

GROUP DEFAMATION, FREEDOM OF EXPRESSION
AND INTERNATIONAL LAW

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requirements for the Award of the L.L.B Degree

By

THIMBA H. NGUGI

Supervisor

AHMEDNASIR M. ABDULLAHI

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CHAPTER I

A PROLEGOMENON: THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS

Introduction

This dissertation is a study in the power of words to maim, and what a civilised society can do about it. Not every abuse of human communication can or should be controlled by the law or custom. But every society from time to time draws lines at the point where the intolerable and the permissible coincide. In a free society such as our own, where the privilege of speech can induce ideas that may change the very order itself, there is a bias weighted heavily in favour of the maximum of rhetoric whatever the cost and consequences. But that bias stops this side of injury to the community itself and to individual members of identifiable groups innocently caught in verbal crossfire that goes beyond legitimate debate.

An effort is made herein to re-examine, therefore the parameters of permissible arguments in a world more easily persuaded than before because the means of transmission are so persuasive. But ours is a world aware of the perils of falsehood disguised as fact and of conspirators eroding the community's integrity through pretending that conspiracies from elsewhere now justify verbal assault- the non-factors and the non-truths of prejudice and slander.

Hate is as old as man and doubtless as durable. This report explores what it is the community can do to lessen some of man's intolerance and to proscribe its gross exploitation. A look at the ancient civilisation will illustrate that even in those ancient times the concept of Human Rights was given the due recognition that it deserved. The following trilogy will ascertain this fact.

CREON : Come girl, you with downcast eyes, do you plead innocent or guilty to these things?

ANTIGONE : Guilty. I deny not a thing.

CREON : Did you know an edict had forbidden this?

ANTIGONE : Of course, I knew. Was it not publicly claimed?

CREON : So you chose flagrantly to disobey the law?

ANTIGONE : Naturally! Since Zeus never promulgated such a law. Nor will you find that justice publishes such laws to man below. I never thought your edicts had such force. They nullified the laws of heaven, which unwritten, not proclaimed, can boast a currency that everlasting is valid;
An origin beyond the birth of man.
And I, whom no man's frown can frighten,
And far from risking heaven's frown by flouting these!¹

Oedipus, the King of Thebes, has suffered the inevitable fate of death: a fate foretold by the gods before his birth. His sons, Polyneices and Eteocles, are in violent contention for the Theban throne. Creon, a supporter of Eteocles, acts as a regent of the city. As a result of the intrafratricidal, armed conflict between Polyneices and Eteocles, both are killed. Hence Creon rules as the supreme potentate of Thebes. He proclaims that the body of Polyneices must be left to decay on the battlefield – the just deserts for a traitorous insurgent. Such was the very epitome of ignobility for a Greek citizen for the last rites burial were sacred and natural rights performed out of respect for the dignity of the human person. Antigone, the daughter of Oedipus is in a double bind: She is caught between the positive law of the state and the duty of divine law which dictates the burial of her dead brother. In defiance of Creon's edict, Antigone heeds the imperatives of "higher law" and buries her brother, Polyneices. Thus, the final episode of the Sophoclean trilogy unfolds.

The men of Sophocles's day were aware of human rights or fundamental freedoms, but the ancient Romans also were cognizant of a body of law that transcended the

mere positive law of mortal man. The Roman *ius gentium*, or *ius inter gentes*, from which the law of nations evolved, is defined in the Institutes of Justinian as a system of legal rules that was discoverable or knowable to men through that faculty of mind called reason. At Roman law, the *ius civile* (civil law) governed the social behavior of the citizens of Rome. Slaves or non-Romans were not protected by or subject to the civil law. But because of the expansion of the Roman Empire, it became necessary for Rome to “adjust itself to the codes and customs of lands that the Roman arms and diplomacy had won”. Hence the creation of the *ius gentium*, or the law of the people, provided a body of law to govern slaves and foreigners or non-citizens. Laws common to all men were admitted to the Roman system of jurisprudence for the protection of these individuals as human beings. The *ius gentium* was later adopted by the theologians of divine law expressing the dignity of man. The *ius gentium* was seen as synonymous with the dictates of right reason or natural law³. Gains characterized it as the law that natural reason had established among all mankind.

Embodied in the introductory colloquy between Creon and Antigone is the idea of the existence and supremacy of a *corpus juris* that may not be arbitrarily restricted by the state. Antigone vociferously denies the validity of Creon’s edict as being incongruent with an a priori “higher law” that is transcendental in nature and emanative of the *jus naturale*.⁴ In the explication of her legally proscribed behavior, Antigone has articulated the very essence of human rights. Human rights or fundamental are not novel concepts.⁵ Even in the time of Sophocles there was an awareness of and respect for this sacrosanct and inviolable rights. Unfortunately, there are often tensions between human rights and the laws of the state. Antigone’s dilemma was manifested in the form of a confrontation between the right of burial and the domestic law of Thebes. A conflict of this sort is not unique: it is a recurring legal obstruction to the protection of human rights at the international level. The task that must be effected is the reconciliation of these conflicts, so that respect for human rights does not succumb to the exaltation of domestic law. If the resolution of this Antigone complex does not occur the deterioration of the state’s social and political cohesion may be a consequence.

The purpose of this work is to effect the reconciliation of two potentially conflicting legal rights that are also human rights: the right to be free from racially defamatory falsehood or group deformation and the principle of freedom of expression.⁶ The intention is to thoroughly probe the nature of freedom of expression as it relates to the categorical prescription of a specific form of group defamation – racial or ethnic defamation – in the international and domestic law contexts. Another analytical focal point of this work will be the alleged conflict between the first Amendment of the United States Constitution⁷ and prospective federal legislation outlawing group defamation. The position of Thomas David⁸ on this is that legislation by the U. S. Congress condemning group defamation would not impinge on the cherished First Amendment right to free speech and press as some commentators have suggested.⁹ However, even if racially defamatory falsehood is viewed as within the ambit of First Amendment Protection, the United States of America has an overriding countervailing and compelling governmental interest that would justify such an impingement. The conception of free expression as embodied in international legal instruments and the domestic constitutions of other countries does not significantly differ from the American idea of freedom of speech and press. The vast majority of nation- states have enacted legislation prohibiting group defamation. The question to ask here is: Is there a need to enact laws prohibiting group defamation in Kenya?

This work does not suggest the proscription of all forms of so-called “hate speech”. Prohibition of language merely derogatory of racial or ethnic groups or even language that a reasonable man or woman would find merely racially offensive is not a desirable or compelling state goal. However, the creation of a law outlawing group defamation, in stricto sensu, would pass constitution muster and allow racial and ethnic groups to exercise the same right to be free of defamatory falsehood that individuals enforce daily in the courts. This position can be accurately described as constitutional minimalism. The other area to consider is the national legislation proscribing group defamation. I shall examine the national legislation against racial defamation and the speech that incites racial hatred promulgated by three common

law democracies as models for a Kenyan statute. Great Britain, Canada and India have set excellent examples worthy of our emulation. In addition, I shall consider the possibility of prosecuting a group defamation action under Nigerian law. Nigeria is also a common law nation.

Racially defamatory speech, the logical precursor of more “aggressive forms of group discrimination”, should not be classified as constitutionally protected speech in any nation -state. The value of such speech is so slight that it does not merit the respect of the domestic law, and it is clearly not protected at international law or under the constitutional law of most nation states. It is worth noting that “ rotten fruit in the market place of ideas ,”¹² it must therefore be expurgated before it despoils the healthy fruit or is purchased by some naïve consumers. With the recent rise of racial or ethnic hostility around the world, Kenya being inclusive, legislation against group defamation/ethnic defamation would act as a catalyst to the expurgatory process.¹³ The Kenyan government has continuously voiced its support for enhancing respect for human rights around the globe. The regal norm of non-discrimination has become a national policy of Kenya. Through the enactment of legislation penalizing racial defamation, speech by its very nature incites violence and racial hatred, the Kenyan society will have successfully taken yet another step towards the elimination of all vestiges of racism/ethnicity and towards the resolution of the apt named “Kenyan Dilemma.”¹⁵

1:2 The Nature of Human Rights: Universal or Cultural Relativism:

“I am convinced that a new conscience has awakened... That conscience serves a concept of human rights that is not unique to any one country, but is universal... Today, no government in this hemisphere can expect silent assent from its neighbors if it tramples on the rights of its own citizens. The costs of repression have increased, but so have the benefits of respecting human rights.”¹⁵

During the 20th century, International cognizance and normative regulation of human rights through the legislative promulgations of the United Nations indicate the importance of human rights at international law. Dr. del Russo has eloquently characterized the idea of human rights:

“Human rights... are not derived to man from the fact that he is a national of one particular state, but from his own nature and dignity as a human person. They are not the creation of any one man or nation; they are the heritage of mankind, universal, inviolable and inalienable. They have the shape, content and flavor of man’s social and political experience through the centuries wherever and whenever liberty has lived in the hearts of men and women of all creeds, races and nationalities. But the mere recognition and awareness of the existence of such rights are not sufficient to guarantee man their enjoyment. The human person must also provided effective and just protection of his rights under law. The securing of fundamental rights to all men is the essential office of every public authority whether at the rational level or in the world community.”¹⁷

Traditionally, customary international law created a barrier inhibiting the international protection of human rights. From a doctrinal vantagepoint, only the state could be a subject of the law of nations. The cognate principles of sovereignty, independence and matters within the domestic jurisdiction of the state constituted obstacles to any attempts towards making the individual a subject of international law

¹⁸ Historically, respect for the rights of individuals was regarded as a matter for internal legislation by the nation-state¹⁹ The nation-state was a product of the *contract social*, the consensual agreement that binds men together in the consociation known as civil society.²⁰ As a result of the confection of this social contract, the individual was regarded as having relinquished to the state power to make rules governing his socio-economic and political behavior. However, in modern times, “the final emergence of the individual as a subject of rights and duties in the law of nations”²¹ occurred during the enlightenment in the eighteenth century. Rousseau, Montesquieu and the philosophes structured the framework for modern human rights.

Of these developments, Del Russo observes:

“The theory of human rights first conceived in the Europe of Montesquieu and Rousseau was transformed on the American continent into a political reality and acquired legal existence in the Declaration of Independence. It was there proclaimed that all men are created equal and endowed with liberties, which are inherent to the human person, inalienable and paramount to the powers of the state. That the state is an entity created by the people and having as its aim the function of securing to the people their natural rights to life, liberty and the pursuit of happiness.”²³

The tragic events of World War II awakened the nations of the world to the necessity of protecting human rights at the international level. The programs perpetrated upon the Jewish community by Nazi Germany led to the drafting of several multilateral treaties for the protection of human rights. Professor Richard Bilder writes:

“Most of what we now regard as “International human rights law” has emerged only since 1945, when, with the implications of the holocaust and other Nazi denials of human rights very much in mind, the nations of the world decided that the promotion of human rights and fundamental freedoms should be one of the principal purposes of the United Nations Organization ... Numerous international instruments have been adopted, including the Universal Declaration of Human Rights and the Genocide Convention in 1948; the Convention on the Elimination of All Forms of Racial Discrimination in 1965; and the International Covenant on Civil and Political Rights in 1966 among others”.²⁴

The protection of these sacrosanct rights could not be left to the nation-states. All

signatories to the United Nations Charter are obligated to respect human rights. The violation of the human rights of an individual by a signatory is therefore the legal concern not only of the particular nation-state involved, but also of the United Nations.²⁵ The Charter of the United Nations is *jus cogens*.²⁶ hence the juridical norms contained therein prevail over obligations under other international instruments that are not peremptory norms. It is commonly held that treaties that violate human rights are in conflict with *jus cogens*, since human rights are themselves peremptory norms at international law.²⁷ Accordingly, the Charter is violated when a signatory state refuses to support the programs of the United Nations, whose purpose is to enhance protection of fundamental freedoms.²⁸

The international concern for human rights has not been limited to western nations. After World War II, there arose an eastern theory of human rights.²⁹ Considering the former Soviet Union a democracy, socialist proponents of human rights contend that the Soviet legal order was totally consistent with the protection of individual rights and the development of a democratic society.³⁰ These theorists assert that only under a socialist regime are individuals equal before the law. They argue that in capitalist countries, equality is a function of class. "Thus, the proclaimed equality before the law is just another fiction of bourgeois democracy."³¹ Socialist human rights theorists base their conception of human rights on Marxism. They assert that:

"All right is derived from the state ... Those fighting for bourgeois society under the slogan of "enlightenment" called human rights or inalienable rights those rights which expressed or protected the fundamental institutions of the social system based on capitalistic private ownership: private property, the freedom of enterprise. These... were conceived of as human rights because they were of fundamental importance to the ... Social system,"³²

Kudryavtev points to the treatment of African-Americans and to the unpunished white-collar crime that permeates capitalist society to buttress his view.³³ Moreover, he submits that human rights and the principles of socialism are in perfect harmony.³⁴ However, he characterizes theories of the universality of human rights as

“anarchistic discourse.”

“As can be seen from the foregoing, human rights are a social and class concept. There are no human rights in the abstract, in isolation from society. A right is an opportunity guaranteed by the state to enjoy the social benefits and the values existing in the given society. For this reason, the one and the same right (for instance, the right to education) has an entirely different content in different historical and social circumstances. True equality can be achieved only in a society where there is no exploitation of man by man, no discrimination or oppression.”³⁵

Kudryastev is not alone in his culture bound view of human rights. J. D. Van der Vyver, Abdul Aziz Said and Mania Lazreg expounded similar realistic philosophies of human rights. Van Der Vyver a South African attempted to justify the South African social and legal system of apartheid by invoking relativity theory.³⁶ Said, a Moslem, asserts that “the character and nature of human rights are determined in the crucible of a specific sociopolitical culture.”³⁷ He charges that the western conception of human rights “excludes the cultural realities and the present existential conditions of third world societies.”³⁸ Lazreg strikes similar themes by asserting that the notion of universality is nothing more than “moralistic universalism”; human rights are used “as tools of international power politics.”³⁹

Contemporary criticisms of universal human rights are ever abundant. Watson applauds the traditional conception of international law and forcefully suggests that no country has anything to do with how another country treats its own citizenry.⁴⁰ He accuses human rights advocates of:

“Seeking ... a supernatural legal order of hierarchical, coercive type prevalent in domestic systems to act as a check on governmental malfeasance. But international law is not such a system and it cannot be turned into one no matter how desirable that may be from a humanistic standpoint”.⁴¹

Watson’s criticism is not limited to this attack on human rights. He notes that the

practice of states does not reveal an international customary regime of human rights. Practice determines customary law, and if the practice of states does not comport with the promulgated legal rules, those rules are "either unenforceable or devoid of significant social results"⁴² Watson then points to the proliferation of human rights violations throughout the world to support his opinion of the inefficiency of human rights norms.⁴³ He asserts that there is no compliance with these rules; they are mere "paper rules" not "real rules."⁴⁴ They are not obeyed and therefore are not laws. He argues that the "Hobbesian state of affairs" existing with regard to respect for human rights in the world reveals these rules are so ineffective that they are in a state of desuetude.⁴⁵ For Professor Watson, human rights norms are not binding categorical imperatives. These principles simply reflect desirable policy statements or social goals toward which nation-states might aspire.⁴⁶

More recently, the United Nations has now recently established the office of the United Nations High Commissioner for Human Rights.⁴⁷ The High Commissioner has been given the daunting task of proactively engaging in efforts to prevent human rights abuse world wide.⁴⁸ High Commissioner Jose' Ayara Lasso has described his major responsibilities as focussing upon "urgent measures, prevention, technical assistance, co-ordination and co-operation".⁴⁹ Providing human rights education and public information are also functions of the office.⁵⁰ The United Nations High Commission for Human Rights is a creation or by-product of the 1993 World Conference on Human Rights convened in Vienna, Australia in 1993.⁵¹

On June 14, 1993, the Vienna conference on Human Rights, sponsored by the United Nations, commenced its opening session mired in controversy over the validity of a universal human rights doctrine. Many third world or developing nations contended that Western norms of justice and fairness were not applicable to their societies.⁵² In support of this was M. Lee's assertion. He said or described cultural relativism as follows:

"In the context of the debate about the viability of international human rights, cultural relativism may be defined as the position according to which local

cultural traditions (including religious, political and legal practices) properly determined the existence and scope of civil and political rights enjoyed by individuals in a given society. A central tenet of relativism is that no transboundary legal or moral standards exist against which human rights practices may be judged acceptable or unacceptable. ... Relativists claim that substantive human rights standards vary among different cultures and necessarily reflect national idiosyncrasies. What may be regarded as a human rights violation in one society may properly be considered lawful in another and Western ideas of human rights should not be improved upon third world societies. Tolerance and respect for self-determination preclude cross-cultural normative judgements. Alternatively, the relativism thesis holds that even if, as a matter of customary or conventional international law, a body of substantive human rights norms exist, its meaning varies substantially from culture to culture.”⁵³

Thus, the developing nations articulated a culture-bound or relativism concept of fundamental human rights.

The African conception of human rights has been described as primarily communal as opposed to individual in character.⁵⁴ In commenting on the nature of human rights as reflected in the African Charter on Human and People’s Rights, promulgated by the Organization of African Unity in 1981, Uchegbu writes:

“What the charter was at pains to emphasize, however, is that the African traditional system is founded on group association not individuals as the European bourgeois concept of human rights stresses. The Charter recognized that individuals, being humans have rights but people also have rights independent of the individuals making up the peoples ... Thus, when the Charter asserts in Article 20 that all people have the right of existence, it refers for example to ethnic groups who here have the right to self-determination”.⁵⁵

Eze explains that the African Charter of Human and Peoples Rights reflects a

different conception of human rights than the western idea of human rights by recognizing or emphasizing group or peoples' rights. He theorizes:

“Side by side with individual rights and freedoms, the African Charter makes provisions for peoples' rights. Group rights are not by themselves new. The rights of racial, ethnic or minority groups as well as the rights of peoples and nations to independence are examples of such rights. It is not clear what the term “peoples” comprises. It does embrace independent states as well as colonies. If one adopted our interpretation of “peoples” the term would also include national and ethnic groups as well as other minority group”.⁵⁶

The emphasis placed on groups or peoples' rights distinguishes the African conception of human rights from the western conception. It is a conception of human rights that reflects the African's belief that the welfare of the group is situated at a higher point on the hierarchy of social values than the rights of individuals.

The developing nations particularistic position was championed by such states as China, Iran, Cuba and Vietnam, signatories to the Bangkok Declaration of 1993.⁵⁷ The Bangkok Declaration provides, inter alia, that though human rights are universal, they “must be considered in the context of ... national and regional particularities and various historical, cultural and religious backgrounds.”⁵⁸ The voices of relativism and dissent were met with a firm defense of universalism. It was stated “we cannot let cultural relativism become the last refuge of repression”⁵⁹ Western nations hold the belief that the question of the universalism of human rights has been settled with the promulgation of the Universal Declaration of Human Rights in 1948. Ultimately, the Universalists won against their Relativist opponents. The Vienna conference on Human Rights reaffirmed the universal nature of human rights and fundamental freedoms by drafting and adopting the Vienna Declaration and Program of Action, a non binding, final conference document.⁶⁰ Thus, to debunk the notion of universal human rights is sheer folly. The numerous multilateral treaties promulgated by the United Nations and other international regional organizations are cast – iron proof that there exists a worldwide consensus as to the validity of a core of human rights.

Further, it is a fact that most of the third world nations are parties to the human rights treaties promulgated by the United Nations.⁶¹ This fact cannot simply be attributed to cultural imperialism or neocolonialism. Third World countries were instrumental in drafting much of the human rights legislation passed by the United Nations. Many human rights norms are codified in the constitutional laws of these nations.

In the case of J. D. Van Der Vyver and socialist or communist writers, a relativistic theory of human rights is useful in excusing gross violations of the human freedoms in their countries. Van Der Vyver invokes his theory of relative human rights to argue that apartheid is a just social order.⁶² He says that the system of apartheid comports with the rule of law; the rule of law simply denotes legality and nothing more. In his view, the South African system of jurisprudence is legal. On the other hand, Watson's view may be interpreted to mean that because there are those who violate the law, the law is worthless. The question to ask with this in mind is: *Is society to do away with the criminal law of the state whenever statistics indicate crime is rising and these rules do not prevent criminal behavior?* As one writer stated concerning human rights in Iran: To argue that lack of compliance invalidates the norms is to argue that an unpunished murder invalidates the law against homicide."⁶³

1.3 A Middle Ground Between Universalism and Relativism

A new school of international scholars have attempted to find a middle ground between universalism and relativism. They describe their interdisciplinary theory of international law as regal polycentricity. The first international conference on legal polycentricity was held in 1992 at the institute of regal science of the University of Copenhagen.⁶⁴ These scholars reject a "single value approach" to law, but deny "radical universalism". One of the legal poliocentricity's foremost advocate is professor Surya Prakash Sinha.

Sinha explains:

"Legal polycentricity rejects the model of the single value approach to matters of morals and law... While this theory rejects the absolution of a single value

approach that does not mean ... an acceptance of a radical relativism that proscribes moral criticism and ends up maintaining that anything goes ... Applied to the society of states and their law, legal polycentricity focuses upon the civilizational pluralism and civilizational diversity of the member of their society and it examines the consequences of that focus upon the principles of international law.”⁶⁵

This new school of international legal thought is in its infancy and merits full development.

Conclusion:

As a matter of law and morality, the idea of universal human rights is a valid one. One must not succumb to the position of those who would do injury to this concept in the furtherance of political expediency or for the purpose of justifying violations of fundamental human freedoms. The perspicacious observations of Macdonald, Johnson and Morris must be born in mind:

“There is a prevailing tendency among all humans to pursue the same values despite the best efforts to suggest the contrary by self-appointed guardians of particular cultures and ideologies. Whatever tenacity might be applied to the objective of training cultural diversity, it is likely to fail in the long run, simply because the facts of geographical remoteness are being overcome by feats of human technology.”

And the telling statement of Professor Hedley Bull sums up the more appropriate view of human rights:

“The western doctrine of human rights is not a static one: It is radically different today from it was 20 or 30 years ago; and it continues to develop. It owes a good deal both to socialist and to the Third World influences... Our notions of national self-determination and racial equality have been deeply affected by the anti-colonial movement... Even if the historical record did not show that individual human rights were the unique property of the west, it

would not follow that they should be.”⁶⁷

The foregoing discourse makes it evident that there has been global concern for protecting those peremptory, juridical norms denominated human rights. Although there has been significant process at the international level in the characterization and codification of human rights, it is my assertion that the effective implementation of these rights has been fraught with difficulties. The right to be free from racially defamatory falsehood or group defamation is a human right. This right warrants urgent protection by nation-states that refuse to outlaw group defamation for fear of infringing freedom of expression. Hence, it is fitting that this work explores the legality of free expression in domestic and international law.

For purposes of clarity, the terms group libel, group defamation, racial defamation or ethnic defamation are used throughout this work as synonymous terms. Technically, group defamation laws include defamatory utterances against groups based on race, nationality, ethnic origin, sex and religion. At common law, an action for defamation of character required proof of several elements:

- ◆ A defamatory statement
- ◆ Falsity
- ◆ Publication to a third party
- ◆ Malice or some other degree of fault
- ◆ Damages and
- ◆ No defense of privilege

A statement or communication is said to be defamatory “if it tends to harm the reputation of another or to lower him in the estimation of the community or to deter third persons from associating with him.”⁶⁸ Further, defamatory statements “tend to hold the plaintiff up to hatred, contempt, or to ridicule, or to cause him to be shunned or avoided.”⁶⁹ Group defamation is the form of defamation (libel or slander) that is directed at racial minorities or individuals of specific nationalities or ethnic origins. The proscription of racially or ethnically defamatory speech is found in several international legal instruments. Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter “Racial

Discrimination Convention”) codifies this crime.⁷⁰ Kenya is a signatory to this convention. It has also ratified it. With this in mind, one needs to ask: *Is there a need for Kenya to enact laws that proscribe group defamation? Also: Are there laws in Kenya that prohibit group defamation?*

END NOTES

1. Sophocles, *Antigone*, in The Oedipus Plays of Sophocles 179 – 180 (P. Roche trans. 1958).
2. See Sophocles, Oedipus the King, id. At 23 – 84; Sophocles, Oedipus at Colonus, id. At 87 – 160.
3. Antigone, *Supra* note 1, at 163 – 164; D. Chambers, Students Guide to Roman Law (1994)
4. The concept of *jus naturale* or law of nature is defined in 3 Works of Cicero: De Re Publica, De Officiis, and De Legibus. Cicero states:
True law is right reason in agreement with nature, worldwide in scope, unchanging, everlasting ... We may not oppose or alter the law, we cannot abolish it, we cannot be freed from its obligations by any legislature and we need not look outside ourselves for an expounder of it. This law does not differ for Rome and for Athens, for the present and for the future; ... It is said and will be valid for all nations and for all times. He who disobeys it denies himself his own nature.
5. See Human Rights in Western Civilization: (600 present (J. A. Maxwell, J. J. Friedberg D.A. DeGolia eds., 2ed, ed. 1994); M. W. Janis. An Introduction to International Law 241 – 272 (1993); A. H. Robertson and J. W. Merrills, Human Rights in the World 3 – 21 (1989).
6. R. August, Public International Law: Text, Cases and Readings 251 – 252 (1995)
7. **U. S. Constitutional Amendment 1 provides, in the relevant part:**
Congress shall make no law... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.
Ironically, though the first amendment is often cited to support the unconstitutionality of group defamation statutes, Jerome T. Shestack, the United States delegate to the European Conference reviewing compliance with the Helsinki Accords, complained that “there most disturbing reports of

voluminous anti-Semitic sentiments thinly disguised as anti-Zionism appearing in the Soviet Press and Media" *Whatever happened to freedom of speech?* Boston Globe, Nov. 25 1980, at 3.

8. Hate Speech, Freedom of Expression and Non-Discrimination (Coliver ed. 1992)
9. See generally Commentaries on the Racial Discrimination Convention: KJ. Partsch, Racial Speech and Human Rights: Article 4 of the Convention on the Elimination of all Forms of Racial Discrimination, in Striking a Balance (1993).
10. M. Zuleeg, Group Defamation in West Germany, 13 Cler. Mar L. Rev. 52/63 (1964); Also C. L. Nier III, Racial Hatred, A comparative analysis of the hate crime laws of the United States and Germany, 13 Dick J. International Law. 242 (1995).
11. See *Ibid.*
12. The idea of "rotten fruit in the market place of ideas" is that of Professor Milton Katz (Harvard Law School).
13. See Klanwatch Intelligence Reports, Southern Poverty Law Center (1997 – 1996 special edition; 25th Anniversary Issue) detailing activities of the Southern Poverty Law Centre to fight hate crimes of the Ku Klux Klan and other white supremacists groups from 1971 – 1996). Also; M. Deer, Hate on Trial: The Case Against America's Most Dangerous Neo-Nazi (1993); see also White Hate Groups Grow, Emerge 9 (June 1992) Klanwatch reports increase in white supremacist groups from 273 in 1990 to 346 in 1991: "Reports of cross burnings doubled in 1991, bias related vandalism tripled and hate motivated assaults increased significantly." There were 25 documented hate-motivated murders in 1991. (More than in any year since Klanwatch began in 1981). D. Morgan, President Decries fires at churches: Clinton links Arson to "Racial hostility" supports legislation, Washington Post, June 9, 1996 at 41 (30 African-American churches in the south destroyed by Arson. President Clinton stated that "*It is clear that racial hostility is the driving force behind a number of these incidents*".

14. The "Kenyan Dilemma" derives from the concept of the "American Dilemma". It was stated by G. Myrdal in: *An American Dilemma: The Negro Problem and Modern Democracy* (1944) as
"It's the ever-razing conflict between on the one hand, the valuations preserved on the general plane which shall be called the "American Creed," where the American thinks, talks and acts under the influence of high national and Christian precepts, and, on the other hand, the valuations on specific planes of individual and group living, where personal and local interests; economic, social and sexual jealousies; considerations of community prestige, and conformity; group prejudice against particular persons or types of people; and all sorts of miscellaneous wants, impulses, and habits dominate his outlook".
15. T. Smith, *President Presses Reagan on Human Rights Policy* (President James Carter's Speech Reform the Organization of American States) N.Y. Times. Nov. 20 1980, p.i.
16. See generally *The United Nations and Human Rights: A Critical Appraisal* (P. Alston ed. 1992); *The Universal Declaration of Human Rights*, G. A. Res. 217, U. N. GAOR, 3d sess, U. N. Doc. A/180 (1948); *Racial Discrimination Convention* (-Art. International Convention of the Elimination of all Forms of Racial Discrimination, 660 U.N.T.S. 195 (Jan 4 1969).
17. Dr. A. L. del Russo, *Foreword: Symposium on the International Protection of Human Rights*, II How L. J. 257 (1965).
18. E. Lauterpacht, *Some Concepts of Human Rights*, II Howard L. J. 264, 266 – 267 (1965)
19. Robertson and Merrills, Human Rights in the World 3-21 (1989); D. P. Forsythe, The Internationalization of Human Rights 15 (1991).
20. J. J. Rousseau, *The Social Contract and Discourses* (G. D. H. Cole trans 1941)
"The 'contract social' or social contract is a part or agreement between the governed and those who govern that allows the civil authorities to regulate and control the people through law for the common good".
21. A.L. del Russo, The International Protection for Human Rights (1971)

22. Del Russo, *Ibid.*
23. Del Russo, *Ibid.*
24. Quoted in B. E. Carter and P. R. Trimble, *International Law* 895 (1995)
25. Specifically, *note* the preamble and Articles 1, 13, 55, 56, 62 (2), 68, 73 and 76 of the United Nations Charter; See also U. N. Yearbook 1001 (1970). These positions establish the duty of state parties to observe and respect human rights.
26. O. Schachter, *International Law in Theory and Practice* 342-344 (1998); The concept of jus cogens or peremptory norms of International Law is defined in articles 53 of the Vienna Convention on the law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969).
27. Schachter, *Ibid* at 343-344. *The prohibition against racial discrimination is a human rights norm considered jus cogens by many scholars. Equally and non-discrimination constitute well established rules on International Human Rights law binding all states.*
28. Art 53 of the Convention on the Law of Treaties of 1969 specifically states: *A treaty is void if, at the time of its conclusion it conflicts with a peremptory norm of general international law. For the purpose of the present convention, a peremptory norm of general international law is a norm accepted and recognized by the International community of states as whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.*
29. P. K. Emmerson, Human Rights Really Divide East and West, Advocate (Baton Rouge, L A) (1996); G. M. Danilenko, *Customs in Contemporary International Law* (1988).
30. V. Kudryavtsev, The Truth About Human Rights, 5 *Human Rights* 193 (1976).
31. *Ibid* at 195
32. F. Newman and D. Weissbrodt, International Human Rights: Law, Policy and Process 337 (1990)
33. *Supra* note 30, at 195

34. V. Kudryartser, *Ibid*, at 194 - 196
35. *Ibid* at 199
36. J. D. Van der Vyver, Seven Lecturers on Human Rights (1976) (reviewed by Jones) 22 How L. J. 539 (1979).
37. A. A. Said, Human Rights in Islamic Perspectives, in Human rights, Cultural and ideological perspectives 86 (A Pollis & P. Schwab eds. 1979)
38. *Ibid*
39. M. Lazreg, Human Rights, State and Ideology: An Historical Perspectives as in A. Pollis & Schwab eds. 1979 (*Supra* note 37 at) 40
40. J. S. Watson, Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law, 1979 U. of Illinois l. Forum 609
41. *Ibid*.
42. *Ibid* at 611
43. *Ibid* at 612
44. *Ibid* at 626
45. *Ibid* at 612
46. *Supra* note 32 at 350
47. J. Preston, U. N. Acts to Establish Commissioner for Rights, Washington Post, Dec-17, 1993; C. Duodu, Human Rights Finally Gains an Office at the United Nations, Edmonton Journal, Dec. 29, 1993.
48. P. Alston, ASIL Insight: The United High Commissioner for Human Rights, American Society of International Law. Newsletter 1, 2 (1995).
49. *Ibid*
50. *Ibid*
51. Alston, *Supra* note 48
52. I. Guest, Vision of Rights Lacking in Vienna, Christian Science Monitor, July 15, 1993, at 19; L. Monat, United Nations Addresses Worldwide Human Rights, Christian Science Monitor (reporting that "Some nations now insist that cultural differences must be taken into account when monitoring human rights ... They say the west is trying to impose its values on them.")
53. M. Lee & F. R. Teson, International Human Rights and Cultural Relativism,

CHAPTER II

FREEDOM OF EXPRESSION IN INTERNATIONAL LAW AND GROUP DEFAMATION

2. Introduction: Case Studies in the International Sphere

J. G. Patterson on freedom of speech said:

“Freedom of speech and of the press is only a human idea and is incapable of exact expression. It is an innate, instinctive desire of man for the right of self-expression and for the right to commune freely with his fellow men. This desire is a natural one and hence this freedom is a natural right. Some have described it as inalienable, imprescriptible, but it is better described as primordial. It is an essential of organized society and of progress from barbarism to civilization. Without its existence, individuality of man is suppressed. Without the right to acquire and impart information, knowledge becomes static, and subsequent generations can learn nothing from their predecessors.”¹

It is best to look at freedom of expression by examining events related to this that occurred around the world.

Case Study: The Czechoslovakian Experience

On January 5 1977, a group of citizens in the former state of Czechoslovakia calling themselves Charter 77, released a manifesto condemning the communist regime of the country for violating fundamental freedoms. Charter 77 described itself as an organization whose aim was the enhancement of respect for human rights in Czechoslovakia.² The manifesto stated that although the International Human Rights covenants had become Czechoslovakian domestic law, these rights had only

theoretical value for the Czechoslovakian people. In particular the manifesto charged that the right of freedom of expression was illusory. The Charter 77 group claimed that tens of thousands of Czechoslovakian citizens were prevented from working in their respective professions because they held opinions inconsistent with those held by the state officialdom. Individuals were subject to harassment and discrimination by the civil authorities and by public organizations. The exercise of free expression, as described in Article 19 of the Covenant on Civil and Political Rights, prohibits both judicial and extra-judicial sanctions against speakers or writers.² In Czechoslovakia, free expression was inhibited by centralized control of the mass media and of public and cultural institutions by the government. No open and robust debate was tolerated in the domains of art and thought. Publications had to be consistent with the official state conception of aesthetics and politics. There was no right to a public defense against fabricated charges by state propaganda organs.³

Many scholars, writers and artists were felled by the state for having published or expressed opinions contrary to the opinions of those holding political power. Many of the signatories to the manifesto were punished for anti-state activities or penalized by the loss of jobs and social security benefits.⁴ For years, President Va'clav Havel, former President of the Czech Republic, and a famous playwright, had been unable to publish or reproduce any of his works in Czechoslovakia. In October 1977, Havel attempted to send the memoirs of former Minister of Justice Prokop Drtina out of the country. His unsuccessful endeavor won him a trial, a conviction and fortunately a suspended sentence of 14 months.⁵ Others were not so lucky among them Professor Jan Patoc'ka, a noted philosopher who in March 1977 died of a brain hemorrhage after having been interrogated by Czechoslovakian authorities.⁶ Professor Jiri Hajek, a politician, had been the Czechoslovakian foreign minister under Alexander Dubcek during the unforgettable Prague spring of 1968. Hajek was subjected to continued surveillance and harassment by the civil authorities.⁷ Charter 77 pledged that its existence would "help to enable all the citizens Czechoslovakia to work and live as human beings."⁸ Charter 77 is still in existence as a non-governmental organization which deals with human rights issues. Thus, the fight for the protection of such

fundamental liberties as freedom of expression existed even in a once rigid authoritarian nation-state. This Czech experience is very much like the Kenyan experience in the 1980s and early 1990s. The Financial Times, The Weekly Review, The Law Monthly and other related publications were at one time or another censored and accused of publishing seditious articles or materials and as a result had their printing and the publishing machines taken away by a totalitarian regime that was in existence then.⁹ Patterson's illuminating view that freedom of expression is an innate and instinctive desire is borne out by the activities of groups like Charter 77, whose members were the products of societies where extreme limitations on freedom of expression are enforced.

Though Czechoslovakia has become two separate and distinct republican nation-states, both the Czech and Slovak constitutions include provisions protecting freedom of expression. Article 3 of the 1992 constitution of the Czech Republic ("1992 Czech Constitution") incorporates by reference the Czech Charter of fundamental rights and freedoms ("the Charter") promulgated by the Presidium of the Czech National Council on December 16, 1992, as part of the Czech Constitution.¹⁰ Chapter 11 of the Charter sets forth fundamental human rights and freedoms. Article 17 (1) and (2) and (3), guarantee the right of free expression to all Czech citizens.¹¹ However article 17 (4) enumerates specific conditions that justify the limitation of free speech of law: *"Protection of the rights and freedoms of others, the security of the state, public security, public health and morality."*¹² Article 10 of the 1992 Czech constitution makes those international human rights treaties to which the Czech Republic is a party "binding and superior to law"¹³. The Czech Republic has ratified the International Covenant on Civil and Political Rights.¹⁴ Articles 18 19 20 21 and 22 of the Civil and Political Covenant protect freedom of expression.¹⁵ Thus, these provisions are binding and superior to Czech law. They are the supreme constitutional law of the Czech republic.

Similar to the 1992 Czech constitution, section 111, article 26 of the 1992 Constitution of the Slovakia Republic (1992 Slovakia Constitution) ensures the right

of the freedom of expression. Article 26 (1), (2) and (3) guarantees the right to (*freedom of expression*) free speech and free press.¹⁶ As is true of the Czech constitution, article 26 (4) of the Slovakia Constitution declares or delineates permissible governmental restrictions on free expression for the protection of the rights and freedoms of others, state security, public order, public health and morality. Chapter 11, article 11 of the Slovakia Constitution declares that international human rights treaties ratified by the Slovak Republic “takes precedence over Slovak laws”¹⁷. Thus articles 18, 19, 20, 21 and 22 of the Civil and Political Rights Covenant are also the supreme constitutional law of the Slovak Republic.

2.2 Case Study: Polish Experience: “solidarity”

An even more vivid illustration of the position of freedom of expression in the hierarchy of legal and human rights norms is past labor unrest in Poland. On September 1 1980, a labor strike by Polish workers, which began at the Baltic port of Gdansk, had spread through the country along the northern south coast. This strike affected all the major industrial centers in Southern Poland. More than 150,000 workers walked off their jobs. The Polish workers demanded a number of radical political reforms, such as free labor unions, the right to strike, the release of all political prisoners and abolition on censorship.¹⁸ The panic stricken Polish Communist party leader, Edward Gierek, was heard to warn:

“There are limits beyond which we cannot go. We cannot tolerate demands against the basis of the ... Socialist State.”¹⁹

However, this veiled threat fell on deaf ears and did not stop the strike. The Gdansk – based Interfactory Strike Committee persisted as bargaining agent for more than 400 Baltic enterprises until it was successful in negotiating the settlement of the nationwide strike that crippled Poland and drew world-wide attention. A prominent émigré was heard to comment that “*if Marx were alive to see it, he would not believe his eyes.*”²⁰ In addition to wage increases, and more social benefits, the government agreed to relax censorship and to allow the free exchange of ideas. It is said that

during the strike, the Poles – who were accustomed to censorship – experienced a burst of free expression: striking workers were quoted in the newspapers; a sermon by the Polish primate, Cardinal Wyszynski, was broadcast over national television; and the text of the government labor agreement and editorials critical of the government labor agreement and editorials critical of the government economic policies appeared in the party newspapers. This was unheard of before as there was a lot of censorship.²¹ Also the government announced that, although restrictions on free speech were being relaxed, it reserved the right to protect state and economic secrets from public disclosure.

It is my assertion that the most illuminating aspect of this political reform movement was that a people who were the product of a society where limitations on civil liberties were the rule, revolted against official, political and economic structures in an effort to exercise freedom of expression, an innate and instinctive right of human beings. Both the Czechoslovakia and Polish historic episodes are supportive testimony to the claim that freedom of expression not only is a legal norm of customary international law, but is universal in character.

2.3 Case study: the Yugoslavian experience

The Yugoslavian people have had similar experiences. Due to constraints existing, one brief incident in Yugoslavia's history will illustrate this. The intellectual community of the defunct Yugoslavian State struggled to protect free-speech rights guaranteed in articles 166 and 167 of the now repealed Yugoslavian constitution. On November 3, 1980, 102 intellectuals appealed to the State Presidency requesting that the section of the criminal code penalizing so called hostile propaganda against the state be repealed. These scholars argued that the provision violated their freedom of expression. The provision was described as being so vague and broad in defining "hostile propaganda" that it allowed courts excessive discretion in interpreting and applying the provision. The provision was used to prosecute many dissidents.²² Ironically, restrictions on human rights in these societies ultimately led to their

demise as totalitarian states and to their rebirth as democracies.

Accordingly, it is my intention to demonstrate that the principle of free expression has long been a recognised juridical norm in customary international law. However, this norm is not absolute in character. Reasonable limitations are provided for in every constitution of the world that recognises the right. Racially defamatory falsehood is not language that comes within the ambit of protection secured by the principle of freedom of expression as defined and construed in the international legal context. Racial defamation or group defamation is categorised as a form of racial discrimination by the law of nations and is legally proscribed.

2.4 Freedom of Expression in International Law and Group Defamation

A Historical Perspective

The ideas of freedom and liberty are ancient in origin. These concepts found their most ardent advocates in eighteenth – century France. Jean – Jacques Rousseau wrote:

*“Man is born free; and everywhere he is in chains.”*²³

His view of human freedom was later espoused by French Revolutionaries on August 26, 1789, in article 1 of the famous Declaration of the Rights of Man and of the Citizen:

Article 1 – “Men are born and remain free and equal in rights. Social distinctions can be founded only on social utility.”²⁴

A theological expression of this idea of human equality is found in the New Testament of the Bible, Colossians 1:11, Verse 2:

“There is neither Greek nor Jew, circumcision, barbarian, Scythian, bond or free; but Christ is all, and in all.”

Prior to the creation of the civil society, the ultimate state of human freedom was characterized by philosophers as the state of nature. The doctrine of fundamental rights is a corollary of the doctrine of the state of nature. Fundamental rights are a priori rights that civil society was created to protect. E. Kant has postulated:

“the civil state regarded as a lawful state, is based on the following apriori principles:

- (i) The freedom of every member of society as a human being
- (ii) The equality of each with all the others as a subject
- (iii) The independence of each member of a common wealth as a citizen

These principles are not so much law given by an already established state, as law by which can alone be established in accordance with the pure rationale principles of external human right,”²⁶

There are essentially two descriptions of the state on nature. For Hobbes, the state of nature was a brutish existence where each person was “a law unto himself, since there was no law outside the self.” Hobbes describes this pre-societal condition as “the war against all.”²⁷ Locke’s vision of this state of almost absolute freedom is less extreme: his is a picture of a state of limited individual rights, not of license. He believed that a person did not have the liberty to destroy himself or the rest of humankind. The preservation of life, limb and property constituted the most important values. The law of nature revealed this truths to individuals through reason. Though each person was equal in the possession of power over another, he had no absolute or arbitrary power to act according to personal passionate heats or boundless extravagancy of his own will.²⁸ Even Hobbes agreed with Locke that humanity could not forever persist in this condition of unlimited freedom if it were to survive. In this book, *The Leviathan*, Hobbes writes:

“From the fundamental law of nature by which men are commanded to endeavor peace, is derived this second law; that a man be willing, when others are so too, as farre-forth, or for peace, and defense of himself he shall think it necessary, to lay down his right to all things; and be contented with so much liberty against other men, as he would allow other men against himself. For so long as every man holdeth his right, of doing anything he liketh; so long are all men in the condition of warre”²⁹

Thus Hobbes has simply rephrased the golden rule of doing unto others as one would have others do to oneself. The political entity called the police, or state was created to

protect humans and property rights from the whim and caprice of other individuals. The contrat social is an agreement between the ruling and the ruled for their mutual benefit, fostering the common good for all the persons who are to be treated as equals.³⁰ Civil society is the end product of this compact. It was created to free men from the sub-economical complications that existed in the state of nature.

2.5 Two Divergent Conceptions, Of Freedom of Expression

One of the rights of men, the perimeter of which have been a source of heated debate since the creation of civil society is the right of freedom of expression. Two conflicting schools of thought on the general nature of freedom creates two divergent conceptions of freedom of expression. These differing theories are expounded respectively by Plato and Aristotle. Plato and sages such as St. Augustine and Spinoza postulated that a person who acts erroneously or without virtue because he is moved by the influence of passion or mistaken ideas is not an *homme libre*. The person is not a free human being. There is a cadre of individuals to whom truth, goodness and virtue are unknown. Since goodness, truth and virtue are known all things that are incongruent with goodness and truth must be controlled or suppressed.³¹ Those who are not virtuous must be made to be virtuous. Virtue is known only to those guardians who are the chosen class. By applying restrictions on liberty of choice and action of those less fortunate, individual freedom is not limited. Rather, the individual is saved from the chains of immorality or dangerous ideas that might be in conflict with the common good.³² Under this elitist doctrine, limitations on freedom of expression are justified because those who are graced with the ability to perceive good and evil must be given the power to circumscribe and prevent the spread of odious ideas amongst members of the community.³³

In contradistinction to Plato's restrictive theory is that of Aristotle. Aristotle believed that human freedom is found in an individual's ability to make choices in the exercise of free will. Individual choice should not be prescribed by another's judgement of what is truth and goodness. Disagreement, experimentation and open debate increase

the possibility of realizing truth and virtue. Hence, individual choice is the essence of freedom. Aristotle held a democratic faith in individual liberty as a means of securing the common good. Association, the free exchange of ideas, and freedom of action or choice are the mechanisms for creating a truly democratic society.³⁴ The Aristotelian conception of freedom and individual liberty may be easily discerned in the works of many other philosophers. Charles De Secondat, Baron de Montesquieu, in his monumental treatise, the *Spirit of Laws*, expressed his unfettered faith in free expression. The law should not punish people for their thoughts, only for “overt acts”.³⁵ Montesquieu recounted the death of Marsyas who dreamt he had cut Dionysius’s throat. For this dream Dionysius put Marsyas to death. Dionysius’s justified his death by claiming that Marsyas never would have dreamt such a hideous thing by night had not contemplated it by day. Montesquieu described this execution as “a most tyrannical action,” since no attempt had been made to carry out the idea. Every “thought must be joined with some piece of action” to be punishable.³⁶ An occasion where thought is coupled with action is the case of indiscreet speeches. Montesquieu believed inciting the public to revolt would be a punishable act because words are coupled with the act of going into the market place to foment civil discord amongst the public.³⁷ Though Montesquieu supported and extolled the virtue of freedom of expression, his concept is not without limitations. Montesquieu quotes the emperors Theodosius, Arcadius and Honorius who once wrote to Rufinius, *praefectus praetorio*:

“Though a man should happen to speak a miss of our person or government, we do not intend to punish him; if he has spoken through levity, we must despise him; if through folly, we must pity him; and if he wrongs us, we must forgive him. Therefore, things as they are, you are to inform us accordingly, that we may be able to judge of words by persons, and that we may duly consider whether we ought to punish or overlook them.”

Montesquieu adhered to the belief that there shall be no censorship of writings unless the works are “preparative to high treason.”³⁸ In 1789, The National Constitutional Assembly of France adopted the Declaration of the Rights of Man and of the Citizen. The preamble to the Constitution of France states that “*the French people hereby*

solemnly proclaim its attachment to the rights of man and the principles of national sovereignty as defined in the Declaration of 1789..."³⁹ Article 11 of the French Declaration restates the conception of freedom of expression as articulated by Montesquieu and many of his predecessors. This provision reads:

"The free communication of ideas and opinions is one of the most precious rights of man; hence all the citizens may speak, write, and print freely, except that each must assume responsibility for the abuse of this liberty as determined by the law."⁴⁰

The preceding conditional conception of freedom of expression has been the prevailing view from the beginning of time. It is a conception that reflects the conditional nature of all rights whether they be civil, political, social or economic. As Gower so astutely observed:

"For over the course of our moral experience, we discover that there is no one value that we are prepared to uphold at all costs and in all circumstances. The single-minded pursuit of any right or good may, in some situations, have to be morally condemned. The man who puts loyalty and obedience to authority before all else can become not merely a victim of virtue, but the perpetrator of vice, and the man who tells the truth always, even he is not asked, is before long avoided as a moral pestilence."⁴¹

2.6 Rights of Free Speech: A General Norm of Customary International Law

The right of free speech in my view stands as general norm of customary international law. Custom may be defined as follows:

"Custom in its legal sense means something more than mere habit or usage felt by those who follow it to be an obligatory one. They must present a feeling that if the usage is departed from, some sort of evil consequence will probably, or at any rate ought to, fall on the transgressor, in technical language

there must be a "sanction," though the exact nature need not be very distinctly envisaged. Evidence that a custom in this sense exists in the international sphere can be found only by examining the practice of states, that is to say we must look at what states do in their relations with one another and attempt to understand why they do it and in particular whether they recognize an obligation to adopt a certain course or in the words of Article 38 of the I.C.J. statutes, we must examine whether the alleged custom shows a general acceptance of law."⁴²

The discussion thus far has shown, as suggested by Patterson in the epigraph of this Chapter, (i.e. Cap2) that virtually all nations of the world have embraced the principle as innate, instinctive, primordial and imprescriptible. A mode of behavior or form of conduct becomes a customary rule of international law through the continuous practice of states (*as stated above*); no mere *pactum tacitum* is sufficient.⁴³ The act of usage need not be universally accepted, but it must be adhered to by an overwhelming majority of states in the international community.⁴⁴ The element of *opinio juris sive necessitatis* must be present before a usage may be classified as customary rule of law. The states adhering to the usage must recognize it as a rule of law that creates a binding legal obligation.⁴⁵ The practice must be viewed as more than *courtois`ie internationale* – a norm of international courtesy abided by out of a serve of comity. Finally, the least important element in determining whether a practice has entered the realm of customary law is that of time. The extensiveness, continuity and uniformity of the practice are much more important indicia.⁴⁶ A customary rule of law may come into being by the general ratification of a codifying treaty.⁴⁷ In this instance, the state's act of ratifying or acceding to the multilateral treaty that claims the existence of a rule of law is a concrete and material act "intended to have an immediate effect on the legal relationship of the state concerned". The state accepts the rule as regally binding upon it.⁴⁸ The right of freedom of expression not appears in several multilateral codifying treaties and documents, but is indelibly inscribed in most of the constitutions of the world.⁴⁹ An examination of the right of freedom of speech as it appears in both international and domestic regal instruments dispels any

doubt as to whether this legal norm is a universal principal of customary international law.

2.7 International Instruments Providing For Freedom of Expression: Absolute or Non absolute

Evidence of the nature of freedom of expression at international law and its logical corollary – freedom of association – is to be found in article 19 of the Universal Declaration of Human Rights, Article 5 of the Racial Discrimination Convention and articles 18, 19, 21 and 22 of the Covenant on Civil and Political Rights.

Article 19 of the Universal Declaration of Human Rights proclaims:

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers “
50

However, article 29 (2) and (3) of the same document creates restrictive caveats:

“2 – In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing recognition (of) and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

3 – These rights and freedoms may in no case be exercised contrary to the purpose and principles of the United Nations”⁵¹

The free expression principle of customary and conventional international law is reiterated in article 5 of the Racial Discrimination Convention, which provides, inter alia:

“State parties undertake ... to guarantee the right of everyone without distinction as to race, color or national or ethnic origin ... to the enjoyment of the following rights ... (vii) the right of freedom of thought, conscience and

religion; (viii) the right to freedom of opinion and expression; ... and (ix) the right of freedom of peaceful assembly and association.”⁵²

Article 4 of the Racial Discrimination Convention creates an exception. It categorically condemns group defamation, language that incites racial hatred, and outlaws those organizations that disseminate literature espousing ideas based on theories of racial superiority. Racially defamatory acts that promote racial hatred and discrimination are punishable by law.⁵³ These proscriptions are laid down with due regard to the principles expressed in the Universal Declaration of Human Rights and article 5 of the Racial Discrimination Convention.

Article 18, 19, 21 and 22 of the covenant on Civil and Political Rights echo the free expressions provisions of the above international legal agreements. These articles provide, in relevant parts:

“Everyone shall have the right to freedom of thought, conscience and religion ... (Article 18). Everyone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression ... The right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. The exercise of the rights provided for in. This article carries with it special duties and responsibilities. It may therefore be certain to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others, (b) for the protection of national security or of public order, or of public health or morals... (Article 19). The right of peaceful assembly shall be recognized (Article 21). Everyone shall have the right to freedom of association with others... No restrictions may be placed on the exercise of this right other than those which are necessary in the interests of national security, public order ... (Article 22) “⁵⁴

Clearly, the concept of free expression as reflected in the foregoing multilateral instruments is non-absolute and may be subjected to impairment in certain

circumstances. The restrictions on this right are evident from the caveats delineated in Articles 19 and 21 of the covenant on civil and political rights. Article 20 of this treaty contains an additional indicium of the conditional character of free expression: it prohibits war propaganda and the advocacy of racial, national and religious hatred.⁵⁵ The articles mirror article 4 of the Racial Discrimination Convention. The American Convention on Human Rights, The European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Helsinki Accords each codify the right to free speech with specific limitations. Article 13 of the American Convention on Human Rights guarantees:

“(i) Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.

The existence of this right ... shall be subject to prior censorship, but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to insure:

(a) Respect for the rights or reputations of others; or

(b) The protection of national security, public order, or public health of morals.

The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

Article 13 (5) of the American Convention punishes racial defamation or language that constitutes incitement to violence or racial hatred.⁵⁶ The American Declaration of Rights and Duties of Man at Article IV provides:

“Every person has the right of freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.”

However, Article xxvii states that”

“ the rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.”⁵⁷

Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms articulates the free speech guarantee of the convention.

- “(i) Everyone has the right to freedom of expression. The right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
- (ii) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for prevention of disorder or crime, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”⁵⁸

The reaffirmation of the right to freedom of expression found in the numerous documents discussed thus far, juxtaposed against various limitations on the right, bears to reason only if the right is construed as conditional and not absolute in character. The right becomes subordinate to certain overriding state interests or goals that can only be achieved by infringing upon it.

2.8 Domestic Constitution And Freedom Of Expression

Provisions protecting freedom of expression appear in most of the world’s domestic Constitutions. Most of the African countries have constitutional provisions granting freedom of expression to their citizenry. A characteristic example is Article 7 of the fundamental law for the Second Republic of Guinea:

“ He shall be free to believe, to think and to profess his religious faith, his political

and philosophical opinions.

He shall be free to express, to manifest and to diffuse his ideas and opinions by speech, by writing and by image.

He shall be free to instruct and to inform himself from sources available to all”.

These freedoms are limited by Article 4, which states:

“The law shall punish any act of racial, ethnic or religious discrimination, or any regionalistic propaganda, which could have a grave effect on national unity, the security of the state, the territorial integrity of the republic or the democratic functioning of its institutions.”⁵⁹

An earlier version of Article 4 ... Article 45 of the former Constitution of Guinea prohibited “any propaganda of racial or regionalistic nature. There have been statements to the effect that constitutional provisions upholding the right to free expression in Sub-Saharan Africa is not the result of western influence. Wai writes that, in pre-colonial Africa, the traditional African mind set institutions and social practices supported the belief that certain rights “should be upheld against alleged necessities of the state.” Discussion in the traditional African community was “open and robust”. Those who harbored different or antagonistic opinions were not ostracized or punished. There was no fear of punishment for expressing ones ideas. There was a clear conception of freedom of expression and association.⁶⁰ The constitutions of both Asian and Islamic nations recognize the right to freedom of expression. It is also common place to view nations of Eastern Europe and other communist or socialist countries as guilty of the most egregious violations of fundamental freedoms. Yet, historically, provisions protecting freedom of expression have appeared in their constitutions. Major communist powers such as the former Union of Soviet Socialist Republics and the People’s Democratic Republic of China include free expression provisions in their constitutions. Article 45 of the Constitution of the People’s Democratic Republic of China declares:

“ Citizens enjoy freedom of speech, correspondence, the press, assembly, association, procession, demonstration and the freedom to strike, and have the right to speak out freely, air their views fully, hold great debates and write big

character posters. Citizens enjoy freedom to believe in religion and to propagate atheism. “⁶¹

The former Soviet Union is a multi-ethnic society now composed of independent republics. It has at least in theory, never retreated from a professed belief in the principles of ethnic or racial equality and the freedom of expression as guaranteed by the soviet constitution. Of particular importance is Article 50 of the former Soviet Union's constitution, which guaranteed freedom of expression:

“In accordance with the interests of people and in order to strengthen and develop the socialist system, citizens of the USSR are guaranteed freedom of speech, of the press and of assembly, meetings, street processions and demonstrations. Exercise of these political freedoms is ensured by putting public buildings, streets and squares at the disposal of the working people and their organizations by broad dissemination of information and by the opportunity to use the press, television and radio”.⁶²

Article 36 of the same Soviet Constitution, which ensured the equal rights of all the citizens of the former Soviet Union, also condemned any preaching or advocacy of racial or national exclusiveness, hostility or contempt.⁶³ Article 36 was also used to combat what was called “*Great Russian Chauvinism.*” and to punish members of the soviet populace who made disparaging remarks about Ukrainians and Georgians or who cast aspersions on the importance of smaller ethnic groups in the country. The Soviets established a censorship department through which all publications were required to pass prior to printing. The censorship department was a branch of the ministry of education in each union republic. This department had the power to forbid the printing, publication and distribution of writings that might stir up racial hatred or religious fanaticism. The 1993 Constitution of the Russian Federation (“Russian Constitution”) one of the now independent republics, mirrors the protection for freedom of expression found in the constitution of the defunct Soviet Union.

Article 29 (1) of the Russian Constitution protects the freedom of speech and thought.

Article 29 (2) may be construed or specifically prohibiting group defamation or language inciteful of racial hatred. It provides:

“No propaganda or agitation inciting racial, social, national or religious hatred and enmity shall be allowed. The propaganda of social, racial, national, religious or language supremacy shall be prohibited.”⁶⁵

Protection of free expression may be found in the constitutions of other independent republics of the former Soviet Union. Article 30 of the 1994 Constitution of the Republic of Kazakhstan, Article 39 of the 1992 Constitution of the Republic of Slovenia, Article 16 (20) of the 1993 Constitution of the Kyrgyz Republic, Article 26 of the 1992 constitution of Turkmenistan, Article 48 of the constitution of the Ukraine and Article 29 of the 1992 Constitution of the Republic of Uzbekistan all guarantee the freedom of expression.⁶⁶ Like the 1993 Russian constitution, Article 34 of the 1978 Ukrainian Constitution proscribes any advocacy as punishable by law.⁶⁷

It is not contended that freedom of speech was actually exercised in the former Union of Soviet Socialist Republics or is now exercised in the new independent republics or the People Republic of China to the same extent as it is exercised in the western world. However, the constitutional commitment to freedom of expression in these countries and the proscription against group defamation reveal the fundamental value of the principle of free speech, even among those nations that allegedly repress civil liberties. As I have reiterated herein, commitment to free expression around the globe reveals the fundamental nature of the right.

Freedom of expression is an innate and intuitive fundamental right. Nevertheless group defamation is not protected under the conception of free expression that I have discussed in this chapter. Group defamation is illegal conduct at international law, and is punishable as a crime under the laws of the majority of nations in the world. Italy has set an excellent example for the world in its prosecution of individuals who use racially defamatory speech or speech inciteful of racial hatred. Eleven youth were sentenced for committing anti-Semitic acts. These youths carried wooden crosses and

shouted anti-Semitic slogans during a basketball game between Israeli and Italian teams in March 1979. The defendants were sentenced to up to three years and four months imprisonment for exalting genocide. They were convicted on October 28, 1980. The sentence was the first ever imposed under the Italian Penal Code provision that prohibits the advocacy of genocide and using language that incites racial hatred. The defendants ranged in age from fifteen to twenty three. A few of the racial slurs shouted were: "*Jews to the oven!*" and "*Hitler taught us its not crime to kill the Jews!*".⁶⁸ Article 21 of the Italian Constitution guarantees freedom of expression, although it allows for certain limitations.⁶⁹

Group defamation is classified as a passive form of racial discrimination at the law of Nations. Article 1 of the Racial Discrimination Convention defines the concept of discrimination as:

"any distinction, exclusion, restriction, or preference based on race, color, descent or national origin which has the purpose or effect of nullifying or impairing the recognition of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

⁷⁰

Vierdag defines discrimination as wrongly or wrongly unequal treatment. He writes that,

"discrimination occurs where the equality or inequality of treatment results from a 'wrong' judgement as to the relevance or irrelevance of the various human attributes that are taken into account."⁷¹

Vierdag theorizes that there must be a significant reason from a departure from the principle of equal treatment, which is the prevailing rule. Unequal treatment is the exemption. The act of racial defamation is an act of racial discrimination under this definition because it is an unjustifiable distinction made on the basis of race through the use of language. Because racial groups are the object of defamatory comments, these racial groups are being treated differently from the racial majority, though all

groups are similarly situated in society. The principle of equality dictates that racial minorities be treated the same as racial majorities. The racial majority is generally free from verbal assaults of a racially defamatory nature. Since the language is uttered against the victims solely because they are of a different race or ethnic group, the differentiation in treatment accorded to them is a racially discriminatory act. Therefore, "it is wrongly unequal treatment" as defined by Vierdag. There is no legally sufficient version to justify this discriminatory treatment of racial minorities.

2.9 Group Defamation in the Cybernet

Recently, white supremacists skinheads have used the Internet to sow the hateful seeds of group defamation and language inciteful of racial hatred. The Carolinian Lords of the Caucasus (hereinafter CLOC) have used their Internet website to express white supremacist ideas. They have openly boasted:

"If you want an organization that makes things happen, visit our victims and learn first hand what kind of a group we are ... CLOC is clearly on the forefront of the great war for Aryan domination of the Internet." ⁷²

One CLOC member describes himself by the name "*Racial Theorist*". ⁷³ the website of CLOC features "an image of burning cross". ⁷⁴ These racist organizations engage in group defamation by spouting the superiority of the white race and the inferiority of minorities. Such speech is often followed by violence. In December 1995, slain heads were arrested for the murder of an African-American couple who lived in Fayetteville, North Carolina. The Washington post at its Internet address reported:

"the victims were shot in the head at cross range while strolling down a dirty road just after mid night. Three white solders who told police they were neo-nazi skinheads and had set out that night to harass blacks after drinking at a local strip bar, have been charged in the case. One of the suspects, kept a neo-nazi flag draped over his bed and white supremacist literature in his room off-post". ⁷⁵

According to the Anti-Defamatory League of B'nai B'rith, skinheads have murdered

at least 40 individuals during the past eight years. They have committed thousands of assaults, firebombings and declarations.⁷⁶ Thus racially defamatory language is the logical precursor of most active or aggressive forms of racial discrimination. An example of racially defamatory acts mixed with more aggressive forms of discrimination was the 1980 Williams College cross-burning episode. A wooden cross was burned in front of a college dorm. The cross-burning, a symbol of racial hatred of blacks and other minorities, was called deeply disturbing and an affront to the fundamental values and commitments of Williams College ...No use of the terrible symbol of the fiery cross, whether seen as a thoughtless or insensitive prank or a malicious effort to intimidate will be tolerated on the Campus. The cross-burning sparked a week of verbal harassment of black students on the campus. Black students reported that racial slurs were shouted at them from dormitory windows; racist notes were tacked to their doors; and some students reported having received verbal threats by phone. Letters were sent to the President of Williams College, John W. Chandler and a minister, the Rev. Muhammad Kenyatta, who was a senior at the college. These letters were described as very offensive and racist. They were postmarked from Cleveland, Ohio, and signed "KKK"⁷⁷. The act of racial defamation as a form of racial discrimination may be illustrated by the following hypothetical:

Mr. X frequents Y restaurant twice each month. Each time he enters the restaurant, he is greeted: "Hello little black Sambo" None of the white patrons of this restaurant are the brunt of insulting characterizations by the owner. Mr. X is black, the owner is white. Most of the other patrons who visit the restaurant are white. All other Black patrons are greeted with the same salutations.⁷⁸

Viewed in its social-historical context, the use of the phrase "Little black Sambo" when referring to an African - American person, is slanderous and insulting. It essentially suggests ideas about African -American that are both untrue and defamatory; it is racial stereotyping. The act constitutes an act of racial discrimination in a place of public accommodation because African-Americans are accorded wrongly unequal treatment by virtue of the fact that they are a different race. My

opinion in the situation described is that, individuals who are similarly situated have not been treated similarly but have been treated differently because of their race. Here the norm of free expression intersects with the norm of non-discrimination. Application of either norm does not sanction the right to engage in acts of racial discrimination or racial defamation; as we have seen, each racially defamatory act potentially incites racial discrimination, racial hatred and violence.

The non-absolute character of the right to freedom of expression was reaffirmed by the General conference of the United Nations Educational Scientific and cultural Organization (UNESCO) meeting in Paris in 1978 at its twentieth session. The conference focussed on the mass media and the free flow of information. The ultimate objective of the conference was a new “ freedom of information order”, which envisioned “ the establishment and operation of a world network carrying balanced, multidimensional and multidirectional communications produced in the interest of all peoples of the world. “ The conference adopted two important declarations by acclamation:

- (1) The declaration of fundamental principles concerning the contribution of the Mass Media to strengthening peace and understanding, the promotion of Human Rights and to Countering Racism, Apartheid and Incitement to War (“ The Mass Media Declaration”) and
- (2) The declaration of Race and Racial prejudice.⁸¹

The Mass Media Declaration’s purpose was the creation of a new international information order. Historically, UNESCO has been concerned with the free flow of information, the programs goal was to conquer the problem of a tremendously increased quantum of international communication where there existed a severe imbalance among nations with reference to “ the means and structures for the transmission and reception of information”. The concept of free expression encompasses the right to receive and impact communications of all character without regard to national boundaries or methods. Developing countries are particularly disadvantaged, since they are often the recipients of disproportionate amounts of

distorted communication from external sources. These countries lack the technological resources and access to international channels of communication necessary to make the world aware of their needs, desires, values, and cultural heritage. Although the Mass Media Declaration has as its objective enhancing the free flow of ideas, thereby creating better understanding among the nations of the world, the Declaration makes specific mention of another fundamental purpose to be achieved by the program: the countering of racism, apartheid and incitement to war. In its search for and encouragement of the "unrestricted pursuit for objective truth", the Declaration specifically recalls and reaffirms the continuing force and validity of Article 20 of the Covenant on Civil and Political Rights, which prohibits group defamation or incitement to national, racial or religious hatred. The Declaration also recalls Article 4 of the Racial Discrimination Convention, which condemns the same offences and those organizations that commit them. In addition the Mass Media Declaration makes reference to the UNESCO Declaration on Race and Racial Prejudice, which defines the fundamental right of equality and condemns all forms of racial discrimination, including group defamation and incitements to racial hatred.

The 1978 UNESCO declaration on Race and Racial Prejudice has been described as "the most comprehensive international instrument dealing with the protection of group identity. At the twentieth session of UNESCO on November 27, 1978, the Declaration won unanimous adoption. Previously, UNESCO had promulgated four declarations on race: the 1950 Statement on Race, the 1951 Statement on the Nature of Race and Race Differences, the 1964 Propositions on the Biological Aspects of Race, and the 1967 Statement on Race and Racial Prejudices. Lerner believes that though the 1978 UNESCO Declaration on Race and Racial Prejudice is not law, it can "become a keystone in the struggle against racism and racial prejudice.

The problem of racially defamatory propaganda has plagued the United Nations since its founding. A Conference on Freedom of Information was convened in 1948, and the result was a Draft Convention on Freedom of Information, which was declared the *Magna Carta of freedom of thought*. Although freedom of information was declared a

fundamental right, the draft convention did not attempt to prevent efforts to emphasize the danger of propaganda. The Draft Convention specifically provided for the proscription of group defamation and racially offensive propaganda. The Conference of Freedom of Information passed a number of resolutions critical of the dissemination of propaganda inciting war and racial hatred.

Three conventions were adopted: one dealt with freedom of information, another focused on the gathering and transmission of news and a third concerned the rights of correction. Forty-three resolutions were adopted. There was concern by delegates to the conference about the passage of legislation that might infringe on the fundamental rights and freedoms e.g. freedom of expression. They argued that more freedom was the best antidote for false reporting and war mongering propaganda rather than the censorship measures suggested. It's my assertion that they were wrong. From the discussion above on freedom of expression and the law of nations, it can only be concluded the principle of free expression must at times give way to certain paramount state interests that are for the good of all. Racial, ethnic or group defamation or language inciteful of racial hatred has never been protected by the principle of free expression in international law. The theory of absolutism has never existed at international law, nor has the restrictive theory proved compatible with the right of free speech and press.

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CHAPTER III

HUMAN RIGHTS AND FREEDOM OF EXPRESSION: THE LAW OF GROUP DEFAMATION IN THE UNITED STATES.

3.1 The Myth of Absolutism: The First Amendment Right to Freedom of Expression.

The First Amendment to the United States Constitution has been described as “the most explicit statement of human rights:” its values are expressive of “a central commitment to human rights.”¹ The “preferred position” of the legally normative content of the First Amendment was announced by the United States Supreme Court in the case of United Nations –v- Carolene Products Co.² In this case Justice Thomas .T. Stone suggested a stricter scrutiny of those restraints that infringe First Amendment freedoms. The presumption of constitutionality should function in a more narrow manner when the courts are examining legislation infringing on First Amendment values.³ As has been earlier stated, contrary to the plain meaning of the language –“ Congress shall make no laws.... abridging the freedom of speech, or of the press”⁴ – the First Amendment is not an absolute categorical imperative. The values of the First Amendment find their genesis in the works of two major political philosophers. Such classical jurists as John Milton and John Stuart Mill as I have earlier on shown, championed the notion of the absoluteness of free speech. Mill contented the suppression of speech was wrong, even if the opinion be false. He says:

“If any opinion is compelled to silence, that opinion may, for ought we can certainly know, be true. To deny this is to assume our own infallibility...though the silenced opinion be in error, it may and very commonly does, contain a position of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth, it is only

by the collision of adverse opinions that the remainder of the truth had any choice of being supplied...even if the received opinion be not only be true, but the whole truth, unless it is suffered to be, and actually is, vigorously and earnestly contested, it will by most who receive it, be held in a manner of a prejudice, with little comprehension or feeling of its rational grounds..."⁵

It can be seen that, implicit in these views of free speech is the belief that truth will ultimately conquer falsehood. Those who have perceived certain immutable truths about life have rejected this wholly unrealistic philosophy. Those jurists who assert the absolutist position invoke Mill or Milton to support their arguments. My assertion on this is that, unfortunately, they fail to realise that Milton and Mill, were not pure absolutists. My reason for so asserting is found in Mill's book, where in chapter III he states that not all opinions are immune from proscription. The liberty of the individual may be circumscribed where his opinions are "a positive instigation to some mischievous act."⁶ One must not become a nuisance to other people. The Supreme Court of the United States of America has stated that the truth rarely catches up with a lie, in the famous case of Gertz -v- Welch.⁷ It can be seen therefore that a discussion of the First Amendment theory and the evolution of the law with its numerous exceptions are of utmost importance. I have chosen to look at the American experience in detail because of its unique historical background and its rich legal and political philosophy.

3.1.1 The First Amendment: Doctrine and Evolution

Various theories attempt to explain the nature and underlying values of the First Amendment. Contemporary exponents of the doctrine of absolutism echo the sentiments expressed by Justice Andrew .H.L Black:

*"I take no law abridging to mean no law abridging."*⁸

Justice Black explained that he never believed "any person has a right to give speeches or engage in demonstrations where and when he pleases"⁹ Another advocate of the absolutist view is one Alexander Meiklejohn. He writes that Congress is

absolutely prohibited from promulgating laws that have the effect of impinging on free speech values.¹⁰ This prohibition would not prevent Congress from passing laws to enhance freedom of expression. The language of the First Amendment creates an unconditional prohibition, it admits of no exception. He further argues that the constitutional proscription against infringing free speech rights exists in times of war, as well as in times of peace. The words of the First Amendment mean literally what they say:

“Congress shall make no law...abridging the freedom of speech, or of the press.”

Therefore, Congress can never abridge freedom of expression. In my view, he is advocating for literal interpretation of the constitutional provision. Meiklejohn has enumerated forms of speech that lie outside the ambit of the First Amendment protection. He says that the First Amendment does not create “the unlimited right to talk.” He says that the constitutional amendment forbids Congress from passing laws infringing upon freedom of expression when the speech is used for purpose of governing the country. The amendment “does not forbid the abridging of speech...it does forbid the abridging of the freedom of speech” To me, this is an ostensibly self-contradicting position.

His theory becomes even more unsatisfactory when you consider the fact that he rejects the reality of exceptions to the First Amendment. He asserts that the First Amendment is an uncompromising statement; there are no exceptions to the rule. There are only restrictions and limitations on free speech rights.¹² He further stubbornly argues that if exceptions were intended, they would have been included. This view of constitutional jurisprudence is overly simplistic. Meiklejohn never explains the difference between what legal scholars or anyone would consider an exception and what he describes as a limitation, or speech not protected by the amendment. It can be said that the fundamental and obvious problem with Meiklejohn’s analysis seems to be definitions. To say language that was not intended to be protected by the amendment does not constitute an exception to the amendment is to be confused about the meaning of the word “exception”. His argument reflects a

lack of understanding of the meaning, legal usage, and etymology of the term "exception." Thomas I. Emerson presents another theory of the First Amendment that is more liberal than Meiklejohn's. He sees the need for a unifying theory of the First Amendment and purports to present one. Emerson's First Amendment theory has its underlying values for specific goals: (1) a system of free expression allows for the self-fulfilment of the individual; (2) free expression is a method of ascertaining truth; (3) free expression permits members of society to participate in the social-political and economic decision-making process; and (4) free expression is a means of maintaining social homeostasis and social cohesion. Emerson states that the most obvious reason for a system of free of expression is the attainment of truth. He observes that, in a society where free speech is revered, the discovery of truth is made simple. Since all sides of issues are offered in the market place of ideas, the listener may evaluate all positions and arrive at a rational judgment as to what is truth. Further, he lays emphasis to the fact that it is especially critical for radical views to be heard and evaluated. The censoring of information and debate inhibits rational judgment-making and tends to perpetuate error; it stifles a generation of new ideas. He further asserts that no matter how evil or false the opinion may be, open and robust debate is the best policy. The dissemination of novel ideas, the fight between conflicting opinions, and the toleration of the pernicious idea unify society and promote the amelioration of the human condition. Truth is the ultimate end of free expression.¹⁶ Emerson posits a theory of social control. The stability of the community and social cohesion is maintained through the exercise of free speech rights. A system of free expression maintains societal homeostasis; "precarious balance between healthy cleavage and necessary consensus."¹⁷

The prohibition change temporarily, but ideas remain unchanged and unity and loyalty are impaired. When ideas are suppressed, positions harden. The opposition may be driven underground with no legitimate means of venting its frustration except by the sword. Open and robust debate has a cathartic or purgative effect; it promotes social cohesion. Freedom of expression he says channels the frustrations of the opposition into avenues that comport with the dictates of law and order.¹⁸ Emerson

observes that this system of free expression is not unconditional in nature. Limitations or exceptions must be clear-cut, precise, and readily controlled. The principle of free expression must be reconciled with other competing rights.¹⁹ Another proponent is Bork. His theory is a much more limited theory of the First Amendment. They believe the amendment protects only political speech. Its purpose being to promote the discovery and spread of political truths, which concern the operation, behaviour, and policies of government.²⁰ Political speech consists of statements about how people are to be ruled by their rulers. Thus, this form of speech includes criticising, evaluating, propagandising and electioneering. Explicitly, political speech is therefore the only speech that merits a preferred position.²¹ Speech advocating the overthrow of the government by use of force or speech encouraging the violation of the law may well concern government and be political, but these forms of speech would not be protected.²² Political truths constitute values that are protected by the constitution and thus are beyond the reach of legislative control. They are paramount truths about the manner in which the government should conduct its affairs as a matter of procedure and substance.²³

One might assume that racially defamatory falsehood would be easier to prescribe under Bork's theory, since it contributes nothing to the governing process and says nothing about the way the government should conduct itself. Bork suggests that we need not protect all arguably valuable speech. Those who suggest we should can be said to be confusing the constitutionality of the laws with their wisdom.²⁴ Political speech is placed in a preferred position because it breeds societal enlightenment and political efficacy. Hence it can be seen that the absolutist approach to the First Amendment is a minority view. Even those who profess adherence to this position do not, in the final analysis accept the amendments as an unconditional rule of law. They fail to disentangle themselves from the skein of illogical, confused and somewhat self-contradictory analysis. Case law exists both supporting and negating the above theories as illustrated by herein below.

New York Times Co v Sullivan²⁵ it illustrated the exception in the principle of free speech. The U.S Supreme court held that a public official could not recover damages against a media defendant for a defamatory falsehood related to the defendant's official conduct regarding a matter of public concern, unless the plaintiff proved the libellous utterance was made with reckless disregard for the truth or falsity of the statement with knowledge of its falsity. In Konigsberg v State Bar²⁵ Justice T.K.Harlan recapitulated the view point that a balancing of interest must be used in protecting First Amendment rights. He asserted that the amendment does not reflect the absolutist position, nor can one induce the scope of its protection from the plain meaning of the text.

3.1.2 Exceptions to the Principle of Freedom of Expression illustrating the falsity of the absolute position as regards the first amendment.

The law of defamation is the most obvious exception to the general rule that speech is protected by the First Amendment. The gravaman of the libel action is the strong interest society has in protecting the character or reputation of the individual.²⁵ Once tarnished, reputation is virtually impossible to restore. At Common Law, the concept of strict liability was applied in libel actions. The plaintiff was only required to place the defamatory statement into evidence and prove the statement was uttered or published by the defendant to others. There was no requirement that the plaintiff prove the statement to be false. Nor was he required to show knowledge on the part of the defendant as to the falsity of the statement, or that the defendant reasonably should have been aware of such falsity. Truth of the utterance was instead an affirmative defence.²⁶ Another well known exception to first amendment protection is the "clear and prevent danger" rule as enunciated in the U.S. case of Schenck -v- United States²⁷. This was a World War I case that upheld a federal statute proscribing agitation against the draft and war effort. Specifically, the defendant was found guilty of distributing pamphlets critical of the motives of those supporting the war effort. These pamphlets advocated violation of the draft laws and the condemnation of conscription. It was alleged that the First Amendment protected the

form of speech involved in the case. Justice Holmes, in upholding the conviction of Schenck, announced the now-famous formula:

“The question in every case is whether the words used are used in such circumstance and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.”²⁸

A series of subsequent cases applied the clear and present danger test, among them, Frohwerk -v- United States²⁹ – the defendant being convicted of publishing an article criticising the American World War I effort, Debs -v- United States,³⁰ and Abrahams -v- United States³¹ which characterised the conduct of the respective defendants as a clear and present danger. I have surveyed two noted exceptions to the principle of freedom of expression with regard to the First Amendment in the decisional law of the United States Supreme Court. Although both of these exceptions have undergone significant evolution, they nevertheless demonstrate the falsity of the absolutist position. The U.S. Supreme Court has consistently used a balancing approach to determine whether the impairment of First Amendment rights is legally justified. A weighing of governmental interest must occur before restrictions on First Amendment freedoms are constitutionally valid. Frankfurter, J stated:

“The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non- Euclidean problems to be solved³²

Justice Mac’Alister Harlan, in Konigsberg-v- State Bar, recapitulated the viewpoint that a balancing of interests must be used in protecting first amendment rights.³³ He asserted that the amendment does not reflect the absolutist position, nor can one adduce the scope of its protection from the plain meaning of the text. The myth of absolutism must give way to a more realistic and practical approach to protecting the First Amendment rights; the so called balancing technique of strict scrutiny. As I have already argued, racial defamation or group defamation is not only a form of

constitutionally unprotected defamation, but is a form of racial discrimination. Therefore, First Amendment values must succumb to the superior value of eliminating all forms of racism and racial discrimination. Domestic tranquillity, social cohesion, and the public interest must be safeguarded, particularly in an ethnically pluralistic society.

3.1.3 Group Defamation Legislation: Criminal or Civil Law?

The criminal law regime remains the best method of controlling group defamation. One is then able to avoid the civil law requirement of colloquium. Most of the United States' jurisdictions that have passed group defamation laws have passed criminal libel statutes. The civil law action for defamation of character has as its purpose the protection of the individual's reputation. The purpose of criminal defamation statutes is identical with the purpose of the criminal laws as a whole: the prevention and punishment of human behaviour that is inimical to the consociation of men called society and the public interest. The criminal law expresses the value of judgment that a certain mode of behaviour is viewed as socially and morally repugnant by civilised men, an affront to commonly held notions of civility. Durkheim on this said:

“ The criminal law's true function is to maintain social cohesion intact, while maintaining all its vitality in the common conscience... it serves to heal the wounds made upon the collective sentiments...without this necessary satisfaction, what we call the moral conscience could not be conserved.... it functions for the protection of society.”

It can be said therefore that consequently, the punishment of certain forms of human conduct when legal norms are breached supports, depends, and protects the community. Thus in an instance of group defamation, the community is the victim. Society as a whole has been injured not merely the individual or the racist group. If one fully understands the difference between the criminal and the civil law, then group defamation statutes or defamation statutes that have been interpreted to give protection to groups should become legally acceptable. The purpose of this chapter can be said to be, to expand and expatiate on the law of group defamation as it has

developed in the United States and its relationship to the First Amendment right to free speech.

3.2 Historical background of Group Defamation Law in the United States.

Since the early 1940s, there have been attempts to create both federal and state laws against group defamation e.g. Illinois and Maryland. Most of these attempts were unsuccessful. However, several states later promulgated racial defamation or group libel statutes e.g. Connecticut, Massachusetts and Minnesota. One of the most important cases that considered the constitutionality of state group defamation statutes is Beauharnais-v-Illinois³⁵ In this case, the president of the White League of America was convicted of distributing a lithograph on the streets of Chicago that, *inter alia*, called for the mayor and city council to prevent further encroachment, harassment, and invasion of white neighbourhood by African-Americans. Beauharnais accused African-Americans of being rapists, marijuana smokers, robbers, carriers of guns and knives, and the mongrelizers of the white race. For these statements he was convicted of violating section 244 (a) of the Illinois Criminal Code. Illinois had been the scene of exacerbated tensions among the races that had often resulted in violence and destruction. The Illinois legislature determined that racially defamatory speech or group defamation had significant instigatory effect in the creation of these disturbances. Therefore, group defamation was punishable because of its tendency to cause breaches of the peace; the use of such language or defamatory depictions might cause violence or disorder.³⁶ The statute was declared constitutional over allegations that it violated due process of law, was void for vagueness and infringed the liberty of speech. The court found that a state could not be denied the power to punish utterance promoting friction among racial and religious groups. The court decided that liberty of speech, guaranteed by the due process clause had not been violated. Libellous utterances, by their very nature are not constitutionally protected.

There are also other court cases where group defamation actions were litigated and upheld under criminal libel statutes that were not group libel statutes. In *State-v-Brady*,³⁷ the court held that libel may be committed upon a class of people. It need not have as its object a particular person. In *State -v- Cramer*,³⁸ the court held that no specific person need be mentioned as the subject of a libellous utterance when prosecuting a group libel action pursuant to a criminal libel statute. It can be seen that by providing a criminal law remedy for group defamation one avoids the insurmountable barrier of colloquium required in all civil law actions. The colloquium principle requires each member of the group to how the defamatory utterance referred to him personally before he is allowed to recover. The speech or language complained of must be "of and concerning the plaintiff" if the alleged defamation is to be actionable. The chance of recovery under the colloquium standard is extremely poor for large groups.³⁹

Having considered the significant case law concerning the problem of racial defamation or group libel, it is of importance to consider one important study, which concluded that group defamation laws are undesirable as a matter of law and public policy. Benjamin L. Zelenko and Theodore Sky produced the study in 1962 for the US House of Representatives, Judiciary Committee.⁴⁰ Although their conclusions are against group defamation laws, it has been said that the report stands as impressive-albeit unwitting –testimony to the constitutional permissibility of group libel laws.⁴¹ Also they present policy argument against group defamation statutes. Zelenko and Sky fear that, in an effort to restrain defamatory speech, useful expression might be abridged by the judiciary⁴². This belief that a good shepherd does not possess the ability to separate sheep from goats is unjustified. The task may be a bit difficult for those unable to recognise a goat in sheep's clothing. However this task creates a problem for the good shepherd. Courts daily make decision as to whether certain forms of speech are libellous or slanderous. The courts have shown themselves to be excellent shepherds.

They will be given the duty of ensuring that only language that defames libels' or slanders the group will be punished. Historically, the courts have been the guardians, shepherds, or watchdogs of civil liberties. In *Beauharnias*⁴³ there was language in the circulars distributed by the defendant that was not defamatory. However, the defendant was not punished for those political beliefs. He was punished only for the defamatory falsehood he published about African-Americans. The courts could not be expected to allow the culprit to escape with impunity because some of his views were privileged. Next, Zelenko restate the famous market place of ideas principle where the fight between competing ideas occurs – a concept that assumes good will always defeat evil.⁴⁴ This almost theological theory was rebutted earlier on in chapter 11 of this dissertation as naive and untrue. Human experience denies its validity. Other policy arguments are represented to justify their disenchantment with group defamation laws. A number of risks are involved when such laws are promulgated, suggests Zelenko and Sky.

First they are concerned the publicity resulting from a criminal prosecution would result in a wider dissemination of the defamation.⁴⁵ Second, they assert the trial and the defence of truth might allow the defendant to use the trial as a sounding board which would result in the views being made public.⁴⁶ Third, if the defamer is convicted, the defendant might acquire public sympathy or even martyrdom. Acquittal might be viewed as vindication or the official sanctioning of the conduct. Fourth the public might believe the defamed group would both have the opportunity to reflect on the possible visits involved in prosecuting the action. The injury could exceed that which resulted form the original libel.⁴⁷ Most of the proceeding arguments already have been refuted. None of these arguments can be said to be legal as they address the wisdom of he law, not its constitutional permissibility. It can further be said that these arguments are analytically defective. The reason for my saying so being the fact that greater dissemination consequences of the original libellous utterance occurs in any defamation suit. This is a consequence of prosecuting defamation in any form .Yet no one has suggested repeal of the laws that allow individual defamation actions simply because the trial causes a greater

dissemination of the defamatory statement and gives the defendant a public forum from which to spread falsehoods.

The law is the proper instrument to be used in support and defence of civil or human rights. In addition, there should be no concern that the defendant who is convicted will receive the popular sympathy of the people or be ushered into symbolic martyrdom. This excuse should never be sufficient justification for allowing individuals or groups to become the victims of defamatory falsehoods. It is not sufficient reason for refusing to protect the civil or political rights of different people {minorities} and public tranquillity. A man is innocent until proved guilty. Therefore to suggest a finding of not guilty would cause people to believe the government supports the indicted behaviour is to suggest that the failure to convict an accused murderer would cause people to believe the government endorses murder. Therefore, a not guilty finding in a group defamation case would not logically be interpreted as "vindication and official approbation"⁴⁸

In response to the last argument, it can be noted political risks and additional injury are always involved when Human Rights are defended those who do not control the means of production and are not members of the majority. The above are the major objections that exist to group defamation laws set forth in the Zalenko-Sky Report. As stated earlier, it is my opinion that this report is analytically deficient. These two concede that:

"there can be no dispute that group defamation constitutes a serious and malignant evil. Scurrilous defamatory attacks on classes of individuals because of their race, religion or ethnic characters injure not only the pluralistic forces which comprise the democratic society, but also deprecate the individuals who are members of the group."⁴⁹

Considering this statement it is indeed puzzling how they could conclude it would be undesirable to pass group defamation statutes.

3.3 Contemporary illustrations of Group Defamation

To fully understand the exact nature of the racially defamatory falsehood or group defamation, one must examine, though briefly, specific examples of the crime. The U.S.A. is taken as a core example due to its uniquely rich experiences.

3.3.1 Sambo litigation.

One of the most significant illustrations of language viewed as racially defamatory is revealed in legal action brought against Sambo's Restaurant, Inc situated in Middlesex City Massachusetts. The now defunct restaurant chain was sued because of its use of the name Sambo to identify its establishments. During its short existence in the 1980s', various communities in the United States attempted to force the restaurant chain to change its Sambo trademark. The name Sambo is considered racially offensive and defamatory by African – Americans and many white Americans. Legal actions against the Company were not merely reactions to the paternalistically offensive though deceptively innocent Bannerman tale. Legal actions were initiated by those who were aware of the socio–historical tradition underlying the Sambo personality.⁵⁰

The denotations of the word Sambo comport with the meaning of the term as it is used in the English language. The Random House Dictionary of the English Language defines Sambo as *1. A Latin American of Negro and Indian or Mulatto ancestry. 2. Disparaging and offensive...Negro.*" *Webster's Third New International Dictionary of the English language is en rapport with the definition found in Random House: "Amer.Sp.zambo Negro, mulatto, perf. fr. Kongo nzambu monkey.) 1. Sambo 2. Often cap: Negro – usu. used disparagingly."* *The Oxford English Dictionary states that Jambo is " applied in America and Asia to persons of various degrees of mixed Negro and Indian or European blood; also a name for a kind of yellow monkey... a nickname for a Negro".* From a historical vantage point, the Sambo personality is a demeaning racial stereotype African–Americans equate with the word

'nigger'. Sambo is perhaps even more derogatory than the word "*nigger*". It is the perfect example of language that might be considered racially defamatory; it says something of African-Americans that is not true.

It is my view that it casts aspersions on the humanity of African-Americans and subjects them to public ridicule, contempt, obloquy, shame and disgrace. It causes injury to the public interest in that it deepens social cleavages along lines of race, and the use of the word has stirred anger, resentment, and violence on the part of both those African - Americans abused by the use of the term and others. The Rhode Island Commission on Human Rights (hereinafter "the Commission") ordered Sambo's Restaurant Inc. to change the name of its restaurants. The Commission held that "the use of the name Sambo's had the effect of notifying African-American persons that they were unwelcome... because of their race".⁵² The Commission determined the name was insulting and derogatory. In Massachusetts, there was judicial and extra - judicial action against the use of the name Sambo by Sambo's Restaurant, Inc. Many communities passed resolutions forbidding use of the name for a restaurant.⁵³ The new Bedford City Council voted that the Building Department refuses requests for building permits for any restaurant called Sambo's.⁵⁴ The Commonwealth of Massachusetts asserted that the term Jambo is racist, insulting and an offensive stereotype of African - Americans. It was further contended that the use of the name Jambo incited others to make use of the epithet and promoted breaches of the peace.⁵⁵ Actual incidents of violence and racist harassment were committed during the opening of one Sambo's Restaurant. Picketers were threatened with guns, charged by the drivers of cars and called Sambos and *niggers*.⁵⁶ In what I may call poetic justice, the user of the trade name became counterproductive after significant numbers of citizens began to protest and refused to patronise the business. Eventually, the restaurant chain collapsed. It can be said that its social and moral error was the cause of its own death.

3:3:2 The Black Muslims or The Nation of Islam.

Another example of racially defamatory language that might be proscribed is certain teachings of the religious doctrine of the Black Muslims or the Nation of Islam. Until the death of Elijah Muhammed, the Black Muslim sect was the primary Black Nationalist Religious Group in America. Its doctrine at one time taught that the white man was a "devil".⁵⁷ The member of this religion awaited the day when "blue-eyed devils would be treated as they ought to be treated"⁵⁸ This meant the annihilation of all members of the Caucasian race. The Black Muslims were never an aggressive group, but they adhered strictly to the belief that self defence should be used against those who might initiate acts of violence against them. This method was seen as the only effective way of solving the race problem in the "wilderness of North America"⁵⁹ The tenets of the religion held African-Americans were superior beings and had a manifest destiny.⁶⁰ The White -Americans were the personification of evil and were a hindrance to the moral development, freedom and closeness with Allah that the African-American sought.⁶¹ White-Americans kept African-Americans in a state of mental bondage. C Eric Lincoln describes the human condition of African-Americans as understood by Black Muslims:

" They have been educated in ignorance, kept any knowledge of their own origin, history, true homes, or religion. Reduced to helpless under the domination of the Whites, they are now so last that they even seek friendship and acceptance from their won mortal enemies, rather than from their own people. They shackled with the homes of their save master; they are duped by the slave masters' religion; they are divided and have no language, flag or country of their own. Yet they do not even know enough to be ashamed.... The most unforgivable offence of these so-called Negroes is that they are guilty of deceiver."⁶² loving the white race and all that race goes for.... The white race is their arch"

Typical of language that might be categorised as group defamation is a dialogue from a play by Louis X (Minister Louis Farrakhan of the One Million Man March Fans called "The Trial").

"I charge the white man being the greatest liar on earth! I charge the white man with being the greatest drunkard on earth... I charge the white man with being the greatest gambler on earth. I charge the white man, ladies and gentlemen of the jury, with being the greatest peacebreaker on earth. I charge the white man with being the greatest robber on earth. I charge the white man with being the greatest deceiver on earth. I charge the Whitman with being the greatest troublemaker on earth. You therefore, ladies and gentlemen of the jury, I ask you to bring a verdict of guilty as charges."⁶³

The trial was produced all over America. The play created a symbolic trial of the "white man" for his injustice towards African-Americans. The "white man" was found guilty and sentenced to death.⁶⁴ Unquestionably, most people would consider the language libellous. The language would also qualify as defamatory utterance under the criteria set out in the various case law discussed above. The speech can be said to contain false assertions of fact. The utterance, which was made in public, directly holds the white race up to contempt ridicule, obloquy, and hatred. It is injurious to public interest because it exacerbates racial tensions; and such language may well be instigative of breaches of the peace because of its inflammatory nature. Finally, the question of fault brings itself to the fore and may be easily proved considering the character and nature of the utterance. It is necessary for me to interject at this point that the Black Muslims or Nation of Islam have modified their religious doctrine and no longer emphasise the white man is a devil theme. Nevertheless, for the purposes of this dissertation, the early teachings of the religion as propagated by the Nation of Islam are quite instructive. The teachings constantly emphasised the white- man as a devil theme. Elijah Muhammad said:

" The entire creation of Allah (God) is of peace, not including the devils who are not the creation of Allah by a race created by an enemy (Yakub) of Allah. Yakub rebelled against Allah and the righteous people and was cast out of the

homes of the righteous into the worst part of our planet to live their way of life until the fixed day of their doom. These enemies of Allah (God) are known at the present as the white race or European race, who are the sole people responsible for misleading nine-tenths of the total population of the black nation. The Yakub-made devils were really pale white, with really blue eyes, which we think are the ugliest of colours for a human eye. They were called Caucasian which means according to some of the Arab scholars, "One whose evil effect is not confined to one's self alone, but affects others" There was no good taught to them while on the Island. By teaching the nurses to kill the black baby and save the brown baby, so as to graft the white out of it; by lying to the black mother of the baby, this lie was born into the very nature of the white baby; and murder for the black people also born in them - or made by nature a liar and murderer."⁶⁵

The 'white man' was considered a doomed race. Elijah Muhammad once stated in an interview:

"Whether they are actually blue-eyed or not, if they are actually one of the member of that race, (white) they are devils."⁶⁶

The theological doctrine once adhered to by the Nation of Islam may be considered racially defamatory.

3.3.3 Defamatory Lyrics of Songs

In June of 1992, two rap artists, Ice-T and Sister Souljah, earned the ire of much of the White American population. These African-American rap artist were taken to task by members of the media, the police, and several political organisations for allegedly inciting violent conduct towards policemen and white people generally. In his song "Cop-Killer" Ice-T becomes a character who is frustrated and angered by police brutality and racism. The character indicates he would act on his frustrations by "dusting off" some cops. Shortly after the release of the album, *Body Count*, on which the song "Cop-Killer" appears there was an outcry accusing Ice-T of inciting the death of policemen. Time Warner, the record's producer were pressured

successfully to withdraw the album from the Market. Former President George Bush declared that Times Warner was 'sick' because it produced an album glorifying the killing of police.⁶⁷ Former Vice-President Quayle described the record as obscene.⁶⁸ However, the National Black Police Association voiced its opinion that Ice-T was describing the Rodney King incident and the subsequent Los Angeles riots.⁶⁹ Ice-T was not without supporters. One critic writes:

“ When...Los Angeles Police Chief, Daryl Gates, told a Congressional hearing casual drug users should be taken out and shot, many of the same politicians who condemned Ice-T were quick to accept Gate's explanation that his remark was merely symbolic of his strong feeling about drug abuse.⁷⁰

Such were not as quick to accept Ice-T's explanation about his song being a work of fiction and that he was simply singing “In the first person as a charger who was fed up with police brutality.”⁷¹ Another defender of Ice-T, in a letter to the editor of the Washington Post wrote:

“ In 1977 Elton John released the “Carabou” album which concluded with “Tickin” a 10-minutes song about a young man who goes into a bar and kills 14 people. The album climbed to the top of the charts and helped to create the Elton Mania of the mid-70s. In 1983, Bruce Springsteen released “Nebraska”, the title song of which told the tale of a man and woman who get into their car and shoot people for no reason than to have fun. The album received rave reviews from critics and helped establish Bruce's reputation and national standing. In fact a year later, Ronald Reagan quoted Bruce in his re-election campaign. In 1991, Stephen Sondheim's score for “Assassins” which presented songs sung mostly in the first person about the presidential assassins and attempted assassins, was released to rave reviews (including top-10 New York Times album list) and was generally considered one of the best of Sondheim's distinguished and outstanding scores. In 1991, Ice-T released Body Count, which included a song Cop Killer about a man readying to kill a police officer. This album and song were greeted with disapproval by the president and an attempted boycott, endorsed by the vice-president among other leaders. Each of the above songs uses an artistic device of extreme examples to help us understand antisocial behaviour and the forces that create such behaviour. All are sung either in the first person (i.e. the singer takes the role of the killer) and/ or with tremendous empathy for the killer. Each song seeks to point out social problems that lead to the

killer's actions. Only one however, incited any sort of public criticism or controversy- Ice-T's. Once again it would seem the race card is rearing its ugly head. As leaders, their responsibility for protecting the first amendment and bringing this racially divided country together takes place to attempting to rouse white fears and thus garner votes." ⁷²

President Bill Clinton(then a presidential candidate) publicly condemned another African-American rap artist, Sister Souljah, during his first election campaign. ⁷³ Sister Souljah in an interview was reported to have said: " If *black people kill black people everyday, why not have a week and kill white people?*" ⁷⁴ The preceding statement was Sister Souljah's reflection on the Los Angeles riots which occurred when the defendants' in the Rodney King police brutality case were acquitted. In both the Ice-T and Sister Souljah's cases, the vast majority of the media, the general public and political figures condemned the content of the speech uttered by the performers. In the case of Ice-T, concerted actions by certain groups were effective in silencing the speaker and thus his viewpoint. Time Warner discontinued the production of "Cop Killer".

The reason I decided to look into the above is so as to relate it to *cross burning*. To many African-American, a *cross burning* constitute a message that advocates the death of African-Americans. Indeed, historically deaths' at the hands of the Ku Klux Klan have accompanied many *cross- burnings*. It therefore raises the specter of hypocrisy that none of the voices that challenged and protested against Ice-T or Sister Souljah were heard to protest when the United States Supreme Court handed down what may be called an enigmatic ruling in *R.A.V. v. St. Paul*. ⁷⁵ The Court to the dismay and annoyance of many held that cross burning was constitutionally protected expressive activity. It is interesting to note that those who raised their voices in choruses of protest against Ice-T and Sister Souljah were amazingly silent when the U.S Supreme Court decided *R.A.V.* Both Ice-T and Sister Souljah were engaging in the exercise of free speech rights, without engaging in any physical conduct or overt action in carrying out their ideas. The appellant in *R.A.V* went beyond mere speech or thought to the physical action of burning a cross on the property of someone else. Neither the President nor his Vice-president protested. The police authorities that

condemned the rap artist never said a word. What hypocrisy! Nor was their condemnation of R.A.V heard from societal pockets of power and authority, despite their responsibility for protecting the human rights of minorities. Perhaps in the future, a more enlightened Supreme Court will clarify R.A.V by refusing to "legitimate hate speech as a form of public discussion".⁷⁶

To recapitulate: The United States Supreme Court has rejected absolutism in matters concerning freedom of expression. Libel and slander are constitutionally unprotected forms of speech, absent a legal privilege. Even if libelous or slanderous utterances are constitutionally protected, prohibition of such language and the attendant infringement of the right of free speech may be justified by applying the doctrine of strict scrutiny. The norm of racial non-discrimination has received the status of *jus cogens* or a peremptory norm of international law. Mckean writes:

"There are thus sound reasons for accepting that the principle of equality and non-discrimination, in view of their nature as fundamental constituents of the international law of human rights, are part of jus cogens (court's emphasis).

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Under the domestic law of the United States, the concept of racial equality and the right to be free from racial discrimination may be analogously characterised peremptory norms. As a matter of law and policy, the United States has since the case of Brown v. Board of Education,⁷⁸ attempted to wipe all cases of racism that were the offspring of a historical epoch now "gone with the wind".

Group defamation is a form of constitutionally unprotected expression and a form of racial discrimination. It is attacked for both reasons. It has been explained why group defamation should be considered actionable as libel or slander and is a form of racial discrimination. The legal norm of non-discrimination, coupled with the affirmative duty to right the present effects of past discrimination,⁷⁹ is without a doubt as compelling a state or government as can be contemplated by the human mind. Under strict scrutiny analysis, this compelling state on governmental interests would justify the limited impairment of First Amendment rights in reference to racially defamatory speech. No less restrictive alternative than social change through law exists as a

means of effecting the socially ameliorative end of destroying racial discrimination and protecting groups from invidious, defamatory falsehood. The unqualified adoption of the racial discrimination convention, and the subsequent passage of implementing legislation, would constitute use of a regulatory method rationally related to a legitimate governmental purpose. What must be borne in mind is that banning of organizations that disseminate racially defamatory propaganda is not advocated for. However, the racially defamatory propaganda, if it constitutes group defamation may be proscribed by law. Most organizations would hardly be effective if they are prevented from propagandizing and disseminating literature to the public. These organizations would be functionally non-existence. Thus, it would not, in my opinion, be necessary or desirable to prohibit meetings by these associations.

I deem it necessary to consider the situation in Western Europe. In fairness to Western Europeans nations, it should be noted that the majority of these nations have passed statutes proscribing group defamation or language inciteful of racial hatred. In 1966, the Council of Europe's Consultative Assembly drafted a model statute, in which its members were encouraged to adopt for the purpose of controlling group defamation or speech that incites racial hatred.⁸⁰ Article 1 of the model law defines the crime of incitement to racial hatred as follows:

“A person shall be guilty of an offence:

- (a) if he publicly calls for or incites to hatred, intolerance, discrimination or violence against persons or group of persons distinguished by color, race, ethnic or national origin or religion;
- (b) if he insults persons or group of persons, holds them up to contempt or slanders them on account of the distinguishing particularities mentioned in paragraph (a)

Article 2 provides:

- (a) Persons shall be guilty of an offence if he publishes or distributes written matter, which is aimed at achieving the effect referred to in Article 1.

(b) “Written matter” includes any writing, sign or visible representation.

Article 4 provides:

Organizations whose aim or activities fall within the scope of Articles 1 and 2 shall be prosecuted and / or prohibited.

Article 5 provides:

- (a) A person shall be guilty of an offence if he publicly uses insignia of organizations prohibited under article 4.
- (b) "Insignia" are in particular, flags, badges, uniforms, slogans, and forms of salutes."⁸¹

The definition of the crime of incitement to racial hatred is very broad. The European Statute can be said to reveal the sincere concern that the Council of Europe has towards the problem of group defamation. The model statute is an effort by the Council of Europe to encourage its members to fulfil their obligations under Article 4 of the Racial Discrimination Convention.

The offence under the model law does not require violence or breach of peace as an element of the offence. Incitement is an independent offence that may be committed simply through making racially defamatory or insulting statements. The actor need only be judged from the objective circumstances as having had the intent to stir up racial or ethnic hatred. The model law would punish not only the libelous or slanderous, but derogatory and insulting speech as well. Accordingly, international legal action against group defamation has been widespread because of its inherently inciteful and socially destructive nature. The proscription of such speech is as provided by Article 4 of the Racial Discrimination Convention.

It is due to the uniquely rich experience in America as regards group defamation that it was of necessity to critically analyze its group defamation laws. In my view, the American group defamation statutes are the most developed and the American system has generated a more extensive jurisprudence than any other jurisdiction. Its importance therefore lies in the fact that it can be used as a source of laws that will be enacted to form our own model statute dealing with group defamation.

END NOTES

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- 23 Ibid. at 15.
- 24 R.Bark, Neutral Principles and Some First Amendment Problems. 47 Indiana Law Journal 1. 27, 30 (1971-72).
- 25 Ibid.
- 26 Ibid. at 20.
- 27 Ibid. at 24.
- 28 Ibid.

- 29 Rosenblatt v. Bear, 383 U.S. 75, 86 (1966). "Society has a pervasive and strong interest in preventing and redressing attacks upon reputation." Sullivan, 376 US 254 (1964). Konigsberg, 366 US 36 49-81.
- 30 J.D Eaton, The Law of Defamation, 61 V.L.R. (1975). Shakespeare commented on libel on this manner :
- "he who steals my purse steals trash; its something, nothing; it was mine its his, and has been slave to thousands; but he that filches from me my good name robs me that which not enriches him and makes me poor indeed."*
- 31 Othello Act III scene iii (Stevens ed. 1982.)
- 32 249 U.S. 47 (1919).
- 33 Ibid.
- 34 249 U.S 204 (1919).
- 35 249 U.S. 211 (1919).
- 36 249 U.S. 616 (1919).
- 37 341 U.S. at 524-25.
- 38 366 U.S. 36, 49-51.
- 39 E. Durkheim, Punishment and Responsibility (1969).
- 40 343 U.S. 250 (1951)
- 41 Ibid. at 253.
- 42 24. P. 948 (Kan. 1890).
- 43 258 N.W. 525 (Minn.1935).
- 44 R.D.Sacks and S.S Baron.: Libel, Slander and Related Problems (154, 159, 2 ed. 1994).
- 45 B.L Zelenka and T. Sky, Staff House Committee On the Judiciary, 88th Congress Report on Proposed Group Libel Legislation cited in Fordham Law Review, 653 (1966).
- 46 Ibid. at 10
- 47 Ibid. at 11
- 48 Supra note 35
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CHAPTER IV

GROUP DEFAMATION IN THE COMMONWEALTH: BRITISH, CANADIAN, INDIAN, AND NIGERIAN LAW.

4. Introduction

Great Britain, Canada, India and Nigeria are four Common Law nations that share the same reverence for the principle of freedom of expression. Great Britain has no formal constitution; the constitutional law is enshrined in numerous legal documents. It consists of British political practice, custom, and usage.¹ The constitutional jurisprudence includes specific principles known and accepted by those who participate in the legal system.² The right to Freedom of speech is protected in several legal instruments: the Magna Carta of 1215, the 1512 Privilege of Parliament Act, the 1689 Bill of Rights and the 1911 Parliament Act.² The Canadian Charter of Rights and Freedoms protects freedom of speech and press in article 2 as fundamental rights³. Article 19 (1) (a) of the Indian Constitution provides that "all citizens shall have the right to freedom of speech and expression."⁴

Article 38 (1) of the 1989 Nigerian Constitution provides that "every person shall be entitled to freedom of expression including freedom to hold opinions and to receive and impart ideas and information without interference."⁵ However, none of these conceptions of free expression is unconditional in character. This fact is evident since Great Britain, Canada and India have promulgated legislation regulating group defamation or speech that incites racial hatred. Also, it has been suggested that a group libel action is cognizable under the Nigerian sedition law. Moreover, article 1 of the Canadian Charter of Rights and Freedoms allows "demonstrably justifiable" reasonable limitations on freedom of expression.⁶ Article 19 (2) of the Indian Constitution specifically provides for "reasonable restrictions" on freedom of speech.⁷ Article 43 of the Nigerian Constitution allows restrictions on free expression for the purpose of protecting the nation (e.g. public safety, order and morality).⁸

Great Britain, Canada and India are democratic nation – states that have profound respect for freedom of expression. They have seen fit to legislate specifically against group defamation. To protect the market place of ideas from rotten produce, they have taken the courageous step of legally proscribing racial defamation or speech that incites racial hatred. The legislation protects the naïve, innocent, or ignorant consumer who might well purchases such “rotten fruit” in the market place of ideas. The essence of such an act in Canada, U.K, U.S.A is to protect racial minorities who have experienced decades of systematic racial discrimination. In the case of India, Nigeria, and Kenya it is to protect against tribal prejudice.

An examination of the operation of group defamation or racial hatred statutes in these countries will prove their statutes are not destructive of free expression or the democratic way of life, as the opponents of group defamation statutes have tended to allege. A review and discussion of the Nigerian Sedition Laws (Kenyan law has similarities to this Nigerian law but with exception of certain provisions) will reveal the potential for utilizing this law to control group defamation in the Nigerian Republic.

4.1. Group Defamation Laws in Great Britain: The Race Relations and Public Order Acts.

Presently, group defamation and language that incites racial hatred are controlled by sections 17-28 of the Republic Order Act of 1986. However, prior to the enactment of the public order act of 1986, there were several statutes that proscribed group defamation and incitement to racial hatred. These included the Race Relations Acts of 1965, 1968 and 1976, and the Republic Order Acts of 1936 and 1963. Prior to the passage of the Race Relations Acts of 1965, there existed common law precedents supporting an action for group libel based on race. Statutes penalising *scandalum magnation*, or libel among high officials and peers of the realm were promulgated during the reigns of Edward 1 (1307-27) and Richard II (1377-99) ⁹. Although these

laws were repealed in 1888, their purpose was to protect the public peace by preventing rumours and defamatory falsehood "whereby discord or slander may grow between the Queen or King and her/his people or the great men of the realm..." One statute provided: "Spreading false news: Everyone commits a misdemeanour who cites or publishes any false news or tales whereby discord or slander may grow between the Queen and her people or the great men of the realm (or which may produce other mischiefs.)" ¹⁰

Queen Elizabeth I punished this form of defamation or seditious libel with the loss of an ear for spoken words and the loss of sight for written words. "The seditious laws made it a criminal act" to provide feelings of ill will and hostility between different classes of His Majesty's subjects." ¹²The oft cited case of the King & Osborne, ¹³ illustrates the common law action for group defamation. In this case the defendant was tried and convicted for publishing a libellous paper against Portuguese Jews who had arrived in England. The Libel alleged the Jews had burned to death a mother and a child whose father was a Christian. As a result of this defamation, some Jewish immigrants were attacked and beaten by mobs in the city; others were threatened with death. The court held that the defendant had published a libel that "tended to raise tumults and disorders among the people, and inflame them with a spirit of universal barbarity against a whole body of men, are guilty of crimes scarcely practicable, and totally incredible." ¹⁴ The court declared that when a group is the victim of libel, every individual of the class is "stained by the sweeping brush".

However there were two ostensibly conflicting reports of the case, as one judge interpreted the case as a group defamation action while the other reasoned that the action of the defendant was incitement to breach of peace. The prosecution of one, James Count, can be said to be the medium out of which the offence of incitement to racial hatred grew. In July 1947, two British sergeants were murdered by the Irgun gang of Palestine. Civil disorder and riots swept through Great Britain. In certain sections of the country, there were demonstrations and mob violence against the

people. The British legal system meted out firm justice to those who had participated in “un-British and unpatriotic acts” of violence, looting and vandalism. ¹⁵

James Count, the editor of the Morecambe and Heysham Visitor, published an editorial entitled: “*Rejoice Greatly*”. The insightful and anti-Semitic statement in the article read:

“On the morning of the announcement of “another catalogue of pains and penalties” there is very little about which to rejoice greatly except the pleasant fact that only a handful of Jews despoil the population of the Borough! The foregoing statement may be regarded as an outburst of anti-Semitism. It is intended to be and we make no apology neither do we shirk any responsibility nor repercussions... If British Jewry is suffering today from the righteous wrath of British citizens, then they have only themselves to blame for their passive inactivity. Violence may be the only way to bring them to the sense of their responsibility to the country in which they live.” ¹

James Count was prosecuted at Liverpool Assizes for the seditious libelling of the Jewish faith, and Jewish people in Britain. He conceded at the trial that he intended the writing to be pejorative and offensive to Jews. Nevertheless, he asserted his purpose was not to incite breaches of the peace or violence against Jews.

The judge, prosecutor, and defence counsel agreed the prosecution had to prove that Caunt had intended to create breach of the peace or stir up racial disorder. ¹⁷ The verdict was in Caunt’s favour because he denied any intent to promote disorder or stir up racial hatred between the classes people in Britain. No violence had occurred as a result of Caunt’s editorial. Lester and Bindman contend that the test used by the Court in the Caunt case was too narrow. It was a subjective test. It should have been an objective test as explained in R-v- Aldred ¹⁸ Because of the failure to convict Caunt, British Jews constantly petitioned successive English governments to legislate against incitement of racial hatred, ridicule, and contempt without regard to intention

to promote breaches of the peace.¹⁹ 1965 proved to be the year of deliverance when the Race Relation Act was passed by Parliament.

Another common law criminal offence invoked to stem the flow of group defamation was “the offence of effecting a public mischief.”²⁰ It has been defined as “all offences of a public nature... and all such acts or attempts as tend to the prejudice of the community.”²¹ Arnold Leese of the Imperial Fascist League was prosecuted under this doctrine for publishing an article which claimed Jews had slaughtered some children as part of their religious ritual.²¹ The Jews did slaughter cattle as part of their religious rites. Leese was accused of “inciting a public mischief by rendering His Majesty’s subjects of the Jewish faith liable to suspicion, affront and boycott.”²³ The offence of public mischief was broad. It included actions that tended to stir up racial prejudice without regard to whether a breach of the peace was likely to occur or whether such a result was intended.²⁴ Section 5A of the Public Order Act as amended in 1963 and 1976 was another law that had been invoked to prevent group libel or incitement to racial hatred. Section 5A was titled “Incitement to Racial Hatred” It provided in part:

“(1) A person commits an offence if

- (a) he publishes or distributes written matter which is threatening, abusive or insulting; or
- (b) he uses in any place or at any meeting words which are threatening, abusive, or insulting in a case where having regard to all the circumstances, hatred is likely to be stirred up against any racial group in Great Britain by the matter or words in question.”²⁵

Under the old section 5 of the Public Order Act, the provision did not specifically prohibit incitement to racial hatred. The section was amended in 1976 by section 70 (1) of the Race Relation Act of 1976. The section appears above in its amended form. However, the section in its unamended form was used to prosecute cases involving incitement to racial hatred and group defamation. One conviction involved insulting and defamatory words used by a speaker in London’s East End who had in an open

air meeting used the language “dirty, mongrel, Russian Jews...are the lice of the earth and must be exterminated from the national life”²⁶ The speaker was sentenced to pay fifty pound for six months and faced imprisonment if he did not cease and desist in his behaviour.²⁷ . Other prosecutions were brought resulting in a significant decrease in Fascist propaganda against Jews and anti-fascist groups. One reason for the effectiveness of section of section 5 was that an offence was committed if the defendant intended a breach of the peace by his conduct or if his conduct was likely to cause violence²⁸ . Therefore, it would not be a defence that the accused did not intend to provoke violence where the statements were of a violence- producing nature or language likely to cause a breach of the peace. In 1963, the Public Order Act of 1936 was applied against the National Socialist Movement in the case of Jordan –v- Burgoyne.²⁶ A speech was delivered by John Tyndall at a public meeting in Trafalgar Square. Order had to be restored by the police several times at the rally attended by about 5,000 people. John Colin Campbell Jordan, the leader of the National Socialist Movement, caused even more disorder by making the following statement:

“More and more people everyday... are opening their eyes and coming to say with us: Hitler was right. They are coming to say that our real enemies, the people we should have fought, were not Hitler and the National Socialists of German but world Jewry and its associates in this country...”

On hearing these words the crowd surged towards the speaker’s platform, and police stopped the meeting. The crowd was dispersed and twenty arrests were made “ for offences involving breaches of the Queen’s peace. The crowd contained Jews, communists and supporters of the campaign for nuclear disarmament. The issue with which the High Court reckoned was whether the words of section 5 –“whereby a breach of the peace is likely to be occasioned” – would properly be construed to mean likely to lead to a breach of the peace by the ordinary citizen in the circumstances of the case. The lower court had decided that though many of the words were highly insulting, they would not lead a reasonable man to commit a breach of the public order. Lord Parker refused to accept the conclusions of the lower court:

“...Be that, however, as it may there is no room, in my judgement, for any test whether any member of the audience is a reasonable man or an ordinary citizen...this is a public order act, something to keep the public order in public places ... if words are used which threaten, abuse or insult – all very strong words – then the speaker must take the audience as he finds them, and, if those words to that audience, or that part of that audience, are likely to provoke a breach of the peace, then the Speaker is guilty of the offence.”³⁰

Moreover, Lord Parker rejected the free speech claim of Jordan Freedom of speech gave the individual the right to disagree with opponents and to criticise their position, but not to threaten, abuse or insult the opponents in such a fashion as to create the potential for breaches of the peace.³¹ The Public Order Act of 1936 preserved “ the delicate balance between public order and personal liberty.”³² It was invoked to control language that incited racial hatred and that was often racially defamatory.

Even before the passage of the Race Relations Act of 1965, English Law was capable of dealing with the problem of group defamation and language that incited racial hatred. The Race Relations Act of 1965 created a new offence of incitement to racial hatred. The 1965 statute was broader than those group defamation statutes in the United States of America. The British Statute not only prohibited libellous or slanderous communications, but it punished language inciteful of racial hatred. Section 6 of the Race Relations Act of 1965 was a prophylactic measure against breaches of the peace that resulted from inciting racial hatred. Section 6 (1) of the Act provided:

“A person shall be guilty of an offence under this section if, with intent to stir up hatred against any section of the public in Great Britain distinguished by colour, race or ethnic or national origins,

- a) he publishes or distributes written matter which is threatening , abusive or insulting; or
- b) he uses in any public place or at any public meetings words which are threatening, abusive, being matter or words likely to stir up hatred

against that section on grounds of colour, race or ethnic or national origin." ³³

The requisite *mens rea* under the statute was the intention to stir up hatred by publishing or uttering words that was racially defamatory or inciteful of racial hatred in a public settings. ³⁴ The cause was not actionable without this intent. This can be said to be an objective test. The mere fact that a person says he did not intend to stir up racial hatred would not absolve him. If his behaviour was such that a reasonable person would conclude he intended to stir up hatred, the defendant had fulfilled the *mens rea* requirement.

In addition to the *mens rea* requirement, the language had to be likely to stir up racial hatred. Therefore, the *actus reus* consisted of oral or written words that were likely to stir up hatred against a particular segment of the community on the basis of race, colour, ethnic or national origins. ³⁵ Those who were convicted under the act were fined and / or imprisoned for six months to two years. Prosecution under the statute could be initiated only by the Attorney General or with his/her consent. This provision must have been included to prevent opening the floodgates to frivolous lawsuits. Legitimate debate and speech were protected. This requirement has been severely criticised because it has been shown to limit the number of cases filed in court. Some observers contend that minimal positive results accrued to the British Community. Regularly published journals and magazines of racist organisations became moderate in tone. These organisations would otherwise have been subject to prosecution under the statute. Circulation of such journals became severely restricted by law to members of racist organisations or those desiring to receive materials as members of private book clubs. The outdoor gatherings of these organisations slowly disappeared, and the owners of halls became cautious about allowing such organisations to use their facilities due to fears of civil disorders and property damage. ³⁶

The case law under the Race Relations Act of 1965 is sparse, but significant. The first case was prosecuted in 1967. R-v- Britton³⁷ the defendant (Britton) was convicted of the offence of distributing racist literature with the intent to stir up racial hatred. The victim, Mr. Bidwell, a member of parliament for Southhall, was about to take his dog for a walk one Saturday morning when he heard a loud crashing noise. When he went to his front door, he found broken glass panels and saw a young man fleeing the scene of crime. He chased the man and caught him. He then took the young man back to his house. Stuck on his door was a poster bearing large black letters that read: "*Blacks not wanted here*". A big hand was depicted on the poster along with the words; "*Stop, stop further immigration*". The poster was signed by the Great Britain Movement. Four or five pamphlets had been left on the porchway along with a beer bottle, around which had been wrapped another leaflet. Britton complained to the police that Bidwell was the one responsible for bringing Blacks to Britain. In Britton's pocket was found a leaflet with the question, "*Do you want a black grandchild?*" This leaflet was never distributed. On appeal, the lower court's conviction was reversed, by holding that there was no distribution within the meanings of the Race Relations Act. The Act Required "distribution to the public at large or to any section of the public not consisting exclusively of members of an association of which the person....distributing is a member. The defendant was perhaps guilty of publication, but he was not charged with publication. Vincent Carl Morris, a member of the National Socialist Movement, was found guilty at Leek's magistrate court of "inciting two youth to distribute racist leaflets". He was convicted and sentenced to six months in prison.³⁹ Ironically, section 6 of the Race Relations Act of 1965 was also invoked to prosecute Blacks. This is called "the boomerang effect" and its unavoidable for it supports the principle of equality before the law. In the case of R v Malik⁴⁰, an appeals Court upheld the defendant's conviction for using insulting, threatening and abusive words that were intended to stir up racial hatred. Malik was head of the Black Muslims and leader of the Racial Adjustment Action Society. He made a speech on July 24, 1967. He said:

"White people are vicious and nasty people... coloured people should not fear white monkeys ... I saw in this country in 1952 White savages kicking black women.

If ever you see White man lay hands on a black woman, kill him immediately. If you love your brother and sisters, you will be willing to die for them.”⁴¹

During the same month of Malik’s prosecution five other members of the Universal Coloured Peoples Association were prosecuted under section 6. The incident occurred in Hyde Park. Alexander Watson, one of the five said:

“Anglo- Saxons are the number one enemy of the human race and responsible for racialism. Each time we kill a white man in Africa, they say we are going back to the jungle, but is not England a jungle?”⁴²

They were fined a total of two hundred and seventy pounds. ***R-v-Hancock***: the action was brought against four members for the Racial Preservation Society. The organisation purported to be concerned about the preservation of the White race. The organisation published and distributed the R.P.S. Southern News. The Southern News was distributed to Mailboxes in Eastern Grinstead. The copy of the journal chosen for prosecution discussed the danger of miscegenation, characterised politicians as race levellers, and made claims concerning genetic differences among the races. The writers claimed white Britain was threatened by liberals, communist and coloured immigrants. The defendants though were acquitted of all charges. Although the victory appeared to be for the Racial Preservation Society, the application of the law in this instance proved that it need not infringe freedom of speech and press, if applied fairly.

Between the year 1965 and 1976, twenty prosecutions were brought by the Attorney General pursuant to the race Relation Act of 1965. Of these prosecutions four were filed against blacks and sixteen actions were instituted against whites⁴⁴ Chapter 74, section 70 of the Race Relations Act of 1976 permitted conviction of a speaker, using oral or written words, with proof that “threatening, abusive or insulting” speech of publication of words “having regard to all circumstances” was likely to stir up hatred against any racial group in Britain.

Unlike the 1965 Act, the speaker did not have to intend to incite racial hatred as a condition precedent for review and examination of public order law.⁴⁵ The Public Order Act of 1986 was the result of a seven year review and examination of public order law⁴⁶. Part III of the Public Order Act of 1986 (hereinafter "the 1986 Act") codifies the new law governing the offence of incitement to racial hatred in its many forms.⁴⁷ Section 17 of Part III defines racial hatred as hatred against a group of persons in Great Britain defined by reference to colour, race, nationality, (including citizenship) or ethnic or national origins. Section 18 criminalizes the use of threatening, abusive or insulting words or behaviour of a racially derogatory character. The section proscribes the displaying of written material that is racially threatening, abusive or insulting. Words, behaviour and display of written material must be used with the intent to stir up racial hatred or such words, behaviour or written material must be likely to stir up racial hatred. Section 19 proscribes the publishing or distributing of written materials that is threatening, abusive or insulting if it is intended or likely to stir up racial hatred. Section 20 proscribes the direction or presentation of the public performance of a play that involves threatening, abusive or insulting words, if such action is intended or likely to stir up racial hatred. Section 21 prohibits the distributing, showing, or playing of a recording of visual images or sounds that are intended or likely to stir up racial hatred. Section 22 makes it a criminal offence to broadcast or to include in a cable program service a programme involving threatening, abusive, or insulting visual images or sound where such conduct is intended or likely to stir up racial hatred.

Section 23 creates the offences of possessing racially inflammatory material. The racially inflammatory material may be written or a recording of visual images or sounds. If the material is threatening, abusive, or insulting, and the individual possesses it with a view of displaying, publishing, distributing, broadcasting, or showing it, the person is guilty of an offence. However, the possessor must have the intention to stir up racial hatred or the stirring up of racial hatred is likely or must be likely by virtue of possession. Section 26 (1) states that part III of the 1986 Act is not applicable to a fair and accurate report of proceedings in parliament. Section 26 (2)

exempts any fair and accurate report of proceedings, publicly heard before a court or judicial tribunal ... where the report is published contemporaneously with the proceedings or... as soon as publication of the report is reasonably practicable and lawful. The concept of the Attorney General is required for the initiation of legal action.⁴⁸

The penalty for violating part III is a maximum of two years imprisonment, a fine or both. An individual subject to summary conviction may be sentenced to a maximum of six months imprisonment, a fine or both.⁴⁹ Corporate liability is also provided for under part III of the 1986 Act. A number of people have been tried and convicted by virtue of part III of the 1986 Act. In 1988, a soapbox orator was convicted under the 1986 Act for making a racist speech and distributing racist literature.⁵⁰ Another defendant was convicted and fined 100 pounds for placing Neo-Nazi stickers on lampposts.⁵¹

In 1990, Major Galbraith, a member of the Conservative party in Cheltenham, described one John Taylor, a black Parliamentary candidate, as a "Bloody Nigger". He was charged under the 1986 Act, but died before trial.⁵² Bindman reflects:

"The series of attempts in the UK to create an effective legislative framework in the hope of curtailing the spread of racist propaganda and the activities of a racist organisation has achieved little in practice. Doubtless, enforcement has been inhibited by anxieties about what could be presented as invasion of the right to freedom of speech. But it is beyond argument that freedom of speech is not an unqualified human right; it yields ... to the right not to be defamed. How much greater is the right of racial groups to be protected from vilification which denies their equal humanity."⁵³

It can be seen that the reform of the incitement to racial hatred law, as has always been said, the continued requirements of the Attorney General's consent for prosecution will prevent the control of racially defamatory speech in Great Britain.⁵⁴ What is of importance though in my view is the strong symbolic significance of Great Britain's legal effort to stem the tide of racial intolerance through the abuse of

freedom of speech. The 1986 Act attests to the serious regard and respect the people of Great Britain have for the human rights of minorities. As Card observed:

“ In our multiracial society, the time may have come when obviously racist words are too disruptive of social harmony, both short and long term, to be tolerated by the criminal law despite the infringement of freedom of expression which an extension of the law would involve.⁵⁵

Thus Great Britain has made a commendable effort to create an effective and comprehensive set of laws resulting from defamation or speech that incites racial hatred.

4.2 Group Defamation in Canada: Section 281 of the Canadian Criminal Code (Chapter 46, S. 218-320), Hate Propaganda

In 1970, Bill -3 C became section 281 of the Canadian Criminal Code. The bill amended the code by making it a criminal offence to communicate racial propaganda that incited racial hatred or defamed a group.⁵⁶ The historical roots of group defamation in Canada date back in 1934. The province of Manitoba enacted a group libel statute called the Marcus Hyman Law⁵⁷ In October 1934, a cause of action was filed against the Canadian Nationalist, which in its October 30, 1934 edition published two libellous articles: “ The Murdering Jew, Jewish Murder” and “ The Night of Murder... secret of the Purim Festival.” An injunction was issued prohibiting the defendants from publishing libellous statements against the Jewish race or members of the Jewish race or members of the Jewish faith.⁵⁸ The present group defamation to the Canadian Criminal Code is the result of the appearance in the 1950s and 1960s of extreme right wing organisation that were anti-Semitic, anti-black and anti-Catholic. Efforts to pass legislation against group defamation and incitement to racial hatred were spearheaded by the Canadian Jewish Congress. Despite its persistence, including annual requests to the legislature, success was not forthcoming during the 1950s.⁵⁹ During 1963 and 1964, an organisation of Neo-Nazis in Toronto and Montreal began a campaign of racial hatred against Jews in particular. The

organisation's members distributed racially defamatory leaflets and brochures. The Canadian Jewish Congress decided to make its campaign a public affair by seeking the support in the Non-sectarian public for legislation to curb the dissemination of racially defamatory literature. These efforts were fruitful. The so-called Cohen Committee of McGill University School of Law, which submitted a volume of recommendations consisting of 327 pages.⁶⁰ The committee recommended legislation to control racial and religious hate propaganda. The report recommended an incitement to racial hatred statute that would penalise:

- “(a) advocacy or promotion of genocide;
- (b) incitement to hatred or contempt against racial, ethnic, or religious groups where such incitements is likely to lead to a breach of peace; and
- (c) wilful promotion of hatred or contempt against racial or religious groups”

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The opposition to this put forward the usual argument on freedom of expression being infringed. The bill was finally approved by Senate in 1969 and by the House of Commons in 1970 to the chagrin of the press.⁶² Supporters of the bill realised it would not eliminate much of hate propaganda, but the law would serve as a policy statement by the government disapproving defamatory propaganda.⁶³ The bill became section 281 of the Canadian Criminal Code entitled “Hate Propaganda”. The Hate Propaganda statute now appears in chapter 46 of the Canadian Criminal Code, sections 318-320. This statute was applied in the case of *Regina-v Buzzanga and Durocher*⁶⁴ The defendants were indicted for wilfully promoting hatred against an identifiable group: the French Canadians. The defendants were French Canadian sympathisers interested in building a French language secondary school in Essex Country. The majority of the local school board opposed its construction. The defendants charged that the Essex country community was prejudiced against the French minority. Racial prejudice, not economics, was the reason for opposing the school. The defendants contended that the handbill was a satire intended to create a furore that would compel the government to act on the French language secondary school question. They denied any intention to stir up or promote racial hatred. The

defendants were convicted by the trial court of the wilful promotion of racial hatred. The trial judge defined wilful as intentional conduct contra-distinguished from accidental conduct. On appeal, the lower court's decision was reversed. The appeals court stated that the issue in the case was what "mental attitude" must be established to constitute an intent to promote racial hatred.

The Supreme court of Canada has upheld the constitutionality of Canada's hate propaganda law in Regina-v-Keegstra.⁶⁵ The defendant, a social studies teacher in Alberta was convicted of the offence. He taught students anti-Semitic ideas. Keegstra described Jews as "Money-Loving" and "Child-Killers". He told students that Jews invented the Holocaust. Another case Regina -v- Andrews⁶⁶ involved two members of the Nationalistic Party of Canada, a white supremacist organisation, which preached the inferiority, uncleanness and propensity for violence of "non whites and non-Aryan groups". Andrew and Smith who were convicted were responsible for publishing and distributing the organisation's bi-monthly magazine called the National Reporter. Section 319 (2) of the Canadian Criminal Code was declared constitutional though it impaired freedom of expression guaranteed by section 2 (b) of the Canadian Charter of Rights and Freedoms. The restriction on freedom of expression was deemed to be a reasonable governmental limitation. Sandler reflects:

"The harms associated with hate propaganda are so significant that they outweigh the limited entrenchment upon freedom of speech that the section entails. As the court noted, there are two types of injury caused by hate propaganda first, there is harm done to members of the target group. Persons belong to racial or religious group under attack are humiliated and degraded. That derision, hostility and abuse encouraged by hate propaganda have a severely negative impact on the individual's self-worth and acceptance...Secondly, hate propaganda can influence society at large ... attracting individuals to its cause and in the process, creating serious discord between various cultural groups and society."⁶⁷

The consensus is that the Canadian group defamation statute will not eliminate most scurrilous hate propaganda. However, most believe it will improve the racial climate. As Cohen writes:

“ An argument frequently used is that since the law will not eliminate racial hatred why enact it? The same consideration is never made when dealing with laws against theft, murder or physical assault, all equally unworkable in the sense that committing the offences has not vanished simply by being outlawed. As the point is made as it used to be made when anti-discrimination laws were first breached, since it cannot eliminate hatred why try the legislation? This of course ignores the fact that the target is not so much the emotion of hatred as the external projection of it upon others. ⁶⁸

4.3 Group Defamation in India: Section 153a of the Indian Penal Code.

Section 153A of the Indian Penal Code ⁷⁰ has been characterised as a law that prohibits class defamation. It clearly prohibits stirring up of racial hatred, as well as other forms of hatred involving conduct destructive of the public tranquillity. The law was passed to preserve order and co-operation among various segments of the Indian citizenry. Sastry and Singh comment:

“...The section was created to effectively check fissiparous communal and separatist tendencies and to secure fraternity assuring the dignity of the individual and the unity of the nation.” ⁷¹

At one time section 153A excluded honest criticism without malice from its proscriptions. This exclusion was deleted on the ground that, no matter how honest or non-malicious the criticism, if the law was to “effectively check *fissiparous* communal and separatist tendencies”, no action prejudicial to maintaining communal harmony or disruptive of public tranquillity could be expected from the statutes operation. ⁷² It was once thought that section 153A was an unconstitutional infringement of freedom of expression. However, article 19(2) of the Indian

Constitution saved the provision from unconstitutionality.⁷³ This provision allows the Indian government to impose reasonable restrictions on freedom of expression in the interest of public order.⁷⁴ Cases prosecuted under sections 153A have not been numerous. In Zaman, A.M.A. -v- Emperor,⁷³ the defendant wrote an article that criticised British imperialism and the rulers of India. The author charged Britain and India were exploiting and oppressing the protectorate in their respective countries. The court held that there was no promotion of hatred among classes of people in India. In the case of Munishi Singh -v- Emperor⁷⁶ the defendant made a speech accusing the Indian government, the Zamindars and the Talukdars of Oudh of causing all the evils, misfortunes, and sufferings in the country. The court held that the defendant intentionally promoted hatred or feelings of enmity among the Kisans, the Zamindars and the Talukdars. Another case Kali Charan Sharma-v-Emperor, involved a Hindu who wrote an extremely critical book ridiculing the Prophet Mohammed as part of a propaganda effort by a group of individuals. The court held that the book promoted feelings of hatred and enmity between Hindus and Mohammedans.

A problem may be seen to arise in India. The reason being that most of the actions litigated in India have come as a result of the defamation of religious groups or classes of people, as opposed to the defamation of racial groups. Nevertheless, since most groups, religious, and classes are made up largely of individuals from certain specific ethnic groups, it is sometimes difficult to determine whether the defamation or hate propaganda was religiously or ethnically motivated. There is a paucity of recent cases under section 153A of the Indian Penal Code.

4.4 Group Defamation in Nigeria: Chapter 7 of the Criminal Code and Group Defamation.

The Federal Republic of Nigeria gained its independence from the colonial rule of Great Britain on October 1, 1960. Nigeria is a common law jurisdiction and much of English law has been received into Nigeria. The organisational structure and

substantive content of the 1989 constitution of Nigeria are patterned on the constitution of the United States. The substantive content of the document reflects at least a proper commitment to human rights. This commitment is memorialised in articles 32 through 44 of chapter IV of the Nigerian Constitution.⁷⁸

Chapter IV of the constitution is entitled "Fundamental Rights"⁷⁹ Among the rights contained therein is the right to freedom of thought, conscience and religion,⁸⁰ and the right to freedom of expression and the press⁸¹. The latter is codified in article 38 of the constitution. However, article 43 reveals that the right of free expression is not an absolute right. Article 43 enumerates the conditions justifying derogation from fundamental human rights. Chapter 10 of the laws of the Federation of Nigeria contains the African Charter on Human and Peoples' Right ratification and Enforcement Act. Chapter 10 constitutes the implementing legislation, which brought the African Charter on Human and Peoples' Rights promulgated by the Organisation of African Unity into force at the domestic level in Nigeria. The charter was unanimously adopted by the Council of Ministers of the O.A.U in Banjul, Gambia in January 1981, before being subsequently adopted by the Heads of States and Governments at the Nairobi Summit in Kenya in July 1981. Freedom of expression is one of the many universal values found in the African Charter on Human and People's Rights at article 9. Article 27 on the other hand evidences the non-absolute nature of the African concept of free expression.

Though there is an honest regard for the sanctity of freedom of expression in Africa, the preceding discussion supports my contention that the character of free expression under Nigerian Law is non-absolute. Chapter 7 of the Federal Criminal Code Act of Nigeria is a specific legal restraint on freedom of expression in Nigeria. It prohibits sedition or undesirable publications. The law of sedition can be seen as the most important abridgement of freedom of expression under the Nigerian constitution. There is no specific law proscribing group defamation or incitement to racial hatred in Nigeria. Nonetheless some African scholars adhere to the position that group defamation or incitement to racial or group hatred might be controlled by instituting a

cause of action pursuant to the sedition law of the Federal Criminal Code Act. The prohibition in section 50 (2) (c) and (d) against promoting hostility and ill-will between different classes of people in Nigeria or raising discontent or disaffection among citizens in society, we can see, is broad enough to cover legal action against individuals or organisation who engage in group defamation that incites hatred or animosity among ethnic or religious groups. Although the Nigerian society is racially homogenous, there are over 300 ethnic tribes.⁸² Historically, the problem of ethnicity in Nigeria has been so serious as to precipitate civil wars. Social cleavages along lines of religion have often precipitated rioting among religious groups. Nigeria is therefore fertile soil for the growth of group defamation. The sedition law of Nigeria is remarkably similar to the new repealed seditious libel law of Great Britain discussed in the beginning of this chapter. As I earlier stated, the English sedition libel statutes have been used to prosecute group libel actions. Thus, the criminal sedition laws of Nigeria can be described as the most appropriate means of controlling group defamation based upon membership to an ethnic or religious group. One professor Oko endorses the use of the sedition law to stem the spread of group defamation or seditious language used to foment discord among ethnic groups.⁸³ The Nigerian sedition law has been upheld as constitutional by the Nigerian supreme court⁸⁴. As for a civil remedy, Nigeria has adopted the common law rule which does not allow civil actions for group defamation. The common law rule is that an action for defamation will not be maintainable when the defamatory words, oral or written, refer to a class or body of individuals generally. Each individual must demonstrate that the statement refers to or is of and concerning him or her specifically. This is the common law doctrine of colloquium. But there is no reason why a Third World State or Nigeria in this instance, should rigidly adhere to a colloquium rule promulgated by the Britons for their own nation, which has for most of its history been ethnically homogenous. Rules of law must change as society changes. No blind adherence to the doctrine of *stare decisis* should reign supreme in the Nigeria legal order. The experience with religious and ethnic violence in Nigeria justifies a departure from the principle of colloquium. The principle of colloquium is a historic relic of an English society, which has now seen fit to avoid the rule by promulgating the public order of

1986 which proscribes language having a tendency to incite racial hatred. The unquestioning reception of this doctrine into the jurisprudence of Nigeria, an African Nation, can be best characterised as a by- product of colonialism. Accordingly a continued adherence to the colloquium principle is not justified and is inconsistent with the African system of jurisprudence.

The legal potential for proscription of group defamation exists under Nigerian law. The Nigerian governmental position leaves little doubt that group defamation based on race, ethnicity or nationality can be prosecuted under the Nigerian sedition laws.

END NOTES

1. For a history on the British legal system see: The History of the British Legal System, Jordan C. M (1994).
2. United Kingdom Constitution, Constitution of the Countries of the World (A.P Blaustein and G.H Flanc edition 1992).
3. Ibid.
4. Constitution Act, 1989 (79), schedule B, Canadian charter of Right and Freedom, article 2, ibid.
5. The Indian constitution, Ibid. article 19 (1) .
6. The Nigerian constitution, article 32 (1), Ibid.
7. Supra notes 3, at article 1.
8. Supra notes 4, at article 19 (2). This provision provides:

“ 19(2), Nothing in sub-clause (4) of this clause (1) shall affect the operation of any existing law, or prevent the state from making any law, in so far as such law imposes reasonable restriction on the right conferred by the said sub-clause in the interest of sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency, or morality or in relation to contempt of court, defamation, or incitement to an offence.”

9. Supra note 5, at article 43.
10. Of slanderous Reports, 1275 (De scandalis magnatum), 3 Edw. . 20, Ch. 34 (Eng.)
reprinted in 1 statute of the realm 35 (1963).
11. Ibid.
12. F.R. Scott, 166, Publishing false News, 30 can. B. Rev. 37, 39 (1952).
13. Ibid.
14. 2 Barn. 166 , 94 Eng. Rep. 425 (K.B. 1732).
15. Ibid.
16. A Lester and G. Bindman, Race and law in Great Britain 345-46 (1972).

CHAPTER V

GROUP DEFAMATION IN KENYA.

5. Introduction

In this chapter, I will endeavour to look at whether it is possible to prescribe group defamation in Kenya i.e. are there laws that can be used to prescribe group defamation? Kenya is a commonwealth country hence a common law jurisdiction. It got its independence from Britain in 1963. Therefore it has a colonial history similar to Nigeria's. Much of our laws were received from Britain. Kenya laws on sedition were in fact a copy of the British sedition laws. In the previous chapter I have illustrated that it is possible to proscribe group defamation in Nigeria through their sedition laws. In Kenya the sedition laws that were found in the Penal Code Cap 63 laws of Kenya were repealed i.e. sections 56-58.¹ Therefore, the question to ask is; could it have been possible to proscribe group defamation through the now repealed sedition laws?

The organizational structure and substantive context of the Kenyan constitution ("hereinafter the Constitution") is such that it accommodates human rights in its provisions. The substantive part of the constitution reflects at least a paper commitment to human rights². This is stated in chapter V of the Constitution. In addition to this paper commitment it should provide for an effective mechanism for the protection and enforcement of human rights. This chapter is titled "Protection of Fundamental Rights and Freedoms of the Individual". These fundamental rights and freedoms include right to life,⁴ right to personal liberty⁵, protection from slavery and forced labour,⁶ protection from inhuman treatment,⁷ protection from deprivation of property,⁸ protection against arbitrary search and entry⁹, provision to secure protection of law¹⁰, protection of freedom of conscience,¹¹ protection of freedom of expression,¹² protection of assembly and association,¹³ protection of freedom of movement,¹⁴ and protection from discrimination on grounds of race¹⁵ among others.

Protection of freedom of expression is codified in section 79 of the Constitution. ¹⁶

Section 79 provides:

- (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive 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.

5.1 Freedom of Expression in Kenya – Is it absolute?

Section 79(2) however reveals that protection of freedom of expression in Kenya is not an absolute right. ¹⁸ Section 79 (2) enumerates the conditions justifying derogation from protection of this right. It states inter alia,

“(2) Nothing contained in or done under the authority of any law shall be held to be inconstant with or in contravention of this section to the extent the law in question makes provision-

- (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;
- (b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing disclosure of information received in confidence, maintaining the authority and independence of the courts or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or televisions; or
- (c) that imposes restrictions upon public officers or upon persons in the service of a local government authority, except so far as that provision, or as the case may be, the thing done under the authority thereof is shown not to be reasonably justified in a democratic society.¹⁹

Another section that deals with derogation is section 83 of the Constitution. It is titled “derogation from fundamental rights and freedoms.” It enumerates the conditions justifying derogation from fundamental rights.” It enumerates the conditions justifying derogation from fundamental rights and freedoms. It provides *inter alia* :

“83(1) Nothing contained in or done under the authority of an Act of Parliament shall be held to be inconsistent with or in contravention of section 72,76,79,80,81 or 82 when Kenya is at war and nothing contained in or done under the authority of any provision of Part III of the Preservation Public Security Act shall be held to be inconsistent with or in contravention of those sections is in operation by virtue of an order made under section 85.”²⁰

It can be seen that the Kenyan approach to the protection of freedom of expression is the non-absolute position. Freedom of expression is therefore not absolute. As noted herein there are those grounds or conditions that justify the derogation from this human right.

The above provisions of into supporting my dissertation that the character of freedom of expression in Kenya is non-absolute. Case law illustrating this assertion includes Koigi wa Wamwere vs A-G, Misc. Application No. 574 of 1990 and Stanley Munga Githunguri vs Republic, Criminal Application No. 271 of 1995. In Willy M. Mutunga vs Republic,(Nbi Misc. Criminal Application No.101 of 1982) Sachdeva, J stated:

“it is worth emphasising that section 70 of the constitution ...makes such right subject to respect for the rights and freedoms of others and for the public interest and again, subject to limitations designed to ensure that the enjoyment of the rights and freedoms of others or the public interest...”

This was restated in Republic vs Clement Muturi Kigano Misc. Criminal Application No.375 of 1995 the court here said

“ ...that constitution sections 70-86 are subject generally to the proviso under s.70 which states that to those rights and freedoms are subject to such limitations of that protection as are contained in those provisions to ensure we do not prejudice the

rights and freedoms of others or the public interest... it is now common ground that freedom under s.79 is not absolute and apart from s.70 there is also limitation imposed by s.79(2) of the constitution.”

Before proceeding to look at the repealed sedition laws and whether such could have been used to proscribe group defamation in Kenya, I will proceed to look at the problem of ethnocentrism or the challenge of ethnicity.

5.3 The Challenge of ethnicity: Ethnocentrism in Kenya.

We cannot deny where we come from. Our cultures have many positive things that should be affirmed. A common language for instance, helps in creating unity and understanding among people and also assists in identity formation and social survival. But since we are humans, our cultures have become distortions that need to be checked hence the need for laws proscribing group defamation. Ethnocentrism is one such distortion. That is the practice of interpreting and evaluating behaviour and objects by reference to the standards of ones own culture rather than those of the culture to which they belong. This obsession with our ethnic background is unhealthy and especially when we beginning thinking that we are more superior than members of other communities. Ethnocentrism is a distortion that needs some form of check. It is a cultural myopia that has led to many conflicts all over the world including the ethnic clashes in some parts of our country, the genocide in Rwanda between the Tutsi and Hutus where more than one million people perished²² and also the ethnic cleansing and displacement of ethnic Albanians in Kosovo, among other conflicts in the former Yugoslavia²³ are only but some of the few examples of how evil ethnocentrism could be.

The currents of ethnocentrism run very deep and are manifested more widely in racism (prejudice against people of a different colour), tribalism (prejudice against people from different tribes), ethnicity (prejudice against people from different ethnic backgrounds) and xenophobia (fear and hatred of people from different backgrounds).

²⁴ Sometimes there is discrimination, domination, and isolation of people we do not

know. The roots of ethnocentrism begins in our history, cultural and traditions. In a bid to survive, people learn to protect themselves from outsiders but this should be no justification. Children are enculturated early in life and they are told who to trust and who is the enemy²⁵. Through stories and myths (e.g. America's Samba Litigation) children are fed with propaganda against other ethnic groups and grow up with discriminatory stereotypes against them. There is need to change our perspective of other people.

It is my assertion that group defamation is closely related to the ethnic/racial stereotypes that influence one's life when growing up. Further, no ethnic group has any genuine basis for pride. Our biases against other people of different ethnic backgrounds are wrong and have no basis. There is a lot to learn from other cultures but we may be so blinded by our own tribal loyalties that we fail to see the richness and beauty of diversity among different cultures. It is shocking in terms of the attitudes we sometimes have towards other people especially those we do not know or those from different ethnic communities. Sometimes the myopia of ethnocentrism, division and prejudice limits us from seeing beyond our immediate circumstances. We must therefore, rise above our ethnocentrism tendencies and learn to live together, irrespective of our ethnic backgrounds. If that was to happen, the need for group defamation statutes may not exist.

Between 1991-1995, Kenya has produced 250,000 internally displaced persons as a result of tribal clashes in Rift Valley, Coast and Western Provinces. This human displacement came about as a result of political events triggered by the introduction of the multi party system of government in 1991.²⁶ It is believed that the clashes were generated with the full support of the Kenyan Government as the main perpetrators of the tribes forming the coalition government, the Kalenjin and the Maasais. The policy behind the tribal clashes has its historic root in an attempt by the Kenyan Government to punish the tribes supporting the opposition parties and force them to leave the regions where they are ethnic minorities. This was meant to politically, economically, and socially unsettle and displace such communities. Many Kenyans

had to leave their areas of residence becoming refugees in their own land ²⁷. Quite a number of people were also murdered. E.g in the first attack, about 10 people were killed and 50,000 displaced. ²⁸ This in their view would achieve political advantage for the ruling party against the opposition parties. ²⁹

The same article attempts to show how ethnicity tends to influence opportunity in the country. An article by Human Rights Watch/ Africa Watch illustrates this. ³⁰

“Although the violence is portrayed by the government as purely ethnic or tribal, its bases is clearly political. The Moi government and much of his Kalenjin community has stood to benefit economically and politically from the violence even after the elections. The polarized ethnic sentiments guaranteed continued Kalenjin support for KANU. Moreover, the violence has been used to reward and empower Kalenjin community by allowing its members to illegally occupy or to cheaply buy land in the fertile Rift Valley province. At the same time, the violence has served to distabilise areas from which the political opposition would have been able to garner considerable political support and to punish ethnic groups that have supported the political opposition. The gradual transformation of the Riftvalley province into a Kalenjin land owning area, as non-Kalenjins abandon or sell their farms, also has significant political implications. Since the Riftvalley is allocated the largest number of seats in palirament, the KANU government is making a long term political gains in a future election by consolidating Kalenjin political Hegemony.”³¹

It can be seen from the above quotation that ethnicity affects or influences opportunity in day to day life. The above shows one or two ethnic communities taking advantage of the other communities to the detriment of the latter, leading to a slow disintegration of a country. A.M. Abdullahi states in an article in the Internal Journal of Refugees, that the absence of ethnically based values in both formation and management of African states and exclusion of ethnicity as a component in political management accentuate crisis in a state which then triggers inter-ethnic conflict.³¹

There is appropriation of state resources by one ethnic community to the exclusion of all others, further aggravating these crisis. The ethnic composition of a state leads to exclusion of certain ethnic nationalities which generates an official policy and practice of the politics of the exclusion followed by deliberate underdevelopment of the regions such exclusion leads to the inhabitants of the excluded regions opposing the state and some even trying to remedy their plight militarily.³²

5.4 Seditious Laws: Could the repealed seditious laws have been used to proscribed Group Defamation?

The repealed seditious laws provided as follows:

At section 56 there was definition of seditious intention and seditious publication. The relevant part of the section is section 56(1) (e) and (f).

“Section 56 (1) a seditious intention is an intention:

...(e) to have discontent or disaffection among the inhabitants of Kenya; or

(f) to promote feelings of ill-will or hostility between section or classes of the population of Kenya.

(2) In determining whether the intention with which any act was done, or words were spoken, or any document was published was or was not seditious, every person shall be deemed to intend the consequences that would naturally follow from his conduct at the time and the circumstances in which he so conducted himself.

(3) A seditious publication is a publication containing any word sign or visible presentation expressive of a seditious intention.

Seditious offences were provided for in section 57.

“S. 57 (1) any person who

(a) does or attempts to do or make any preparation to do or conspire with any person to do, any act with a seditious intention; or

(b) utters any word with a seditious intention; or

(c) prints, publishes, sells, offers for sale, or reproduces any seditious publication; or

(d) imports any seditious publication, unless he has no reason to believe that that it is seditious,

is guilty of an offence and is liable to imprisonment for a term not exceeding ten years, and any seditious publication shall be forfeited.

(2) any person who without lawful excuse has in his possession any seditious publication is guilty of an offence and is liable to imprisonment for a term not exceeding seven years and such publication should be forfeited.

Just as section 27 of the Great Britain's Public Order Act of 1986 requires the consent of the Attorney General to prosecute an offence under the relevant provisions, so to does section 58 (2) of Kenya's Penal Code (seditious laws , now repealed).

With the above in mind, my assertion is that the prohibition in section 56(1) (e) and (f) against promoting hostility and ill-will between different classes of people in Kenya or raising discontent among citizens in society was broad enough to have covered legal action against individuals or organizations who engaged in group defamation. Repealing of the relevant sedition laws (quoted hereinabove) was an error. Further, the repealed laws that could have proscribed group defamation should have been left in place when the sedition laws were repealed. This being due to the fact that ethnic tensions in Kenya are very much in existence. The contemporary illustrations (hereinbelow) are a pointer to this. As the sedition laws were repealed, there is need to consider an alternative statute –which I will consider in the last chapter.

5.4 Case study of group defamation in Kenya.

The ease with which one finds contemporary examples of ethnically defamatory speech is shocking; they are abundant. It is important to emphasise here that this dissertation is not concerned with merely offensive derogatory or hateful utterances it

is concerned with libelous or slanderous utterance that constitute group defamation. I will analyse two examples of potential ethnic defamatory language.

“Chop-fingers of Oppositionist call”

The violent history of tribal clashes and the resulting mass displacement of over 250,000 persons in the country is traceable to events which occurred in 1991.³³ Kenya was a one party state and people were clamoring for the introduction of a multiparty system of government. The ruling single party Kenya African National Union (KANU) tried to forestall the introduction of multipartism.³⁴ So its leaders went about issuing threats to those advocating for change in the political system. The above call can be seen in the context of a non-official policy of the Kenyan government to intimidate and punish the people that supported the opposition parties.³⁵

This was a call that was made in 1992 by a nominated MP, Mr. Wilson Leitch. The nominated MP had issue a threat to have the fingers of those who flashed the two finger salute (then a popular opposition salute) chopped.³⁶ This statement amounts to group defamation per the definition contained herein and in the model statute (chapterVI). Due to lack of recognition as to the gravity of such utterances, the nominated MP alleged that the statement he made in 1992 to chop of the fingers of those who flashed the two-finger salute was meant purely as a joke.

“A former legislator Wilson Leitch yesterday said his threat to have the fingers of those who flashed the two finger salute chopped was only a joke. Leitch yesterday recanted his infamous 1992 remark ... Leitch said the chop-the finger remark was purely meant as a joke. He said he made the remark jokingly but that such was later used against him...”

Both local and international pro-democracy forces condemned the chop-finger call, e.g. International Commission of Jurists, the church, Kenya Human Rights Commission among others. My view in this is that it might have contributed regardless of how little, to the ethnic clashes that later broke out in parts of the country.

“Ethnic / Tribal Clashes”

These began due to defamatory statements / inciteful utterance made by politicians in the run-up to multi-party elections in 1992 e.g. KANU Politicians Shariff Nasir and William Ntimama as illustrated herein, especially during the clamor for multi-partism in the period 1990-1992. In an article in the Kenya Jurist³⁷ of June 1992, Ntimama, it was said was among the first bunch of leaders to incite people to the present clashes when he told the non-Maasai living in Narok to leave the district if they were not KANU followers. Another leader Mr. Wilson Leitich called wanainchi in Nakuru to chop-off two fingers identified with FORD (Forum for Restoration of Democracy) and said in a public rally that he would lead other leaders in raping Kikuyu women. They occurred in various parts of Kenya almost tearing it apart e.g. Rift valley (Molo, Nakuru district in 1991) and Coast Province (Likoni in 1996). Another recently affected area is Isiolo District in 2000 (Eastern Province) where statements uttered by political leaders (MP Chaffano Mokku) that “foreigners” should leave Isiolo has led to the death of more than 24 innocent civilians.³⁸

In the eXpression today- a journal on democracy, human rights, and the media, an article has been featured therein which demonstrates the ethnic tensions still prevalent in Kenya. The article quotes a number of people including ministers who breathe ethnic fire. For instance Minister Shariff Nassir:

“ ...that will not prevent Office of the President Minister Shariff from breathing ethnic fire and thunderstorm.”³⁹

When the Minister is besieged he utters ethnic profanities e.g. asked to defend himself by the Daily Nation in February 10 2000 against accusations that he grabbed Langata Prisons Land he raved, exhibiting the ethnic stereotype or insensitiveness that is so prevalent in our country. He was quoted as having uttered the following statement which amounts to group defamation:

“You have heard that Maasais and Pokots regard all cattle as belonging to them right from creation. That is how the Kikuyu view all Land in Kenya. They think all the land belongs to them. So the moment they hear that Nassir

has been allocated land somewhere they dash to the newspaper offices to say Nassir has grabbed land.”

Interestingly his interviewer, Kamau Ngotho, is a Kikuyu which points to an interesting angle about Kikuyu bashers (other tribe bashers); they are not necessarily conscious of it.⁴⁰ Such comments should be proscribed by a group defamation statute i.e. people making a political career out of creating ethnic tension by bashing some communities. It would have been a non-issue were it that such tribal stereotyping remained just at that level. But since 1991, this country has experienced on and off politically motivated ethnic killings. The latest theatre of these program being Laikipia(1999) and Isiolo (2000). One of the victims of ethnic killings, Jane Ndungu, quoting raiders who attacked Kikuyu families in Kajiado North immediately after the 1997 General elections.

“You Kikuyus queued for Saitoti (the Vice President) during the KANU nominations and eventually voted for him... The Maasai rejected Saitoti because he is a Kikuyu... Pull down your houses and uproot the trees you have planted and go back to Kiambu.”⁴¹

The article gives reasons as to why the Kikuyu have received so much flogging. Further, it states, none of the grounds given here warrant the kind of flogging the Kikuyus have received from the Nyayo Government. An impression has been created that in Kenya, one can make a political career by hammering the Kikuyu. Indeed, a casual look at who is who in Moi's Cabinet reads like a catalogue of Kikuyu bashers' Francis Lotodo, William Ole Ntimama, Nicholas Biwott, Sheriff Nassir, Fred Gumo, Julius Sunkuli and until they fell out of favour Kipkalia Kones and Simeon Nyachae. All of their names have been mentioned adversely in connection with tribal cleansing, or with the tribulations of Kikuyu peasants.⁴²

An explanation of why there is so much hostility against the Kikuyu is important. Kikuyu Phobia as it has come to be known is not a new phenomenon in Kenya. Robert Fay in his book reported how at independence the people of Lamu lobbied for autonomy from the upcountry people for fear of Kikuyu domination.⁴³ History books

tell us how the British colonial authorities were never comfortable with the Kikuyu , reportedly because of their treacherous and cunning nature. The Kikuyu are the single largest community in Kenya. They produced the first President of Kenya and were in power for a long time concentrating power and wealth in their hands. Coupled with their adventurous nature they are scattered all over the republic. There is no other community with as many members in the Diaspora as the Kikuyu. They have also dominated in all aspects of the economy, owning or operating all kinds of businesses. Most of the other communities therefore harbor suspicions with regard to this community. Coupled with this is the fact that in the late 1980s they took the frontline to agitate for the opening of the political system. Multipartism became the other version of Kikuyuism. A state propaganda campaign was unleashed to create the impression that agitation for pluralism was a ploy to retake power by the Kikuyu. This worked perfectly to the extent that they were shunted to the side. This begs the question: Is there official sanction of ethnical / tribal cleansing by the Kenya government?

In the human rights journal- eXpression today – is an article by Mutie Mula titled “The Ethnic Question in Kenya- A Freaky Paradox.”⁴⁴ He states as follows:

“Why did the ethnic clashes deal with the advent of political pluralism? Was it a Balkan variant of nationalism pushed to the wall as it was in former Yugoslavia? Ever since 1991 the clashes have taken various synonyms such as land clashes, tribal clashes, cattle rustling and of late highway robberies even where highways do not exist. Many theories have been advanced to explain or make sense of the clashes but many have turned out to be concepts quite apart with the reality. But the fact remains, these clashes have turned out to be a paradox that transcends space, time, power dispensation, distribution of wealth and even political survival. It is a pity that politicians have exploited this paradox for their own expediency.”

The above goes to further illustrate the necessity of proscribing group defamation. In the last chapter I will draft a brief model statute that may be used to proscribe group defamation.

CHAPTER VI.

CONCLUSION

In all the preceding chapters, I have dealt with all aspects relating to group defamation. I considered the nature of human rights. I also considered freedom of expression in international law and group defamation. Further, I considered the scenario existing in the USA due to its uniqueness. In addition, I did also consider the Commonwealth position where I looked at four commonwealth countries and their law relating to group defamation. The rationale being to look at an international setting and how group defamation has been dealt with in the various countries of the world. I ended by looking at the situation existing in Kenya. It became clear that the repealed sedition laws as provided for in the Penal Code (cap 63 of the Laws of Kenya) have been used to proscribe group defamation just like in Nigeria where these laws were similar in structure and substance. Due to the fact that these sedition laws were repealed, there was therefore a need to consider an alternative. An alternative that will and can be used to proscribe group defamation in order to create harmony between the groups or tribes. What I have done is look at the statutes used to proscribe group defamation in the countries that I have considered above and came with what I might call a model statute to be enacted in Kenya. This may be used as a model by the Kenya Government for the drafting of a more comprehensive bill on group defamation.

The Model Group Defamation Statute.

The model statute is derived from various other group defamation statutes among them, the Defamation Act (Kenya), Columbia Group Defamation Statute, and the Public Order Act of 1986 (UK). The Model statute defines group defamation as:

“Any utterance which directly or by innuendo, holds up the group person, or persons concerning whom it is uttered, to public contempt, hatred, shame, disgrace or obloquy or causes him or them to be shunned, avoided or injured

in his or their business, profession, or occupation (or lowers the individual's or group's reputation and esteem in the eyes of the community)."¹

Further, language tending to cause a breach of the peace may be defined in the model statute as:

"Any utterance which when judged by the probable reaction of a person of normal self-control tends to provoke violence, or incites to violence, or which tends to stir anger, unrest or violent resentment or confrontations on the abused or tends to create a disturbance."²

This definition of breach of peace is broad and would cover not only language so inciteful as to encourage an immediate violent confrontation but language that would stir anger, unrest or violent confrontation on the part of or against the defamed group. The actual civic disturbance need not occur before the speech is punished. This provision is therefore very useful since it would allow the control of speech before actual physical violence resulted or before social cleavages along lines of race deepened. Definitions of public place, utter, persons and racial, religious or national group are the same as those appearing in the Colombia statute."³

If selected elements of sections 18 and 19 of the Public Order Act of 1986 of the UK and section 111 of the Columbia statute were combined with some modifications and additions – the following formulation would explain how the model statute is breached:

- I. A person shall be guilty of an offence under this section if he intentionally, recklessly, or negligently utters in a public place a false, defamatory and unprivileged statement concerning a racial, ethnic or national group, or if he publishes or distributes written matter which is deemed defamatory (as defined by this model statute) and having regard to all circumstances is inimical to the public interest and which has a tendency to incite breaches of the peace.

II. An action authorized by this section may be commenced by the Attorney General of Kenya only.

I have added three new elements to section I above; recklessness, negligence, and language inimical to the public interest. The recklessness and negligence standards have been included to broaden the scope of liability. Intent in cases on group defamation would be extremely difficult to prove. The concept of language- utterance of which is inimical to the public interest-is an element I have borrowed from a group libel structure proposed by authors of an article that appeared in the Yale Law Journal.⁴ As to the definitions of criminal negligence and recklessness I borrowed the definitions found in a Model Penal Code Proposal found in a journal by the American Law Institute.⁵

“A person acts negligently with respect to a material element of an offence...when he should be aware of a substantial and unjustifiable risk that the material element of a crime and degree that the actor failed to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actors situation...”⁶

Section 202 (c) of the Model Penal Statute defines recklessness thus;

“A person acts recklessly with respect to a material element of an offence when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct a law-binding person would observe in the actor’s situation.”⁷

The punishment for the crime of group defamation under the Model statute would include a public retraction by the defendant and as possible fine and or imprisonment. The convicted defendant would be required to use the mass media for retraction at his

own expense. The Columbia Statute provides a remedy of a fine and /or imprisonment only if the language had a tendency to breach the peace. The tendency of the language to cause a breach of the peace also would be a requirement under the Model Statute. The Public Order Act of 1986 (UK) is silent on the question of retraction and provides for a fine, imprisonment or both. ⁸

Section II of the Model Statute would not allow individuals or corporations to bring actions. There would exist no private right of action, as the statute would be a pure criminal law statute. Under the Columbia Statute individuals and Corporations might sue. ⁹ The British Proposal though is the better approach. It would allow only the Attorney General to be bring the action. The Model Statute would also only allow the Attorney General of Kenya to bring an action on behalf of the defamed group.

With all the above in mind, it can be said that history teaches that ethnic questions as a paradox cannot be solved through mere oppression or repression. Because of its multi-faced nature it demands a continued education on the tenents of a unitary nation state. Ethnic chauvinists will need education for their own existence and certainty. They have to be injected with the doctrine of compromise and accommodation. Here a little force might be necessary because some learn faster through punishment than reward. We should see warmongers arraigned in court for incitement hence the need for a group defamation statute (such action is possible through the Model Group Defamation Statute). This through is a short-term measure. In the long term, the state must look at the ethnic question more critically because we cannot afford to wish away the ethnic question in Kenya. It does not help to make it a taboo. It should be open for discussion just like the AIDS pandemic. Lessons should be drawn from the communist Russia and the Balkan states where ethnicity as a national crisis was swept under the carpet. It served the ideological expediency as long as communism held sway. However, when communism implode because of its introversion ethnicity exploded. The Balkans went on fire and has been so ever since. In Yugoslavia, Dictator Tito ignored ethnicity only for the country to disintegrate immediately after his death. His successor, President Slobodan Milosevic used ethnic

ideology to tear the country into pieces. This stated mission was to create “ a larger Serbia” at the expense of other ethnic groups. Such is the paradox of ethnicity the world over. It varies from state to state ranging from hunger for power to land distribution to customs, to wealth distribution and political survival. Ours is a cocktail of all these....thus, it’s a freaky paradox. The experiences of the stated countries should serve as a warning to Kenyans. Lets not assume that it cannot happen to us. It is time to act. Unless something is done no one will know when the ethnic tensions prevalent in Kenya will reach their maximum stretching point leading to an unprecedented explosion of ethnic violence which might even degenerate into civil war. I do not wish to sound like the prophet of doom but the situation in our country justifies this assertion. As was once stated:

“ Pure truth, like pure gold, has been found unfit for circulation because men have discovered that it is far more convenient to adulterate the truth than to refine themselves.”