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Defamation of the President of Zambia: Contextualising the Decriminalisation Debate

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Abstract

The last two decades have seen a growing global movement towards the decriminalisation of defamation. Numerous calls have been made at various levels for states to repeal all criminal defamation and 'insult' laws. Yet many states continue to maintain such laws on the statute books. Zambia is a case in point. This article focuses on the law that criminalises defamation of the President of Zambia, which the authorities have continued to apply with vigour. Diverging from extant judicial precedent upholding the constitutionality thereof, the article argues that that law is unconstitutional and falls foul of international standards on freedom of expression. The article culminates in a call for the decriminalisation of defamation of the President.

Keywords: criminal defamation; decriminalisation; democratic society; freedom of expression; President of Zambia

1 Introduction

Enshrined in national constitutions and in a number of international instruments,[1] freedom of expression is indissociable from democracy. Freedom of political debate, in particular, is at the very core of the democracy which many states, including Zambia,[2] have adopted as their preferred form of government.[3] This freedom is, however, subject to many restrictions. While some of those restrictions are clearly justifiable, laws that criminalise peaceful expression such as defamation and 'insult' are widely seen as unjustifiable. Many see the criminalisation of defamation, particularly defamation involving public officials, as an overkill; their argument being that well-tailored civil defamation laws could provide adequate protection against unwarranted attacks upon reputation while upholding freedom of expression.

[1] Eg Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ('ECHR'), art 10; International Covenant on Civil and Political Rights 1966 (ICCPR), art 19; American Convention on Human Rights 1969 (ACHR), art 13; African Charter on Human and Peoples' Rights 1981, art 9.

[2] Constitution of Zambia 1991, as amended by Act no 2 of 2016, art 4(3).

[3] See *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986), para 42 (holding that 'freedom of political debate is at the very core of the concept of a democratic society').

Most notable calls for the decriminalisation of defamation have been largely general in nature and in scope. This article, however, focuses on one type of defamation which is criminalised in Zambia: defamation of the President. The article considers whether, when examined in light of various decriminalisation calls and applicable constitutional provisions, section 69 of the Penal Code 1931 which criminalises defamation of the President, specifically, ought to be repealed. This question is timely and important. Unlike in some countries where extant criminal defamation laws are largely dead letter, section 69 is actively applied in Zambia. Moreover, although the Supreme Court of Zambia upheld the constitutionality of section 69 in 1996, the court lacked the benefit of recent developments on the international scene when making its decision at that time. Accordingly, the next section of this article provides an overview of the decriminalisation debate from an international perspective. Sections 3 and 4, respectively, analyse the tenor of section 69 and its constitutionality in light of that debate. And section 5 concludes.

2 The Movement Towards Decriminalisation of Defamation

The last two decades have seen a growing global movement towards the decriminalisation of defamation. In 2000, for example, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression jointly called on states to 'consider' repealing 'criminal defamation laws in favour of civil laws'.[4] Taking cognisance of the continued abuse of criminal defamation laws by politicians and other public figures, the trio declared more vehemently in 2002 that criminal defamation was 'not a justifiable restriction on freedom of expression' and called on states to abolish 'all criminal defamation laws' and, where necessary, replace them with 'appropriate civil defamation laws.'[5] In 2010, the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information joined the trio in declaring criminal defamation as one of the ten key threats to freedom of expression.[6] These representatives of four major international human rights organisations have continued to echo their decriminalisation call in their joint annual declarations on freedom of expression.[7]

In 2007, the Parliamentary Assembly of the Council of Europe adopted a resolution in which it

[4] UN Special Rapporteur on Freedom of Opinion and Expression and others, 'Joint Declaration: Current Challenges to Media Freedom' (London, 30 November 2000).
[5] UN Special Rapporteur on Freedom of Opinion and Expression and others, 'Joint Declaration: International Mechanisms for Promoting Freedom of Expression' (London, 10 December 2002).
[6] UN Special Rapporteur on Freedom of Opinion and Expression and others, 'Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade' (Washington DC, 2 February 2010).
[7] See eg UN Special Rapporteur on Freedom of Opinion and Expression and others, 'Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda' (Vienna, 3 March 2017), para 2(b); UN Special Rapporteur on Freedom of Opinion and Expression and others, 'Joint Declaration on Media Independence and Diversity in the Digital Age' (Accra, 2 May 2018), para 1(a)(v).

welcomed the efforts of the OSCE Representative on Freedom of the Media 'in favour of decriminalising defamation'.[8] The Assembly went on to make its own call on the member states of the Council of Europe to '*abolish prison sentences for defamation without delay*' and to '*remove from their defamation legislation any increased protection for public figures*' in compliance with the case law of the European Court of Human Rights (ECtHR).[9]

The ECtHR has not declared criminal defamation to be wholly incompatible with article 10 of the European Convention on Human Rights (ECHR) which guarantees freedom of expression. It, however, considers that the imposition of a prison sentence would be compatible with article 10 'only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence'.[10] In a number of cases, the ECtHR has found the imposition of prison sentences in defamation cases to be a violation of freedom of expression regardless of whether the finding of criminal liability itself could be justified.[11] The Inter-American Court of Human Rights (IACtHR) has similarly rejected the imposition of prison sentences in a number of defamation cases, declaring it disproportionate and thus a violation of freedom of expression as enshrined in article 13 of the American Convention on Human Rights (ACHR).[12]

Both the ECtHR and the IACtHR have specifically disapproved of criminal defamation laws that seek to offer increased protection for public figures. According to the ECtHR , 'the limits of acceptable criticism are wider with regard to a politician acting in his public capacity than in relation to a private individual, as the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance.'[13] With respect to defamation laws that seek to protect heads of states, in particular, the ECtHR has declared that any interest in protecting the head of state '*cannot justify conferring on him or her a privilege or special protection vis-à-vis the right to report and express opinions about him or her*.'[14] The IACtHR espouses this position. In its considered view, 'in the context of the public

[8] Parliamentary Assembly, 'Resolution 1577 (2007): Towards Decriminalisation of Defamation' (Strasbourg, 4 October 2007), para 10.
[9] Ibid, para 17 [emphasis added].
[10] *Cumpănă and Mazăre v Romania* App no 33348/96 (ECtHR, 17 December 2004), para 115; *Gavrilovic v Moldavia* App no 25464/05 (ECtHR, 15 December 2009), para 60.
[11] See eg *Mariapori v Finland* App no 37751/07 (ECtHR, 6 July 2010), para 68.
[12] Eg *Herrera-Ulloa v Costa Rica* Series C no 107 (IACtHR, 2 July 2004); *Palamara Iribarne v Chile* Series C no 135 (IACtHR, 22 November 2005); *Canese v Paraguay* Series C no 111 (IACtHR, 31 August 2004); *Tristán Donoso v Panama* Series C no 193 (IACtHR, *27* January 2009).
[13] *Dichand & others v Austria* App no 29271/95 (ECtHR, 26 February 2002), para 39. See also *Lingens v Austria* (n 3), para 42.
[14] *Artun and Güvener v Turkey* App no 75510/01(ECtHR, 26 June 2007), para 31, as quoted by S Griffen, *Defamation and Insult Laws in the OSCE Region: A Comparative Study* (OSCE 2017) 14 (text of the original judgment available in French only) [emphasis added].

debate, the margin of acceptance and tolerance of criticism by the State itself, and by public officials, politicians and even individuals who carry out activities subject to public scrutiny, must be much greater than that of individuals.'[15]

The UN Human Rights Committee, too, shares these sentiments. Its view is that article 19 of the International Covenant on Civil and Political Rights (ICCPR) places a particularly high value upon uninhibited expression in cases of public debate concerning public figures in the political domain and public institutions.[16] The Committee expresses particular concern 'regarding laws on such matters as...defamation of the head of state and the protection of the honour of public officials.'[17] According to the Committee, states parties to the ICCPR 'should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and *imprisonment is never an appropriate penalty*.'[18]

There has also been a continent-specific decriminalisation campaign in Africa. The World Association of Newspapers and News Publishers set the scene for a robust campaign in June 2007 through the adoption of the Declaration of Table Mountain. That declaration called on African governments to abolish 'insult' and criminal defamation laws 'as a matter of urgency',[19] and the call was subsequently endorsed by numerous organisations in Africa and elsewhere.[20] The declaration noted that, in the first five months of 2007, defamation and 'insult' laws had been used to harass, arrest and/or imprison 229 editors, reporters, broadcasters and online journalists in 27 African countries.

The campaign was given a boost in September 2010 when Africa's leading press freedom advocates met in Nairobi to support the Declaration of Table Mountain and to form a campaign steering committee.[21] This played a key role in instigating the ACHPR to adopt its own resolution on repealing criminal defamation laws in Africa in November 2010.[22] That resolution underlined that criminal defamation constituted a serious interference with freedom of expression as enshrined in the African Charter on Human and Peoples' Rights (African Charter) and impeded the role of the media as a public watchdog. It therefore called on all concerned African states to repeal criminal defamation

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[15] *Canese v Paraguay* (n 12), para 103.
[16] UN Human Rights Committee, 'General Comment No 34 - Article 19: Freedoms of Opinion and Expression' (Geneva, 29 July 2011), para 38.
[17] Ibid.
[18] Ibid, para 47 [emphasis added].
[19] World Association of Newspapers and News Publishers, 'Declaration of Table Mountain: Abolishing "Insult Laws" and Criminal Defamation in Africa and Setting a Free Press Higher on the Agenda' (Cape Town, 6 June 2007).
[20] See R Louw, 'Introduction: Furthering A Family Affair' in P McCracken, *Insult Laws: An Insult to Press Freedom, A Guide to Evolution of Insult Laws in 2010* (WPFC 2012) 2.
[21] Ibid, 4.
[22] ACHPR, 'ACHPR/Res 169(XLVIII)10: Resolution on Repealing Criminal Defamation Laws in Africa' (Banjul, 24 November 2010).

and/or 'insult' laws that impeded free speech. In 2012, the ACHPR under the aegis of the Special Rapporteur on Freedom of Expression and Access to Information also formally launched its own continent-wide campaign for the repeal of such laws.[23]

However, the most critical voice on the decriminalisation crusade in Africa perhaps came from the African Court on Human and Peoples' Rights (ACtHPR) in 2014 through its landmark judgment, in *Konaté v Burkina Faso* (*Konaté case*).[24] In that case, the ACtHPR found several provisions of Burkinabe law on the basis of which the applicant had been sentenced to imprisonment to be contrary to the provisions of article 9 of the African Charter and article 19 of the ICCPR on freedom of expression.[25] The ACtHPR espoused the ECtHR's view that violations of laws on freedom of speech and the press could not be sanctioned by custodial sentences without going contrary to the above provisions' unless in '*serious and very exceptional circumstances*'.[26] It further endorsed the view that people who assume public roles must face a higher degree of criticism than private citizens because otherwise public debate might be stifled.[27] Courts in Zimbabwe, Kenya and Lesotho have since followed the judgment in the *Konaté case* and have declared criminal defamation in those countries unconstitutional for being inconsistent with freedom of expression.[28]

Towards the end of 2017, PEN International and PEN's Africa Centres (PEN) comprising writers, journalists and media practitioners across the continent, reiterated their previous call on all African governments to repeal extant criminal defamation and 'insult' laws and to 'allow issues of reputation to be addressed solely as a civil law matter'.[29] This call was made in the context of a study whose findings revealed little progress towards ridding the continent of criminal defamation and 'insult' laws. In two of the focus countries of the study, Uganda and Zambia, the study found that the authorities had continued to apply such laws 'with vigour' and showed 'little sign of dispensing with them.'[30]

These are just some of the numerous decriminalisation calls which have been repeatedly made by prominent stakeholders. Many states around the world, however, maintain criminal defamation and

[23] PEN International and PEN African Centres, 'Stifling Dissent, Impeding Accountability Criminal Defamation Laws in Africa' (PEN International 2017) 6.
[24] App no 004/2013 (ACtHPR, 2 December 2014).
[25] *Konaté case*, para 164.
[26] Ibid, para 165 [emphasis added].
[27] Ibid, para 155.
[28] *Misa-Zimbabwe & others v Minister of Justice and others* Case no CCZ/07/15 (6 February 2016); *Okuta & another v Attorney General & others* Petition no 397/2016 (6 February 2017); *Peta v Minister of Law, Constitutional Affairs and Human Rights & others* Case no CC 11/2016 (18 May 2018).
[29] PEN International and PEN African Centres (n 23) 2.
[30] Ibid, 1.

'insult' laws on the statute books.[31] Consider, in particular, criminal defamation of the President of Zambia.

3 Criminal Defamation of the President of Zambia

Defamation of the President of Zambia was criminalised in 1965 through an amendment to the Penal Code. This was shortly after Zambia acquired independence from the British administration in 1964. The timing of the amendment suggests that it was designed to be a power consolidation tool, to protect the then new President from criticism related to his performance in office. Indeed, this is evident from the broad fashion in which the provision in question is couched. Section 69 of the Penal Code provides: 'Any person who, with intent to bring the President into hatred, ridicule or contempt, publishes any defamatory or insulting matter, whether by writing, print, word of mouth or in any other manner, is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding three years.'

An offence under this section has two elements (1) the act of 'publishing' what is considered 'defamatory' or 'insulting' *(actus reus*), and (2) the 'intent' of the publisher to bring the President into hatred, ridicule, or contempt (*mens rea*). The section does not, however, provide further guidance as to how these elements are to be established. Moreover, there are several respects in which section 69 is peculiar. It can be readily contrasted, for example, with the provisions on criminal defamation set out in sections 191 to 198 of the Penal Code which apply generally. Section 191 in particular provides: 'Any person who, by print, writing, painting, effigy, or by any means *otherwise than solely by gestures, spoken words, or other sounds,* unlawfully publishes any defamatory matter concerning another person, with intent to defame that other person, is guilty of the *misdemeanour* termed "*libel*".'[32]

First, whilst section 191 creates one offence namely, libel, section 69 creates two distinct offences; it criminalises the publication of both 'defamatory' matter and 'insulting' matter. But when it comes to enforcement, the authorities seem to fail to distinguish between 'defamation' and 'insult' and thus tend to treat the two offences as one. For example, in December 2018, a private citizen reportedly appeared before a Lusaka subordinate court on a charge of defamation of the President for using vulgar language against President Edgar Lungu.[33] Similarly, in January 2019, it was reported that a

[31] See also Griffen (n 14) 8 (showing, as of 2017, that three-quarters (42) of 57 OSCE states maintained general criminal defamation and/or insult laws). See also Association for Progressive Communications, 'Unshackling Expression: A Study on Laws Criminalising Expression Online in Asia' (Global Information Society Watch 2017).

[32] Emphasis added.

[33] T Sakala 'Zambeef Butchery Assistant in Court for Defaming Lungu' *The Mast* (Lusaka, 15 December 2018) <https://www.themastonline.com/2018/12/15/zambeef-butchery-assistant-in-court-for-defaming-lungu/> accessed 10 March 2021.

retired Zambia Army officer appeared in a Ndola subordinate court on a charge of defamation of the President for allegedly saying that President 'Lungu is an idiot and a dog.'[34] At least in the Zambian context, to call someone a dog or indeed to use vulgar language by making explicit reference to someone's private parts is considered 'insulting' rather than defamatory. The distinction between the two offences is important. Even tort law draws a distinction between defamatory statements and non-defamatory statements, such as insults, which are clearly a matter of raised passions or vitriol, since any ordinary person would know the difference between a statement made out of anger and a statement made when one is calm.[35] For example, nobody in their right frame of mind would ever believe that a human being is a dog.

Second, unlike section 191 which criminalises libel (defamation in a 'permanent' form, eg in writing or print) to the exclusion of slander (defamation in a transient form, eg by word of mouth), section 69 criminalises both libel and slander. This is unusual because even English common law on which Zambia drew, before the Coroners and Justice Act 2009 abolished criminal defamation, did not generally criminalise slander.[36] Moreover, in civil defamation, tort law draws a distinction between libel and slander. The tort of slander is *not actionable per se* (without proof of actual damage) at common law, except where the statement is one of a particular character.[37] Libel on the other hand is *actionable per se*; the law presumes damage.[38] Criminalising libel and slander alike therefore seems to be misguided. At a minimum, slander should have been a lesser offence.

Third, the Penal Code provides helpful definitions vis-à-vis the offence of libel created by section 191; it defines the terms 'defamatory matter', 'publication' and 'unlawful publication' in sections 192, 193 and 194 respectively, but no similar definitions are provided in respect of the offences created by section 69. Granted, the words 'defamatory' and 'insulting' are well-known adjectives in the English language. But one must invoke value judgment to decide whether a statement is defamatory or insulting. And therein lies the nub. What this means in practice is that any person facing a charge under section 69 is essentially at the mercy of what the arresting officer and, ultimately, the judicial officer before whom that person is prosecuted 'think' is defamatory or insulting.

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[34] T Tembo, 'Ex-Commando Arrested for using 'I' Word on President Lungu' *The Independent Observer* (Ndola, 28 January 2019) <https://tiozambia.com/ex-commando-arrested-for-using-i-word-on-president-lungu/> accessed 10 March 2021.

[35] See *Penfold v Westcote* [1806] 2 B & P (NR) 335.

[36] For exceptions, see P Milmo & WVH Rogers (eds), *Gatley on Libel and Slander* (10th edn, Sweet & Maxwell 2004), para 3.8.

[37] For exceptions to this rule, see *Foulger v Newcomb* [1867] LR 2 Ex 327; *Gray v Jones* [1939] 1 All ER 798.

[38] Ratcliffe v Evans [1892] 2 QB 524, 528; South Hetton Coal Co Ltd v North-Eastern News Association Ltd [1894] 1 QB 133, 145.

Fourth, the offence of libel created by section 191 is a misdemeanour punishable with imprisonment for a term not exceeding two years or with a fine or with both,[39] whilst the offences created by section 69 are felonies[40] punishable with imprisonment for a period of up to three years without an option of a fine. In other words, defaming or insulting the President of Zambia is a more serious offence than defaming any other citizen. The President is therefore offered increased protection against criticism than other citizens.

Fifth, the Penal Code specifies the defences which are available to a charge of libel under section 191 including truth, absolute privilege, and conditional privilege;[41] but section 69 is completely silent on defences. It remains unclear to date whether there is any defence to a charge under section 69. The Supreme Court had a golden opportunity to decisively pronounce itself on this question in 1996 but refrained from doing so. In *Mmembe & others v The People* (*Mmembe case*),[42] the appellant accused persons in challenging the constitutionality of section 69 had argued in the High Court that truth would not be a defence to a charge under section 69. The Supreme Court described that argument as 'startling and highly debatable'[43] but stopped short of considering the merits of the argument, declaring it inconsequential to the determination of the appeal. Therefore, a person accused of defaming or insulting the President cannot confidently advance a defence to the charge since it is 'highly debatable' whether any defence is available at all. And the authorities can charge and prosecute anyone under section 69 without considering the possibility that the accused has a defence as the law remains uncertain. Since the offences under section 69 are tried by subordinate courts whose decisions have no precedential value,[44] moreover, it is probable that some courts consider certain defences whilst others do not.

Lastly, section 69 creates 'cognizable offences' (for which police may arrest without warrant), whilst criminal libel under section 191 is a 'non-cognizable offence' (for which police may not arrest without warrant).[45] Coupled with the fact that a decision to effect an arrest under section 69 must be based on value judgment, this makes it easier for police to arrest critics of the President arbitrarily. This is not mere speculation. For example, on 3 August 2017, police detained the president of the UPP party, Saviour Chishimba, on allegations of defamation of the President only to release him a week later

[39] Penal Code 1931, s 38.
[40] A 'felony' is 'an offence which is declared by law to be a felony or, if not declared to be a misdemeanour, is punishable, without proof of previous conviction, with death, or with imprisonment with hard labour for three years or more' (Penal Code 1931, s 4).
[41] Penal Code 1931, ss 194-198.
[42] (1995-97) ZR 118.
[43] *Mmembe case*, 120.
[44] Criminal Procedure Code 1934, s 11 (as read with SI No 277 of 1965, as amended by SI No 186 of 1973).
[45] Ibid, s 2 as read with the first schedule.

without bringing him before any court.[46] The study by PEN found that the authorities have frequently invoked section 69 'to prosecute journalists and editors, opposition politicians and even private citizens accused of publicly criticizing the head of state and his performance in office.'[47] And some of the allegations upon which some individuals have been charged under section 69 are quite frivolous. For example, in May 2018, a police officer at Serenje Police Station was reportedly arrested on a charge of defamation of the President for allegedly stating that the 'One Zambia One Nation slogan does not exist and that there is no President' in Zambia.[48] What is defamatory about this statement? Even an average citizen knows that 'One Zambia One Nation' is Zambia's motto and that there is someone occupying the office of President.

All in all, section 69 is couched in broad terms. It is virtually impossible for citizens to adapt their criticism of the President to it to avert criminal liability. There is no doubt, therefore, that section 69 necessarily stifles political debate, undermines the media's role as a watchdog of the public interest, and impedes government transparency and accountability.[49] Anyone who dares criticise the President faces a real risk of prosecution and of imprisonment for defamation of the President at the whims and caprices of the authorities. And there is empirical evidence that citizens are not free to express their views on matters of governance if those views are not favourable to the sitting President. According to a study conducted by Afrobarometer in 2017, only about one-third (36%) of Zambians were comfortable to offer criticism to the incumbent President, Edgar Lungu.[50]

In the *Mmembe case*, the Supreme Court held that there was no 'threat inherent' in section 69 which endangered freedom of expression.[51] But that holding is the antithesis of the prevailing situation. Both media reports and empirical studies show that section 69 seriously interferes with the exercise of the right to freedom of expression. The studies conducted by Afrobarometer and PEN referred to above are particularly instructive. Moreover, the foregoing analysis clearly shows that section 69 is inherently problematic because it is couched in broad terms so much so that it is susceptible to arbitrary enforcement and interpretation. There must be compelling reasons, therefore, for that

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[46] United States Department of State, 'Zambia 2017 Human Rights Report' (Bureau of Democracy, Human Rights and Labor 2017) 6; Amnesty International, 'The State of the World's Human Rights' (Amnesty International 2018) 404-05.
[47] PEN International and PEN African Centres (n 23) 4.
[48] The Zambian Observer, 'Police Officer Arrested for Defamation' (30 May 2018) <https://www.zambianobserver.com/police-officer-arrested-for-defamation/> accessed 10 March 2021; Zambian Eye, 'Serenje Cop Arrested for Allegedly Defaming President Lungu' (1 June 2018) <https://zambianeye.com/serenje-cop-arrested-for-allegedly-defaming-president-lungu/> accessed 10 March 2021.
[49] PEN International and PEN African Centres (n 23) 4.
[50] M Bratton, and others, 'Zambia at a Crossroads: Will Citizens Defend Democracy?' (Afrobarometer Dispatch no 157, 19 July 2017) <http://afrobarometer.org/sites/default/files/publications/Dispatches/ab_r7_dispatchno157_zambia_democracy_at_a_crossroads.pdf> accessed 10 March 2021.
[51] *Mmembe case*, 125.

provision to be maintained on the statute books.

4 The Constitutionality of Section 69

Freedom of expression is enshrined in article 20 of the Constitution of Zambia 1991. According to article 20(1), a person has 'freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence.' The Constitution, of course, does not protect freedom of expression as an absolute right. Article 20(3), however, requires any restriction on freedom of expression to be: (1) *contained in*, or imposed under the authority of, *law*; (2) *reasonably required* for the purpose of protecting at least one of the interests specified under that provision; and (3) *reasonably justifiable* in a democratic society. These three conditions for permissible restrictions are consistent with international standards on freedom of expression.[52] Having already established that section 69 interferes with the exercise of freedom of expression, the next question to be considered is whether that section satisfies all three conditions.

4.1 The 'Lawfulness' of Section 69

Article 20(3) of the Constitution requires any restriction on freedom of expression to be prescribed by, or imposed under the authority of, law. At first blush, the question of whether section 69 is 'law' might seem mundane since the Penal Code is part and parcel of the laws of Zambia. It is not. To qualify as 'law', a statutory provision must meet certain qualitative standards. It must, as international human rights standards dictate, be formulated with sufficient precision to enable individuals to regulate their conduct accordingly.[53] This, of course, does not imply 'absolute certainty' in the framing of the law, but that the law must be sufficiently precise to enable the citizen, where necessary with appropriate advice, to foresee with reasonable certainty the consequences that may attend a given action. In short, a rule is 'foreseeable' and thus qualifies as 'law' 'when it affords a measure of protection against arbitrary interferences by the public authorities and against the extensive application of a restriction to any party's detriment.' [54]

Does section 69 meet that standard? According to the Supreme Court's decision in the *Mmembe case*, it does. In that case, the court stated that there was 'a big difference between legitimate criticism or other legitimate expression and the type of expression' criminalised by section 69.[55] The court,

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[52] ICCPR, art 19(3); ECHR, art 10(2); ACHR, art 13(2). See also *Good v Botswana* Comm no 313/05 (ACHPR, 26 May 2010), para 188.
[53] *Silver & others v United Kingdom*, Apps nos 5947/72, etc (ECtHR, 25 March 1983), para 88; *Konaté case*, para 128; UN Human Rights Committee (n 16), para 25.
[54] *Centro Europa 7 SRL and Di Stefano v Italy* App no 38433/09 (ECtHR, 7 June 2012), para 143.
[55] *Mmembe case*, 123.

however, implicitly acknowledged that section 69 alone did not provide adequate guidance as to when it would be 'appropriate to prosecute' an individual for defaming or insulting the President, noting the need to have recourse to 'the principles of legal interpretation *obtaining in England*' pursuant to section 3 of the Penal Code.[56] But one would be too optimistic to expect police officers who effect arrests under section 69 to be familiar with any such principles. In any case, what about the offence of insulting the President? How should the authorities deal with it given that there has never been such an offence in England?

Recall, moreover, that times have changed. There is no law any longer in England which criminalises defamation, let alone defamation of the head of state. As noted above, criminal libel was wholly abolished in England and Wales by section 73 of the Coroners and Justice Act. Technically, therefore, it is no longer possible to interpret section 69 according to the principles of English law. Any attempt to have recourse to the principles of English law which are no longer applicable would fall foul of section 3 of the Penal Code which allows for the importation of such principles only insofar as they are 'obtaining in England.' Moreover, the law on criminal libel was largely already dead letter in England even before it was formally abolished.[57]

Given the numerous peculiarities and loopholes of section 69 identified above, detailed guiding principles on the application of that provision would have to be formulated if the authorities were to be restrained from applying it arbitrarily. No such principles have been formulated since all cases under section 69 are tried by subordinate courts whose decisions have no precedential value. The few cases which have proceeded to superior courts on appeal, the *Mmembe* case inclusive, have not provided guidance on how the elements of the offences created by section 69 are to be established.

The 'big difference between legitimate criticism or other legitimate expression' and the type of expression caught by section 69 as asserted by the Supreme Court is not palpable. As illustrated by the examples given above, many people have been arrested and convicted under section 69 for all manner of expression, ranging from well-founded criticism of the President to petty allegations. Importantly, since it remains uncertain as to whether there is any defence to a charge under section 69, even those who might have proof of transgressions on the part of the President are likely to refrain from exposing those transgressions for fear of being imprisoned. The concept of truth as a defence in defamation cases is now an internationally accepted norm and, as the UN Human Rights Committee has stated, public interest in the subject matter of defamation cases should in any case be recognised

[56] Ibid.

[57] C Walker, 'Reforming the Crime of Libel' (2005-2006) 50 NY L Sch L Rev 169, 177; Index on Censorship and English PEN, 'A Briefing on the Abolition of Seditious Libel and Criminal Libel' (July 2009) <https://www.englishpen.org/wp-content/uploads/2015/09/seditious_libel_july09.pdf> accessed 10 March 2021.

as a defence.[58]

In short, although the Supreme Court upheld its validity as 'law', section 69 is at least 'bad law' because it is drafted without sufficient precision to enable citizens to adapt their expression to it. This is what has made it possible for the authorities to use that provision arbitrarily to stifle even legitimate criticism of the President as shown by empirical evidence.

4.2 The Purpose of Section 69

The legitimacy of the purpose of section 69 was also considered by the Supreme Court in the *Mmembe case*. The court ruled that section 69 served two legitimate purposes, namely (1) to forestall a *possible* unpeaceful reaction from citizens and supporters of the President; and (2) to protect the reputation of the President who, being 'the first citizen', could not be consigned into 'the general rank and file of the citizenry'.[59] Indeed, article 20(3) of the Constitution and relevant international instruments recognise the maintenance of public order and respect for the rights and reputation of others as some of the legitimate objectives the pursuit of which might necessitate the imposition of a restriction upon freedom of expression. But the reasoning of the court is impeachable.

First, it is not clear how section 69 contributes to the maintenance of public order. Recall that before defamation was decriminalised in England, an indictment for libel would lie in two instances, namely (1) where the libel could provoke the person defamed to commit a breach of the peace;[60] or (2) where it was in the public interest in all the circumstances that criminal proceedings should be brought taking into account, for example, the importance of the person defamed and the gravity of the libel.[61] According to the Supreme Court, however, section 69 criminalises defamation of the President to forestall a 'possible' unpeaceful reaction not from the President himself but from the citizens and his supporters. The court's assumption here is that defaming or insulting the President could provoke his supporters to commit a breach of the peace.

Apart from being hypothetical, this reasoning loses traction when it is extrapolated to other political players. The President is not the only political figure with supporters who could be provoked if their leader were defamed or insulted. The Vice-President and opposition political party leaders, for example, have supporters too. If section 69 is reasonably required 'to forestall a possible unpeaceful reaction from the citizens and supporters' of the President, then, every public figure who has 'supporters' must be afforded the same protection. In any case, the fact that one has been elected to

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[58] UN Human Rights Committee (n 16), para 47.
[59] *Mmembe case*, 121.
[60] *Hicks' Case* (1618) Hob 215; *R v Summers* (1665) 1 Lev 139; *R v Saunders* (1670) T Raym 201; *R v Holbrook* (1878) 4 QBD 42, 46.
[61] *Goldsmith v Pressdram Ltd* [1977] QB 83.

the office of President does not necessarily entail that s/he has more supporters than other politicians such as the Vice-President (especially now that the Vice-President is elected as a running mate to the President[62]) or losing candidates. Only a small fraction of citizens votes in general and presidential elections.[63]

One would, therefore, be speculating to say that the President deserves special protection from defamation or insult in the name of preserving public order because s/he enjoys more support from the citizenry than other politicians. According to international standards, there must be a *close causal link* between the risk of harm envisaged and the expression in question to warrant any restriction on freedom of expression on public order grounds.[64] It is not enough to say that section 69 pursues one of the objectives set out in article 20(3) of the Constitution. It must be shown that section 69 is *reasonably required* or *suitable* to ensure the attainment of the objective in view. A clear causal link between the risk of public disorder and defamation of the President is clearly missing. Moreover, the Penal Code as read together with the Public Order Act 1955 has provisions that more directly deal with specific instances of public disorder including unlawful assemblies, riots, etc. Any effect of section 69 on public order is too remote to be deemed legitimate.

Secondly, whilst it is true that defamation laws pursue a legitimate purpose of protecting reputation, the designation of the President as 'the first citizen' who deserves special protection on that basis is misguided. There is no law in Zambia that creates a hierarchy of citizenship. Interestingly, the Supreme Court relied on article 43 [now article 98] of the Constitution which grants immunity to a sitting President from legal proceedings to support its claim that the President did not stand before the law equally with the rest of the citizenry.[65] But that was a misapprehension of the purpose of presidential immunity.[66] That the President enjoys personal immunity from legal proceedings while in office does not mean that the President is 'above the law'. Like everyone else, the President is subject to the law. Article 98 of the Constitution itself provides for the removal of immunity against prosecution upon leaving office in respect of any act done or omitted to be done by the President while in office.[67] Moreover, if the public desires prompt action, the President can be impeached under article 108 for violating a provision of the Constitution or of any other law. This confirms that, even

[62] Constitution of Zambia 1991, as amended by Act no 2 of 2016, art 110

[63] Compare poll statistics from previous elections (available at https://elections.org.zm/) with the country's population (statistics available at https://www.zamstats.gov.zm/). For the eligibility criteria to register as a voter, see Constitution of Zambia 1991, as amended by Act no 2 of 2016, art 46; Electoral Process Act 2016, s 8.

[64] ACHPR, 'ACHPR/Res 62(XXXII)02: Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa' (Banjul, 23 October 2002), para XIII, 2.

[65] *Mmembe case*, 125.

[66] See *Nixon v Fitzgerald* 457 US 731 (1982).

[67] See *Chiluba v Attorney-General* (2003) ZR 153 (concerning the removal of a former President's immunity).

while in office, the President is accountable under the law.

In short, there is only one legitimate purpose recognised by article 20(3) of the Constitution which section 69 can be said to serve, that is: the protection of the reputation of the President. This, however, has nothing to do with social status. Everyone who has a reputation deserves to be protected by the law. The next question then is whether section 69 is needed to protect the reputation of the President even when there are other provisions such as sections 191 to 198 of the Penal Code which are also designed to serve that very purpose.

4.3 The Necessity of Section 69 in a Democratic Society

To be reasonably justifiable in a democratic society in terms of article 20(3) of the Constitution, any restriction on freedom of expression must not only be necessary to achieve the objective that justifies it (*necessity test*), it must also not go beyond what is strictly necessary to achieve that objective (*proportionality test*).[68] Necessity, according to international standards, implies the existence of a *pressing social need*[69] and the proportionality test holds that any restriction on freedom of expression must be *closely tailored* only to accomplish the legitimate objective necessitating it.[70]

Section 69 clearly fails the necessity test. The Supreme Court itself acknowledged in the *Mmembe case* that there were other means by which the reputation of the President could be protected.[71] Specifically, the reputation of the President and of all citizens, is protected by Zambian civil defamation law which draws on English common law as consolidated and amended by the Defamation Act 1953. Civil defamation is in fact more suitable because it is designed to directly restore the reputation of the victim by way of damages, unlike criminal defamation where the victim is a mere bystander in the proceeding.[72] Moreover, albeit without endorsing them, the general provisions on criminal libel set out in sections 191 to 198 of the Penal Code apply to the President as they do to other citizens. There is no *pressing social need* to protect the President's reputation through three different means. Section 69 is, therefore, superfluous.

Section 69 is also disproportionate. It is not *closely* tailored to accomplish the legitimate objective of protecting reputation. It goes beyond what is necessary to do so because there are other less intrusive means of achieving that objective. Recall the *six differences* between criminal defamation of the President and general criminal libel discussed in section 3 of this article. Those differences and the supporting empirical evidence referred to in that section demonstrate that section 69 is more

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[68] See *Sunday Times v United Kingdom* App no 6538/74 (ECtHR, 26 April 1979), para 59; *Herrera-Ulloa v Costa Rica* (n 12), paras 121 and 123.
[69] *Sunday Times v United Kingdom* (n 68), para 59; *Herrera-Ulloa v Costa Rica* (n 12), para 122.
[70] *Herrera-Ulloa v Costa Rica* (n 12), para 121.
[71] *Mmembe case*, 123.
[72] Walker (n 57) 179.

restrictive on freedom of expression. In particular, by criminalising both forms of defamation (slander and libel) and insult alike and by treating those offences as cognisable felonies punishable with imprisonment for a period of up to three years without an option of a fine, section 69 goes beyond what is necessary to protect any reputation which the President might legitimately claim. At a minimum, slander and insult should have been lesser offences, and in any case, the provision should have been flexible enough to permit the imposition of a fine.

As noted in section 2 of this article, all major regional human rights courts tend to reject the imposition of prison sentences in defamation cases. These courts have found prison sentences shorter than the three years which section 69 prescribes, and even fines in some cases, to be disproportionate. Recall, moreover, that both the UN Human Rights Committee and the Council of Europe have stated that imprisonment is *never* an appropriate penalty in defamation cases. Given the need for uninhibited political debate and open discussion on matters of public interest in a democratic society, section 69 also falls foul of international standards that dictate that public figures should be offered less, not more, protection against public criticism. Section 69 is, therefore, inconsistent with the very concept of a democratic society which is enshrined in article 4(3) of the Constitution of Zambia.

5 Conclusion

Freedom of expression and, in particular, freedom of political debate is 'a cornerstone upon which the very existence of a democratic society rests.'[73] Thus, the freedom of expression enshrined in article 20 of the Constitution of Zambia applies not only to information or ideas that are favourably received but also to 'those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".'[74] This article argues that section 69 of the Penal Code that criminalises 'insult' and defamation of the President of Zambia falls foul of these requirements and of relevant international standards on freedom of expression. That section does not only constitute a superfluous restriction on freedom of expression; it is also disproportionate. The Supreme Court missed a golden opportunity to declare it unconstitutional in the *Mmembe case*. But this should not be very surprising because judges are appointed by the President, the very beneficiary of section 69. It is only natural for judges to exhibit some loyalty to the appointing authority even though the Constitution requires them to act independently when making judicial decisions. It therefore seems unlikely that the courts would declare that section unconstitutional. Since the police have also shown unwavering propensity to apply it with vigour, the onus is on the legislature to repeal it. Those serving in the executive at the

[73] *Herrera-Ulloa v Costa Rica* (n 12), para 112.
[74] *Handyside v United Kingdom* App no 5493/72 (ECtHR, 7 December 1976), para 49.

pleasure of the President may not be willing to drive the process, but it is possible under standing orders for other members of parliament to introduce a private member's bill.

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