³¹² *Gorelishvili v Georgia* (2009) 48 EHRR 36, para. 32.

³¹³ (Sep 20, 1994) *Case 11.012*, Report No. 22/94, Inter-Am.C.H.R., OEA/Ser.L/V/II.88 rev.1 Doc. 9 at 40 (1995).
September 20, 1994.

³¹⁴ (1993) AC 534.

defamation, as the *Derbyshire County Council case*³¹⁵ states, is an exaggeration and may amount to unjustifiable infringement of the right to reputation. Furthermore, it is also not correct to state that a journalist does not need to prove the truth of his statements if they are personal opinions, as the *Prager case*³¹⁶ argues. Journalists who fail to make efforts to establish the truth of the stories they write about cannot be condoned.³¹⁷

Freedom of expression is not superior to competing rights including reputation and privacy.³¹⁸ In *Berezovsky v. Forbes Inc (No 2)*,³¹⁹ the Court of Appeal acknowledged the equality between free speech and reputation. Furthermore, in *Reynolds v Times Newspaper Ltd*, the court held that “reputation is an integral part of an individual’s dignity” and that it is “conducive to the public good” to safeguard reputation.³²⁰ Therefore, while freedom of expression is important, other rights such as reputation are equally important. It is important for media personnel to respect the right to reputation and privacy as they report news about anyone including public figures.

The European Court has stated that the media should not violate the right to reputation or any other rights of others as they do their work. In *Alithia Publishing Company v Cyprus*,³²¹ the European Court emphasized the importance of keeping professional ethics for journalists and that the European Convention does not protect a journalist who writes false stories about political figures. It does not condone journalists who do not make efforts to verify whether the stories they are writing about are true or not.

In *Goodwin v UK*,³²² the European Court emphasized that the exercise of free speech must go together with duties. The media should be professional in their work and this requires that they report on information which is true and accurate and must write in good faith. The same sentiments were expressed by the Inter-American Court of Human Rights in the Advisory Opinion

³¹⁵ *Derbyshire County Council v. Times Newspapers Ltd* (1993) AC 534.

³¹⁶ *Prager and Oberschlich v Austria* (app no. 15974/90) ECHR 26 April 1995).

³¹⁷ *Alithia Publishing Company v Cyprus* (2008) ECHR 17555/03 (65).

³¹⁸ *Campbell v MGN* (2004) 2 AC 406, at 31-33.

³¹⁹ (2001) 1 EMLR 45, CA.

³²⁰ *Reynolds v Times Newspaper Ltd* (2001) 2 AC 127, HL 201.

³²¹ (2008) ECHR 17550/03 [65]; See also *Flux v Moldova* (2008) ECHR 22824/04.

³²² (1996) 22 EHRR 123, European Court of Human Rights.

Enforceability of the Right to Reply or Correction when it emphasized the need to balance free speech and reputation.

The African Charter does not expressly mention reputation but free speech. However, the Charter provides that the enjoyment of free speech must be “within the law”³²³ which is taken to include State law such as defamation law. Article 27 of the African Charter further states that people must enjoy their rights considering “the rights of others.”³²⁴ The phrase “the rights of others” should include protection of reputation. However, there is hardly any jurisprudence by the African Court of Human Rights explaining how to balance the conflict between reputation and free speech. Most of the jurisprudence by the African Court is on free speech protection.

3.3 Restrictions on Freedom of Expression by the Malawi Courts

The Malawi Courts play a vital role in interpreting free speech and reputation under the Malawi laws. The judiciary defines the scope of the right to free speech, interpret the limiting factors to free speech, and determine whether a particular law is consistent with constitutional provisions. Judges in Malawi have a lot of work in interpreting the right to free speech considering the fact that the 1994 Malawi Constitution misses to spell out specific permissible limitations as many human rights instruments do. In their interpretation, judges have to reconcile statutory provisions and the general constitutional provision on freedom of expression. In doing so, they will also be influenced by individual preferences, that is, whether they are inclined to free speech or protection of other rights like reputation.

As noted earlier, free speech has been acknowledged by several judicial decisions in Malawi. In *Chihana v Rep*,³²⁵ free speech was upheld by the Court who stated that Malawians could speak on any issue or policy of Government. In *Makande & Kamlepo Kaluwa v Rep*,³²⁶ the defendants were convicted for sedition and inciting violence for referring to President Bingu wa Mutharika as *aka kangwazi* (this small hero) during campaigns for the 2009 general elections. The Court stated there was no sedition in the words *aka kangwazi* and that the words had to be understood within the context of a run-up to elections when emotional language is likely to be used

³²³African Charter on Human and People’s Rights 1981, art 9.

³²⁴ *ibid* art 27.

³²⁵ (1992) Crim. App. Cas. No. 9, MSCA.

³²⁶ (2009) Appeal Case No.15.

by candidates in order to win voters. In *R v Mabvuto Banda, Rafael Tenthani and Horace Nyaka*, the defendant journalists wrote that former President Bingu wa Mutharika did not want to occupy the State House in Lilongwe for fear of ghosts. They were arrested but the Court held that the arrest threatened press freedom in Malawi.³²⁷

The judiciary has also acknowledged that free speech can be limited in Malawi for other legitimate interests. Although the Constitution of Malawi 1994 does not have express provisions limiting freedom of expression, restrictions are possible, as noted earlier, during a state of emergency,³²⁸ or through the general limitation clause,³²⁹ or under statutory provisions. However, limitations on free speech must conform to the requirements stipulated in the 1994 Constitution of Malawi³³⁰ which states that such restrictions should be stipulated in the law, must be reasonable, necessary and in accord with international standards.³³¹ It is the duty of the Courts to ensure that limitations on free speech meet these requirements. A law or court decision will be invalid if it does not meet this test.

As stated previously, free speech is restricted to promote other equally important values and rights like reputation, national security, public order, and public morality. Society has various needs and interests which are usually in competition and the law helps to balance these interests. The interests may be private, social, or public.³³² The Courts of Malawi endeavor to reconcile these interests in their judgments and recognize that there other values and rights in Malawi which are as important as free speech.

³²⁷ <http://www.news.bbc.co.uk/2hi/Africa/4350667.stm>. (accessed on 10th June 2018).

³²⁸ Constitution of Malawi 1994, s 45.

³²⁹ *ibid* s 44; these clauses allow the Government to pass laws limiting rights generally, provided this is done in accordance with the Constitution and international human rights standards. The restriction should also be reasonable and necessary in a democratic society.

³³⁰ Constitution of Malawi 1994, s 44(2).

³³¹ There is no direct provision in the Constitution of Malawi 1994 for limiting freedom of expression. Any limitation on freedom of speech is possible by importing the general limitation clause to the rights under under section 44 (2) of the Constitution which are similar to some of the conditions enshrined in article 19 (3) of the ICCPR for restriction of freedom of expression. Both the Malawi Constitution and the ICCPR provide that restrictions on freedom of expression must be necessary and provided by law. The Constitution further provides that the restriction must be in line with international human rights provision. This takes into account the fact that Malawi is signatory to international human rights treaties such as the ICCPR and the African Charter. Furthermore, the Constitution provides that restrictions on freedom of expression must be reasonable and necessary in an open and democratic society. Perhaps the expression ‘democratic society’ was borrowed from article 10 (2) of the European Convention.

³³² See Roscoe Pound, “A Survey of Social Interests,” 57 *Harvard Law Review* (1943) 99.

In this respect, the Courts of Malawi have made several decisions acknowledging limitations to freedom of expression. In *Attorney General v The Editor of the Malawian Newspaper et al.*,³³³ the defendants continuously published the photograph of the former President Bakili Muluzi depicting him as a prisoner. An injunction was granted to stop the publication and the court argued that the portrait intended to insult and ridicule the President.³³⁴ The same insult laws were used to charge former opposition politician Gwanda Chakuamba for making statements which were deemed ‘disrespectful’ of President Bingu wa Mutharika and for stating that the President would be out of office soon.³³⁵

The Courts of Malawi have also allowed limitation on free speech to protect reputation. Malawi has no statute solely on defamation but provides for the same in the Penal Code 1929. The defamation law of Malawi follows the common law of England. There are various decisions of the Courts of Malawi which have upheld reputation. In *Mkandawire v Mtonga*,³³⁶ the plaintiff, the Chief Executive for Lilongwe City Assembly, sued the defendants, publishers of the Nation Newspaper, for publishing a defamatory article in their newspaper. The plaintiff argued that his reputation was damaged because the article portrayed the plaintiff as a violent person who did not abide by the law and the judiciary and that the plaintiff was not fit to be a Chief Executive of a reputable institution like Lilongwe City Assembly. The Court awarded the plaintiff 400,000 Malawi Kwacha exemplary damages for defamation.

The Courts have also pronounced judgments to safeguard reputation alongside related rights such as privacy³³⁷ and human dignity.³³⁸ In *J.K. Khamisa v AG*,³³⁹ the plaintiff sued the defendant for the infringement of his rights to privacy, reputation and dignity. The plaintiff was an employee of the Government of Malawi who had been posted to a diplomatic mission to Kenya to serve as a Second Secretary at the Malawi High Commission to Kenya. At one time the plaintiff

³³³(1994) Misc Civ. Cause No. 16, HC (LL).

³³⁴ See section 4 of the Protected Flag, Emblems and Names Act 1967 which prohibits insulting the President.

³³⁵ <http://www.irinnews.org/report.aspx?reportid=56394> (accessed on 1st January 2018).

³³⁶ (2005) Civil Case No. 521.

³³⁷ See Constitution of Malawi 1994, s 21.

³³⁸ *ibid* s 19.

³³⁹ (Civil Cause No.565 of 1994) (565 of 1994) [2002] MWHC 35 (18 September 2002)

became acting High Commissioner of Malawi to Kenya when Malawi's ambassador went on an official visit outside Kenya. The Plaintiff's diplomatic services expired and had to come back to Malawi. At Jomo Kenyatta Airport, he left his luggage with the shippers to arrange its transportation to Malawi. Immediately after his departure, Mr Nkona, Malawi's ambassador to Kenya requested the shippers to open the luggage of the plaintiff for a search. This was done without the plaintiff's consent and in the presence of the shipping agents, officials and employees, other customers and some employees from Malawi Embassy.

The Court held that the High Commissioner trespassed on the plaintiff's property, infringed his privacy, and that the plaintiff's character had been damaged because he was believed to have stolen things from the embassy to take to Malawi at the expiry of his diplomatic mission. The Court awarded damages for defamation and for infringing the plaintiff's privacy.

The Malawi Courts, though very rarely, have also affirmed criminal libel as per section 200 of the Penal Code 1929. For instance, in *R. v Mbisa*,³⁴⁰ the defendant alleged that a teacher leaked the 1990 Primary School Leaving Certificate Examination. He was charged with criminal defamation. However, the current trend and campaign is to have criminal libel abolished because it is believed to be an undue restriction on freedom of expression. Since reputation is personal, it is argued that its infringement should be redressed in civil proceedings.³⁴¹

Free speech has also been restricted by the Malawi Courts when there is the duty of confidentiality. This includes employment relationships and communications shared between a patient and his or her doctor as well as anything shared between a lawyer and his or her client. In *Missih v GDC Haulage*,³⁴² the complainant was dismissed from the defendant company for revealing to outsiders that GDC employee had died outside the country notwithstanding that he had no authority do so. The Industrial Relations Court held that the plaintiff had a duty of confidentiality and had no authority to publish the news about the demise of the employee.

³⁴⁰ 14 Malawi Law Reports 434 (1991).

³⁴¹ See Fidelis Kanyongolo, *Report on Laws that Restrict Freedom of the Press in Malawi* (Zomba).

³⁴² IRC Matter No 67 of 2000.

However, there may be exceptional circumstances when the doctor can reveal certain information about the patient if there is danger to other people or the public. For example, the doctor should be obliged to reveal to fellow healthcare workers who are treating the patient if the doctor finds that the patient has a highly contagious disease or condition such as HIV so that they can handle the patient with extra precaution.

Where there are defamatory statements, the Courts of Malawi have further laid down factors to consider in awarding damages. In *Justice Mwaungulu v Malawi News*,³⁴³ the High Court indicated that the factors to be considered include the nature of defamation, that is, whether it is libel or slander, the position of the claimant in society, the circumstances in which the defamatory statements were made, the possibility of more publication of the material, the defendants' behavior since publishing the material and the recklessness of the publication.

3.4 Conclusion

The UN Human Rights Commission has not commented enough on balancing free speech and reputation. Much of the jurisprudence on the subject is found in regional courts and commissions.³⁴⁴ These courts, just like the Malawi courts, acknowledge that free speech can be limited. The right to free speech can be restricted to protect other interests in society. However, the courts emphasise that restrictions on free speech should satisfy the requirements set out in the ICCPR.³⁴⁵ The courts have observed that although the aims protected in the ICCPR are genuine, some of them like security and public order are prone to abuse by Governments. Morality is also controversial because it varies from society to society.

The right to reputation is acknowledged by the European Court, the American Court and the Malawi courts as a justifiable aim for limiting free speech. The jurisprudence of the European Court and the American Court seems to suggest that free speech is superior to reputation. In the event of the conflict between reputation and free speech, the European Court and the American

³⁴³ (1994) Civil cause No. 518.

³⁴⁴ Most of the jurisprudence is by the European Court of Human Rights and the Inter-American Court of Human Rights. The African Court of Human Rights speaks more of free speech but has not said much about reputation.

³⁴⁵ Article 19(3) of the International Covenant on Civil and Political Rights 1966 provides that the restrictions to free speech must be provided for by the law, must meet the legitimate interests, that is, national security, public order, public morals, public health and rights of others including reputation.

Court generally incline towards protecting free speech. The African Court of Human Rights has not said much on balancing reputation and free speech.

The European Court applies the proportionality-based approach to resolve the clash between reputation and free speech. In restricting free speech, it must be more beneficial to safeguard the particular aim than to protect free speech.³⁴⁶ Public officials should tolerate more criticisms than everyone else.³⁴⁷ Despite this assertion, the media are obliged to keep professional ethics as they report on public officials.³⁴⁸ The media cannot just write false stories about anyone because the claimant is a political leader. Further, the Courts have acknowledged the equality between free speech and reputation.³⁴⁹ Moreover, the courts have stated that reputation forms part of the dignity of a person.³⁵⁰

Although the Constitution of Malawi seems to prefer promoting free speech, there is no indication that the Courts of Malawi give preference to free speech. Again, despite the fact that statutory provisions in Malawi seem to prefer protecting reputation more than freedom of expression, the Malawi Courts do not seem to favour protecting reputation; rather decisions are made depending on circumstances or the taste of the particular judge, whether or not he or she prefers free speech or reputation. Further, the Malawi courts have cautioned against the enforcement of some of the aims like security. For example, the courts declared unconstitutional sections 50 and 51 of the Penal Code 1929 which provide for sedition.

³⁴⁶ *Lingens v Austria* (1986) 8 EHRR 407, ECtHR.

³⁴⁷ *ibid.*

³⁴⁸ *Alithia Publishing Company v Cyprus* (2008) ECHR 17550/03 [65]; See also *Flux v Moldova* (2008) ECHR 22824/04.

³⁴⁹ *Berezousky v Forbes (No 2)* (2001) 1 EMLR 45, CA.

³⁵⁰ *Reynolds v Times Newspaper Ltd* (2001) 2 AC 127, HL 201.

CHAPTER FOUR

A CASE FOR THE BALACING OF FREEDOM OF EXPRESSION AND REPUTATION

4.0 Introduction

The previous chapters have shown that international and regional laws as well as the regional courts and the Malawi Constitution give preference to free speech, not reputation. At the same time, Malawi's statutory provisions lean towards safeguarding reputation more than free speech. This Chapter, therefore, will suggest the balancing of the Malawi laws so that they can promote both rights.

Since the objective is to achieve the respect and protection of both free speech and reputation in equal measure, the chapter first intends to make a contextual analysis of the enjoyment of the two rights and determine the extent of the infringement of the rights. The Chapter will advocate for the enjoyment of free speech where it is justifiable to do so and discouragement of unjustifiable forms of speech. Further, while acknowledging that the Courts of Malawi do not seem to favour either of the rights in question, the Chapter suggests the adoption of the Brems Model by the courts to assist them in assessing the facts of the case and making determination thereof.

4.1 Contextual Analysis of the Enjoyment of Free Speech and the Right to Reputation

4.1.1 The Violation of the Right to Freedom of Expression

Since the dawn of multi-party government in 1994, Malawi has made strides in strengthening the exercise of free speech. A 2010 report by the British High Commission observed that the Constitution of Malawi 1994 which is described as “unusually progressive”³⁵¹ protects fundamental liberties like free speech and that Malawi “has signed up to most international treaties,”³⁵² for example, the ICCPR, UDHR and the regional instruments like the African Charter which guarantee freedom of expression. Since 1994, the country has experienced a rise in the number of television stations, radio stations, newspapers and magazines. Currently, there are many human rights organizations in Malawi. These include Human Rights Commission of Malawi, Malawi Human Rights Watch, Centre for the Development of People, Human Rights Consultative Committee, the Centre for Human Rights and Rehabilitation, and the Institute for Policy

³⁵¹ See “Human rights under the Constitution of Malawi” (January, 2013).

³⁵² “Human Rights in Malawi,” *British High Commission* (Lilongwe, January 2013).

Interaction, among others. These media houses and human rights organizations generally operate freely without too much interference from the State. Further, as the British Report also observed, there are no political prisoners in Malawi jails as it used to be during the one-party era of Hastings Kamuzu Banda.³⁵³

In spite of the progress made in promoting free speech in Malawi, there are many challenges that the right faces. Such challenges include the continued use of insult, treason, sedition and criminal defamation laws; intimidation of critics and journalists; and the bias and lack of independence of Malawi Communications Regulatory Body (MACRA), among others.

4.1.1.1 Colonial-Era anti-sedition and Treason Laws

Malawi continues to have the colonial-era anti-sedition, criminal defamation, treason and insult laws which have some provisions which unjustifiably limit free speech. The provisions of these laws are usually too broad and are therefore prone to abuse by the State. These are the laws which have been used by successive Governments of Malawi since 1994 to suppress dissent. These laws include the Penal Code 1929 which provides for sedition and criminal defamation; the Protected Flag, Emblems and Names Act 1967 prohibiting insults to the President; the Police Act 1946; the Official Secrets Act 1913; the Censorship and Control of Entertainments Act 1968 which gives wide powers to the Censorship Board to ban material which is ‘undesirable,’³⁵⁴ among others.

Seditious and insult laws can discourage the media from commenting on issues of public interest.³⁵⁵ Insult laws tend to protect public officials from criticism and make them to be above the citizens.³⁵⁶ Most of the provisions of the seditious and insult laws, as seen earlier, are not clear and are prone to wide interpretation.³⁵⁷ The provisions are prone to abuse by government officials and tend to suppress criticism of Government actions and officials or abuse of power.³⁵⁸ The laws have the final effect of discouraging Government transparency and accountability and can therefore hamper democratic governance and usher in dictatorial tendencies. It is therefore

³⁵³ See “Human Rights in Malawi,” *British High Commission* (Lilongwe, January 2013).

³⁵⁴ Censorship and Control of Entertainment Act 1967, s 24.

³⁵⁵ *Media Institute of Southern Africa*, 13.

³⁵⁶ *ibid.*

³⁵⁷ *ibid* in Kanyongolo, “Legal Regulation of Freedom of Expression and the Media in Malawi” (2008).

³⁵⁸ *ibid.*

important for the court to guard against the abuse of these laws and further some of them need to be amended so that they are not too wide.

Successive Governments in Malawi have not been interested in amending or repealing the laws which are not in accord with constitutional provisions on free speech. Some of these laws were made in colonial era times and also during the one-party State of Hastings Kamuzu Banda and used to serve State interests more than the people's interests. They were used to suppress dissent. When the 1994 Malawi Constitution was made, there was hope these laws would be amended to be in consonance with the spirit of the Constitution which promotes free speech. However, up to now most of the statutory provisions have not been amended. The exact reasons why Governments are not committed to amending the provisions are not known but it is likely because Governments want to use the provisions to suppress dissent and criticism so that they continue to remain in power.

4.1.1.2 Intimidation of Critics

Free speech is often undermined by Governments of Malawi through intimidation and harassment of critics. Successive governments have used the seditious, insult and treason laws to arrest critics arbitrarily, detain or assault them. More often than not, the police have often used excessive force to harass and intimidate critics which has sometimes resulted in deaths and injuries.³⁵⁹

During the era of Bakili Muluzi (1994-2004), for example, it was reported that Mary Clara Makungwa, the then Vice President of National Democratic Alliance (NDA) party, was beaten up by the Young Democrats, Muluzi's militia group, and that her vehicle was burnt down as she was about to hold a political rally in the Central Region.³⁶⁰ Muluzi and his UDF party were also alleged to have masterminded the death of Malawi's renowned reggae musician Evison Matafale. The musician wrote a letter in 2001 which accused President Muluzi's Government of bad treatment

³⁵⁹U.S Department of State '2011 Human Rights Report: Malawi' available at <http://www.state.gov/j/drl/hrrpt/2011/af/186215.html> [accessed on 30th May 2016].

³⁶⁰ Joseph Maere, "The Extent of Hate Speech Politics in Malawi: An Analysis of Proliferation of Hate Speech Ahead of 2009 General Elections," available at: https://www.researchgate.net/publication/309291943_The_Extent_of_%27Hate_Speech%27_Politics_in_Malawi_An_Analysis_of_Proliferation_of_Hate_Speech_Ahead_of_2009_General_Elections (accessed on 6th August 2018).

of the poor masses. The police arrested him and he died in custody.³⁶¹ The Muluzi administration also harassed the following people for criticizing his presidency: Anglican Bishop Tenganena, Vera Chirwa, and Emme Chanika. President Muluzi castigated Vera Chirwa for criticizing him for allowing women to be dancing for him at rallies.³⁶²

Government harassment and intimidation of critics continued in the era of Bingu wa Mutharika (2005-2012). During the July 20, 2011 anti-government demonstrations,³⁶³ the police used live bullets to disperse the protesters which resulted to the death of 20 people.³⁶⁴ More than five hundred people were arrested.³⁶⁵ Further, Bingu's Government intimidated students and lecturers. At one moment, the Inspector General of Police, Peter Mukhito, intimidated Blessings Chisinga, a Political Science lecturer of Chancellor College, by interrogating him on the lecture he gave on mass demonstrations in Tunisia and Egypt. The Malawi Government feared that such lectures would incite the Malawians into a revolution.³⁶⁶

The Bingu administration was also alleged to have been behind the murder of Robert Chasowa, an engineering student at the Polytechnic³⁶⁷ and a critic of Government. Chasowa was found dead at the Polytechnic campus and Government insisted that the student had committed suicide but Civil Society blamed the DPP Government for the death.³⁶⁸

4.1.1.3 Harassment of Journalists

The other obstacle to free speech in Malawi is the harassment of journalists. Although there is no record of a journalist being killed in Malawi after 1994, intimidation of journalists is not uncommon. Journalists have suffered arbitrary arrests and detention. During the reign of Muluzi

³⁶¹ W.C. Chirwa, "Malawi Democracy and Political Participation," *Open Society Foundations* (2014) 96.

³⁶² Joseph Maere, "The Extent of Hate Speech Politics in Malawi: An Analysis of Proliferation of Hate Speech Ahead of 2009 General Elections," available at:

https://www.researchgate.net/publication/309291943_The_Extent_of_%27Hate_Speech%27_Politics_in_Malawi_An_Analysis_of_Proliferation_of_Hate_Speech_Ahead_of_2009_General_Elections (accessed on 6th August 2018).

³⁶³ Civil Society Organisations led mass protests against the Bingu administration demanding economic reforms. That time the country experienced serious shortages of fuel and foreign currency.

³⁶⁴ "Malawi 2012," *African Media Barometer* (Windhoek: Friedrich-Ebert-Stiftung Fesmedia Africa) 14.

³⁶⁵ "Malawi," *Human Rights Watch* (January 2012) 2.

³⁶⁶ W.R. Chirwa, "Malawi Democracy and Political Participation," *Open Society Foundations* (2014); See Article 33 of the *Constitution of Malawi* 1994, which provides for academic freedom.

³⁶⁷ Polytechnic is a Constituent College of the University of Malawi located in Blantyre City.

³⁶⁸ *ibid*; see also "Academic Freedom in Malawi" available at <http://www.osisa.org/education/malawi/victory-academic-freedom-malawi> (accessed on 12th May 2018).

and UDF party, for example, journalist Chinyeke Tembo was pulled out of a minibus and beaten by Government supporters.³⁶⁹ On 12th August 2001, Muluzi's supporters beat up Brian Ligomeka at Chileka Airport for allegedly speaking ill of the President.³⁷⁰

Harrasment of journalists increased during the Bingu administration. In 2011, the police imprisoned Kingsley Jassi, a reporter of Blantyre Newspaper Limited, for taking pictures of police officers who were assaulting a man.³⁷¹ During the July 20, 2011 protests, the police beat 14 journalists and arrested three for attempting to cover the demonstrations.³⁷² Some private radio stations were banned from covering the protests.³⁷³ A few days before the demonstrations, two vehicles owned by the private radio station, Zodiak, were allegedly set ablaze by DPP supporters.³⁷⁴ The Nyasa Times online journalist, Collins Mtika, was also jailed for some days for covering the demonstrations.³⁷⁵

The attacks on journalists continued in Joice Banda's Government when journalist Thoko Chikondi was assaulted for photographing consumer rights activists.³⁷⁶ All these examples of intimidation of journalists seek to show that free speech is sometimes unjustifiably limited. Although Malawi has not had any journalist who has been killed since 1994, the practice of detaining and arresting journalists discourages journalists from reporting on issues that affect the masses. This is infringement of the right to free speech.

4.1.1.4 MACRA's Bias and Lack of Independence

The apparent lack of independence of Malawi's governing body of the media, Malawi Communications Regulatory Authority (MACRA), has also contributed to the violation of

³⁶⁹ Joseph Maere, "The Extent of Hate Speech Politics in Malawi: An Analysis of Proliferation of Hate Speech Ahead of 2009 General Elections," available at: https://www.researchgate.net/publication/309291943_The_Extent_of_%27Hate_Speech%27_Politics_in_Malawi_An_Analysis_of_Proliferation_of_Hate_Speech_Ahead_of_2009_General_Elections (accessed on 6th August 2018).

³⁷⁰ *ibid.*

³⁷¹ MISA p 15 in IFEX 'Journalists arrested and attacked, media censored (2011) available at http://www.ifex.org/malawi/2011/07/27/journalists_arrested/ (accessed on 20th March 2018).

³⁷² "Malawi," *Human Rights Watch* (January 2012) 3.

³⁷³ *ibid.*

³⁷⁴ "Malawi", *African Media Barometer* (Windhoek: Fredrich-Ebert-Stiftung Fesmedia Africa, 2012)14.

³⁷⁵ MISA p 15 in Gondwe G, 'Malawi: Court releases journalist unconditionally' available at <http://www.bizcommunity.com/Article/129/466/62241.html>. (accessed on 20 March 2018).

³⁷⁶ W.C. Chirwa, "Malawi Democracy and Political Participation," *Open Society Foundations* (2014)79.

freedom of speech in the country. The Communications Act 1998 establishes MACRA³⁷⁷ which should carry out its duties with independence.³⁷⁸ However, MACRA's independence has always been questionable because it is usually state-controlled and fails to stop the malpractice of Malawi Broadcasting Corporation (MBC) radios and television.

MBC is established under the Communications Act 1998.³⁷⁹ The Act sets out the mandate of MBC which, *inter alia*, includes broadcasting material which reflects the diversity of Malawi's cultural life³⁸⁰ and providing balanced election coverage.³⁸¹ MBC is required to operate with independence and without influence from any quarters.³⁸² Notwithstanding these provisions, MBC Radios I and II and the television operate as mouthpieces of the political party in power and fail to open up to the opposition.³⁸³ Government ensures that senior employees of the MBC are people who are loyal to the State. The President and his Government officials like to give orders on how the MBC should operate.

The bias for the incumbent President and the ruling party is conspicuous during general elections.³⁸⁴ The Communications Act of 1998 establishes a requirement that MACRA shall ensure that all media outlets in the country give equal coverage of political parties.³⁸⁵ Further, media outlets sign a code of conduct that contains standard commitments to remain objective, balanced and accurate.³⁸⁶

The provisions above are meant to ensure the proper conduct of elections in Malawi but the MBC has been criticised over and over again for political biases during every election

³⁷⁷ Communications Act 1998, s 3(1).

³⁷⁸ *ibid* s 4(3).

³⁷⁹ *ibid* s 86.

³⁸⁰ *ibid* s 87(1).

³⁸¹ *ibid* s 87(2).

³⁸² *ibid*.

³⁸³ WC Chirwa, "Malawi Democracy and Political Participation," *Open Society Foundations* (2014) 81. For more details see, <http://www.nyasatimes.com/2013/08/21/mbc-is-detrimental-to-democratic-and-progressive-politics-in-malawi/> (accessed on 17th March 2018).

³⁸⁴ WC Chirwa, "Malawi Democracy and Political Participation," *Open Society Foundations* (2014) 88; See http://www.mediacouncilmw.org/The_Role_of_the_media_in_2009_PPE-final_draft.pdf. (accessed on 10th August 2018).

³⁸⁵ Communications Act 1998, s 41 (1).

³⁸⁶ Third Schedule of the Communications Act 1998, art 6.

since 1994.³⁸⁷ There are more ruling party items on MBC than for the opposition parties. Further, news about the ruling party and Government is always positive while news about the opposition parties is almost always negative. The analysis of the 2009 general elections, for example, revealed that the MBC and Television Malawi (TVM) allocated more coverage of political actors to Democratic Progressive Party (DPP) and President Mutharika. On MBC, the President, Government and DPP received coverage of eighty one per cent, the Malawi Congress Party seven per cent while six per cent was given to United Democratic Front. On TVM the President, Government and DPP were given eighty one per cent coverage, Malawi Congress Party seven percent and the United Democratic Party six per cent.³⁸⁸

Under the provisions of the Communications Act 1998, MACRA is empowered to license the broadcast media.³⁸⁹ However, MACRA has sometimes unjustifiably refused to license media houses or has closed them down. For instance, MACRA closed down eight private radio stations in 2010 for believing that they were operating without licenses. In 2011, MACRA ordered two radio stations not to cover the antigovernment protests of July 20. In the same year, MACRA refused to issue a license to one religious group which was critical of the Government.³⁹⁰ Refusing to give license for no good reasons or closing down media outlets which are critical of Government infringes the right to free speech.

4.1.2 Abuse of Freedom of Expression

It is indisputable that free speech enhances democratic governance in a State. However, like most of the rights and liberties, free speech is limited and should be exercised with some responsibility. No one has the right just to say or write anything about anyone under the pretext of freedom of expression even if those things hurt others. However, this is what some people do in Malawi, to think that they can talk or write anything they want. As a result there is a lot of abuse of freedom of expression which manifests itself in various forms such as defamation, hate speech, false stories, or destructive expressions to morals.

³⁸⁷“The Role of the Media in Malawi 2009 Elections” available at: http://www.mediacouncilmw.org/The_Role_of_the_media_in_2009_PPE-final_draft.pdf. (accessed on 10th August 2018).

³⁸⁸“Malawi Presidential and Parliamentary Elections Final Report,” *European Union Election Observation Team* (May 2009) 19.

³⁸⁹ Communications Act 1998, s 31.

³⁹⁰“Malawi”, *African Media Barometer* (Windhoek: Fredrich-Ebert-Stiftung Fesmedia Africa, 2012)14.

4.1.2.1 Violation of the Right to Reputation

Malawi has seen unprecedented instances of defamation since the introduction of multi-party democracy and the emergency of internet use. Both libel and slander have been on the increase but it is the former type of defamation which is rampant through the media. In his article “The Rise of Defamation in Malawi Media Industry and Ways of Avoiding Defamation,”³⁹¹ Marco Namwawa explores some of the possible reasons behind the increase of defamation in the country. Namwawa cites corruption as one factor increasing defamation cases. Big shots in Malawi have used the media to write false stories about political competitors or firms to tarnish their image. Journalists in Malawi are generally not well-paid and sometimes they become easy prey to engage in corruption for the sake of money.

The second reason for the increase in defamation is that some of the media houses are owned by politicians and tend to be in competition. For example, Joy Radio is owned by former President Bakili Muluzi while Galaxy Radio was founded by the late former President Bingu wa Mutharika. Certain programmes in these media institutions tend to defame the politicians of the other party to taint their image.

Marco also mentions pressure from editors of the media house as one of the contributing factors to the increase of defamation. Short deadlines are given for journalists to submit articles for publication. The journalists end up bringing stories whose truth is not verified. They also end up making other mistakes such as writing wrong names of the people or venues of the stories and giving other inaccurate details about the story. The fourth reason for the hike in defamation cases in Malawi is the ignorance of the law by some journalists. They write about issues as if there were no limitations to free speech.

The media in Malawi sometimes abuse freedom of expression. Journalists breach their ethics by not reporting news truthfully, accurately and fairly. Not only are rumours or opinions presented as facts but journalists also sometimes distort facts, exaggerate stories or omit facts. As a result, several media houses or journalists have been sued for defamation. Apart from the defamation

³⁹¹ Marco Namwawa, *The Rise of Defamation Cases in Malawi Media Industry and Ways of Avoiding Defamation* (Friday, 16th September 2016) available at: <http://mmnwawawa.blogspot.com/2016/09/the-rise-of-defamation-cases-in-malawi.html> (accessed on 15th October 2018).

cases seen earlier on in chapters two and three, other examples of defamation cases include the lawsuit involving former President Joice Banda and MBC and Nankhumwa in which the defendants (MBC and Nankhumwa) alleged that the plaintiff (Joice Banda) masterminded the death of former President Bingu wa Mutharika to take over power. On 26th October 2017 Justice Michael delivered a judgment in favour of Joice Banda and ordered damages to be paid by the defendants.³⁹² In another case, Sam Mpasu, former Minister of Education in Muluzi's Government, sued the Democrat Newspaper for alleging that Mpasu was involved in a graft when the Ministry bought exercise books for schools. He was awarded awarded K200,000 in damages.³⁹³

Another case of defamation involved Presidential Press Secretary Gerald Viola who sued Times TV presenter Brian Banda for what was aired in one of their TV programmes.³⁹⁴ In 2015, the lawyer for Atupele Muluzi demanded an apology from the Daily Times newspaper and also retraction of the defamatory article published on May 28, 2015.³⁹⁵ In another case, in 2013 the president of the UDF party, Atupele Muluzi, sued Mussa, Minister of Home Affairs and Internal Security, for the statements he made against him on Zodiak Broadcasting Corporation (ZBC) radio.³⁹⁶

In 2014, Former Peoples Party (PP) second deputy Director of Elections, Benedicto Chambo, sued Minister of Energy Ibrahim Matola for defamation after he had been detained by Mangochi Police in January 2014.³⁹⁷ Mohammad Sidik Mia brought an action for defamation against acting Secretary General, Paul Maulidi for saying that Mia bribed voters at a polling centre in Chikwawa Mkombezi during the May 2014 general elections.³⁹⁸

³⁹² "Ex-Malawi leader JB wins defamation case against MBC, Nankhumwa: Court orders she receives damages," *Nyasa Times*, available at: <https://www.nyasatimes.com/ex-malawi-leader-jb-wins-defamation-case-mbc-nankhumwa-court-orders-receive-damages/> (accessed on 10th August 2018).

³⁹³ *Mpasu v. The Democrat et al.*, (1995) Civil Cause No. 124.

³⁹⁴ Irene Sauke, "Defamation Cases in Malawi," <http://ireensauke.blogspot.com/2016/11/defamation-cases-in-malawi.html> (accessed on 10th August 2018).

³⁹⁵ <https://www.nyasatimes.com/muluzi-claims-libel-malawi-minister-demands-daily-time...> (accessed on 16th October 2018).

³⁹⁶ <https://www.nyasatimes.com/atupele-eyeing-malawi-presidency-formally-sues-foul-mouthed-minister-uladi/> (accessed on 16th October 2018).

³⁹⁷ <https://www.nyasatimes.com/chambo-sues-matola-for-defamation/> (accessed on 16th October 2018)

³⁹⁸ <https://www.nyasatimes.com/mia-sues-maulidi-for-defamation-over-claims-of-vote-buying/> (accessed on 16th October 2018).

In another case, President Peter Mutharika sued Allan Ntata for defamation after Ntata allegedly stated that the President was involved in the K92 billion cash gate which is believed to have been stolen during the presidency of Bingu wa Mutharika.³⁹⁹ MBC paid a compensation of 300000 Kwacha to former opposition National Democratic Alliance (NDA) party leader Brown Mpinganjira for MBC's news bulletin of 28 December 2002 which alleged that Mpinganjira had been arrested in Zambia.⁴⁰⁰ In another defamation case, the Daily Times newspaper paid Ziliro Chibambo, a former Cabinet Minister, K90,000 in compensation for alleging that Ziliro Chibambo was unable to pay his debts to Blantyre businessman Thupi and that the two eventually engaged in a brawl.⁴⁰¹

In 2015, the Balaka Second Grade Magistrate Court convicted a 41-year-old Pastor of a certain Ministry at Balaka Town for defamation and for conducting himself in a manner which could breach peace.⁴⁰² In 2013, lawyer for Shepherd Bushiri of the Enlightened Christian Gathering, Christopher Chiphwanya paid K50,000 in compensation to Member of Parliament Jimmy Bauleni Mannah for defamation.⁴⁰³ These examples of defamation seek to testify that the right to reputation is infringed under the pretext of free expression. It is important that Malawians should recognise the equality of free speech and reputation and ensure responsible enjoyment of free speech.

4.1.2.2 Hate Speech

The abuse of free speech in Malawi has also been manifested in hate speech.⁴⁰⁴ Although the Constitution of Malawi 1994 does not have a provision prohibiting hate speech, the country is

³⁹⁹ Irene Sauke, "Defamation Cases in Malawi", <http://ireensauke.blogspot.com/2016/11/defemation-cases-in-malawi.html> (accessed on 10th August 2018).

⁴⁰⁰ www.panapress.com/Radio-Malawi-coughs-up-K300,000-for-defamation--13-47304 (accessed on 16th October 2018).

⁴⁰¹ "Malawi Daily Times Loses Defamation Case", *Media Institute of Southern Africa (MISA)* (11th February 1998) available at : https://www.ifex.org/malawi/1998/02/10/malawi_daily_times_loses_defamation/ (accessed on 17th July 2018).

⁴⁰² <https://www.nyasatimes.com/malawi-pastor-convicted-for-defamation-ordered-to-swe...> (accessed on 16th October 2018).

⁴⁰³ <https://www.nyasatimes.com/malawi-court-fines-prophet-bushiris-lawyer-defamation-> (accessed on 16th October 2018).

⁴⁰⁴ Daniel E. Hall, *e-Study Guide for: Constitutional Values : Governmental Power and Individual Freedoms* (Facts 101 study guides). Hate speech has been defined as any speech, gesture or conduct, writing, or display which is forbidden because it may incite violence or prejudicial action against or by a protected individual or group, or because it disparages or intimidates a protected individual or group.

party to the International Convention on the Elimination of All Forms of Racial Discrimination 1965 which makes it an offence to disseminate ideas founded on “racial superiority or hatred or to incite racial discrimination as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin.”⁴⁰⁵ Further the ICCPR, to which Malawi is also party, provides: “Any propaganda for war shall be prohibited by law and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”

The international and domestic laws as well as the Courts have high regard for free speech in promoting democracy but they exclude hate speech. In its judgment, the Tribunal for Rwanda, for instance, recommended States to outlaw hate speech.⁴⁰⁶ Thus the Tribunal convicted journalists of crimes against humanity for influencing people towards violence.⁴⁰⁷ In another case, the International Military Tribunal at Nuremberg convicted Julius Streicher of crimes against humanity for his writings which promoted the extermination of Jews.⁴⁰⁸ These examples demonstrate that hate speech is not kind of speech to be protected.

Malawi has experienced various instances of hate speech under the cover of free speech. As Kayambazinthu and Moyo observed, for example, opposition party leaders are presented by every serving president, his or her ruling party as well as their cronies, sychophants and clones, and the public broadcasters, MBC radios and television, as untrustworthy, criminals, and warlords.⁴⁰⁹ Such categorizations are calculated to tarnish the image of the opposition and subsequently silence them.

For instance, during the UDF party era, as Kayambazinthu and Moyo noted, evidence of hate speech by UDF ranged from “stereotypes, negative name calling, selection and suppression

⁴⁰⁵ International Convention on the Elimination of All Forms of Racial Discrimination 1965, art 4.

⁴⁰⁶ <http://www.webology.org/2013/v10n1/a104.html#6> (accessed on 5th August 2018).

⁴⁰⁷ Ibid; the journalists who were convicted include Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze and Georges Ruggiu.

⁴⁰⁸ <https://encyclopedia.ushmm.org/content/en/article/international-military-tribunal-at-nuremberg> (accessed on 16th October 2018)

⁴⁰⁹ Joseph Maere, “The Extent of Hate Speech Politics in Malawi: An Analysis of Proliferation of Hate Speech Ahead of 2009 General Elections,” available at: https://www.researchgate.net/publication/309291943_The_Extent_of_%27Hate_Speech%27_Politics_in_Malawi_An_Analysis_of_Proliferation_of_Hate_Speech_Ahead_of_2009_General_Elections (accessed on 6th August 2018).

of facts, slogans and one-sided reporting.”⁴¹⁰ For example, President Muluzi once called Vera Chirwa *mkaidi* (prisoner) *wodwala mutu* (lunatic).⁴¹¹ The opposition parties have also practised hate speech language, for example, Hetherwick Ntaba, one of the leaders of the opposition parties at the time, once said about former President Bakili Muluzi that Malawi was led by ‘a silly and brainless person.’⁴¹² President Bingu wa Mutharika also used hate speech when he called opposition party members ‘hynas’.⁴¹³ No one can justify such demeaning and undiplomatic expressions as legitimate exercise of free speech.

MACRA has also been faulted for failing to control the hate speech which is perpetrated by the public broadcasters, MBC radios I and II and the television. The Third Schedule of the Communications Act 1998 prohibits words which are ‘obscene’ and ‘indecent’ to morality. Further, the Parliamentary and Presidential Elections Act of 1993 prohibits words that are “inflammatory, defamatory or insulting’.⁴¹⁴ While it is extremely hard to figure out what the words like ‘indecent’, ‘obscene’, ‘offensive’, ‘inflammatory’, or ‘insulting’ mean, it was another extreme for MACRA not to make effort at all to investigate the alleged defamatory hate speech programmes on MBC, Makiyolobasi and Mizwanyanya pa Ndale.⁴¹⁵ Instead MACRA quickly closed down the opposition radio station Joy Radio for broadcasting Nkhanga zaona and Kalibu Show programmes which were critical of government.⁴¹⁶

Malawi cannot condone hate speech as part of free speech. MACRA should take tough stance against media houses which perpetrate hate speech in the country including withdrawing

⁴¹⁰ “A Democracy of Chameleons: Politics and Culture of New Malawi,” available at: <https://books.google.co.ke/books?isbn=9171064990>.

⁴¹¹ *ibid.*

⁴¹² D Cammack, “At the Crossroads: Freedom of Expression in Malawi,” *Malawi Election Media Monitoring Project (1999)* 11.

⁴¹³ Joseph Maere, “The Extent of Hate Speech Politics in Malawi: An Analysis of Proliferation of Hate Speech Ahead of 2009 General Elections,” available at: https://www.researchgate.net/publication/309291943_The_Extent_of_%27Hate_Speech%27_Politics_in_Malawi_An_Analysis_of_Proliferation_of_Hate_Speech_Ahead_of_2009_General_Elections (accessed on 6th August 2018).

⁴¹⁴ Parliamentary and Presidential Elections Act 1993, s 61 (1).

⁴¹⁵ These were programmes which humourously satirized the opposition parties and their leaders.

⁴¹⁶ Joseph Maere, “The Extent of Hate Speech Politics in Malawi: An Analysis of Proliferation of Hate Speech Ahead of 2009 General Elections,” available at: https://www.researchgate.net/publication/309291943_The_Extent_of_%27Hate_Speech%27_Politics_in_Malawi_An_Analysis_of_Proliferation_of_Hate_Speech_Ahead_of_2009_General_Elections (accessed on 6th August 2018).

licenses to broadcast. Considering that issues of ethnicity, region of birth and religion are sometimes sources of conflict in Malawi, it is important for the Constitution to contain provisions against hate speech as a limiting factor of free speech.

4.1.2.3 Breach of Morals

The right to free speech is restricted in Malawi to protect public morals. There are several statutory provisions in Malawi to protect public morals.⁴¹⁷ One of these statutes is the Censorship and Control of Entertainment Act 1968 which, as discussed earlier on, regulates the making of films, public information relating to legal proceedings, State-security related information, and publication of expression contrary to public morals.

Since 1994, Malawi has experienced a deterioration of moral standards, perhaps under the pretext of free speech. Immediately after attainment of democracy, free speech manifested itself in various forms including dressing. Since then, it is not uncommon to see women wearing very tight clothes, short dresses or mini-skirts which expose their bodies and attract a lot of attention. The Malawi Council of Churches has lamented that some women, for example, move almost with bare breasts.⁴¹⁸ In recent years, the country has also seen men plaiting their hair or wearing earrings like ladies. Further, as the Council has observed, some men are walking with dropped trousers. The Council has called all this kind of dressing immoral.⁴¹⁹ Whether these practices have anything to do with morality or relate to Malawian culture is a matter of debate. However, one thing is clear: that most of these practices were banned during the reign of Hastings Kamuzu Banda.

The increase of the availability of pornographic material has also been interpreted as a sign of moral decadence in Malawi. As early as 1998, the Censorship Board bemoaned the circulation of 'blue movies' (pornographic videos) in the country.⁴²⁰ In the eyes of the Board, the introduction of democracy in the country was responsible for these developments. The Board called on the citizens to uphold culture of Malawi because it is a source of pride and identity for Malawians.⁴²¹ Whether there is anything called Malawian culture is also a matter of debate. Despite the existence

⁴¹⁷ See the Education Act, 2012; Penal Code 1929.

⁴¹⁸ *ibid.*

⁴¹⁹ *ibid.*

⁴²⁰ Diana Cammack, "At the Crossroads: Freedom of Expression in Malawi," *Malawi Election Media Monitoring Project* (1999) 11.

⁴²¹ *ibid.*

of a few similarities, Malawi's multi-cultural society comprises different beliefs and traditions. It is therefore difficult to know the so-called Malawian culture.

To echo the sentiments of the Censorship Board, Reverend Mhone was of the view that the country should bar importation of corrupting materials such as literature and films.⁴²² Mhone further stated that the MBC programme called *Tinkanena*, which was frank and explicit about HIV/AIDS issues, was not actually good for the youth it intended to protect.⁴²³ He opined that such a programme had the potential to promote immorality among young people instead of curbing it.⁴²⁴

In the same vein, the Malawi Council of Churches has condemned the media for displaying pornographic material.⁴²⁵ The Council noted some of the programmes on televisions and radio stations such as *Pakachere*, *Chenicheni Nchiti* on MBC, actually sent more of negative messages to the audience than positive messages.⁴²⁶ The Council observed that these programmes had illustrations, posters, adverts which had disturbing messages. The Council believes that the pornographic materials are contrary to Christian values.⁴²⁷

Exposure to pornographic material has since increased with internet facilities. Today people can access pornographic materials on their computers and phones. A report by 'Covenant Eyes' in 2015 found that there were more than 2 billion web searches for pornography worldwide and that 20% of mobile-phone searches concerned pornography.⁴²⁸ The social media may also contain nude pictures. It is easy for people to post to one another pornographic material using the internet. Children are at risk of accessing this pornographic material. Parents and teachers have the responsibility to protect children from pornographic materials.

⁴²² *ibid.*

⁴²³ *ibid.*

⁴²⁴ *ibid* 24.

⁴²⁵ WC Chirwa, "Malawi Democracy and Political Participation," *Open Society Foundations* (2014) 48.

⁴²⁶ *ibid.*

⁴²⁷ *ibid.*

⁴²⁸ Michael Castleman, "Duelling Statistics: How Much of the Internet is Porn?" (3r November, 2016) available at: <https://www.psychologytoday.com/us/blog/all-about-sex/201611/dueling->

The Malawi Council of Churches has also condemned the practice of prostitution in Malawi. According to the Council, it was not proper for the country to form the *Sex-Workers Association in Malawi* because such bodies will encourage prostitution in the country. The Council made reference to the fact that Malawi laws prohibit prostitution and that the practice is also sinful before God. The Council stated that Malawians should not hide under democracy as the reason to allow prostitution.⁴²⁹ Indeed democracy and freedom of expression do not mean doing anything that comes to mind. People must respect the values of society.

Furthermore, the Malawi Council of Churches has condemned the campaigns by civil societies to legalize homosexuality and lesbianism. Malawi is a God-fearing nation and therefore lesbianism and homosexuality cannot be acceptable practices. According to the Bible, lesbianism and homosexuality are sinful practices⁴³⁰ and are against nature because God created a man and woman and told them to multiply.⁴³¹ Human rights claims should not be a justification to engage in practices which are contrary to Christian values.⁴³²

Democracy and freedom of expression should not be used to legalise such forbidden practices. Homosexuality has been practiced from time immemorial but it has always been considered unusual to normal human conduct and therefore it could only be exercised in hiding to protect the rest of humanity from adopting such malpractices. The society of today, however, wants to make such unusual behaviours, which our forefathers were ashamed of, legalized. If to be a homosexual/lesbian is a human right, what are the bounds of these so-called human rights?

Further, it is also not fair that societies which have legalized these malpractices should begin to put pressure on societies which reject such practices. Western countries should not false African countries to spread homosexuality in the name of protection of the rights of the homosexuals and lesbians. For example, when Uganda passed an Anti-Homosexuality Act in 2014, several countries cut aid to Uganda. These include Norway, Sweden, Denmark, and Netherlands whose aid or loans amounted to US\$ 118 million.⁴³³ The World Bank suspended the loan of US\$90

⁴²⁹ WC Chirwa, "Malawi Democracy and Political Participation," *Open Society Foundations (2014)* 48.

⁴³⁰ Lev. 20:3.

⁴³¹ Gen. 1: 27.

⁴³² *ibid.*

⁴³³ <https://www.theguardian.com/global.../2014/feb/.../uganda-donors-cut-aid-anti-gay-la..> (accessed on 24 th June 2018)

million which it wanted to give to Uganda for use in the health sector.⁴³⁴ The United States also suspended a portion of their financial aid to Uganda which was meant to help the health sector especially in the procurement of anti-retroviral drug and HIV testing kits. Funds amounting to US\$ 3 million which was meant to support Ugandan biodiversity and tourism was also suspended.⁴³⁵

Malawi experienced similar suspension of financial aid from the West following the conviction and sentencing of two homosexuals, Steven Monjeza and Tiwonge Chimbalanga, to 14 years imprisonment in 2011. Western countries suspended financial aid to Malawi amounting to US\$ 400 million for human rights violations and poor governance.⁴³⁶ The matter made the UN Secretary General Ban Ki Moon to come to Malawi to advocate for the repeal of the anti-homosexuality laws. President Bingu wa Mutharika, following his meeting with Mr Ban Ki Moon, pardoned Monjeza and Tiwonge.

4.2 Balancing Freedom of Expression and the Right to Reputation

Based on equality of rights and of human beings,⁴³⁷ conflicts between rights require equal treatment and balancing. More often than not, the exercise of free speech comes in conflict with reputation. When that happens, indivisibility of rights requires that each right carries equal weight.⁴³⁸

Natural law theory requires giving equal weight to reputation and free speech. Each human being possesses both free speech and reputation by virtue of being human.⁴³⁹ There is no right between free speech and reputation which is superior to the other. This means that the State should protect free speech and reputation equally in its legal framework and enforcement mechanisms. The fact that reputation is not provided for as a conventional right in international and national legal framework gives the impression that it is inferior to free speech. There is need for Malawi

⁴³⁴ *ibid.*

⁴³⁵ *ibid.*

⁴³⁶ “Hypocrisies and Contradictions: Western Aid and LGBT rights in Africa,” available at: <http://www.polity.org.za/article/hypocrisies-and-contradictions-western-aid-and-lgbt-rights-in-africa-2014-04-15> (accessed on 6th August 2018).

⁴³⁷ See Universal Declaration of Human Rights 1948, art 1.

⁴³⁸ Stijn Smet, “Freedom of Expression and the Right to Reputation: Human Rights in Conflict”, *American University International Law Review* (Vol. 26, Issue 1, 2010).

⁴³⁹ See Francis J Nicholson, *Juridical Positivism and Human Rights By Mieczyslaw Maneli*, 5 B.C. Int'l & Comp. L. Rev. 489 (1982),

<http://lawdigitalcommons.bc.edu/iclr/vol5/iss2/8> (accessed on 17th February 2018).

laws as well as international laws to frame both free speech and reputation as conventional rights. Guaranteeing the right to reputation only as a limiting factor to free speech makes the latter a superior right.

The conflict which arises between free speech and reputation indicates that these rights are not absolute. As the theory of libertarianism postulates, every person may enjoy his or her rights in so far as he or she does not infringe other people's rights.⁴⁴⁰ The enjoyment of free speech should not trump over other rights including the right to reputation.⁴⁴¹ Where an individual begins to violate the rights of the other, Government has a duty to intervene to prevent the infringement of rights.⁴⁴² John Stuart Mills emphasizes that in the enjoyment of liberties individuals should not ignore the happiness of other people.⁴⁴³ Mill postulated the harm principle which states that individuals should enjoy their rights in a way that does not cause harm to others.⁴⁴⁴ In this sense, rights such as free speech are sometimes restricted if they cause harm to other people by violating their right to reputation.

Further, free speech is curtailed where the speech is offensive to others. According to Feinberg's offense principle, there are forms of speech which may not necessarily cause harm to others but are offensive and as such they should also be restricted.⁴⁴⁵ This means speech such as hate speech which is certainly offensive to others must be restricted. It is not correct to call others 'silly and brainless persons', 'lunatic' or 'hynas' as politicians of Malawi have sometimes done. Such expressions are offensive and should not be tolerated.

The foregoing arguments mean that the exercise of free speech must go hand in hand with the duty to respect other people's rights. The will theory of rights postulates that rights have corresponding duties. Hart has argued that a right makes the right-holder 'a small scale sovereign,'⁴⁴⁶ able to decide what others may do or not do concerning her right. The will theory

⁴⁴⁰ "Libertarianism," <https://plato-stanford.edu/entries/rights> (accessed on 8th December 2017).

⁴⁴¹ Francis J. Nicholson, *Juridical Positivism and Human Rights* By Mieczyslaw Maneli , 5 B.C. Int'l & Comp. L. Rev. 489 (1982), <http://lawdigitalcommons.bc.edu/iclr/vol5/iss2/8> (accessed on 17th February 2018).

⁴⁴² Ibid.

⁴⁴³ John Stuart Mills, *On Liberty* (1978).

⁴⁴⁴ *ibid.*

⁴⁴⁵ "Libertarianism," <https://plato-stanford.edu/entries/rights> (accessed on 8th December 2017).

⁴⁴⁶ HLA Hart, 'Legal Rights' in *Essays on Bentham* (Oxford: Clarendon 1982) 183.

gives powers to the plaintiff to seek redress both through the court and even consideration of having his or her right contained in the laws of the country.

4.2.1 Crafting Limitation Clauses

Natural law stipulates that rights are inherent and that governments are not the source of the rights to the citizens. Nevertheless, Governments have a duty to protect rights and liberties. This may take the form of legislative and policy measures as well as judicial enforcement. In order to balance protecting rights, drafters of human rights provisions usually add limitations to the various rights. It is imperative for law makers to draft provisions that make legitimate limitations on rights without necessarily undermining the enjoyment of such rights.⁴⁴⁷ The limitation clauses constrain and empower lawmaking bodies and courts to allow specific limitations on rights and at the same time place limits on such restrictions in order to protect the right against excessive restrictions.⁴⁴⁸

There are various forms of devising limitation clauses to a bill of rights. First, countries can deal with limitation clauses by not putting any limitation clause to the bill of rights, for example, the United States of America and Argentina. In that case, limitation to the rights is guaranteed by statute and case law. For instance, the First Amendment of the United States Constitution provides: “Congress shall make no law...abridging the freedom of speech, or of the press.” This absolute provision on freedom of expression should not give the impression that the US does not restrict speech in all forms. In *Chaplinsky v New Hampshire (1942)*,⁴⁴⁹ the Supreme Court of the United States held: “There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional provisions.” Where there is no specific limitation to a right, the courts have the duty to explain the scope of the right.

It has however been argued that having a constitution without any limitation clause is good for countries which have mature democracy where there are credible and independent courts. Having no limitation clause may be very risky for democracies which are not mature, for example,

⁴⁴⁷ “Limitation Clauses”, *International Institute for Democracy and Electoral Assistance (International IDEA)* (2nd edn, 2014).

⁴⁴⁸ *ibid.*

⁴⁴⁹ (1942)315 US 568.

where the legislature and the courts are not independent and trustworthy.⁴⁵⁰ This is because such constitutions give wide discretionary powers to the courts. The powers of this kind require a responsible and competent judiciary to interpret the right.

Second, limitations to rights may be in a form of a general limitation clause. Malawi Constitution has a general limitation clause through which free speech is restricted. The availability of a general limitation clause ensures flexibility in the interpretation of the right but its non-specific nature also means it can either allow too much limitation on the right or very little limitation depending on the attitude of the courts.⁴⁵¹ Again, general limitation clauses give the legislature and the courts wide discretion.

General limitation clauses are said to be suitable for countries which have strong democratic institutions and good human rights record.⁴⁵² A country which has a strong, pluralistic and independent legislature as well as a strong, vibrant and independent civil society can have general limitation clauses. A parliament which is working for the good of the people would resist any moves to make arbitrary restrictions on rights. On the other hand, for countries which have fragile democracies, for example, countries which have a weak civil society and a legislature which is influenced greatly by the Executive, general limitation clauses may not be recommended.⁴⁵³

In addition, general limitation clauses on human rights require an independent judiciary. They need a judiciary which has a tradition of respecting human rights and is independent from the influence of the other arms of government and high profile figures. The citizenry should have the trust in the judges that they are capable of interpreting the limitations to the rights correctly.⁴⁵⁴

Third, limitations to rights can also exist in the form of right-specific limitation clause. It is asserted that a specific limitation clause indicates how important the right is and also its nature.⁴⁵⁵ Right-specific limitation clauses function well in countries which have fragile

⁴⁵⁰ “Limitation Clauses”, *International Institute for Democracy and Electoral Assistance (International IDEA)* (2nd edn, 2014).

⁴⁵¹ *ibid.*

⁴⁵² *ibid.*

⁴⁵³ *ibid.*

⁴⁵⁴ *ibid.*

⁴⁵⁵ *ibid.*

democracies.⁴⁵⁶ For example, where the legislature likes to serve the interests of the executive and the civil society lacks independence, a tightly-worded limitation clause is more efficient and helps to prevent abuse.⁴⁵⁷ Where there is no public legitimacy for the judiciary to make right interpretations of general limitations clauses, more specific clauses that bind and instruct the judiciary may be more relevant.⁴⁵⁸ Tightly-worded limitation clauses also serve better in countries which have dictatorial rule or are coming out of a dictatorship.⁴⁵⁹

Some have argued that Malawi does not yet have a strong democracy. In that case, a general limitation clause to the rights may not be the best for the country. Malawi faces issues of poor governance, endemic corruption, limited transparency, inadequate accountability and lack of political will.⁴⁶⁰ Blessings Chisinga calls Malawi a ‘defective democracy’ whose institutions are not effective.⁴⁶¹ For example, Malawi’s parliament has not always discharged its duties in the interest of Malawians. Chisinga observes that parliament has often been a political battleground to advance political party wishes. He cites as an example the political dramas that happened in the first term of President Bingu wa Mutharika (between 2004 and 2009). That time the opposition had more members of parliament than the ruling party and used the tyranny of numbers to shoot down valid government proposals. For example, opposition party MPs often rejected most of the nominees to senior public offices for reasons that were political.⁴⁶² Chisinga further observed that it was difficult for Government at the time to have the budget passed because opposition MPs refused to discuss the budget unless section 65 of the Constitution, which forbade crossing of the floor, was applied to remove MPs who had joined the ruling party.⁴⁶³ When the Executive struck a deal to discuss the budget first and section 65 issues later, the President prorogued parliament immediately the budget was passed. All these events show that parliament can be abused by politicians to advance political ends.

⁴⁵⁶ *ibid.*

⁴⁵⁷ *ibid.*

⁴⁵⁸ *ibid.*

⁴⁵⁹ *ibid.*

⁴⁶⁰ *ibid.*

⁴⁶¹ “Towards Consolidation of Malawi’s Democracy,” *Konrad-Adenauer-Stiftung* (Occasional Paper No. 11, Malawi, 2008).

⁴⁶² *ibid.*

⁴⁶³ *ibid.*

Most Malawian MPs tend to serve the wishes of their parties more than the common good or the interests of their constituencies. Nandini Patel, for example, has observed that many MPs after they have been elected do not mind about their constituencies so much and only reappear when another election approaches.⁴⁶⁴ In order to advance the agendas of the ruling party, MPs have sometimes passed strange laws which violate human rights. For example, the Malawi Parliament passed a new injunction law which prohibited instituting civil suits against Government officials.⁴⁶⁵

These examples demonstrate that the Malawi Parliament is not generally independent and may not always be committed to protecting liberties. If the Parliament is given wide discretionary powers through the general limitation clause to make laws to limit the rights, it is possible for such a Parliament to make laws that infringe the rights of Malawians to promote the agenda of their parties. In such cases, right-specific limitation clause to the rights such as freedom of expression which are tightly-worded would be advisable.

As for Malawi's judiciary, generally it is perceived to be independent. The World Justice Project ranks the independence of Malawi's judiciary fourth in sub-Saharan region only after Botswana, Ghana and South Africa.⁴⁶⁶ Since the emergence of multi-party government in 1994, the judiciary has been a core stabilizing institution for Malawi's democracy.⁴⁶⁷ It has been a very important institution providing checks and balances on Parliament and the Executive through its bold judgments. For example, the Malawi courts overturned Joyce Banda's unconstitutional attempt to nullify the 2014 presidential election results. Around 2008 the Court stopped former President Bakili Muluzi from contesting as president in the 2009 general elections because he had already served two terms (from 1994-2004). In 2006 the Court held that Section 65 which prohibits crossing the floor was constitutional and therefore could not be repealed as President Bingu wa Mutharika prayed for. The Malawi Courts have also been important in adjudicating other cases

⁴⁶⁴ *ibid.*

⁴⁶⁵ See "Malawi," *Human Rights Watch*, (January 2012); Further, in 2011 Malawi Parliament amended section 46 of the Penal Code 1929 which gave powers to the police to search without a warrant.

⁴⁶⁶ Rachel Ellet, "Politics of judicial independence in Malawi," *Freedom House*

⁴⁶⁷ *ibid.*

relating to general elections; it has been instrumental in solving intra-party political disputes; and defending freedom of private radio stations to broadcast, among others.⁴⁶⁸

Malawi's judiciary has generally been independent but its independence is threatened by several factors. A 2003 report by Fidelis Kanyongolo, a renowned Malawian lawyer, observed that several challenges rock the judiciary in Malawi.⁴⁶⁹ Despite improvements in judges' salaries and resources for the Court, Malawi's judiciary continues to suffer acute underfunding through inadequate budget.⁴⁷⁰ Lack of sufficient resources for the judiciary has the potential of making the institutions run slowly and inefficiently and can also demoralize the staff and judges. Insufficient funds for the judiciary may also be the contributing factor to the insufficient judicial security at the judges' residences and the court. This threatens the lives of the judges.⁴⁷¹

Malawi's judiciary also faces political interference, which comes in various forms including resentment and the issuing of threats to judges who make decisions against government. For example, when the Court held that section 65 was constitutional and that it could not be repealed, President Bingu wa Mutharika showed resentment of the court for the decision. In another case, when the Court uplifted the ban which President Muluzi made against holding rallies or protests against his third term bid, Muluzi began a process of dismissing the judges although he never succeeded due to internal and external pressure. Appointment of judges has also sometimes been perceived to be politicized. Presidents tend to appoint judges who will sympathise with government or those who come from their regions.⁴⁷²

Although Malawi's judiciary has been lauded for its independent decisions, it operates in a fragile environment which has the potential of undermining its operations and independence. The lack of funds for its operations makes the court to have a backlog of cases which denies litigants timely delivery of justice. Lack of legal representation and legal information, and the expensive court fees have a bearing on the delivery of justice to Malawians, most of whom are poor. The constant interference of the Executive in the judiciary compounds the problems.

⁴⁶⁸ *ibid.*

⁴⁶⁹ See Edge Kanyongolo, "State of Judicial Report: Malawi 2003," *IFES* (2004)

⁴⁷⁰ *ibid.*

⁴⁷¹ *ibid.*

⁴⁷² *ibid.*

Considering all these factors, it is better for Malawi to have tightly-worded specific right limitation clauses, rather than a general limitation clause to the rights. Freedom of expression provision must contain its specific limitations because that will help to expressly provide for the scope of the right to all Malawians, not only the Court. When the limitations are not spelt out, the ordinary Malawian may not be aware of the kind of limitations involved. Even if some limitations are spelt out in statutes, generally people are more aware of constitutional provisions than the statutory provisions. The bulk of the statutes has the potential of making it difficult to follow what they contain unlike the Constitution which is a single document.

4.2.2 A Model for Balancing Freedom of Expression and the Right to Reputation

The conflict of interests which arises in a lawsuit calls on the court to consider the rights of both the plaintiff and the defendant. A lawsuit presupposes a conflict of two sets of rights: the plaintiff's rights, which are directly invoked by the claimant, and the defendant's rights, which come about indirectly as the defendant tries to defend himself or herself.⁴⁷³ Courts will need to identify the clash between the rights and try to resolve the conflict without favouring a particular party's rights. To balance the plaintiff's and defendant's rights, the court may use the Brems Model,⁴⁷⁴ developed by Eva Brems, which requires the court to consider the following criteria in making its decision: impact criterion, periphery criterion, additional rights criterion, and general interest criterion.⁴⁷⁵

The impact or seriousness criterion takes into consideration the impact the decision of the court will have on the party against whom the decision is made.⁴⁷⁶ For instance, where allowing the plaintiff's right causes serious impairment to the defendant's right while allowing the defendant's right to prevail does not affect the plaintiff's right much, then the defendant's right should be upheld.

⁴⁷³ Stijn Smet, "Freedom of Expression and the Right to Reputation: Human Rights in Conflict," *American University International Law Review* (26 no. 1, 2011).

⁴⁷⁴ Eva Brems, *Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 27 *HUM. RTS. Q.* 294, 303 (2005).

⁴⁷⁵ *ibid.*

⁴⁷⁶ Stijn Smet, "Freedom of Expression and the Right to Reputation: Human Rights in Conflict," *American University International Law Review* (26 no. 1, 2011).

In many defamation cases, for example, the European Court has made arguments which are related to the impact criterion. The Court has, for instance, used the impact criterion to comment on how the nature and severity of penalty given to journalists for abuse of freedom of speech can discourage the journalists from writing on issues of public interest. In *Cumpăna v Romania*,⁴⁷⁷ journalists were convicted and jailed for a period of seven months for publishing an article in a newspaper. They were also suspended from practicing for twelve months. The European Court found the penalty against the journalists was “manifestly disproportionate” and would have a “chilling effect” on the media.

The periphery/core criterion considers whether or not the issues in the conflict go to the heart of the right claimed by the defendant or plaintiff.⁴⁷⁸ If the issues do not seriously affect the right claimed by one party, then the Court will not decide for that party. For example, the Court may promote free speech of members of trade union in labour disputes because the debates touch on the core interests of the workers. Further, in assessing the relationship between privacy and reputation, the European Court stated that reputation is part of one’s private life but does not go to the core of private life.⁴⁷⁹ However, the holding of the European Court that reputation does not go to the core of privacy is very questionable. One’s reputation and privacy must be intimately related.

The third criterion is the criterion which considers additional rights of the defendant or the plaintiff.⁴⁸⁰ The strength of a party’s position is assessed considering other rights which may be affected apart from the rights which are directly involved on either side. For instance, if upholding the right of the plaintiff would affect not only the right of the defendant directly involved but also a couple of other rights of him and even other people, in that case the defendant’s rights must take preference.

⁴⁷⁷ (2004) Eur. Ct. H.R. at 95.

⁴⁷⁸ Stijn Smet, “Freedom of Expression and the Right to Reputation: Human Rights in Conflict,” *American University International Law Review* (26 no. 1 (2011)).

⁴⁷⁹ See *Karako v Hungary*, App. No. 39311/05, 21,25 (Eur. Cr. HR April 28, 2009). This case considers the right to reputation as an independent right and not necessarily connected to private life.

⁴⁸⁰ Stijn Smet, “Freedom of Expression and the Right to Reputation: Human Rights in Conflict,” *American University International Law Review* (26 no. 1, 2011).

The fourth criterion is the general interest criterion.⁴⁸¹ For instance, if the exercise of the defendant's right affects both the plaintiff's right and the general interest while the exercise of the plaintiff's right affects only the defendant's rights but has no impact on the general interest, then the courts should uphold the plaintiff's right. For example, the European Court has used general interest criterion to promote media freedom.⁴⁸² However, if someone writes on something which is not for the general interest, then reputation is preferred more than free speech. In *Leempoel v. Belgium*,⁴⁸³ a publication made a direct criticism of a judge's character which was not of any public interest.

4.3. Conclusion

Free speech has often been infringed since 1994. Successive governments have used the laws on sedition, insult, and treason to intimidate critics and harass journalists. No journalist has been killed in Malawi since 1994 but many have been detained, arrested or have suffered physical attacks. A few critics have lost their lives like musician Evison Matafale and Polytechnic student Robert Chasowa. MBC also infringes free speech for failing to cover opposition parties. Further, MACRA infringes free speech by refusing to grant licenses or closing down radio stations and other media outlets.

Successive Governments in Malawi have not been interested in amending or repealing the laws which are not in accord with constitutional provisions on free speech. The exact reasons why Governments are not committed to amending the provisions are not known but it is likely because Governments want to use the provisions to suppress dissent and criticism so that they continue to remain in power. When people are in power they get so many privileges that many do not want to relinquish power.

Free speech is also abused in Malawi. There are people who think they can write or say anything they want against anyone. As a result the country has experienced unprecedented levels of defamation. Most of the defamation takes place among politicians. The media have also been involved in defamation and sometimes they are used by politicians to do so. Abuse of free speech

⁴⁸¹ Stijn Smet, "Freedom of Expression and the Right to Reputation: Human Rights in Conflict," *American University International Law Review* (26 no. 1, 2011).

⁴⁸² *Radio France v France*, (2004) II Eur. Ct. H.R. 125, 149.

⁴⁸³ (2006) App. No. 64772/01, 77 (Eur. Ct. H.R.).

has also manifested itself in hate speech which largely happens among politicians. Malawi does not yet have a law to regulate hate speech. The media has also propagated hate speech. There is sometimes indecent dressing. The country has also experienced increased availability of pornographic materials.

CHAPTER FIVE

CONCLUSION, FINDINGS AND RECOMMENDATIONS

5.1. General Conclusion

According to natural rights theory, human rights are inherent and equal and this includes free speech and reputation. The State does not grant reputation and free speech but it has the huge responsibility to respect, protect and promote the two rights. Respect for the rights requires the State itself to avoid activities that infringe human rights; protection of the rights entails preventing third parties from infringing the two rights; and promotion of the rights involves the State taking positive steps such as policy and legislative measures to safeguard the two rights. It is at this point that positivism becomes important for the rights to free speech and reputation. The State is obligated to include the two rights in the Constitution and also statutes to protect and promote the rights. Positivism makes it easier to enforce the rights because there is a clear reference point.

Free speech and reputation are conflicting legitimate interests which require equal protection and promotion by the State. Every individual has the right to reputation in the same way he or she has free speech. However, these rights are not absolute and therefore there are times when the State makes restrictions on the particular right to give way to the enjoyment of other rights or for the sake of other societal values. The libertarian theory states that citizens can enjoy freedom of speech as long as their liberty does not infringe the liberties of other people. John Stuart Mill said in his *On Liberty* that individuals are entitled to as much liberty as possible in so far as they do not cause harm to others.⁴⁸⁴ Feignberg added that speech which is offensive to others may not be tolerated.⁴⁸⁵

5.2 Research Findings

5.2.1 Findings Concerning the Laws on Free Speech and Reputation

The right to free speech is expressly enshrined in international and regional instruments on human rights and the Malawi Constitution. The scope of free speech under the 1994 Malawi Constitution is not as elaborate as the clauses in international instruments such as the ICCPR. This

⁴⁸⁴ John Stuart Mills, *On Liberty* (1978).

⁴⁸⁵ “Feinberg’s Offence Principle and the Harm Principle”, available at: <https://iindabaezothusayo.wordpress.com/2014/11/12/feinbergs-offense-principle-and-the-harm-principle/> (accessed on 16 October 2018).

gives the judiciary wide discretion to interpret the scope of free speech. Free speech protection in that case will depend on the competence of the court.

Free speech is not absolute under the human rights instruments. It can be limited to protect other equally important societal values and rights of others such as the right to reputation. Human rights instruments provide for free speech as a conventional right but not for reputation. Reputation is mentioned only as a limiting factor of the right to free speech. The 1994 Malawi Constitution fails to mention reputation as a limiting factor or a conventional right. This gives the impression that reputation is less important than free speech. Thus the Malawi Constitution and international instruments fail to protect both free speech and reputation equally. The existing laws cannot be effective in balancing free speech and reputation because they give the impression to the reader that free speech is more important by guaranteeing it and not reputation.

Under the human rights instruments, limitations to free speech are contained either as specific limitation clauses or a general limitation clause to rights. Most of the regional instruments on free speech have specific limitation clauses which spell out the legitimate aims to limit free speech. Under the 1994 Malawi Constitution, there is no specific clause to limit free speech but a general limitation clause to the Bill of Rights. Scholars argue that general limitation clauses are not the best for countries like Malawi which do not have strong democracies.⁴⁸⁶ This means that the general limitation clause may not be effective in balancing free speech and reputation in Malawi. Specific limitation clauses are suitable for countries which have weak democracies like Malawi.⁴⁸⁷

Limitations to free speech should be legitimate.⁴⁸⁸ In Malawi, limitations to free speech are permissible during a state of emergency⁴⁸⁹ and through the general limitation clause applicable to

⁴⁸⁶ See "Limitation clauses," available at www.constitutionnet.org/sites/default/files/limitation_clauses.pdf (accessed on 2 March 2018).

⁴⁸⁷ *ibid.*

⁴⁸⁸ Article 19(3) of the International Covenant on Civil and Political Rights 1966 provide that limitations to free speech must be provided for by the law, must protect a legitimate interest such as public order, public security, public morals, public health and the rights or reputation of others.

⁴⁸⁹ Constitution of Malawi 1994, s 45.

the Bill of Rights.⁴⁹⁰ Free speech is also curtailed to protect human dignity⁴⁹¹ and privacy⁴⁹² which are enshrined in the Constitution.

Under the general limitation clause to the Bill of Rights, Malawi has statutes which limit free speech to protect legitimate objectives such as public order, morals, security, health, and other people's rights including reputation. These include the Penal Code 1929 which protects the right to reputation;⁴⁹³ the Censorship and Control of Entertainments Act 1968 which protects morals;⁴⁹⁴ the Preservation of Public Security Act 1960 protecting security and order and therefore gives powers to the Minister to prohibit publishing materials which are prejudicial to public security;⁴⁹⁵ the Printed Publications Act 1947 which regulates the press;⁴⁹⁶ the Official Secrets Act 1913 which provides that it is a misdemeanor for a Government official to reveal information confided in him or her;⁴⁹⁷ the Protected Places and Areas Act 1960 which forbids people to be in a protected place without a permit;⁴⁹⁸ the Protected Flag, Emblems, and Names Act 1967 prohibiting doing anything that insults the President;⁴⁹⁹ and the Communications Act 1998 meant to regulate the press, broadcasting, telecommunications and postal services.⁵⁰⁰

However, some of the statutes mentioned above unjustifiably limit free speech because some of the statutory provisions are framed in broad terms and grant wide interpretation, which makes them prone to abuse by Government. Some of the provisions are expressed in ambiguous terminologies. The law which makes defamation a crime amounts to undue limitation on free speech because such matters have sufficient remedies in civil proceedings and do not need prosecution. Seditious and insult laws infringe free speech and media freedom because they discourage journalists from commenting on issues of public interest.⁵⁰¹ Insult laws tend to protect

⁴⁹⁰ *ibid*, s 44.

⁴⁹¹ *ibid*, s 19.

⁴⁹² *ibid*, s 21.

⁴⁹³ Penal Code 1929, s 201.

⁴⁹⁴ Censorship and Control of Entertainment Act, s 23.

⁴⁹⁵ Preservation of Public Security Act 1960, s 3.

⁴⁹⁶ Printed Publications Act 1913, s 5(1).

⁴⁹⁷ Official Secrets Act 1913, s 4.

⁴⁹⁸ Protected Places and Areas Act 1960, s 4.

⁴⁹⁹ Protected Flag, Emblems, and Names Act 1967, s 4.

⁵⁰⁰ Communications Act 1998, s 3.

⁵⁰¹ Media Institute of Southern Africa, 13.

public officials from criticism and make them to be above the citizens.⁵⁰² Seditious and insult laws can be used by Government officials to suppress criticism of Government actions and officials or abuse of power.⁵⁰³

Malawi does not have a Defamation Act to balance free speech and reputation. The country uses the common law of England and the few provisions on defamation contained in the Penal Code 1929. The Penal Code 1929 defines defamation and gives the defences but it is silent on remedies. As the provisions stand, they are not sufficient to balance free speech and reputation. Further, Malawi experiences hate speech but there is no legislation on the same.

5.2.2 Findings on the Courts' Interpretation of Free Speech and Reputation

Judicial interpretation of reputation and free speech acknowledges the existence of both rights. Most of the jurisprudence on the subject is found in regional courts and commissions.⁵⁰⁴ These courts, just like the Malawi courts, acknowledge that free speech is limited for other values in society. Nonetheless, the courts emphasise that limitations to free speech must be legitimate.⁵⁰⁵ Further, the regional courts have observed that although the aims protected in the ICCPR are legitimate, some of them like security and public order are prone to abuse by Governments. Morality is also controversial because it is broad and varies from society to society. The Malawi courts have also acknowledged that some of the aims like security can be abused by Governments. For example, the courts declared unconstitutional sections 50 and 51 of the Penal Code 1929 which provide for sedition.⁵⁰⁶

The courts generally agree that reputation is a legitimate factor to restrict free speech but none of the courts proposes to have reputation included in the laws as a conventional right. Close scrutiny of the jurisprudence by the European Courts seems to suggest that the courts give more

⁵⁰² *ibid.*

⁵⁰³ *ibid.*

⁵⁰⁴ Most of the jurisprudence on the relationship between free speech and reputation is produced by the European Court of Human Rights and the Inter-American Court of Human Rights. The African Court of Human Rights concentrates on promoting free speech but does not discuss much on the relationship between free speech and reputation.

⁵⁰⁵ Any restrictions to free speech must meet the three requirements mentioned under article 19(3) of the International Covenant on Civil and Political Rights 1966, that is, the restriction must be provided by law; they must be for a legitimate interest, that is, to protect national security, public order, public morals, public health and rights of others including reputation; and must be necessary.

⁵⁰⁶ See *Chihana v Rep* (1992) Crim. App. Cas. No. 9, MSCA.

preference to free speech than reputation. The fact that there is very little jurisprudence by the African Court on reputation but more of that on free speech might also suggest that the African Court gives more preference to free speech than reputation. Thus the jurisprudence from the regional courts is not able to balance free speech and reputation. The Malawi Courts, on the other hand, do not seem to favour protecting either reputation or free speech but they have also failed to suggest that reputation be included in the Malawi Constitution as a conventional right. The Malawi courts have not discussed whether the general limitation clause in the Malawi Constitution is sufficient to protect other people's rights.

The European Court applies the proportionality-based approach to resolve the clash between reputation and free speech. In restricting free speech, it must be more beneficial to safeguard the particular aim than to protect free speech.⁵⁰⁷ Public officials should tolerate more criticisms than everyone else.⁵⁰⁸ Despite this assertion, the media are still obliged to keep professional ethics as they report on public officials.⁵⁰⁹ The English Courts, on the other hand, have acknowledged the equality between free speech and reputation.⁵¹⁰ Further, they have stated that reputation forms part of the dignity of a person.⁵¹¹ The Malawi courts have shown they are able to balance free speech and reputation but the principle they use is not known.

5.2.3 Findings on whether there is Infringement of Free Speech and Reputation

Free speech has often been infringed in Malawi since 1994. Successive governments have used the laws on sedition, insult, and treason to intimidate critics and harass journalists. MBC, the public broadcaster, also infringes free speech for failing to cover opposition parties. Further, MACRA infringes free speech by refusing to grant licenses or closing down radio stations and other media outlets without good reasons.

The Malawi Government has not been interested in amending or repealing the laws which are not in accord with constitutional provisions on free speech. The exact reasons why Governments are not committed to amending the provisions are not known but it is likely because

⁵⁰⁷ *Lingens v Austria* (1986) 8 EHRR 407, ECtHR.

⁵⁰⁸ *ibid.*

⁵⁰⁹ *Alithia Publishing Company v Cyprus* (2008) ECHR 17550/03 [65]; See also *Flux v Moldova* (2008) ECHR 22824/04.

⁵¹⁰ *Berezousky v Forbes (No 2)* (2001) 1 EMLR 45, CA.

⁵¹¹ *Reynolds v Times Newspaper Ltd* (2001) 2 AC 127, HL 201.

Governments want to use the provisions to suppress dissent and criticism so that they continue to remain in power.

Abuse of free speech has also been rampant in the country. Since 1994, the country has experienced unprecedented levels of defamation, especially among politicians. The media have also been involved in defamation and sometimes they are used by politicians to do so. Abuse of free speech has also manifested itself in hate speech, indecent dressing, and the increase of pornographic materials in the country. Malawi does not yet have a law to regulate hate speech.

5.3 Recommendations

5.3.1 Long Term Recommendations

The general objective of the research is to balance the conflict between reputation and free speech in the laws of Malawi and therefore the recommendations seek to promote both rights. The following are the long term recommendations:

First, the Malawi Parliament must amend statutory provisions which unjustifiably limit free speech. Some of these provisions are: section 47 of the Education Act which gives too wide powers to the Minister to ban materials ‘unsuitable’ for schools in Malawi. There is need for a criterion to be included to help the Minister in making decisions. Section 13 (2)(a) of the Censorship and Control of Entertainment Act 1968 which gives wide powers to the Censorship Board to ban materials which are ‘undesirable’ also needs to be amended to explain clearly what ‘undesirable’ materials are. Section 3 of the Preservation of Public Security Act 1960 which gives wide powers to the Minister to prohibit publishing materials which are ‘prejudicial to public security’ should also be amended to explain clearly what is ‘prejudicial to public security.’ There is also need to amend section 60 of the Penal Code 1929 which prohibits publishing anything which can cause fear or alarm to the public because the clause is vague. Section 200 of the Penal Code 1929 which criminalises defamation should be repealed. Section 4 of the Protected Flag, Emblems and Names Act 1967 which provides for insult laws should also be amended.

Second, Parliament should also amend section 35 of Malawi Constitution on free speech to explicitly include the main elements of free speech. Malawi can emulate the provision of the ICCPR which guarantees free speech as follows: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of

all kinds, regardless of frontiers, either orally, in writing, or in print, in the form of art or through any other media of his choice.”⁵¹² Other good examples to follow would be South Africa and Kenya. Free speech is enshrined in the Constitution of Kenya 2010 in these terms: “Every person has the right to freedom of expression, which includes freedom to seek, receive, or impart information or ideas; freedom of artistic creativity; and academic freedom and scientific research.”⁵¹³ Such provisions are better because they give more information on the scope of free speech. The Malawi provision gives wide interpretation of free speech to the Courts.

Third, the word ‘press’ in section 36 of the Constitution should be replaced with the word ‘media’ which is more inclusive. The word ‘media’ covers more items including what the word ‘press’ covers and is therefore the most appropriate word.

Fourth, there is need for Parliament to amend the Constitution of Malawi to incorporate reputation as an independent and conventional right. Further Parliament should also amend the Constitution to include a specific limitation clause to free speech. The limitation clause should expressly outlaw hate speech and protect other societal values such as morals, public order, health, security and other people’s rights including reputation, honor and privacy. The country can emulate the provision in the ICCPR.⁵¹⁴

Fifth, Parliament should also pass a Defamation Act to balance free speech and reputation. The Defamation Act will define defamation, its elements, who can sue or be sued, the defamation of public figures, internet defamation, defences to a defamation suit, remedies available to the plaintiff and limitation of action. The defences should be made clearer for defendants for easy application.

⁵¹² International Convention on Civil and Political Rights 1966, art 19 (2); Other good provisions on freedom of expression include the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 10 (1); the American Convention on Human Rights 1978, art 13 (1).

⁵¹³ Constitution of Kenya 2010, art 33 (1); see also Constitution of South Africa 1996, s 16 (1).

⁵¹⁴ Malawi can emulate the limitation clause to freedom of expression guaranteed in the International Convention on Civil and Political Rights 1966, art 19 (3) which provides that the exercise of the right to freedom of expression carries with it special duties and responsibilities and it is subject to certain limitations as provided by law and are necessary for the respect of the rights and reputation of others and for the protection of national security, public order, public health and public morals. In article 20, the ICCPR further provides that freedom of expression does not extend to propaganda for war, hate advocacy, incitement to discrimination and violence.

Sixth, Government should also improve the working conditions of the judiciary. It should increase funding to the judiciary. This will help the judiciary to employ more magistrates and judges to reduce the huge backlog of cases in the country. Increase of the budget on the judiciary will also help to increase the salaries of the employees in the court. The judicial officers in Malawi also need more training and education. This requires Government to accredit the private institutions which are seeking to teach law. It also requires strict monitoring of such schools to ensure quality of education. Malawi should introduce masters and doctorates courses in law. Further, the Malawi courts need to develop a strong jurisprudence on free speech and reputation. In balancing free speech and reputation the court may also implore the Brems Model. The judiciary should get means to promote legal education and legal representation.

Seventh, Malawi needs more professional media practitioners. This requires journalists to be well-educated, that is, they should be able to advance their education to higher levels of learning such as masters and doctorates. Currently, there are very few Malawians who have advanced to such levels. Further, media practitioners should undergo frequent refresher courses. All this requires Malawi to have more training institutions and schools. Apart from training and education, journalists need to be independent and impartial. This entails according the journalists good salaries so that they are less tempted to engage in corruption or bribes in reporting matters. There should also be strict enforcement of codes of ethics for journalists. Moreover, there is need to strengthen associations of media owners and journalists.

5.3.2 Short Term Recommendations

The following are the short term recommendations to promote free speech and reputation in Malawi: First, the judiciary should declare unconstitutional statutory provisions which unjustifiably limit free speech. The court should also help to clarify the meaning of some of the vague provisions. The Executive should also avoid using these provisions to intimidate critics and journalists.

Second, MBC radios and television, as public broadcasters, should not only be the mouthpieces of Government but also opposition parties. The Government monopoly of MBC must come to a halt and dissenting views from opposition parties must be accommodated. This includes giving platform to the opposition during elections to present their views. In this regard, it is the

duty of MACRA under the Communications Act 1998 to enforce equal treatment of political parties by the media. Further, MACRA should be impartial and independent in its dealings with the various media outlets.

Third, Civil Society Organizations in Malawi also need to be more active. Malawi Human Rights Commission and Human Rights Watch are among the few organizations which are active. There is little that is known about the other Civil Society Organizations in Malawi. These organizations also need more funding for their operations. They also need to assert their independence so that they are not bribed by Government. As they do their work, Civil Society Organisations should avoid working as puppets of Western countries.

Fourth, Malawi's politicians should refrain from hate speech or defaming one another for the sake of gaining political mileage. Most of the hate speech and defamation cases in Malawi involve political leaders. The quest for power should not make politicians abuse freedom of speech by injuring the reputation of other people and by inviting violence through hate speech. Politicians must learn to be persons of integrity, not people who cherish lies and tarnishing other people's images. This further requires the country to have politicians who base their arguments on ideology and issues.

Fifth, Government must engage in public awareness on responsible enjoyment of human rights including free speech. The Ministry of Information which controls the media should sensitise media outlets in Malawi to practice responsible journalism. It should also use the media to bring awareness to the general populace on responsible enjoyment of free speech. The media can also be used to disseminate legal education on free speech and reputation.

Recommendation to the general public is that everyone may enjoy their rights but respect other people's rights. Where the right to reputation has been infringed, the victims should learn to seek remedies in court instead of just keeping quiet. Conversely, where free speech is unjustifiably limited, the victims should also enforce their right in courts. Instituting suits for the infringement of free speech and reputation will hopefully help Malawians to enjoy rights responsibly.

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