



Decriminalizing Criminal and Seditious Libel: Comparative Analysis of  
Its Application in Ghana, Kenya and Sierra Leone.

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## CONTENTS

<b>TABLE OF CONTENT</b> .....	<i>i</i>
<b>ABSTRACT</b> .....	<i>ii</i>
<b>INTRODUCTION</b> .....	<i>1</i>
<b>CHAPTER I</b> .....	<i>6</i>
<i>Theoretical Perspectives and Conceptual Background</i> .....	<i>6</i>
1.1 Definitions of Key Terms and Concepts.....	<i>6</i>
1.2 The Tension between Criminal and Seditious Libel and Freedom of Expression: Theoretical Perspectives .....	<i>7</i>
1.3 Rationale of Freedom of Expression In relation to Democratic Governance .....	<i>11</i>
1.4 Overview of International and Comparative Experiences ( concerning Criminal and Seditious Libel and Freedom of Expression).....	<i>13</i>
<b>CHAPTER II</b> .....	<i>16</i>
2.1 The Ghanaian Model.....	<i>16</i>
2.2 The Kenyan Jurisprudence: A Journey Towards a Possible Repeal of Its Criminal Code on Libel. ....	<i>20</i>
2.3 The Retention of Criminal and Seditious Libel in Sierra Leone: Another Lost Opportunity. ....	<i>23</i>
<b>CHAPTER III</b> .....	<i>29</i>
3.1 Comparative Analysis and Lessons .....	<i>29</i>
3.2 Alternatives to Decriminalizing Libel .....	<i>31</i>
<b>CONCLUSION</b> .....	<i>33</i>
<b>BIBLIOGRAPHY</b> .....	<i>35</i>

## ABSTRACT

Focusing on the Ghanaian legislative model used in repealing its libel laws in 2001, a clarion call to replicate this model has been made a priority by journalists, human rights activists, media practitioners and ordinary citizens and politicians in different countries including Kenya and Sierra Leone, calling on their respective governments to repeal the seditious and criminal libel laws still retained and used by government to limit speech. This thesis argues that the retention of colonial libel laws is the hallmark of an unfree society, as it appears to provide government with the powers to criminalize criticisms, opinions or comments that the government dislikes or finds critical of its policies. A comparative analysis of the application of the laws on sedition and libel in Kenya and Sierra Leone will be made, and in addition will examine key court cases and the justification of freedom of speech as a necessary tool in every democratic dispensation.

The study will be conducted through consultation of reports, journal articles, books and internet sources reflecting the literature, trends and developments surrounding this subject matter. In the final analysis, it will proffer recommendations to Kenya and Sierra Leone, in view of lessons learnt from Ghana and other jurisdictions, towards reforming the legal framework of Free Speech.

## INTRODUCTION

In reliance with international and regional standards of freedom of expression and its expectations for member states to ensure the protection of fundamental rights to freedom of speech is guaranteed, a case for decriminalization of seditious and criminal libel laws held in the law books of several countries, including Kenya and Sierra Leone has been subject to many research and studies. The chilling effect and the disproportionate penalties these laws carry are unjustifiable, unconstitutional and a breach of fundamental rights and freedoms.

The United Nations International Covenant on Civil and Political Rights (ICCPR),<sup>1</sup> adopted by the UN General assembly on 19 December 1966 is an international binding treaty in which features amongst one of its general positions the right to hold public opinions without interference. It further requires parties to the Convention to take necessary steps in their respective jurisdictions to adopt laws and other necessary measures in order to give effects to the rights recognised in the Convention. It is evident that government throughout Africa and other continents are signatories to most of the internationally recognized instruments on human rights like the International Covenant on Civil and Political Rights, Universal Declaration on Human Rights, the African Charter on Human and Peoples Rights and other rights related Conventions. The objectives and goals of these conventions demonstrate their individual commitment to the protection of fundamental human rights, including freedom of expression- a right that is universally recognised as the cornerstone of democracy (a key to civil, political as well as socio, economic and cultural rights).

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<sup>1</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, last accessed 4<sup>th</sup> April, 2018

In 2010, the African Charter on Human and Peoples Rights<sup>2</sup> adopted a resolution in which it specifically addressed the issue of Criminal libel and defamation. The resolution urged African Union member states to take all possible steps in repealing their libel laws and further stated that criminal defamation laws constitute a serious interference with freedom of expression.

In recent years, there have been rising trends in Africa towards the decriminalization of libel by various non-state actors including Civil Society, journalists, writers, NGOs, Human Rights activists, media professional and other media-rights groups. The Pan African Parliament also adopted a resolution to protect media freedom and freedom of expression.<sup>3</sup> The call for repeal of such obnoxious laws has been given much attention when in 2001; the Republic of Ghana took the bold step in repealing its libel laws. This was supposed to be a wakeup call for many other governments especially Kenya and Sierra Leone who continue to use these laws to silence the views of the public in their criticisms of the government.

The threat of criminal conviction, possible fines and imprisonment in criminal and seditious libel cases are evidence of the reasons why most people are unwilling to speak up which is a direct contravention of their rights to free speech. This was predominately the case in Ghana before its repeal, and currently the case in Kenya<sup>4</sup>, Sierra Leone,<sup>5</sup> and other African and western jurisdictions. In Sierra Leone and Kenya for instance, there has been several cases in which seditious libel charges have been brought by authorities against journalists and other citizens, which are later dropped for either insufficient evidence or other reasons such

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<sup>2</sup> African Charter on Human and Peoples Rights/ Res 169 ,available at <http://www.achpr.org/sessions/48th/resolutions/169/>

<sup>3</sup> PAP/P (3) RES08 (1), available at <http://www.wan-frica.org/articles/2012/12/19/pan-african-parliament-resolution-to-protect-media-freedoms>.

<sup>4</sup> Reporters Without Borders for Freedom of Information ; on 17 January 2016 Kenya's Attorney General drops criminal libel prosecution against Kamau Ngotho ,an investigative journalist for allegedly implicating a government official and associating the president with corrupt practices; available at <https://rsf.org/en/news/authorities-drop-libel-prosecution-against-investigative-reporter>

<sup>5</sup> The Global Network; Defending and Promoting Free Expression ; Editors released after 19 days of detention in Sierra Leone ; available at [https://www.ifex.org/sierra\\_leone/2013/11/07/editors\\_released/](https://www.ifex.org/sierra_leone/2013/11/07/editors_released/)

as a public apology being made by the alleged offenders, or for no reasons at all. This shows therefore that the purpose for which the law was intended has failed, and therefore its continued use in both countries has had an adverse effect on their international reputation and a violation of their various treaty obligations. The retention of these laws would add up to the continued intimidation of writers, journalists and campaigners without actually being prosecuted.

Seditious and criminal libel laws are not just a hindrance to freedom of speech, but their general applications are mostly broad and too often fail to provide adequate defences which leave the majority with wide latitude of serious abuse of powers and prohibitions of genuine debates on legitimate issue of public interest.

This thesis, will critically examine the application of criminal and seditious libel laws in Kenya and Sierra Leone because both states are parties to international instruments like the ICCPR, AChHPR, in which they have vowed to uphold the rights they guarantee, but have decided to withhold their laws on criminal defamation. It will further examine their compatibility with the fundamental guarantees of freedom of expression, their modes of litigation, the targeted groups, actors and the practical impacts of both criminal and seditious libel laws in Kenya and Sierra Leone.

It draws comparative perspectives from Ghana which has decriminalized its laws sedition and libel since 2001. At the heart of what is sometimes divisive, albeit spontaneous public debates on the possible repeal of these laws, there have been polarized views over privacy, media professionalism and its regulation, and public order in an increasingly democratic and liberalized society. Also bearing in mind recent case laws and impingements of freedom of expression and media in Kenya and Sierra Leone, this thesis further aims to contribute to the ongoing discussions and existing advocacy on possible changes in the jurisprudence of free speech and the law. In the final analysis, it will proffer

recommendations in view of lessons learnt from other jurisdictions, towards reforming the legal framework of free speech in Kenya and Sierra Leone.

The choice of jurisdictions came as a result of wide spread debates and advocacy on the repeal of libel and sedition in especially Kenya and Sierra Leone. The choice of Ghana is rather obvious; Sierra Leone, Kenya and Ghana share the same colonial past (as the three countries being former British colonies). Ghana like Kenya and Sierra Leone, at independence inherited the British draconian laws amongst those laws still obtained is the laws on seditious and criminal libel. Interestingly, Ghana and Sierra Leone had experienced almost the same post-independence political trajectory (from democratic governance, to One-party dictatorships, Military rule; and now multi-party democratic governance) Ghana's repeal process will be used as a key analysis to this research. Also the case of Ghana was included to examine how to apply some of the lessons learnt from decriminalization of its laws on sedition and libel.

Kenya was selected in particular because research has shown that its Constitutional court has already ruled unconstitutional the application of its libel laws in a recent case law in January 2017. Further developments in February 2017, came with news that the director of public prosecutions directed that all criminal proceedings on libel be brought to a halt. This is a big step forward in terms of a possible repeal of their criminal code in the coming years. For Sierra Leone, no steps have been taken towards a repeal of sections (Part V) of its Public Order Act 1965(Criminal and Seditious Libel).There is hope that the Law Reform Commission and the new government would take into consideration the need to repeal most of its old colonial laws. The clarion calls for decriminalization of the draconian laws on sedition and libel by journalists, human rights campaigners, civil society, the media and other actors in Kenya and Sierra Leone are yet to be heard to, notwithstanding the numerous

promises made by both leaders in Kenya and Sierra Leone.<sup>6</sup> These three countries were colonized by the British and therefore share a common heritage by inheriting legislation that was acquired from the English laws enacted in the early years of the 19<sup>th</sup> Century.

The thesis is divided into three main substantive chapters. Chapter one presents the theoretical framework of the thesis, mainly examining the conceptual tensions between seditious libel and freedom of expression from a comparative perspective. It however starts with the definition of key terms and concepts dealing with sedition and libel. The second chapter focuses on the existence and application of the laws in Ghana and Kenya. It will further draw comparative lessons and analysis of the application of the laws in both countries. Chapter three carries an analysis on criminal and seditious libel and freedom of expression and its application in Sierra Leone. Further in this chapter, the argument or rationale for decriminalization of criminal and seditious libel in Kenya and Sierra Leone will be discussed. It will consider Ghana's model used in its repeal and argue on other alternatives to criminal and seditious libel like an introduction of a civil redress alternative or the promulgation of other laws with lesser punishment instead of criminalization. The thesis concludes with lessons learnt from Ghana and possible recommendations for Kenya and Sierra Leone. It will conclude with a call for the repeal of the laws on criminal and seditious libel in Kenya and Sierra Leone.

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<sup>6</sup> UNDP (n 12).



# CHAPTER I

## *Theoretical Perspectives and Conceptual Background*

### ***Introduction***

This Chapter will start with a definition of key concepts and terms relating to sedition and libel, and shall state the main theoretical and historical perspectives of how the law on sedition and libel originated and how it was applied and will further bring out the importance of these laws, how it was applied back then by colonial masters and shall further discuss and compare its use and current application in modern times.

### **1.1 Definitions of Key Terms and Concepts**

#### **(a) Seditious and Criminal Libel**

Seditious Libel and Criminal Libel are common law offences that emanated from the United Kingdom. Seditious libel could be defined as “written or spoken words, pictures, signs and other forms of communication that tend to criticize, defame, discredit, challenge or embarrass the government or any authority about its policies, or its officials”.<sup>7</sup> In Stevens Digest on Criminal Law, he defines sedition as:

Sedition consists of any act done, or words spoken or written and published which (i) has or has a seditious tendency and (ii) is done or are spoken or written and published with a seditious intent. A person may be said to have a seditious intent if he has any of the following intentions, and acts or words may be said to have a seditious tendency if they have any of the following tendencies: an intention or tendency to bring into hatred or contempt, or to excite disaffection against the person of, Her Majesty, her heirs or successors, or the government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite Her Majesty's subjects to attempt, otherwise than by lawful means, the alteration of any matter in Church or State by law established, [or to incite any person to commit any crime in disturbance of the peace] or to raise discontent or disaffection among Her Majesty's subjects, or to promote feelings of ill-will and hostility between difference classes of such subjects.<sup>8</sup>

Criminal libel is the prosecution of any form of libel through the criminal rather than civil courts, and is used to prosecute libels against the state or other groups, rather than individuals. Criminal libel also a common law offence is usually used by politicians as a form

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<sup>7</sup> <https://legal-dictionary.thefreedictionary.com/Seditious+Libel>

<sup>8</sup> Stephen, Digest of the Criminal Law, 9th ed. Art. 114

of political control of political opponents and the media. It can also be used by private individuals to punish people who allegedly publish libellous publications. Such offences usually carry criminal punishments, fines and terms of imprisonment.

## **1.2 The Tension between Criminal and Seditious Libel and Freedom of Expression: Theoretical Perspectives**

Several justifications on the importance of freedom of speech have been put forward by various scholars. Alexander and Horton notes: “Speech encapsulates many different activities; speaking, writing, singing, acting, burning flags, yelling on the street corner, advertising, threats, slander and so on”.<sup>9</sup>

This particularly points to the fact that most of the forms of communication highlighted above need special levels of protection. For instance, to criticise government and its policies are among one of the most protected forms of speech than others types of speech such as artistic freedom etc., because a critical assessment or criticism of government will expose citizens to a variety of views, would foster open and unhindered debate and will maintain democracy.

Eric Barent in his book “ Freedom of Speech”<sup>10</sup> highlighted four main theories in respect of an argument in favour of a free speech principle which he considers special; discovery of truth; in which he stressed the importance of open discussion which leads to the discovery of truth, free speech as an aspect of self-fulfilment, wherein each and every individual has a rights to self-development and determination, and therefore any restriction on what to write ,say or hear can have an effect on one’s personality and growth. In his third

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<sup>9</sup> See Laurence Alexander & Paul Horton; The Impossibility of a Free Speech Principle, North Western University Law Review, 78 No5 ,Pg. 1319-1358

<sup>10</sup> Eric Barendt, Freedom of Speech, Oxford University Press 2<sup>nd</sup> Edition, Pg. 13-23.

theory, which I consider the most appropriate, he argued the importance of citizen's participation in a democracy. Participation would allow citizens to fully understand political issues; it would enable them to participate in governance, hold opinion and as well hold government accountable. And lastly his theory to have reasons to be strongly suspicious of government to restrict speech, which is mostly the tool used by government to silence citizens' views. He argues further that governments in most cases set up regulatory authorities and institutions who pose danger to the rights of freedom of speech.

Within English history, libel in the early years was regarded by both the secular and spiritual, religious or ecclesiastical authorities as a sin which was adequately dealt with by the Church's courts and tried as a criminal offence with light sentences of penance. The Common law at that time was only concerned with cases such as theft, assault, murder and did not favour the creation of an offence in which mere words would amount to a criminal punishment.

In the early 1500s, because of the inadequacies of the English ecclesiastical courts in dealing with defamation, common law action of defamation was introduced to punish people who were found guilty of tarnishing other's character and reputations. Defamatory actions were brought before the king's court by nobles who had been slandered and by men whose reputations had been ruined on the basis of false accusations of infidelity. The king's court took over jurisdiction and only granted limited remedy based on the selection, character and resulting consequences of the imputation.<sup>11</sup>

The Scandalum Magnatum, a statute passed in 1275, broadened the scope of the application of the libel laws by allowing Church officials and judges to bring an action in an event they were defamed. Two justifications for defamation laws, which are still relevant today, were made. It argues that first, parliament wanted to prevent insults to the nations "best men"

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<sup>11</sup> See Van Vechten Veeder; The history and theory of law of defamation ,3 Colum L.REV 546,548,552(1903)

because of fear of threats to the feudal order, which meant that an uncontrolled criticism could drive individuals out of the public service. Secondly, the Crown wanted to restrain critics or members of the public who it considered undermined the Crown's legitimacy.<sup>12</sup>

In 1507, the first Common law defamation case was brought before the king's court where it was decided that mere spoken words could have an effect on the honour and reputation of a man just like physical attacks.<sup>13</sup> Three categories of defamation existed at that time; (i) words or false accusations of crimes, (ii) falsely accusing someone of being incompetent at their job and (iii) words accusing someone of a particular disease.

By the mid 16<sup>th</sup> Century, various forms of defamatory actions were brought before the courts which became the common practice for judges who made it a bread and butter affair. This led to the establishment of several rules, criteria and adjustments were also made to limit the amount of cases that were brought before the court. These include proof of special and real damage to the claimant's reputation and words made jokingly were not actionable under the law. Up till the 1600s the Common law was unable to distinguish between defamation by written and spoken words, although defamation by writing attracted higher punishment.

With regards publications, the Roman Catholic Church invented modern censorship without which a criminal charge can be levied. Printing was a matter of ecclesiastical or religious concern. An authorization was expected to be sought from the Church or government authorities who gave specific permissions before publishing any material. This was done in order to protect the community against false information especially about religion or information critical of the government.

In the US, two main legislations that exhaustively dealt with sedition were passed by Congress collectively known as the Alien and Sedition Acts of 1798 which restricted speech

<sup>12</sup> See Rosenberg Norman L; protecting the best men: An interpretative history of the law of libel4, 11, 1886.

<sup>13</sup> English Legal History; History of Defamation ;available at <https://englishlegalhistory.wordpress.com/2013/10/18/history-of-defamation/>

that was critical to the government or the president, Congress, the US flag or the military. This was due to the communist experience and uprisings in the early 1970's. Seditious speech in the US remained subject to punishment for a long time even with the existence of the First Amendment to the US Constitution.<sup>14</sup> The importance of democracy was one of the main justifications forwarded by the US for allowing freedom of speech especially in its strong arguments in support of the protection of political speech. The notion of democracy became more significant in Justice Holmes dissenting judgement in the Abrams case,<sup>15</sup> where he formulated the marketplace of ideas argument which has had significant influence in the US and other jurisdictions on the doctrine of free speech.

Seditious and Criminal libel laws are still very popular actions mostly used in the political context to silence citizens from making statements made against their government. In the celebrated case of *New York Times v Sullivan*,<sup>16</sup> a case in which a clear understanding of the political implications of giving importance to free speech interests against political actors was decided. It was held that free speech is not dependent on truth, popularity or usefulness of the expressed ideas. The court limited the right of recovery to public officials who could recover for honest error that produced defamatory false statements about their official conduct. This case is important because it clearly states that in an even a public official claims a statement made by an individual has ruin his or her reputation, such libellous matters can only be constitutionally upheld if it was made with malice and the defendant had knowledge that his statement was untrue or have been recklessly as to its truth.

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<sup>14</sup> Andras Sajo ;Freedom of Expression ,Institute of Public affairs ,European Program 2004

<sup>15</sup> Abrams V United States 250 US 616 (1919); Justice Oliver Wendell Holmes states: "the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market."

<sup>16</sup> New York Times v Sullivan 376 U.S 254( 1964)

Furthermore, in a famous essay on United States First Amendment Constitution, Harry Kalvern wrote;<sup>17</sup> “Political freedoms end when governments can use its powers and courts to silence its critics. The presence or absence of law in the concept of seditious libel defines the society”. The arguments Kalvern was referring to could be understood to mean that democracy itself as a concept is tightly linked to every citizen’s right to engage in a critique of government or be able to contribute to open, frank and free discussions in matters of public importance without fear of being prosecuted. To therefore limit speech by the retentions of laws which inhibit one’s ability to openly engage in public debates is a direct contravention of one’s right to freedom of expression and prohibition to partake in the democratic governance of one’s country.

### **1.3 Rationale of Freedom of Expression In relation to Democratic Governance.**

Rights as a general rule are never absolute and are subject to restrictions for one or more reasons, more particularly because of the potential of harm resulting from such speech. Freedom of speech can thus be restricted for public safety, security reasons, territorial security, protection of harm and reputation of others, for health reasons, preventing the disclosure of sensitive information, to protect morals, prevention of crime etc. Freedom of expression is undoubtedly one of the basic tenets of democracy and as such legitimate; one out of several freedoms that are regarded as the core, without which democracy cannot function.

One of the expectations of every democracy is to ensure its citizen’s have the right to access information, to make opinion, the right to advocate for change, which includes the

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<sup>17</sup> *Harry Kalvern: The New York Times Case :A note on the “Central meaning of the first Amendment ” ,1964 Supreme Court Review 191,205*

right to change government without fear and undue restrictions. It gives equal opportunity to the majority and the minority to be heard, the right to challenge tyranny by state authorities by the use of words and dissemination of ideas.

During the 20<sup>th</sup> Century, in order for government to restrict rights to speech and to expand its powers, the use of censorship was the practice used to imprison government critics, exile writers, the press, and limited debates, all with the aims of limiting criticisms. It was used to as a protection mechanism against incorrect views especially those that were contrary to the rules of the religious sects and that of government. The adoption of revolutionary constitutions like the French Declaration of 1789, the American Bill of Rights declared the recognition of freedom of expression and thought as a sacred right of mankind which the government should not restrict.

In the African scenario, the rise of anti-authoritarian and despotic rule of governance and democracy has given rise to expressions of opinion and criticism of government actions by the press, writers and ordinary citizens. With the recent transformative trends in Africa especially from postcolonial to date, there has been a wave of optimism in the developments of the current democratic revival in African constitutionalism. Democratization as Kwesi Prempeh in his article, which he recognized as the third wave of African Constitutionalism,<sup>18</sup> marks the end of decade's old authoritarian rule and a new dawn of implementing democratic and liberal constitutional reforms in African democracies. Most modern democracies are therefore expected to govern according to the limits set by the Constitution. Freedom of expression is therefore seen as the backbone of democracy in which every individual has the fundamental right to speak freely without fear or being restricted by government or any laws.

However, despite the transformative changes Africa has initiated, i.e. from post-colonialism to gaining democratic legitimacy by the adoption of new constitutions and other

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<sup>18</sup> H. Kwesi Prempeh; Africa's "Constitutionalism Revival": False Start or New Dawn?; International Journal of Constitutional law Volume 5, issue 3, 1<sup>st</sup> July, 2007

reforms, it still carries with it leftovers of post-colonial way of rule by still retaining certain laws like libel and sedition which was used by the then colonial administration to limit Speech.

Most African countries regard themselves as being modern democracies. For example, the Kenya 2010 constitution could be regarded as one the most beautifully drafted constitutions which entails changes in its governance structure, its legislative body and a host of provisions that other modern constitutions entail.

With the exception of Ghana, who repealed its laws in 2001, and one of the first post-colonial countries to gain independence in the early 1960s, other countries like Botswana, Namibia, have also gone through a repeal of their sedition and libel laws. Kenya, Sierra Leone, Uganda, Liberia, Burkina Faso etc. are amongst other African countries who are yet to repeal their laws despite several calls from international organizations and key judgements from their regional courts on the unconstitutionality of these laws.

As highlighted above, most of these countries are administered under constitutional mandates, which makes the argument for freedom of expression being regarded as legitimate under democratic governance, bearing in mind the explicit provisions contained in their various Bill of Rights sections of freedom of expression and opinion, although governments sometimes feel the suppression of speech could also be considered values of a democracy.

#### **1.4 Overview of International and Comparative Experiences ( concerning Criminal and Seditious Libel and Freedom of Expression)**

The right to freedom of expression has found its way in the texts of most human rights declarations and as such is protected by multitude of international and regional treaties,



directives, Charters and Framework decisions to which most countries are signatories to.<sup>19</sup> It was during the establishment of Human Rights regimes in International law and the formation of the United Nations that the concept of the right to freedom of expression became universally known. This concept to date has been the focus of several human rights organizations stressing the need for member states to these conventions to ensure freedom of expression is guaranteed to their citizens. The UN General assembly in its first session in 1946 adopted a draft declaration on fundamental Human Rights and Freedoms, in which it declared that freedom of expression is a fundamental right and shall be the cornerstone of all freedoms to which the UN is concerned.<sup>20</sup>

Article 19 of the Universal Declaration of Human Rights<sup>21</sup> recognizes freedom of expression as a right as well as other numerous international institutions whose aims and objectives are geared towards member states adherence to the principles of human rights and freedoms. As stated in the Universal Declaration of Human Rights the same rights became part of treaty law in article 19 of the International Convention on Civil and Political Rights (ICCPR)<sup>22</sup> which also reinforces states international commitment on the adoption and exercise of freedom of expression with an addition of explicit grounds in 19(3)<sup>23</sup>, where these rights may be limited.

<sup>19</sup> See for example; Universal Declaration of Human Rights Art.10; The African Charter on Peoples and Human Rights Art.9; The International Convention on Civil and political Rights Art.19.

<sup>20</sup> See Resolution 59 of 14<sup>th</sup> December, 1946

<sup>21</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III) states : "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 and regardless of frontiers", available at :<http://www.un.org/en/universal-declaration-human-rights/>

<sup>22</sup> UN Human Rights Committee (HRC), General comment no. 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice", available at:

<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

<sup>23</sup> Ibid

The African Charter on Human rights 1981,<sup>24</sup> in Article 9, also called on African member states to ensure individuals have the rights to freely express and disseminate their opinions within the law. In addition, the African Commission on Human and People's rights at its 33<sup>rd</sup> session in 2002<sup>25</sup> reaffirmed article 9 of the African Charter on Human Right by adopting among other things , a declaration in which it urged member states to recognise the fundamental importance of freedom of expression as an individual Human Right and as the corner stone of democracy.

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<sup>24</sup> Find the entire document on:

<http://www.africaunion.org/root/AU/Documents/Treaties/text/Charter%20on%20Democracy.pdf> In

<sup>25</sup> Declaration of Principles on Freedom of Expression In Africa (2002), adopted by the African Commission on Human and Peoples' Rights, at its 32nd Ordinary Session, 17 - 23 October, 2002: Banjul, The Gambia.) available at:

[http://www.fesmedia-africa.org/fileadmin/user\\_upload/pdf/AMB\\_Methodology/Relevant\\_regional\\_and\\_international\\_instruments\\_on\\_freedom\\_of\\_expression\\_and\\_the\\_media.pdf](http://www.fesmedia-africa.org/fileadmin/user_upload/pdf/AMB_Methodology/Relevant_regional_and_international_instruments_on_freedom_of_expression_and_the_media.pdf)

## CHAPTER II

### *Criminal and Seditious Libel and Freedom of Expression in Ghana, Kenya and Sierra Leone.*

#### **Introduction:**

The laws on Sedition and libel in the Republic of Ghana, Kenya and Sierra Leone have been largely shaped by the colonial English system's authoritarian and anti-democratic way of rule. The laws by their very nature are still being used by government to stifle peaceful political criticism by citizens. This chapter will particularly discuss the application of the laws on sedition and libel in the three countries by taking into consideration Ghana's legislative approach and the political will of its government which led to the repeal of its laws on Libel in 2001. It shall also discuss the application of the libel laws in both Kenya and Sierra Leone and will examine important case laws from both jurisdictions. It will further state the need for a change in the jurisprudence on the laws on sedition and libel in Kenya and Sierra Leone.

#### **2.1 The Ghanaian Model**

Being a political assurance given in one of its campaigns, the current Ghanaian government made its promise a reality with the passage of the Criminal Code (Repeal of the Criminal and Seditious laws-Amendment Bill) Act 2001, which was unanimously voted for in parliament.<sup>26</sup>

Before the repeal, there were no concrete safeguards in place to protect citizens from a defamatory publication in an event an individual was being prosecuted. This was as a result of the latitude and the scope of the law. As one of the major campaign promises made by the

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<sup>26</sup> African News: Government indicates it will change libel laws; available at [http://web.peacelink.it/afrinews/60\\_issue/p4.html](http://web.peacelink.it/afrinews/60_issue/p4.html), last accessed 3<sup>rd</sup> April, 2018.

National Patriotic party in Ghana, the repeal is viewed by many as the government's commitment in the furtherance of a democratic framework in Ghana and to expand the boundaries of freedom of speech.

The repeal of Ghana's penal code on seditious libel laws which then criminalised free speech for more than a century could be seen as a tremendous stride in the consolidation of democracy, the rule of law and development in Ghana's constitutional history.<sup>27</sup> This came as a result of the media's demand to abolish the law which was regarded as authoritarian and anti-democratic.<sup>28</sup>

The use of the criminal libel law could be traced as far back as the establishment of the 1892 Criminal Code Ordinance and its following amendment in 1934. The 1934 amendment provided an application of the law on sedition and had provided one of the most celebrated cases in the constitutional history of Ghana. The case *Rex v ITA Wallace Johnson & Nnamdi Azikwe*, a Sierra Leonean journalist and Pan Africanist; and Nigerian anti-colonial agitator and Nationalist, respectively who were both charged. Both Wallace Johnson and Azikwe were allegedly charged and convicted of two counts of publishing seditious materials and found in possession of documents containing seditious materials.<sup>29</sup> The "offending" article written by Azikwe titled "Has Africa a God?" was published in the African morning Post.<sup>30</sup>

<sup>27</sup> Speech Delivered by Presidential candidate of Ghana's New Patriotic Party Nana kufo-Addo in a Conference in Pretoria on "Outlawing Criminal Libel Laws in Ghana" available at : GhanaWeb <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/Outlawing-Criminal-Libel-Law-A-Speech-by-Akufo-Add-216002>

<sup>28</sup> Lienna Merner, Sarah Clarke, Romana Cacchioli; Stifling Dissent, Impeding Accountability; Criminal Defamation Laws in Africa; Published by PEN International, October 2015.

<sup>29</sup> Rex v Wallace Johnson and Nnamdi Azikwe 1937

<sup>30</sup> The words that brought about the charges of Sedition by the colonial masters at that time are as follows:

"Personally, I believe the European has a god in whom he believes and whom he is representing in his churches all over Africa. He believes in the god whose name is spelt Deceit. He believes in the god whose law is 'ye strong must weaken the weak.' Ye 'civilised' Europeans you must 'civilise' the 'barbarous' Africans with machine guns. Ye Christian Europeans, you must 'Christianize' the pagan Africans with bombs, poison gases, etc.

"In the colonies the Europeans believe in the god that command ye Administrators, make Sedition Bill to keep the African ragged, make Deportation Ordinances to send the Africans to exile whenever they dare to question your authority.

"Make an Ordinance to grab his money so that he cannot stand economically. Make a levy bill to force him to pay taxes for the importation of unemployed Europeans to serve as Stool Treasurers. Send detectives to stay around the house of any African who is nationally conscious and who is agitating for national independence and if possible, round him up in 'criminal frame-ups' so that he could be kept behind bars."

They both attempted to bring the case before the West African Court of Appeal but were unsuccessful and led to the deportation of Azikwe to the Gold Coast and Wallace back to Sierra Leone.

Sections 112 and 113 of the Criminal Code of Ghana 1960(Act 29)<sup>31</sup> respectively stated cases in which persons were found guilty of libel and defined what constitutes a libellous matter. Section 112<sup>32</sup> makes provision for negligent and intentional libel and anyone convicted of such offence shall pay a fine and shall be guilty of a misdemeanour, with a fine not exceeding forty Ghana Cedis for negligent libel and a term of imprisonment not exceeding three years for intentional libel. Section 113<sup>33</sup> defined cases (such as in printing, writing or acts of negligence or an intention to defame other persons) in which individuals may be found guilty of the offence of libel.

The journey towards the repeal of the Criminal Libel Code began after several public uproar and national debates by media practitioners who were always subject to prosecutions. In addition the commitment and Attorney General and Minister of Justice, who led the repeal in parliament in July, 2001. With the coming into existence of the 1992 constitution, the Ghana Journalist Association was at the forefront of the fight against the criminal libel and sedition laws. They argued that the laws on sedition and libel were not in accordance with the spirit and letter of the new constitution. They had mounted pressure during a National Democratic Congress government but never succeeded. Several journalists at that time were arrested and prosecuted by the NDC government during their tenure and in the early years of 2000.<sup>34</sup> The Ghana Journalist Association together with other stakeholders from parliament,

<sup>31</sup> Criminal Code of Ghana 1960(Act 29)

<sup>32</sup> Section 112 (1) states that "whoever is guilty of negligent libel shall be liable to a fine not exceeding 40,000 and (2) Whoever is guilty of intention libel shall be guilty of a misdemeanour".

<sup>33</sup> Section 113 (1) states "A person is guilty of libel, who, by print, writing, effigy, or by any means otherwise than solely by gestures, spoken words or other grounds, unlawfully publishes any defamatory matter concerning another person, either negligently or with intent to defame that other person".

<sup>34</sup> Three prominent journalist; Tommy Thompson, Kofi Coomson and Eben Quarcoo were prosecuted for stories which were published and termed as being critical of government. See Emma Walters and Alex Johnson on report by

benchers, the Bar Association, civil society groups, private newspapers and editors , held various workshops and other avenues like World Press Freedom Day conferences and meetings to raise awareness for the repeal of the libel laws.

The ruling party having rejected the media's plea for a repeal of the laws, the National Patriotic Party the then majority opposition party took advantage of this and made a campaign promise that it will repeal the criminal libel laws if voted into governance. The media placed a campaign of repeal or no repeal of the libel laws on the campaign agenda of the 2000 electioneering process. The elections were eventually won by the NPP and one of the promises made to the media in meeting held with the president elect, John Kufor, on the 30th January, 2001, was that the laws on sedition and libel would be repealed. This was followed by an amendment Bill which repealed Chapter 7 of Part II of the Ghana Criminal Code 1960(Act 29) which generally dealt with criminal libel. It became law on the 17<sup>th</sup> August, 2001.

In the Memorandum Bill presented before parliament, the Attorney General Nana Akufo –Addo stated:

The time has come to repeal these laws and expand the boundaries of freedom in the State. Designed to frustrate our freedom and perpetuate our servitude, these laws should have been repealed at independence. Unfortunately, they were maintained and, in some cases, actually extended, especially during the period of the one-party-state of the First Republic, and have up to date remained on the statute books, even throughout the short-lived existence of the multi-party states of the Second and Third Republics. The dangers implicit in the retention of these laws for an open and free society is now plain for all to see. The laws are unworthy of a society seeking to develop on democratic principles, on the basis of transparency and accountability in public life. Government is confident that the good sense of the Ghanaian people will ensure that the expanded space created for expression and the media with the repeal of these laws will be used for the development of a healthy, free, open and progressive society operating in accordance with the rule of law and respect for human rights. It is time to chart a new course.<sup>35</sup>

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international Federation of journalist on decriminalizing defamation 2005, available at [http://www.ifj.org/uploads/media/170-decriminalising\\_defamation.pdf](http://www.ifj.org/uploads/media/170-decriminalising_defamation.pdf)

<sup>35</sup> GhanaDot.Com; Reviews, available at <http://www.ghanadot.com/Review.nanaaddo.criminallibel.080911a.html>

There were, however, heated debates over the challenges of the repeal of the Criminal libel laws in Ghana. Although one school of thought envisaged it was a step in the right direction as freedom of speech is now guaranteed, the press and public can freely write and criticise government, and the media can provide accurate and timely information to enable citizens to make informed choices, others were of the view that the repeal has led to irresponsible journalism in Ghana.<sup>36</sup>

In his article on the Media and the offence of criminal libel in Ghana,<sup>37</sup> Olivia Anku-Tsede argued that since the repeal of the libel laws, some media practitioners have taken advantage of the repeal and are circulating malicious publications in the media. This, therefore, has sparked debates as to the re-instatement of the criminal libel laws, which in their view would restrain persons from making malicious and false publications.

The Attorney General and Minister of Justice Mr, Nana kufo-Addo stated in an interview in London that he had no regrets in championing the repeal of the law to allow free press and freedom of expression, although he had been highly criticised for this and has been blamed for encouraging irresponsible journalism. He believed that the notion of an irresponsible press is not an excuse for undermining freedom of expression or press freedom.<sup>38</sup>

## **2.2 The Kenyan Jurisprudence: A Journey Towards a Possible Repeal of Its Criminal Code on Libel.**

Upon promulgation of its 2010 Constitution, one might assume that Kenya would have amended some of its archaic laws in order to conform to the letter and spirit of the Constitution. It has ,however since its independence in 1963, retained its laws on criminal

<sup>36</sup> Willian Yaw Owusu; The Ghanaian Media Landscape: How Unethical Practices of Journalists Undermine Progress-Reuters Institute for the study of Journalism 2011/2012.

<sup>37</sup> Anku-Tsede, Olivia : The Media and the Offence of Criminal Libel in Ghana: Sankofa

<sup>38</sup> Ghana Web : available at <https://www.ghanaweb.com/GhanaHomePage/NewsArchive/No-regrets-for-repealing-Criminal-Libel-Law-Akufo-Addo-140644>

libel. The laws on sedition and libel continues to dominate the law books of most East African countries and is being used by the government to violate the constitutional right of free speech and opinion. The Kenyan Judiciary, in 2017, created space in allowing free speech by declaring unconstitutional the penal code on criminal defamation. This also gave rise to dropping charges of Libel against all accused persons charged with that offence.

Although Kenya's new Constitutional design establishes a new institutional framework which includes democracy, the rule of law and rights and freedoms, it still carries with it colonial leftovers of certain laws that are a hindrance to its democratic principles. The Kenyan authorities since colonization have continued to apply laws criminalizing Libel. Defamation remains a criminal offence even though there has been a repeal of sections 56, 57 and 58<sup>39</sup> of the Penal Code in the Statute Law (Miscellaneous Amendments) Act, 1997. The Penal Code Act, Cap 63,<sup>40</sup> Laws of Kenya, article 194 in particular, which makes defamation a criminal offence is still in force and has constantly been used to silence the views of the public in their criticisms of the government. There is continued prosecution of citizens and journalists under section 194 and 196 of the Penal Code over the past ten years. In 1990, *Rev. Lawford Ndege Imunde*, was sentenced to six years in prison for possession of seditious publications using section 194 of the penal code.<sup>41</sup> Imunde was said to have in his possession publications of passages he wrote in his personal desk diary and was said to have received funds from an unknown source to destabilize the government. In 2017, the Kenya Parliament passed the Powers and Privileges Act 2017,<sup>42</sup> and under clause 27(3) (f) and (g) makes it an offence and impose a fine or a two year imprisonment term for any false publication or

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<sup>39</sup> Repealed by Act No.10, 1997

<sup>40</sup> Kenya Penal Code Act, Cap 63.

<sup>41</sup> *Rev. Lawford Ndege Imunde v. A.G.* High Court Misc. Appl. No. 180[1990]

<sup>42</sup> Kenya Parliamentary Privileges Act, 2017.



defamatory words directed at Parliament or its committees. Various calls for the act not to be passed when it was at its Bill stage were made<sup>43</sup>.

The High Court in January 2017 declared unconstitutional the offence of criminal defamation under section 194 of the Kenya Penal code in *Jacqueline Okuta & another v Attorney General & 2 others*, who were charged with criminal defamation for statement made on a Facebook page titled “Buyer Beware-Kenya”<sup>44</sup> Following this recent development, the director of the Kenya Public Prosecution Kerioka Tobiko<sup>45</sup> has directed that all criminal cases pending before the High Court and where accused persons were charged under section 194 of the Penal Code should be withdrawn. He also directed that no one should be charged or arrested under the invalidated act. Despite these recent developments, it is however yet to be confirmed whether the Kenya parliament will be ready to formally repeal its laws on Libel.

Kenya’s 2010 Constitution is widely praised for its broad inclusion of the protection of the right to freedom of expression. Part II specifically makes provision for rights and fundamental freedoms, and in article 33, the right to freedom of expression which shall include freedoms to seek, receive and impart information and ideas are also provided for. This fact was endorsed during the second cycle of the Universal Periodic Review (Kenya) 2010,<sup>46</sup> in which the government of Kenya accepted among other recommendations its compliance with its international human rights obligation on freedom of expression and information.

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<sup>43</sup> Kenyan National Assembly Criminalises “Defamation of Parliament” (Vienna, 19 October 2005)

Available at: <http://legaldatabase.freemedia.at/2015/10/19/kenyan-national-assembly-criminalises-defamation-of-parliament/>.

<sup>44</sup> *Jacqueline Okuta & another v Attorney General & 2 others* [2017] eKLR (Petition No. 397,2016)

<sup>45</sup> See report at : <https://www.standardmedia.co.ke/article/2001230260/keriako-tobiko-withdraws-all-cases-of-criminal-libel>

<sup>46</sup> Article 19 Individual Submission to the Universal Periodic Review of Kenya For consideration at the 21<sup>st</sup> Session of the UN Working Group in January–February 2015 14 June 2014.

### 2.3 The Retention of Criminal and Seditious Libel in Sierra Leone: Another Lost Opportunity

Having also retained its laws on Sedition and Libel since independence, Sierra Leone forms part of countries who face pressures from its citizens and a host of international organizations to repeal its old laws to suit international and democratic trends. Although many efforts have been made towards repealing its laws on sedition and libel, this is yet to be achieved due to lack of political will and failure of government to adhere to its international commitment to ensure freedom of speech is guaranteed.

In Sierra Leone defamatory and seditious libel crimes could be traced far back to its colonial heritage dating to the 17<sup>th</sup> to 18<sup>th</sup> century reign of monarchs in England. Having been colonized by the British, Sierra Leone even after its independence in 1961 and up to date still retained parts a huge chunk of British colonial laws in its statute books. The Public Order Act of 1965 is one such law still used as a law which criminalizes libel and sedition. Proceedings under the criminal and seditious libel laws have been repeatedly used by the government and persons in authority to silence citizens, opponents; particularly journalists, writers, bloggers, which does not bode well for freedom of expression in Sierra Leone.<sup>47</sup> This law has been frequently used through tactics that include censorship, restrictive legislation, and harassment of journalists, bloggers and others who voice their opinions.

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<sup>47</sup>In August 2011, a prominent newspaper publisher spoke critically of the government on a popular live daily SLBC radio program. A government representative unsuccessfully attempted to interrupt the broadcast to present a rebuttal. The program was neither re-aired the following day, as is standard, nor were requests for taped copies of the interview honoured, leading to criticisms that the SLBC and the government were jointly attempting to muzzle the journalist. In July 2013 Police arrested the managing editor of the *Independent Observer* newspaper, Jonathan Leigh, on charges of defamatory libel after he wrote an article alleging that a politically connected businessman, Momoh Conteh, was involved in corrupt activities. Leigh was released on bail of 50 million Leones (\$11,560) after one night in prison. He subsequently wrote an article critical of the judiciary and was re-arrested for contempt of court. Leigh was imprisoned for several additional days and eventually settled the matter out of court.

January 2014; David Tam Bayoh was arrested for seditious libel and released on bail. In May 2014, his radio programme Monologue was banned for two months following a government directive. He was arrested again in November 2014 for comments made on his programme regarding the government's response to the Ebola outbreak. He was detained for 11 days and released on bail.

Since the end of the civil war in 2002, there has been renewed interest in expunging from the Statute books of Sierra Leone the criminal and seditious libel law.<sup>48</sup> The removal of criminal and Sedition aspect of the Public Order Act of 1965, I argue should not just be a priority forming part of the democratic aspirations of the country, but an integral component of its post war reconstruction agenda. Having being described as the black spot on the country's democratic and human rights image, it is high time Sierra Leone abandoned the colonial relic criminal and seditious libel law.

There are two types of libel provisions in the Public Order Act of 1965. Defamatory libel in section 27 and seditious libel in section 33. Sections 26, 27, and 33 of the said Part 5 are instructive statutory regimes relating to criminal libel. Whilst Sections 26<sup>49</sup> and 27<sup>50</sup> criminalize what is defamatory libel; Section 33<sup>51</sup> seeks to penalize defamation with a seditious intent. The restrictions imposed by the Public Order Act 1965, are enforceable in the ordinary courts. Further, the 1965 Act does not allow truth as a defence unless the

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<sup>48</sup> Sierra Leone Telegraph; UNDP, 'Nationwide Symposium on Decriminalizing Seditious Libel and Defamation Law' (2016) During the Conference, key institutions put forward the following policy statements: The President of the Sierra Leone Association of Journalists (SLAJ) Kelvin Lewis said: "Our fundamental problem with the criminal libel law is that truth is not a defence. We accept that there must be punishment if you tell a lie, but should we be punished again for telling the truth? That is unacceptable and that is why criminal libel laws must be abolished. It is a bad law." The Minister of Information, Mohamed Bangura said: "We are going to make sure that we repeal this law. I am here speaking on behalf of His Excellency the President and the Government of Sierra Leone, and also my co-minister, who is the Attorney General and Minister of Justice. We are both committed to make sure that this law is repealed. But please, please, let us look for a viable alternative that can stand the test of time." The Inspector General of Police, Francis Munu said: "As we always put the interest of the state above all else, we have also taken a fundamental rethinking and have come to the conclusion that a repeal of the said Part 5 of the Public Order Act No.46 of 1965 might best serve the interest of the state and we welcome it. We see that Government is determined to let it go and the media has been yearning for it, we cannot stand in the way of reform." Finally, Julian Cole, Secretary General of the Sierra Leone Bar Association (SLBA) stated the Bar's position thus: "The Sierra Leone Bar Association is in harmony with the call for us to march as a nation towards a Part Five-free Sierra Leone. The benefits of a free speech legal regime without the fetters of oppressive legislations to a fledgling democracy cannot be overstated. The case for reform of Part 5 of the Public Order Act is a compelling case".

<sup>49</sup> Any person who maliciously publishes any defamatory matter knowing the same to be false shall be guilty of an offence called libel and liable on conviction to imprisonment for any term not exceeding three years or to a fine not exceeding one thousand Leones or both.

<sup>50</sup> Any person who maliciously publishes any defamatory matter shall be guilty of an offence called libel and liable on conviction to a fine not exceeding seven hundred Leones or to imprisonment for a period not exceeding two years or both such fine and imprisonment.

<sup>51</sup> Any person who—(a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention; or (b) utters any seditious words; or (c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication; or (d) imports any seditious publication, unless he has no reason to believe that it is seditious, shall be guilty of an offence and liable for a first offence to imprisonment for a term not exceeding three years, or to a fine not exceeding one thousand Leones or to both such imprisonment and fine, and for a subsequent offence shall be imprisoned for a term not exceeding seven years, and every such seditious publication shall be forfeited to the Government.

defendant proves the publication was a matter of public interest which the judge may use its discretion to allow truth as a defence.

In the leading case of *Maitland Tholla-Thompson*,<sup>52</sup> a case heard in 2001, the Court rejected the challenge that the Public Order Act did not contradict the freedom of expression provisions in the 1991 Constitution. This was met with a mixed reaction from both citizens and members of the media. Following the *Tholla Thompson* case, the Sierra Leone High court in 2004, in the *State v Paul Kamara*,<sup>53</sup> an editor for one of the widely used newspapers 'For Di People, sentenced the accused to four years imprisonment for publishing an article in which he referred to the then president as a "true convict".

On 20<sup>th</sup> March 2015, another violation of the right to free speech was disrupted by the police during the Sierra Leone Bar Association meeting held in the Law Courts building in Freetown. Since the meeting was held during the Public Health Emergency, they claimed the meeting was not Ebola related and had extended 6pm curfew time. Many lawyers feel the reason for such police intimidation was because members of the Bar were about to vote on whether the President's subsequent act to remove the Vice President was unconstitutional. This shows the extent to which freedom of speech is being threatened and down played by the Sierra Leone political actors and those in governance. In September 2017, four journalists working for two popular newspapers; Salone Times and New Age Newspaper were respectively indicted on a fourteen counts charge of Seditious and Criminal Libel brought by the government's National Telecommunications Commission (NATCOM). The ministry alleged that publisher of the New Age newspaper on 28<sup>th</sup> March published a story with an element of defamatory, heading "Another nightmare...TOP UP CARD INCREMENT BEING APPROVED". The second accused was also charged for publishing another story in

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<sup>52</sup> *Thompson v Kamara* (2001)SLHC

<sup>53</sup> *S v Kamara* (Cr.App 32/2004) SLCA

his paper on the same subject matter titled “Cooperate Gangsterism ; AIRTEL, AFRICEL NATCOM IN TOP UP CONSPIRACY”<sup>54</sup>

Drawing from recent events of arrests and criminal proceedings in the High Court of especially writers and journalists and other citizens, it is highly unlikely that these provisions will be repealed anytime soon. Officials in the State institutions have used these dreadful laws to punish its citizens especially journalist from expressing their views on matters of public concern.

The Truth and Reconciliation Commission (TRC),<sup>55</sup> a product of the Lomé Peace Agreement<sup>56</sup> of 7 July 1999 between the Government of Sierra Leone and the Revolutionary United Front (RUF), made various recommendations including ensuring freedom of expression and of the press in governance.

Furthermore, in the just concluded Sierra Leone Constitutional Review in 2016, several calls were made for a repeal of the criminal and seditious libel aspect of the Public Order Act of 1965. Sierra Leone Association of Journalist (herein after referred to as SLAG), acting on behalf of the professional media community, made a submission to the Constitutional Review Committee (CRC)<sup>57</sup>, essentially requesting inclusion in the new draft Constitution a special chapter on “Media Freedom and Responsibility” with provisions that protect press freedom and the right to free expression of ideas. This recommendation was however rejected by the government in its White Paper published in October, 2017. There are however hopes that the new president elect, Retired Brigadier Julius Bio, would call for a repeal of the criminal and seditious libel aspect of the 1965 Public order Act, as this was also one of the issues, coupled

<sup>54</sup> Concord Times: Three Journalists face defamatory libel charges; available at <http://slconcordtimes.com/3-journalists-face-defamatory-libel-charges/> last accessed 25<sup>th</sup> March 2018.

<sup>55</sup> See recommendation 79 of the TRC in Vol. 2, Chap 3, (p. 132)

<sup>56</sup> Lomé Peace Agreement (Ratification Act), 1999

<sup>57</sup> Sierra Leone Constitutional Review Committee ,Abridged Draft Report ,July ,2016

with other constitutional changes highlighted in the party manifesto of The Sierra Leone Peoples.<sup>58</sup>

With respect to constitutional guarantee of freedom of expression, Sierra Leone like every other democratic state has in its 1991 Constitution provisions explicitly stating its commitment to the respect of freedom of expression, with its limitation being described by many as the greatest threat to democracy in Sierra Leone. Chapter III of the Constitution makes provisions for the recognition and protection of fundamental human rights and freedoms. As specifically stated in section 25,

“no person shall be hindered in the enjoyment of his freedom of expression, and for the purpose of this section the said freedom includes the freedom to hold opinions and to receive and impart ideas and information without interference, freedom from interference with his correspondence, freedom to own, establish and operate any medium for the dissemination of information, ideas and opinions, and academic freedom in institutions of learning”. This means that in no uncertain terms can the rights to freedom of expression be hindered.

Although there are restrictions mainly on issues such as public order, public safety or health, the existence of the criminal and seditious libel aspects of the Public order Act of 1965 continue to pose a direct interference to the rights provided in the constitution.

In 2013, the Sierra Leone parliament passed the Right to Access Information Act which requires government agencies to produce information upon request by any citizen of official government documents, to which penalties for failure to comply with the provisions of the act can be imposed. A Right to Access Information Committee was established in 2015 to assist in implementing the law.

Due to the fact that the right to freedom of expression has been under threat, Sierra Leoneans for the past ten years have resorted to the use of social media as a platform in which their views on public and government criticisms are made. This resulted in the arrest and prosecution of Theresa Mbomaya, a student of Fourah Bay College for sharing inciting post

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<sup>58</sup> Sierra Leone peoples Party Manifesto 2018 pg. 69, available at <https://electiondata.io/media/1035>, last accessed 28<sup>th</sup> March, 2018

on social media.<sup>59</sup> Police allegedly arrested her for sharing a post on a student WhatsApp group calling her fellow student's to protest for the rising price of fuel. The Minister of Information and Communication on 28<sup>th</sup> November 2016 issued a press release on behalf of the government, announcing its plan of censoring the use of social media by regulating the content of online post. With the rising number of arrests and prosecution of its citizens, the ruling government for the past five years has shown their strict and violent intolerance of freedom of expression whenever its citizens tend to be critical of government policies.

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<sup>59</sup> Cocorioko The Voice of the People :Sierra Leone Government says Theresa Mbomaya was arrested for serious crime of incitement ,not social media activism, available at <http://cocorioko.net/sierra-leone-government-says-theresa-mbomaya-was-arrested-for-serious-crime-of-incitement-not-social-media-activism/>

## CHAPTER THREE

### 3.1 Comparative Analysis and Lessons

The retention of criminal libel law over the past decades has been viewed as having no place in modern democracies. This has always been the concern of international institutions that the fear of prosecutions shuts down freedom of speech. One such organization is the Global Writers group called PEN international who has been working with countries like Sierra Leone, Ghana, Uganda and Zambia towards the campaign against the use of criminal defamation and insult laws in Africa. Ghana is not the only African country that has gone through a repeal of its criminal libel laws. Other countries such as Botswana, which has libel as a civil offence, Central African Republic who in 2005 passed a new press law and adopted a new constitution which respects freedom of expression and decriminalized libel. In Congo Brazzaville, following its 2001 legal reforms, the offence of libel was punishable by fines rather than by imprisonment.<sup>60</sup>

The Ghana repeal which was done through legislative means could be a model followed by states which are yet to repeal their laws on sedition and libel. The political will of the then opposition party made a lot of commitment to ensuring that the repeal of the Libel laws was achieved. This was timely as it came in at a time when freedom of expression has been under constant threat to its media, its citizens and around the world. With over one hundred and thirty fine newspapers and approximately one hundred and ten radio stations ,Ghana's press is now very free and under no restrictions and can independently criticize government or government policies.

As the Kenya Judiciary has made efforts to recognise that its Penal Code is unconstitutional by annulling the application of sections 19 of its penal code, has given rise to curtailing the

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<sup>60</sup> Find world press freedom report on World Audit .Org. available at <http://www.worldaudit.org/presstable.html>



use of governments criminal laws used to curtail free speech and fundamental rights of its citizens. As Justice Motivo pronounced in his Judgement in the *Jaqueline Okuta and Ano v AG and Anor* case: “The harmful and desirable consequences of criminalizing defamation ,viz, the chilling effect possibilities of arrest, detention and two years’ imprisonment, are manifestly excessive in their effect and unjustifiable in a modern democratic society”.<sup>61</sup> The judge was of the view those seven years down the line since the promulgation of the Kenya 2010 Constitution, a repeal of its old laws was imminent in order to align to the letter and spirit of the Constitution.

Sierra Leone’s situation shows that successive governments have used the Public Order Act provisions on defamation to limit freedom of speech more especially among the press, who are mostly subject to court prosecutions. Although the last government had promised to repeal the laws in one of their campaign messages, this is yet to be achieved as the criminal libel laws have frequently been used to stifle free speech, and intimidate and harass journalists and citizens by the government.

As the cases revealed in both Kenya and Sierra Leone countries, a huge improvement and step has been made by Kenya through its High Court. This can be regarded as a possible step which might lead to a repeal of its penal code on libel in the near future. Since the Director of Public Prosecutions has discharged all those charged with libel, efforts to decriminalize by repealing the laws have still not been realized although there has not been any reports on any arrests or prosecution with respect to the provisions in the penal code since the High Court declared the law unconstitutional. Sierra Leone on the other hand, is yet to take positive steps to have their libel laws repealed. The only possibility which were the recommendations made

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<sup>61</sup> Kenya Law, Weekly Newsletter: Court declares section 194 of the Penal code(dealing with the offence of criminal defamation) Unconstitutional; available at <http://kenyalaw.org/kl/index.php?id=6949,last> accessed 4<sup>th</sup> April,2018.

during the constitutional review process, which was later dropped by a government white paper is a lost opportunity which could have been an effort that would have led to a repeal. But despite this, journalists and human rights activists are still piling pressures on the government to have these laws repealed.

### **3.2 Alternatives to Decriminalizing Libel**

There has been an unending advocacy for the need to decriminalise seditious libel laws for the past decades. To be able to get correct answers to this, it is worth looking into how other nations have dealt with this conundrum, by taking a key look at the strategies, actors and models used to get this issue settled.

It could be argued that without an effective alternative to criminal and seditious libel laws from the law books of Kenya and Sierra Leone, its retention would suggest that it is an accepted norm in democratic societies which despite constitutional assurances on freedom of expression is guaranteed. There has always been a controversy between these two notions; which is like giving with one hand and taking with the other.

From the analysis of the laws in both countries, the dangers essentially connected with the retention of these laws are now quite easy to see. The laws themselves are anti-democratic, repressive of freedom of expression and not worthy for societies based on good governance and democratic principles. Like in many other countries, the protection of one's reputation is primarily treated as a private issue which requires redress in civil courts instead of criminalization, which is unnecessary to provide an adequate protection for reputations.

Criminalization of speech made against a public official in matters of public interest is a disproportionate punishment compared to the importance of free speech in a democratic state.

Therefore criminal sanctions and huge fines cannot be justified, especially when there is no alternative to address reputational harm. This therefore calls for a civil way of redress rather than criminalising speech done in criticisms of government officials.

The road to decriminalizing laws on sedition and libel has always not been rosy. Ghana for instance had to endure a series of prosecutions and huge fines under all its previous governments, save for the relentless effort made by the press, civil society, the Bar Association and other human rights organizations. In the case of Ghana, the political will and campaign assurances of the National Patriotic Party made it possible for its laws to be repealed, compared to Sierra Leone, whose political leader have made several campaign promises but ended up doing the reverse. The Kenya situation is a bit welcoming because the Judiciary has already ruled unconstitutional its Penal code which criminalises libel.

In effect therefore, and in addition to the civil alternative to reputational claims, instead of criminalizing libel, a variety of other options could be used like the British laws on Crime and Disorder 1998,<sup>62</sup> which establish nine crimes including crimes of assault, criminal damage, public order offences and harassment which carry maximum penalties. Initiating such laws will be core in placing limits on reckless misinformation, speech and will equally not be a fatal consequence or hindrance to the values of freedom of expression.

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<sup>62</sup> Crime and Disorder Act ,1988

## CONCLUSION

Around the world, several countries still retain the use of criminal and defamation laws, which activists feel are suppressive, authoritarian and laws that strike fear in the minds of journalists, writers and ordinary citizens. From the above analysis of the existing situations in Kenya and Sierra Leone, decriminalization of these laws could be the only option for the enjoyment of a free right to speech, right to criticise government and make meaningful contribution and keep up with international trends of freedom of expression.

One key justification for the right to freedom of expression is its connection with the goals of democracy and development. an underlying principle of the African Charter.<sup>63</sup> Development in this instance could be understood to mean processes of maximizing freedoms as principal ends of attaining democracy and the advancements of rights.

As demonstrated in the various case laws cited in the analysis, it is crystal clear that seditious libel laws used in Ghana, before its repeal and both Kenya and Sierra Leone are often used as a tool by government to silence speech which international human rights treaties seek to protect. This despite international pressures on states to repeal their laws to conform to the tenets of democracy and the rule of law, several countries withhold them for their own personal ways of harassing and limiting criticisms of bad government policies with criminal prosecution and huge fines as a way of punishment.

Although rights are to some extent not absolute, abolishing the laws on criminal and seditious libel on the one hand is a way of the government showing its commitment to free speech and opinion, and should, on the other hand, ensure there are provisions of adequate safeguards for the protection of reputation through civil means, while also ensuring that a civil way of redress does not impose excessive fines and damages to the extent that it will be

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<sup>63</sup> The Preamble of the African Charter on People's Rights states in part: "Convinced that it is henceforth essential to pay a particular attention to right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights, in their conceptions as well as universality, and that the satisfaction of economic social and cultural rights is a guarantee for the enjoyment of civil and political rights".

a burden on its citizens. Such fines and burden may have the propensity to impede and restrict free speech rights in a democratic society.

A thorough review of the laws on sedition and libel may not only lead to the conformity with the right to freedom of expression as required by international law, but will also serve as an opportunity for states to enhance the right to know, which is also an essential part of the right to freedom of expression and democratic accountability.

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