

# LEGISLATIVE ALERT

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## THE PRIVILEGE OF THE MEDIA IN THE GHANA LAW OF DEFAMATION

by

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No one, not even the editor of the most scurrilous broadsheet likes to be called a thief or a rapist, or otherwise libelled without any supporting evidence or grounds. A person enters public service to serve his nation, and does not thereby agree to be insulted by any Kwesi or Kweku Junior.

It is no help to society to deliberately libel a public figure and complain that high damages have been awarded against you. Damages on libel are at large and always include a punitive element.

That much having been said, it is submitted that if the editor or publisher of a libel is in any way protected by law, he must, in a democratic society which has any respect for the rule of law, be entitled to the benefit of that protection.

The 12th Chapter of the 1992 Constitution of Ghana contains certain articles which have never appeared in any former constitution of the

country. Among these are Articles 162, 163, 164 and 165, and they provide:

- 162 (1) Freedom and independence of the media are hereby guaranteed.
- (2) Subject to the Constitution and any other law not inconsistent with the Constitution, there shall be no censorship in Ghana.
- (3) There shall be no impediments to the establishment of private press or media and in particular, there shall be no law requiring any person to obtain a licence as a prerequisite to the establishment or operation of a newspaper, journal or other media for mass communication or information.
- (4) Editors and publishers of newspapers and other institutions of the mass media

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shall not be subject to control or interference by Government, nor shall they be penalized or harassed for their editorial opinions and views, or the content of their publications.

- (5) All agencies of the mass media shall, at all times, be free to uphold the principles, provisions and objectives of this Constitution, and shall uphold the responsibility and accountability of the Government to the people of Ghana.

It is important to note that these five subclauses of Article 162 are entrenched under Article 290(1)(i), meaning that they would only cease to have effect as part of the laws of Ghana after the people have so decided in a referendum.

Sub-clause 6 of Article 162 imposes the duty of rejoinder on every medium for the dissemination of information to the public, and Article 163 provides that all state-owned media shall afford fair opportunities and facilities for the presentation of divergent views and dissenting opinions.

The foregoing new constitutional rights and obligations of the media, though not entrenched are nonetheless clearly designed to ensure decency and fairness in the whole of the media industry, both private and state-owned.

Article 164 and 165 are both saving clauses, the first, to save all laws that are reasonably required in the interests of national security, public order, public morality and for the purpose of protecting the reputation, rights and freedoms of other persons; and the second, i.e. Article 165 to save in operation the right of any person who complains of a contravention or threat to the fundamental human rights guaranteed under Chapter 5, to apply to the High Court for redress.

It is also important to note that both these saving clauses are not entrenched in the Constitution. The Constitution came into force on 7th January 1993 and we are thus in the sixth year of its operation, and yet the noted feature in the media industry is the marked insecurity of the private media and the seeming inability of the state-owned media to establish their editorial independence of, or be insulated from the Government as envisaged by the Constitution.

Editors and publishers are being penalized and denied bail, and are harassed constantly, with heavy damages being awarded against them as if the Article 162 (4) did not appear in the Constitution.

The crippling powers over the state-owned media exercised by the erstwhile Ministry of Information, have become vested in the new all-embracing Ministry of Communications, with all the frightening implications for the expected independence of the state-owned media.

Just as the extravagant powers vested in the Attorney General as the chief legal advisor to the Government can only be justified in the context of a strong, alert and independent legal profession which compels a responsible exercise of those powers, so the granting of extensive powers to the Ministry of Communications must be predicated on a strong, effective and independent media profession.

It is suggested that the parlous state of affairs in the media industry derives from the scandalous construction placed on the provisions of Article 164 of the Constitution which states:

"The provisions of Article 162 and 163 of this Constitution are subject to laws that are reasonably required in the interests of national security, public order, public morality and the purpose of protecting the reputation, rights and freedoms of other persons".

The marginal note to that article reads "LIMITATION ON RIGHTS AND FREEDOMS". Simply said, "to limit something is not to obliterate it; a limitation on rights and duties does not do away with them."

Yet it is argued by some that by that Article, the Constitution took away the guarantees of freedom and independence granted under Article 162, and that in the result the dispensation for the media under the 1992 Constitution is no different from what it was before the coming into force of the Constitution.

They argue that the law of defamation inclusive of the law relating to criminal libel remains in force by reason of Article 164, and therefore editors and publishers in the media may be

harassed and dragged to Court and there penalized, notwithstanding the clear language of Article 162(4).

This seems to be the dominant view not only in the corridors of power, executive, legislative and judicial, but also in the legal profession. This must be why the "freedom and independence of the media" guaranteed under the 1992 Constitution, has suffered the same fate as the "Freedom and Justice" embossed on the National Coat of Arms.

This author believes that the predominance of this terrible view even within the legal profession, explains the increase both in criminal libel prosecutions and in civil libel litigation.

It is also the author's view that a proper constitutional interpretation cannot result in the abrogation, negation, or obliteration of the entrenched clauses of Article 162 by the unentrenched provisions of Article 164. Entrenched clauses in respect of the two languages English and Dutch, and also of the so-called Coloured Vote appeared in the Union of South Africa Act 1910. The acrimonious and long-drawn-out litigation over the Coloured Vote shows how difficult it is to get rid of entrenched clauses; not even the enthusiastic diehards and tyrants of the South African Nationalist Party could wish them away by reference to unentrenched clauses.

The American Constitution does not differentiate in its provisions and articles between entrenched and unentrenched clauses, and all provisions are of equal strength. Even there, it is not permissible to presume a conflict between different articles or provisions of the Constitution.

The proper approach is to read the Constitution as a whole so as to make sense of each article, and make each provision reasonably enforceable.

The continued existence of the law of libel, even of criminal libel does not preclude the enjoyment of absolute or qualified privileges by categories of persons on whom the same have been conferred either by common law or statute; needless to say the constitutional conferment of such privileges by entrenched provisions must render them sacrosanct.

It is the burden of this paper to argue that it is only by treating Article 162 (4) as establishing a new category of privilege in the law of defamation, that all the provisions in Chapter 12 of the Constitution can make sense, and that it is the only sensible approach.

Tradition has recognized two degrees of privilege available in both civil and criminal laws of defamation; these are absolute and qualified privileges, and the person who, or the occasion which is privileged in civil libel is equally privileged in criminal libel.

A privilege conferred by or under the Constitution is accordingly enjoyable in both civil and criminal law; furthermore, unless the wording used in the Constitution expressly or by necessary implication qualifies the privilege, it must be taken as an absolute privilege and like all constitutional provisions, the judges are bound to uphold it in conformity with the judicial oath to uphold, preserve, protect and defend the Constitution whether or not pleaded by the editors, or their lawyers or legal representatives.

Once it is disclosed to the court that the defendant is an editor or publisher in the mass media, and that the libel complained of was contained in his publication, the court must stay further proceedings and refer the parties to the Media Commission as the constitutionally designated, and therefore the proper forum for the settlement of media complaints, or dismiss the action entirely.

It is true that the National Media Commission Act makes provision for recourse to the original jurisdiction of the courts, but the Constitution itself contains no indication of such facility. Justice Forster and two of his colleagues on the Court of Appeal, have in a recent landmark judgement shown how statutes enacted by Parliament in excess of constitutional provisions ought to be treated: they ought properly to be ignored by the courts.

At common law the authorities establish beyond all question that neither party, witness, counsel, jury nor judges, can be put to answer civilly or criminally for words spoken in office, and that no action for libel or slander lies whether against judges, counsel, witness or parties for words spoken or written in the course of any



proceedings before any court recognized by law, and this although the words were written or spoken maliciously without any justification or excuse, and from personal ill will against the party defamed.

It is immaterial if the proceedings are in the open or in camera. The world has not come to an end because members of the legal profession, be they counsel or judges, enjoy privileges from suits for defamation committed in the course of their professional duties; it is the author's humble considered view that the world would not be plunged into chaos if similar privileges were extended to the editors and publishers, if that is what is required for the development of the media profession into a decent and honourable one.

The Consultative Assembly that drafted the Constitution shared this view which was subsequently endorsed by the people of Ghana in a referendum. The power to enforce the provisions of the Constitution is however vested in the Supreme Court.

In England, the courts which are the custodians of the Common Law have been very reluctant to extend the number of occasions on which no action will lie, even though the defendant published the words with full knowledge of their falsity and with express intention of injuring the plaintiff. See per Lopes L.J. in *Royal Aquarium v. Parkinson* (1892) 1 Q.B. 451.

Although some progress has occurred in recent times, the dead hand of judicial precedent has retarded the recognition by English judges of similar privileges in respect of defamation committed by the practitioner within the media. The absence of that privilege in favour of British media practitioners has blinded many in the local legal profession (judges and lawyers) to the importance of the very progressive, if not revolutionary provisions of Chapter 12 of the 1992 Constitution.

This is not the only reason why the honourable judges of Ghana will not be readily disposed to recognize that, as far as the discharge of professional duties is concerned, Kwesi Pratt Jnr. is entitled to the same absolute privileges from actions for libel as themselves; the main reason is the deep-rooted perception, especially

within the ruling classes to which these judges belong, that the media profession in Ghana is too immature and irresponsible to be relieved of the restraints and sanctions on their reckless enthusiasm and youthful exuberance, provided by libel actions.

There is no doubt that several members of the Government and other enlightened members of society share this view, and that abundant evidence in justification is provided by the incredibly sensational and notoriously inaccurate, and sometimes even fabricated reports and articles constantly carried in the local media, both private and state-owned.

The truth however remains that the privilege is intended for the public benefit, and unless it is reviewed by constitutional amendment, the views of individuals or classes, however powerful in society, cannot and should not be allowed to prevail. The immunity given to practitioners in the legal profession is not "so much for their own sake as for the sake of the public and for the administration of justice".

In respect of judges it has been said that "the ground ... on which this rule rests is that if such action would lie, the judges would lose their independence, and that the absolute freedom and independence of the judges is necessary for the administration of justice."

The preamble to the Constitution solemnly proclaims the commitment of the people "to freedom, justice, probity and accountability", and sub-clause (5) of Article 162 enjoins that "all agencies of the mass media shall, at all times, be free to uphold the principles, provisions and objectives of this Constitution, and shall uphold the responsibility and accountability of the Government to the people of Ghana".

This is an enormous task requiring dedication and the commitment of considerable human and material resources. A weak and impoverished media cannot "uphold the responsibility and accountability of the Government to the people of Ghana". On the face of it, it seems that the assignment of this task to the media has intensified the traditional hostility of Governments of Ghana towards newspapers or other media for mass communications not owned or published by their own supporters.

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None of the previous Governments including the British colonial administration, has ever viewed such papers as watchdogs for liberty; each Government has treated them as irresponsible trouble makers; and each Government has adopted its own methods to silence these critical papers.

Nkrumah bought out the *Graphic*, turned it into a state paper supporting his Government, and simply banned the *Ashanti Pioneer*.

The response of the Acheampong regime was characteristically devious: newsprint was withheld from the printers of the *Legon Observer* until they discontinued printing the paper.

The NLC simply took over the newspapers which had been state-owned under Nkrumah, unbanned the *Ashanti Pioneer* and allowed the registration and launching of only the *Legon Observer* by the intellectual supporters of the coup.

The periods served by the Busia and Limann regimes were relatively short and their methods did not have time to manifest themselves; but the relentless pursuit of both Kofi Badu and *The Spokesman* suggests that Busia, as his other endeavours at statecraft demonstrated, would have followed the British colonial example.

When the British colonial administration suddenly realized in the thirties that through the entrepreneurial efforts of Ocansey, the redoubtable Ada merchant, the foundations of a formidable newspaper industry were being laid, they struck, not at the proprietors or publishers, but at those of the editors who were knowledgeable, dedicated to the people's cause, and effective.

The British always boasted of their liberal credentials, and wanted to point at the existence of locally edited newspapers, provided they remained ineffective and uninfluential broadsheets.

The scandalous prosecution of both Nnamdi Azikiwe and Wallace Johnson had a traumatic effect on the development of the media profession, and delayed the emergence of a respectable daily news paper until Cecil King, a British newspaper tycoon set up the *Daily Graphic* after the Second World War as a watch-

dog on the activities of the CPP Government.

It is true that Azikiwe later successfully relocated in his own country of origin, Nigeria, but there already existed in that country a formidable, well established, professionally-run press under the leadership of Duse Mohamad Ali, the Egyptian editor of the *Comet* who had previously established the hugely successful *The African and Oriental Times* newspaper in London, and who could not be toyed with by the local administration.

The provisions of Chapter 12 of the Constitution were designed to promote a free and independent media profession, and the National Media Commission was provided for and accordingly charged "to take all appropriate measures to ensure the establishment and maintenance of the highest journalistic standards in the news media".

It is the function of the Commission to insulate the state-owned media from the Government, but not to interfere with, or control the practice of the journalistic profession itself, except where under Article 167 the Commission has been called upon to investigate, mediate or settle a complaint made against or by the press or other mass media. This is remarkably similar to what the General Legal Council is to the legal profession in Ghana.

The Constitution has thus set up a domestic forum for the settlement of all media complaints except where under Article 165 as read with Article 33, recourse may be had to the High Court where a person alleges that his fundamental human rights and freedoms have been contravened by a journalist in the course of his professional duties, such as the invasion of the privacy of his home under Article 18.

It is not necessary to consider whether by reason of these provisions, all complaints against editors and publishers, except those in respect of human rights must first be dealt with by the Media Commission because Parliament did not take that view in enacting the National Media Commission Act of 1993.

It is unfortunate that the early problem that beset the Media Commission did not allow it time to impress itself on the public mind as the primary institution for the development of the media profession and the discipline of its members.

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The author is persuaded that if the inane pursuit of continuity had not frustrated the constitutional command for change in this regard, the Media Commission would by now have evolved effective non-penal reliefs for the settlement and redress of media complaints; the public would by now have begun to appreciate that the Constitution has specifically vested the duty to investigate media complaints in the Media Commission, and that just as the police may intervene when two lawyers are exchanging blows in court, and may not do so when the same lawyers are exchanging pleadings, so the police cannot interfere in the professional work of journalists.

The 1992 Constitution marked the end of the decade of the culture of silence during which press freedom, freedom of expression and religious freedom were all and each ruthlessly emasculated by draconian legislation, and when Chief Justice after Chief Justice presided over a cowed judiciary which was stripped of its collective will to maintain and defend its independence and the dignity of the high office.

Prior to that period, judges relied on the Chief Justice to defend each of them against executive attack on their position on the bench; each judge knew and expected the Chief Justice would see to it and insist that the procedures laid down and the grounds for the removal or dismissal of judges were honoured.

The judges dismissed in 1964 and after the 1966 coup could not look to their respective Chief Justices for succour because those Chief Justices were included among those dismissed; the same cannot be said of the judges arbitrarily dismissed during the PNDC era. In one fell swoop the confidence in their leader that had built up in the judges during more than a century of the Superior Court of Judicature was destroyed, and each judge began to look for his own guardian angel and protector in or near the Castle. Inevitably, a strong and close symbiotic

relationship developed between individual judges and individual members of the executive, and their views on several issues of both law and fact began to coalesce dangerously.

The coming into force of the 1992 Constitution with the restatement of the grounds and procedures for the removal of judges, has reversed the aforesaid tendency, and it can be said that the confidence of individual judges and the collective judiciary in the leadership of the Chief Justice is growing.

The alleged high levels of damages awarded for libel in favour of ministers and other prominent persons should not be blamed on executive influence on the judiciary. Moreover there is not a scintilla of evidence to support the claim that the so-called high awards are in any way threatening the existence of the private media.

If that were so, a newspaper against which a heavy award has been made would seek amalgamation with other like-minded newspapers. It would not duplicate itself, with the new paper playing the role of a crusader and leaving the old infidel to shoulder the award alone.

The Chief Justice has recently expressed the wish that several of the libel actions should have commenced or been dealt with in the Media Commission. He was not seized with a case, and had not had the benefit of legal argument; he spoke *ex cathedra*.

The author has no doubt that if the constitutional entitlement of media editors and publishers were recognized by the courts and the lawyers, most cases would not go to court and that complainants against newspapers would prefer a settlement within the media profession itself, where these editors would not be entitled to any privileges, in the same way as lawyers appearing before the disciplinary commission for use of obscene or libellous words in court, cannot claim any professional privileges.

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