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LAW AND THE MEDIA IN NIGERIA: THE ANATOMY OF AN UNEASY RELATIONSHIP

Animashaun Oyesola*

Abstract

The freedom of expression and the media is guaranteed under sections 38 and 39 of the Constitution of the Federal Republic of Nigeria 1999, and under the various international human rights instruments which the Nigerian state adopted.However, the rights of the citizens to privacy, his reputation and derogation from the right guaranteed under section 39 of the 1999 Constitution is also protected underthe common law and the same Constitution. Furthermore; the freedom of the media is curtailed by the state in the interest of defence, public policy, public order, public morality or public health and the assumption of emergency powers by the state under section 45 of the Constitution. This presents a precarious situation for the courts, to negotiate a delicate balance between the right of the populace to be informed represented as the freedom of expression and the media, and the right of the citizens totheir reputation on one hand, and the need for the state to operate smoothly on the other hand. Thus, the right to freedom of expression is subject to the right of others not to have their reputation injured.

The paper discusses the statutes guaranteeing the freedom of expression and the media; and those protecting the reputation of the natural and juristic persons. It discusses civil, online and criminal defamation. It also examines the statutes enacted by the state to assume emergency powers and for protecting its officials and the impact of this on the freedom of the expression and the media. The paper found that in most cases the state in excess of the requirement for state security and public interest acted by fiat in order to cripple or intimidate the mediaor stifle the creativity of the people by banning and censoring their books, plays, films, newspapers and views. It also found that the ordinary law of the land is enough to protect the reputation of the citizenry and curb the excesses of the media. The paper condemns the harassment and intimidation of the citizens and the media and their trial outside the ordinary law of the land. The paper advocates the abolishment of criminal defamation and the review of our law in line with the modern trends in order to balance the conflict between the rights of freedom expression with that of protecting the reputation of others and the interest of the state.

Keywords: Media, defamation, freedom, expression and Nigeria.

1.0 Introduction

The law holds that every person is entitled to hold, express, receive and impart opinions, ideas and information freely; as well as being free to own, establish and operate any medium subject to the regulations instituted by the state. Also, every person has a right to the protection of his name, reputation and the estimation, which he stands in the society of his or her fellow citizens. Consequently, whoever utters, publishes, broadcasts, communicates or telecasts anything injurious to the good name, or reputation of anothercommits both a tort and a criminal offence. Apart from defamation, the freedom of

expression and the media may be impinged by the law of sedition,[1] law against obscene publication and disclosure of official secrets.[2] Also, contempt of court with regards to cases pending before the court, scandalizing the court or the judge as well as the contempt of the Parliament are limitations on the freedom of expression of any natural or juristic person.[3]However, it is only defamation that shall be addressed in some depth in this paper.

2.0. The Law's Conception of Media

Before the advent of modern technology and mass media, the artists were the conscience of the society and themoulderof public opinion in African societies. In thepre colonial Yoruba society, for instance, theyperform the function of entertainment, education, informing and censoring like the modern media,[4] this freedom was guaranteed under the culturally accepted, though unwritten precept of "the king does not arrest minstrel",enforced by the traditional religion. However, as a result of deculturation, this injunction no longer holds because, the traditional religion, its harbinger and traditional institutions have been desecrated and abandoned. Olabimtan,[5] cited many instances including the experience of his own father, Ojelabi, a man accustomed to the practice in the Old Oyo Empire where even the supreme monarch, the *Alaafin*was commonly criticized at religious functions without any detrimental recourse. Ojelabi was shocked when sued in 1927 for poetic utterances couched in descriptive words and vivid imagery referring to a particular tycoon whose name was not mentioned (innuendo).[6] The customary court judge in colonial Nigeria awarded some fine against him.

The traditional media includes drums and traditional musical instruments, poetic renditions, religious rituals, cultural plays, artworks, painting, and idioms,traditional messaging modes- *aroko*, effigies and the likes.The advent of writing, recording, colonization, post colonization and the complexity of modern living changed the concept of media to include pictures, cartoons, caricatures, painting, play, novel, television, radio, letter, the broadcast and print media, online publication and the likes. The court has even held that medium is not limited to the orthodox mass media but could reasonably include schools.[7]

2.1. Legal Protection of the Right to freedom of expression and the Media

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[1] Section 50 and 51 of the Criminal Code

[2] Section 97(1) of the Criminal Code

[3] See Adi, I.E *Judicial Attitudes to Freedom of Speech and the Press with Particular Reference to Contempt of Court*(Nigerian Institute of Advanced Legal Studies Publications, Lagos, 1986)2

[4]Olabimtan,A. "The Challenges to Yoruba Literature: Yesterday, Today and Tomorrow" -Inaugural Lecture Series University of Lagos.(Lagos University Press, Lagos 1987) 10

[5] Ibid p 12

[6] To be discussed in some depth later.

[7]*Okogie v AG Lagos State* (1981) 1NCLR 218; *Adewole v Jakande and ors.* (1981) 1 NCLR 262

The right to freedom of expression and the press is guaranteed under Section 39 of the 1999 Constitution of Nigeria, it provides that:

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

2. Without prejudice to the generality of sub section (1) of this section, every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions provided that no person, other than the government of the federation or a state, or any other person or body authorized by the President on fulfillment of a condition laid down by an Act of National Assembly, shall own, establish or operate a television or wireless broadcasting station for any purpose whatsoever."

This right is also protected under the various international human rights instruments in which Nigeria is a signatory. For instance, Article 19 of the Universal Declaration on Human Rights provides that:"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinion without interference and to seek, receive and impart information, and ideas through any media and regardless of frontiers."

Also, Article 19 of the International Covenant on Civil and Political Rights provides that:

1. Everyone shall have the right to hold opinions without interference.
2. 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 print in the form of art or through any other medium of his choice.

Article 9 of the African Charter on Human and Peoples Rights made similar provisions thus:

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinion within the law.

Freedom of expression and the media indicates that every person is entitled to openly hold, impart and review opinions, idea and information without restraints, punishment or fear of punishment, subject only to the restrictions under the same law. The courts have held that the press cannot be compelled, save in grave and exceptional circumstances, justifiable under the law to disclose the source of its information.[8]This freedom however is not absolute, it has limitations. Hence, the relationship between the right to freedom of expression and the attached limitations is succinctly expressed by Akande[9] quoting Blackstone thus:

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[8]*OlusolaOyegbemi v AG Federation and ors.*(1982) 3 NCLR 895; *Tony Momoh v Senate of the National Assembly* (1981) NCLR 105; *Innocent Adiukwu and ors.V Federal House of Representatives of the National Assembly* (Suit No. ID/18m/81)

[9]Akande J, *Introduction to the Constitution of the Federal Republic of Nigeria 1999* (MIJ Publishers, Lagos 2000)95

theatre in Nigeria, Hubert Ogunde was cautioned by the Police, fined 125 pounds and had his theater troupe banned in Josin 1946.He was arrested, assaulted, refused licence to perform and jailed at different times by the colonial administration for staging plays which vas perceived as anti-colonial in orientation.[10] His concert, play and professional activities were also declared unlawful in the Western Region of Nigeria, and his epic play "Yoruba Ronu" banned by virtue of The Ogunde Concert Party (Declaration as Unlawful Society) Order of 1964.[11] This paper shall concentrate on instances whereby the state used its legislative powers to hinder the freedom of expression rather the historical rendition of the countless incidents of violation of this right.[12] The Nigerian Nobel laureate, Wole Soyinka's prison diary 'The Man Died' published in 1972, was banned in Nigeria,[13] for a period for being critical of Nigerian Authorities. He was jailed and sent into exile several timesas a victim of the state reprisal. Ex- Military Head of State cum civilian President, Obasanjo,[14] revealed in one of his autobiographies that "Newbreed Magazine" was seized and banned from circulation for publishing an item on National Security Organisation in breach of national security. There was the notorious Decree No. 4 of 1984, a military law which protects public officers against 'embarrassment' whether or not such publication was true or not. The State Security Protection Decree No. 2 of 1984 also was aimed at deterring the Press from publishing certain information not approved by the military authorities. Under the Public Officer (Protection Against False Accusation) Decree No. 4 of 1984, promulgated during the General Buhari's regime, two journalists – NdukaIrabor and Tunde Thompson,working for *The Guardian* Newspaperswere arrested, tried and convicted.[15] Their offence was that they published a speculatory story on the possibility of the appointment of a certain Rtd. General Hannaniya as Nigeria High Commissioner to United Kingdom. The military authorities were miffed at the 'leakage' of their perceived well-guarded secret. At the trial, when asked, the journalists refused to reveal the source of their information. They were subsequently convicted by a Special Military Tribunal. One

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[10] Clark E, *Hubert Ogunde: The Making of Nigeria Theater* (University Press Ltd., Ibadan 2008) xvii,35-37

[11] This was rescinded after the Army take over via The Ogunde Concert Party (Declaration as Unlawful Society) (Revocation) Order of 1966 WNLN 25 of 1966.

[12]The Circulation of Newspaper Decree No. 2 of 1966, Defamatory and Offensive Publication Decree No. 44 of 1966, Newspaper (Prohibition from Circulation) Decree No. 17 of 1968, The Sunday Star and ImoleOwuro (Prohibition) Edict No. 17 of 1968, The Printers and Publishers of the *Sunday Star* and ImoleOwuro Declaration of Unlawful Society Edict No 19 of 1968, Public Officers (Protection Against False Accusation) Decree No. 11 of 1976, Armed Forces and Police (Special Powers) Decree No. 24 of 1967, Trade Dispute Decree No. 7 of 1976, Newspaper Prohibition from Circulation Validation Decree of 1978, The Press Council Decree No. 1 of 1978 and The Daily Times Decree of 1978.

[13]Available online at https://books.google.com.ng/books?id=IFx6JOw9QjsC&pg=PA316&lpg= PA316&dq = wole +soyinka+case+on+the+man+died&source=bl&ots=65CXdmsIcR&sig=0yX4s2J4UR5rrHaEz_RigNzBWqY&hl=en&sa=X&ved=0ahUKEwibnuW5vaLKAhXEkQ8KHdnfCO8Q6AEIODAG#v=onepage&q=wole%20soyinka%20case%20on%20the%20man%20died&f=falseaccessed 11 July 2017.

[14]ObasanjoO, Not My Will (University Press, Ibadan1990) 43-44

[15]*Federal Republic of Nigeria v Tunde Thompson &Ors.* (1984) Charge no POPT/L/I/84

of the Decrees that were enacted by the military regime in 1987 was the Newswatch Proscription Decree which put the magazine out of circulation for six months, for the publication of the report of the Political Bureau headed by Justice Cookey, which had previously been published in newspapers!

3.1. Defamation

The protection of a person's reputation is an age long issue as the Biblestates emphatically that"A good name is rather to be chosen than great riches.",[16] which also made Shakespeare in one of his masterpieces "Othello" to rephrase the biblical injunction thus"Good name in man and woman, dear my lord, Is the immediate jewel of their souls. Who steals my purse steals trash; 'tis something, nothing; 'Twas mine, 'tis his, and has been slave to thousands: But he that filches from me my good name robs me of that which not enriches him.And makes me poor indeed."[17] Thus, importance of a good name need not be over emphasized; which brings about the issue of "defamation". Defamation is one of the derogation from the right to freedom of expression. It is both a tort and a crime in this jurisdiction.[18] The tort ofdefamation (civil defamation) is essentially regulated by the rules of common law and the various states'statutes.[19]Defamation refers to injury sustained by a person with regards to his reputation resulting from written or spoken words by others against him. Reputation under this law is the reaction of a third party to the publication complained of and what he perceives of the plaintiff's reputation, and not what the plaintiff thinks of himself. Every written or spoken wordwhich tends to do any of the following is defamatory:to lower the person defamed or claimant in the estimation of right-thinking members of society generally; [20] or to cut him off from society; or to expose him or her to hatred, contempt or ridicule.It is also defamatory to cause other persons to shun or avoid him or her; or to discredit him or her in his office, trade or profession; or to injure his or her financial credit.

Defamation is of two variants, namelyslander and libel. The former is a defamatory statement expressed through speech or made in a transient form.[21] Libel is a defamatory statement in written, printed or in any permanent form such as a book, computer device, electronic document, electronic storage card or device or disk, letter, notice, newspaper,

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[16]The Holy Bible KJV Book of Proverbs 22:1

[17]Shakespeare, William. *Four Tragedies: Hamlet, Othello, King Lear, Macbeth.* (Bantam Books, London 1988) (3.3.155-161)

[18] Defamation as a crime has been abolished in many jurisdictions including England, Northern Ireland and Wales by virtue of section 73(b) of the Coroner and Justice Act of 2009. Although it is rarely litigated in modern time but it is still part of Nigerian laws.

[19]For instance, Lagos State Defamation Law(1961) Cap D2 Laws of Lagos State; Defamation Law (1959) Cap 32 Laws of Western Nigeria applicable

[20]*Sim v Stretch* (1936) 52 TLR 671; *Sketch Publishing Company Ltd &Anor.V AlhajiAzeezAjagbemokeferi* (1989) 1 NWLR (Pt.100) 678 (SC); *BasseyEdem&Anor.vOrpheo Nigeria Limited &Anor.*(2003) NSCQLR Vol. 15 192 at 206-207 per Iguh, JSC.

[21]*Chief NyaEdimEkong v. Chief AsuquoE. Otop&Ors.*(2014) LPELR-23022(SC).

documentary, photography, pictures, images, sculpture, carving, statute, caricature, cartoon, moving cinematography, film, television, radio broadcast, telecommunication text message, cyber or internet communication platforms such as social media, instant messengers and so on. Generally, libel and slander are governed by the same principles, however, libel is actionable *per se* that is, without the need to prove any special or actual damage whereas slander is not actionable *per se*, except in the following cases: - imputation of crime; imputation of certain diseases such as sexually transmitted diseases; imputation of unchastity or adultery in a woman,[22] and imputation affecting professional or business reputation.Both natural and juristic persons are capable of being defamed. A trading corporation or company is aprofit-making venture, then the defamation of it may adversely affect and ruin it.[23] Accordingly, a company may maintain an action for defamation in respect of any word calculated to injure its reputation in the course of its trade or business.[24]Consequently, where a statement is made stating that a company conducts its business in a dishonest, improper or in-efficient manner, such that right-thinking members of society generally believed it to be so, the law is the same as in the case of an individual, and the company can maintain an action without proof of special damage.[25]

Criminal defamation is infrequently prosecuted, as defamation is usually treated as a tort. [26] It is defined in section 373 of the Criminal Code as, one which 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. Section375 of the Criminal Code madedefamation a crime and prescribed punishment as follows:"Subject to the provisions of this chapter, any person who publishes any defamatory matter is guilty of a misdemeanor and is liable to imprisonment for one year and any person who publishes any defamatory matter knowing it to be false is liable to imprisonment for two years."

Similarly, there is the offence of sedition, which has been confirmed to be probably the most serious offence that impinges on the liberty of the citizen to freely express himself.[27] Here the court must strike a balance between individual freedom of expression and security of the state. A seditious publication has the intention to bring into hatred or contempt or to excite disaffection against the person of the President or Governor or

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[22]*Egbe v. Adefarasin* (1987) 1 NWLR (Pt.47) 1; (1987) 1 SC 1 at 20; *AlhajiDauduOlaniyi v. AjibadeElero* (2006); *Olaniyi v. Elero* (2007) 8 NWLR (Pt.1037) 517;*Alawiye vOgunsanya* (2004) 4 NWLR (Pt. 864) 486.

[23]*South Hetton Coal Co. Ltd. v North-Eastern News Association Ltd.* (1894) 1 OB. 133 at 145(CA).

[24]See *Linotype Co. Ltd. v British Empire Typesetting Machine Co. Ltd.* (1899) 81 LT 331; 15 TLR 524 (HL*) Slazengers Ltd. V. Gibbs & Co.* (1916) 33 TLR 35.

[25]*BasseyEdem&Anor.vOrpheo Nigeria Limited &Anor.* NSCQLR Vol. 15 (2003) 196 per Iguh, JSC at page 207.

[26]Okonkwo C.O. *Okonkwo andNaish: Criminal Law in Nigeria*(2nd ed. Spectrum Law Publishing, Ibadan)279

[27] Ibid p 339

Government of the Federation; or to excite the citizens or other inhabitants of Nigeria to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Nigeria as by law established; or to raise discontent or disaffection amongst the citizens or other inhabitants of Nigeria; or to promote feelings of ill-will and hostility between different classes of the population of Nigeria.[28] Under the Criminal Code, sedition is punishable with asentence of two years or a fine, and three years for a subsequent offence.[29] Under the Penal Code, the sentences are longer.The Court of Appeal however held in *Arthur Nwankwo v The State*[30] that the offence of sedition under sections 51 and 52 of the Criminal Code is inconsistent with section 36 of the 1979 Constitution (now section 39 of the 1999 Constitution).Nevertheless, the law remains in the statute. This paper advocates for its abrogation from our laws. The majority of the Nigerian cases on this subject were during the colonial time and the first republic and these cases were few.[31]

3.2. What the Defamed Claimant must prove to succeed:

To succeed in an action in defamation, according to*Guardian Newspaper Ltd. vs. Ajeh*,[32]among other authorities,[33]the Plaintiff must prove the followings: (a) That the words complained of were defamatory or contained defamatory imputations; (b) That the words referred to the plaintiff; (c) that the statement was false,and (d) That the words were published by the defendant to at least one person other than the Plaintiff.[34]The Words must be Defamatory or contained defamatory imputations:

3.2.1 That the words complained of were defamatory or contained defamatory imputations: the words complained of are capable of bearing defamatory meaning in its natural meaning,[35] or by means of an innuendo.It must not be a vulgar abuse.[36]It is defamatory to state that a married University lecturer is having an affair with his female student,[37] or that a Pastor is a thief.[38]In *Youssoupoff vMetro Goldwyn Mayer PicturesLtd*,[39] the court held defamatory, a cinematograph film which falsely imputed that the plaintiff, a

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[28]Criminal Code Act, Cap. C 38 LFN 2004 s. 50(2).

[29] Ibid s. 51(2)

[30](1985) 6 Nigerian Commercial Law Report (NCLR) 228.

[31]*R v Agwuna* (1949) 12 WACA 456; *R v African Press* (1957) WNLR 1;*Chike Obi v Director of Public Prosecution* (1961) 1 All NLR186;*Ogbuagu v Police* (1953) 20NLR 139; *Ogidi v Police* (1960) 5FSC 251; *DPP v Efunkoya* (1964) 1 Nig LJ 112-113

[32](2005) 12 NWLR (Pt.938) C.A. 205 at 229

[33]*Sketch Publishing Company Ltd &Anor v. AlhajiAzees A. Ajagbemokeferi*(1989) 1 NWLR (part 100) 678

[34]See *Emmanuel Bekee&Ors v Friday EbomBekee* (2012) LPELR - 21270 (CA); *Orji Asaa v. Mr. Frank Ojah (2015) LPELR-24278(CA).*

[35]*Chief NyaEdimEkong v. Chief Asuquo E. Otop&Ors* (2014) LPELR-23022(SC); *Okolo v. Midwest Newspaper Corporation* (1977) 1 SC 33, *Okafor v. Ikeanyi* (1973) 3 - 4 S.C. 99.

[36]*Bakare v Ishola*(1959) E.S.C.R. 194;*V. M. Iloabachie v Benedict N. Iloabachie* (2005) Vol. 22 NSCQLR 672 at pages 711-712 per S.A. Akintan JSC.This is not applicable to libel

[37]*Ntenda v Alade* (1974) 4 ESCLR 470

[38]*Guardian Newspapers v Pastor Ajeh* (2011) 5 SCM 111@ 124

[39](1934) 50TLR 581, 587

Russian Princess was raped and seduced by a notorious monk, Rasputin.The court in determining whether the words are capable of a defamatory meaning, using a reasonable man's test has to:[40]consider what is the natural and ordinary meaning in which these words would be understood by reasonable men to whom they were published [41] or construe the words according to the fair and by reasonable persons of ordinary intelligence who are neither unusually suspicious nor unusually naïve. [42]The court must reject that meaning which can only emerge as the product of some strained or forced or utterly unreasonable interpretation[43] and the said words must be construed as a whole and not in isolation.[44]

However, if the plaintiff is pleading innuendo, he must prove that by virtue of the facts and circumstances known to persons to whom the words were published, the words are defamatory, although such words may not be defamatory in their ordinary meaning. Innuendo is of two variants. First,under false or popular innuendo, the words may be defamatory in their natural and ordinary meaning, including implications. For instance, in *Asubiojo v ACB*,[45]it was held defamatory when a bank wrongfully marked a cheque "Return to Drawer" and refused to honour the cheque drawn by a customer who had adequate balance.The imputation is that such customer is a bad financial risk and dishonest. Similarly, in *Mutual Aid v Akerele*,[46] it was held that defamatory inferences could be drawn from the wrongful advertisement of the plaintiff property for auction, that he was broke hence had to auction his property to satisfy his creditors. Second, true or legal innuendo arises when in the light of the facts andcircumstances known to the persons to whom the words were published then it becomes defamatory, though the words are not defamatory in its ordinary meaning. In *Akintola v Anyiam*,[47]the plaintiff was incorrectly identified as the son of one "Chief Sawe of Ilesha andAlice" in the pamphlet published by the defendant. The words on the face value looked innocent, but the plaintiff was able to prove that he was a politician who had always claimed to be from Ogbomosho.Thus, to such persons who were aware of this fact, he would be held to be lying about his origin and parentage. Similarly, publications that a clergyman visits a particular house sounds innocent on the face value but if it is known to certain persons that it is a brothel, the court would hold it to be defamatory. [48]Liability for defamation depends, not on the intention of

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[40] See generally EsanA, available online at http://baralpha.com/2015/08/09/the-tort-of-defamation- accessed January 10 2016.

[41]*Omo-Osagie v. Okutubo* (1969) 2 All NLR 175 at 179.

[42]*Prince Yahya Adigun v AG Oyo State* (1987) 1 NWLR (pt. 53) 678. Per Eso JSC

[43]See *Sketch Publishing Company Ltd &Anor v. AlhajiAzees A. Ajagbemokeferi*(1989) 1 NWLR (part 100) 678

[44]*Dumbo v Idugboe* (1983) 1SCNLR 29; *MichealLabasi v LuqmanBadmus* (2002) 1NWLR (pt.1014) 199 @216

[45] (1966) LLR 156; *Adeleke v National Bank* (1978) 1LRN 159

[46] (1966) NMLR 257 (SC)

[47] (1961) 1 All NLR 508

[48] See also *Tolley vFry & Sons Ltd.* (1931) AC 333; *Grubb v Bristol United Press Ltd.* (1963) 1QB 309, 327; *Allsop v Church of England Newspapers*(1972) 2 QB 161

the defendant, but on the facts of the defamation. A defendant will be held liable for defamation based on the reasonable inferences to be drawn from the words attributed to him, and not his intention, whether he meant what his words imply or not. [49]

3.2.2 The Words must refer to the plaintiff:the words complained of must be shown to refer to the plaintiff. It is easier to prove if the plaintiff is named or his picture is published.[50] The requirement was explained by Fatayi-Williams J.S.C. in *Dalumo v. The Sketch Publishing Co. Ltd*,[51] thus:

"It is an essential element of the cause of action for defamation that the words complained of should be published 'of the plaintiff.'... It is not necessary that the words should refer to the plaintiff by name. Provided that the words could be understood by reasonable people to refer to him, and this is the test in every case, it is sufficient. As the law stands, the test of whether words that do not specifically name a plaintiff refer to him or not is this: are the words such as, reasonably in the circumstances, would lead persons who knew the plaintiff to believe that he was the person referred to?"

Hence, where the defamatory statement was intended to refer to a fictitious character or a person other than the plaintiff, the defendant will be liable if a reasonable person would think that the statement refer to the plaintiff. The popular author Jeffrey Archer in his book *Twist in the Tale* portrayed a fictional Nigerian Minister of Finance as a money launderer and a thief. A former Nigerian Minister of Finance, Major General James Oluleye instituted a libel case. He won, as the defence of the author that it was a fiction was not accepted by the court.[52] If a fictional country were used, this would probably have availed the author. Similarly, in *Hulton& Co. v Jones*,[53] the defendant/appellant published a defamatory statement on the morals of a fictitious Artemus Jones, a Churchwarden in Peckam.Unknown to the publishers there was a barrister by the same name who lives in Peckam, the barrister sued and the court held the defendant/ appellant liable irrespective of the fact that they did not intend to defame the plaintiff. Also, in *Newstead v London Express Newspaper Ltd.*, the defendant published that a 30-year-oldCamberwell man was convicted of bigamy.However, there was another 30-year-oldCamberwell man as well bearing the same name. He sued and the publisher was held liable but the accessed damage was minimal. The newspaper would have escaped liability if it had published the address of the convict in Camberwell. Other antidotes for the cases similar to those stated above are first, reliance on section 6 of the Lagos Defamation Law which provides for an offer of amends involving the publication of a suitable correction and an apology in cases of unintended defamation. Second, film makers, authors, and such publishers could issue a disclaimer *ab-initio* stating that they have undertook reasonable care and that the work is

[49] *ACB Ltd v. Apugo* (2001) FWLR (Pt.42)38 at 35.
[50] *Dwek v Macmillan Publishers* (2000) EMLR 284.
[51] (1972) 1 All NLR 130
[52] Available online at http://theconservativethinkers.blogspot.com.ng/2010/09/jeffrey-archer-from-wikipedia-free.html#!/ 010/09/jeffrey-archer-from-wikipedia-free.html accessed July 2017.
[53] (1910) AC 20

that of fiction, bearing no resemblance to anyone dead or alive. Booksellers, newsagents, libraries and film clubs belong to the category of innocent disseminators of libel who could only escape liability if they could show that they neither know nor ought to have known of the existence of libel in the work being distributed.[54] The defendant lack of knowledge must not be due to negligence.

3.2.3. Publication by the defendant of untrue statement: the untrue defamatory words must have been published to a third party, who, by law, was not entitled or privileged to hear or receive the offending words or writing,[55] at least one person other than the person being defamed.[56] Once publication is not properly pleaded and proved, the case of defamation must fail. [57]Publication to the plaintiff alone is not actionable, as the tort of defamation protects a person from injury to his reputation among other people, and not from injury to his feelings about himself.Thus, where the communication was made directly to the plaintiff and to no-one else, no action is maintainable against the writer. In the case of *Okotcha v. Olumese*,[58]Adefarasin CJ stated that: "In order to succeed in an action for defamation, a plaintiff must establish that the libel was communicated to some person or persons other than the plaintiff himself. In the case in hand, it is quite clear that although the certificate was headed 'To Whom It May Concern,' and that it was made available only to the Plaintiff himself.... Regarding the communication by the plaintiff to Mr. Hayden of the character certificate, I am of the view that it was not the act of the first defendant and no action is maintainable against him on that account.... The communication was made directly to the plaintiff and to no-one else."

Likewise, the publication of disclaimer claiming that a person who used to be a staff ceased to be an employee of the organization and that anyone who transacts any business with the disclaimed person as representative of the said organisation does so at his own risk is common place in the media. The issue that disclaimers published in the press are embarrassing is not contentious but is it defamatory? The question arose in *Atoyebi v Odudu,*[59] the defendant published a "Disclaimer" in a circular, circulated to all estate surveyors in and outside Ilorin. It stated that "This is to inform you that the appointment of MrAtoyebi who was in our employment has been terminated for professional misconduct. Any person transacting business with him on our behalf does so at his own risk". The Supreme Court held that those who publish disclaimers should be cautious not to infringe on the right of others and the vilification of the plaintiff's conduct should not form part of

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[54]*Vizentelly v Mundie's Select Library Ltd.* (1900) 2 QB 170; *Awolowo v Kingsway Stores Ltd.* (1968) 2 All NLR 217

[55]*Daura v Danhauwa* (2011) ALL FWLR (Pt.558) 991; *Mamman vSalaudeen* (2006) ALL FWLR (Pt.298) 469; *Independent Newspapers Ltd v Idiong* (2012) ALL FWLR (Pt 647) 677; *Vanguard Media Ltd v Olafisoye* (2012) All FWLR (Pt. 634) 97.

[56]*Dairo v UBN* (2006) 16 NWLR (pt. 105) 99

[57]Esika v Medolu (1972) 2 NWLR (pt. 485) 54

[58](1967) FNLR 174, Per Adefarasin, J

[59](1990) NWLR (pt. 157) SC

a disclaimer. The publication was held to be defamatory for the inclusion of "professional misconduct". The only defence available to the defendant on this issue is justification.

3.3.4 Defamatory Statement must be Pleaded Verbatim:

The full text of the actual words complained of and not merely their substance must be set out verbatim in the pleadings in order to determine whether it convey defamatory meaning or not.[60] The Plaintiff is duty bound to present the offensive words or translate the same to the language of the Court which is English, if the original language of the defamatory statement was a different language.The dictum ofChukwuma-Eneh JSC, in*Oruwari v. Osler*,[61]is apt here:

"Where the libel or slander was published in a foreign language, it must be set out in the statement of claim and followed by a literal translation. It is not enough to set out a translation without setting out the original or vice versa. The pleader should include an allegation to the effect that the translation is a true interpretation of the foreign language used."

The onusis on the defendant to prove that the statement is not defamatoryrather than for the plaintiff to prove its truth.[62]

3.4. On-Line Defamation

The Computer and internet network has completely altered the manner of conducting business, communication and the way of life of the inhabitants of this planet. The growing importance of this trend made the Supreme Court to state as far back as 1969 that "The Law cannot be and is not ignorant of modern business methods and must not shut its eyes to the mysteries of a computer"[63]. The social network is a veritable forum for information dissemination as well as defamation. The fluidity and mobility of this forum made for enactment of a special law known as the*Cyber Crimes (Prohibition, Prevention, etc.) Act, 2015*signed into law on May 16, 2015 to provide the legal framework for prohibition, prevention, detection, investigation and prosecution of cybercrimes; and for other related matters makes it a criminal offence for any person who knowingly or intentionally sends a message or other matter by means of computer systems or network that:

a) is grossly offensive, pornographic or of an indecent, obscene or menacing character or causes any such message or matter to be so sent; or

(b) he knows to be false, for the purpose of causing annoyance, inconvenience danger, obstruction, insult, injury, criminal intimidation, enmity, hatred, ill will or needless anxiety to another or causes such a message to be sent.

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[60]*Akin Olaifa v. Gabriel AdedejiAina* (1993) 4 NWLR part 286 page 192 at 200 paragraph H, *Chief S.O.N Okafor v. D.O. Ikeanyi*(1979) 12 NSCC 43, *Sketch Publishing Company Ltd v. Ajagbemokeferi* (1989) 1 NWLR (part 100) 678 at 695.*D.D.G.A. Pharmaceuticals Ltd. v Times Newspapers Ltd* 1973 1 QB.21

[61](2012) LPELR – 19764,

[62]*Akomolafe v. Guardian Press Ltd* (2004)1 NWLR (Pt. 853) 1 CA.

[63]*Esika v Medolu* (1972) 2NWLR (pt. 485) 54

This electronic media is not amenable to the conventional defamation trials of periodical, print and slander for the following reasons: first, there is preponderance of anonymous publications and the internet service providers (ISP) may not be aware of defamation content of the myriad daily postings. Second, the issues of jurisdictional and evidential conflicts; different jurisdictions have different rules on issues of liability for internet and social network defamation, as evidenced by the conflicting judgments and varied awards in the industrialized countries such as Canada[64], US [65] and the UK.[66] Third, the fact that internet facility does not respect international boundaries, the seamlessness of transmission of information and the instant capacity to erase posted data provide evidential problem. Fourth, there is no editorial control. Fifth, in the assessment of damages, there would be the difficulty of establishing the extent of publication. Sixth, a most peculiar problem in Nigeria is the level of computer literacy among the populace, even the lawyers and the judges, which is very low. Thus, there is paucity of cases involving this variant of defamation in Nigeria.

4.0. Award of Damages

The award of damages is at the discretion of the court and it is based on the followings: the standing of the plaintiff in the society, the nature of the defamation,[67] the mode and extent of the publication. Others include refusal to retract and render apology to the plaintiff, the value of the local currency,[68] the prominence given to the publication,[69] and other relevant facts. The apology published after the discovery of the falsehood of a defamatory statement may mitigate the damage. However, it is not a defence to an action,[70]an apology which does not contain the withdrawal of the defamatory imputation or regret for publishing it, is inadequate to mitigate damages. [71]

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[64] *Barrack Gold Corporation v Jorge Lopehandia&anor. (2004)CANLII 12938 available on http//www.canlii.org; accessed January 2 2018; Vaquero Energy Ltd. Weir (2004) AQB 68*

[65] *John Doe (1) v Cahill* 884 A2D 451 (Del. Sup.Ct.2005).*High Fields Capital Market Ltd. v Doe* 385 F.Supp.2D 968 (2004). 775 F Supp(US District Court S(1) NY 1991); *Playboy Enterprises v Welles* 60 F Supp. 2d 1050,1054 (S.D. CA 1999)

[66] *Gofrey v Demon Internet Ltd.* (2001) QB 201; *Dow Jones & Co. Inc. v Y.A. Jameel* (2005) ECWA Civ 75; *Bunt v Tilly&ors.*(2007) 1 WLR 1243; *Derby v Weldon (no 9)* (1991) 2 All ER 901.*StattonOakmount Inc. v Prodigy Services Co.* 23 Media Law Report 1794

[67] The nature of the language used, the recklessness of the publication and the lack of sense of responsibility in ascertaining the truth before publication

[68] *Mayange v Punch Nig. Ltd. (1994) 7 NWLR (pt. 358) 570); Zik Press v AlvanIkoku 13 WACA 188.*

[69] *Guardian Newspapers Ltd v Ajeh* op cit

[70] *Edukugho v Proprietors of Sunday Times* (1958) WRNLR 215

[71] *Adetona v Drum Publications Nig. Ltd.* (1972) 1 NMLR 4

5.0. Defences to a Charge of Defamation

A defendant alleged to have defamed the plaintiff's character is not without a shield. This shield is called defences.If successful,it impeaches the intent of defamatory matter complained of and exculpatesthe defendant of defamatory liability.

These defences are explained hereunder:

5.1. Absolute Privilege:statement made on certain occasion is absolutely privileged and no action for defamation can arise, irrespective of any malice or the defamatory meaning or intent of the maker. The occasions are as follows: statement made during the proceedings in the parliament or judicial proceedings; statement made by one officer of the state to another in the course of their duty; fair and accurate report of any of the foregoings, contemporaneously published with such proceedings. [72] It is a complete defence to defamation.

5.2. Qualified Privilege: this applies to a broad range of statements for the protection or public or private interests. The Lagos State Defamation Law,[73] extends the position at common law by adding other occasions that are privileged. Any publication made *bona fide* in which the party has an interest or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty although it contains a defamatory substance, which would have been actionable without this privilege. [74] Duty here includes,legal, social or moral duties. In *Ayoola v Olajure,* [75] a company intending to employ a staff wrote the former employer, the defendant, requesting a character reference. The defendant replied with some damaging statement and concluded that the plaintiff if engaged would be a liability to their company. The letter was held to be privileged as the defendant has a moral duty to reply to inquiries about its former employees and the new company has a legitimate interest in the information sought. The Press is at liberty to publish yet to be released official reports, but not secret or security documents, the subject matter and content of which is of public interest.[76] However, the privilege will not avail the Press if it publishes the official police crime diary, [77] but information passed on to the police about the suspected commission of a crime is covered by qualified privilege. [78] Falsehood or malice destroys this defence. [79]Hence, to put the word "Lawyer" in

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[72]*Ojeme v Punch Nig. Ltd. &anor* (1996) 1NWLR(pt. 427)701@711; see also s 15 Defamation Law, Cap 52 Laws of Bendel State (Now Edo and Delta); s 10 DefamationLaw of Lagos State.

[73]Section 9 ;Parts 2 &3 to the Schedule of the Defamation Law of Lagos State.

[74]*First Bank of Nigeria Ltd. v Aboko* (2007) 1NWLR (pt. 1014) 129

[75](1977) CCHCJ 315; *Akomolafe v Guardian Press Ltd.* (2010) 3NWLR (PT. 1181)

[76]*Bello Osagie v Concord Press Nig. Ltd.*Suit No. B/226/83(Unreported) Judgment Delivered 26 November 1986

[77]*Oloyede v Sketch Publishing Co. Ltd.* (1977) 1 OYSC (pt. 2) 255.

[78]*Chief Osanyade&ors. V UdoEtuk* (2008) 1 NWLR 211

[79]*African Newspapers Ltd v Ciroma*(1996) 1NWLR (pt. 423) 156 @ 165

inverted comma,stating that a "Lawyer" is being tried, was held to be defamatory as it depicts the Lawyer as a fake, a charlatan, a fraud or an imposter just passing off as a Lawyer.[80]

3 Fair Comment: an action on defamation could successfully be defended by a plea raised by the defendant, that the defamatory matter alleged was only a personal contribution in the course of fair comments on public issues. The onus is on the defendant to prove that:[81] there was a matter of public interest in favour of which the defendant passed a comment; the facts which prompted the defendant's commentaries are premised on truth. and that the comment on the fact is true.For the defence of fair comment to avail the defendant, the statement must be based on facts not laced with an insincere expression.

5.4. Truth or Justification: the plaintiff need not prove that the defamatory statement is false, for the law presumes that in his favour, [82] but the defendant can prove justification, the technical name for the truth. The defence of justification means that the plaintiff has no right to the reputation he asserts hence cannot claim damages for the loss of what he does not have (*DamnumAbsqueInjuria*).[83]This defence will not avail anyone who publishes another's statement out of context.[84]

There are occurrenceswhich might help in mitigating the cost of damages to be awarded against the defendant/ tortfeasor by the adjudicating tribunal[85]or lead to the discontinuance of the case. These, though notdefences, properly so called, yet produced an effect almost akin to the defence proper. They jointly or severally support the defendant that the action of defamation against him shouldnot be heard or be struck out before the adjudicating court. The plea of *res judicata, if* successfully raised by the defendant terminates the extant case between the parties since it was presumed to have been resolved by a preceding suit. Similarly, delay in bringing the action before a court of competent jurisdiction made it statue barred. Also,published corrigendum or apology retracting or correcting the alleged defamatory statement orthe application of *volentia non-fit injuria*, that is to say, the plaintiff consented to the injury caused by the defamatory matter of the defendant; therefore, assumed the accompanying risk, serve as a mitigating factor.

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[80]*Ogbuatu v Daily Times of Nigeria* Ltd. (1972) 2FNR 185
[81]*Concord Press Nig. Ltd. v Olutola* (1999) 9NWLR (pt. 620) 578
[82]*Akufere v Sketch Publishing Co. Ltd.* (1971) 1 UILR 13
[83]*M'Pherson v Daniel* (1829) 10 B & C@ 27
[84]*Adamolekun v African Newspapers of Nigeria Ltd.* (1982) 2 FNR 87
[85]Available online athttp://media-laws.blogspot.com.ng/2011/06/laws-regulating-media-practice-in.html accessed January 5th 2018.

6.0. Conclusion

The paper explored the often uneasy relationship between the different laws guaranteeing and derogating from the freedom of expression and the media such as defamation, sedition and other laws. The basis of an action in the tort of defamation is to seek for compensation for injury to reputation as a means of vindicating the reputation, maintaining or restoring the plaintiff's good reputation that has been damaged. The laws of sedition, Decrees such as Decree No 4 of 1984 and the assumption of emergency powers under sections 45 and 305 of the 1999 Constitution are meant to protect the state power and public interest. The essence of the power of contempt of Court and the Parliament is to protect the integrity of the court and the parliament respectively. The court is in precarious situation in trying to balance the right to the freedom of expression and the media with the conflicting rights of others not to have their reputation injured and state security requirements. Thus, negotiating a balance between the laws of sedition, defamation, contempt of court and the parliament on one hand and the right to freedom of expression on the other hand by the courts presents an unending and uneasy relationship.

The media must not be oblivious of the pitfalls stated above in order not to fall foul of the law. The media must be sensitive to the need not to defame others and to protect themselves by avoiding defamatory landmines, by publishing a disclaimer in cases of fictitious publications that any resemblance to anyone living or dead is coincidental, rending an apology in cases of unintended defamation and checking whether they are availed of any of the defences under the law, among others. The paper shows the peculiarities of internet defamation and the need to enact a primary legislation to address the electronic challenges discussed above. The paper advocates the removal of the laws of sedition and criminal defamation from our books and the trial of individuals and the media by the ordinary laws of the land only.