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ARTICLE 19

GLOBAL CAMPAIGN FOR FREE EXPRESSION

DEFAMATION ABC

A SIMPLE INTRODUCTION TO KEY
CONCEPTS OF DEFAMATION LAW

NOVEMBER 2006



DEFAMATION CAMPAIGNING TOOLS

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1. WHAT ARE DEFAMATION LAWS?

Defining the term

- Broadly speaking, the term ‘defamation law’ is used to refer to any law related to the protection of individuals’ reputation or feelings. All countries have defamation laws, although a range of terms are used to describe these, including libel, slander, insult, ‘desacato’ and so on. The form and content of these laws differs widely from country to country. In some places, there is a dedicated ‘defamation code’, but in most countries articles dealing with the subject can be found in more general laws, such as the civil code or criminal code.
- A **good** defamation law – one which lays the groundwork for striking a proper balance between the protection of individuals’ reputation and freedom of expression – could be defined as follows: a defamation law is a law which aims to *protect people against false statements of fact which cause damage to their reputation*. This definition contains four elements. In order to be defamatory, a statement must:
 - be *false* (see the section on the defence of the truth, below);
 - be of a *factual* nature (see the section on the defence of opinion);
 - cause *damage*; and
 - this damage must be to the *reputation* of the person concerned, which in turn means that the statement in question must have been read, heard or seen by others (see the section on ‘reputations versus feelings’ below).

Many defamation laws around the world do not conform to this definition.

Distinguishing defamation from other concepts

- Many countries have other types of laws which may be confused with, but should be distinguished from, defamation laws, even if that term is understood broadly. These include hate speech, blasphemy and privacy laws.
- Hate speech laws are laws which prohibit statements which incite to discrimination, hostility or violence against a group with a shared identity, such as nationality, race or religion. In some cases, the term ‘group defamation’ is used to refer to such laws. There are, however, two important differences with defamation laws: first, hate speech laws are intended to protect the safety and social equality of vulnerable groups, rather than their reputation; and second, hate speech laws protect groups of people, identified by certain shared characteristics, rather than individuals or legal persons (such as businesses or non-profit organisations).
- Blasphemy laws are laws which prohibit the denial or mockery of religion(s). The difference with defamation laws is again that blasphemy laws do not specifically protect individuals or even the reputation of the religion. Rather, they protect the sensitivities of adherents to the religion.
- Privacy laws are laws which prohibit unauthorised intrusion into or publication of the details of a fellow citizen’s private life. In contrast to defamation laws, privacy laws can

be used to prevent the dissemination of *truthful* facts, such as genuine photos taken surreptitiously in a private home. Furthermore, the effect that these facts have on the reputation of the person concerned is immaterial. The deciding factor is whether the plaintiff has proven wrongful intrusion into his or her privacy. In some situations, privacy laws and defamation laws could overlap. This might be the case, for example, if someone draws false conclusions from surreptitious photographs, such as that the person portrayed is having an affair.

2. KEY PROBLEMS WITH DEFAMATION LAWS

Although defamation laws can certainly serve a legitimate purpose – protection of reputation – in practice they often represent unnecessarily and unjustifiably broad restrictions on freedom of expression. The most common problems with defamation laws are that they are overbroad in their application, that they fail to provide for adequate defences – that is, legally recognised ‘excuses’ – and that sanctions for breach are excessive. In some cases, laws which use the terminology of defamation in reality serve purposes unrelated to the protection of reputation, creating confusion amongst citizens and discouraging them from expressing their views.

Stifling debate on public institutions

- Some defamation laws explicitly seek to discourage debate about official institutions by broadly prohibiting criticism of the head of State, the flag or other public bodies and symbols, or by imposing higher penalties when a defamatory statement affects one of these entities. The mere existence of laws of this type may encourage self-censorship amongst the media and individual citizens, even if they are applied with restraint. In other cases, poorly drafted laws may be exploited by officials and other public figures to silence their critics and to prevent debate about issues of legitimate public concern.

Protecting feelings instead of reputations

- Another common flaw which allows a defamation law to be abused is the protection of feelings rather than reputations. Words like ‘insult’, ‘affront’ or ‘aspersion’ may be used in such laws. Since feelings do not lend themselves to definition but are, rather, subjective emotions, these laws can be interpreted flexibly to suit the authorities’ needs, including in order to prevent criticism. Moreover, the subjective nature of what constitutes an insult means that a charge of this sort is very difficult to defend against (see further the section on ‘reputations versus feelings’ below).

Protecting public order instead of reputations

- Some States have laws which use the terminology of defamation, but whose aim is in fact to protect public order rather than the reputation of others. This confusion between defamation and public order laws is in part historical since, in the past, an insult could in fact lead to public order disturbances, such as a duel or even a war. The problem with this type of law is not so much the risk of abuse, but its potential to confuse. ‘Defamation laws’ which are really public order laws suffer from several defects:
 - They tend to duplicate other public order laws, leading to uncertainty about which standard applies, and raising the possibility of different rules being applicable to the same act.
 - Their use of defamation terminology can lead judges to apply them to cases of defamation without any public order aspect. As a result, judges may apply sanctions which, while appropriate and proportionate in a public order context, are excessive in the context of defamation. The threat of having excessive sanctions imposed, in turn, may lead individuals to censor themselves unduly.

- The connection between defamation and public order may lead judges to hold individuals responsible for the disproportionate reaction of others, rather than for the actual content of their own statements.

Thus, although protecting public order can justify restrictions on freedom of expression, this is best done through laws specifically designed for that purpose rather than through defamation laws.

- Laws which use defamation language are occasionally directed at yet other goals, such as ensuring friendly relations with foreign States or protecting national security. The objections against such legislation are much the same as those against public order 'defamation' laws.

Inadequate defences

- Many defamation laws fail to provide for sufficient defences, such as that the disputed statement was an opinion, not an allegation of fact, or that it was reasonable to publish the statement. Often, defamation laws allow courts to assume that facts which cause harm to reputation are false, rather than requiring this to be proven.
- Even in countries with an ostensibly well-written defamation law, which genuinely aims to protect reputations and provides adequate defences, the cost of defending against defamation actions can still have a heavy impact on freedom of expression. The imposition of crushing damage awards or other excessive penalties, particularly criminal sanctions, may further discourage open discussion on matters of public interest.

3. TYPES OF DEFAMATION LAWS

Spoken and written defamation

- In some countries, the law draws a distinction between spoken defamation (slander) and written defamation (libel). Because of the wider reach of the printed word, libel is generally considered the more serious offence of the two. For the same reason, defamatory statements communicated through modern types of mass media, such as radio or television, are usually categorised as libel, even if they consist of spoken words.

Reputations versus feelings

- Within the wide range of legislation commonly referred to as ‘defamation laws’, an important distinction can be drawn between those laws whose purpose is genuinely to protect *reputation*, defined as the esteem in which other members of society hold the person, and those which aim rather to prevent harm to someone’s *feelings*, regardless of whether the person’s social standing has been diminished.
- The key difference is that laws which protect feelings seek to protect a purely *subjective* value. Whether or not someone has actually been hurt by a remark cannot be proven by any external factor – the only evidence available is the person’s own statement as to his or her feelings. By contrast, reputation is an *objective* concept: it is possible to prove damage to someone’s reputation through external factors. For example, a company could prove that its profits plummeted as a result of the publication of a false accusation against it, or an individual could show the loss of friends by producing angry letters from them.
- Laws which protect feelings put the plaintiff in a very strong position – all he or she needs to do is persuade the court that the statement in question caused offence, and it will be practically impossible for the defendant to offer any counterevidence. Inevitably, laws of this kind are often used by powerful figures to attack their critics. In order to ensure that the open debate which is essential for democracy can take place, many countries have been moving away from laws protecting feelings towards genuine ‘reputation’ laws. This does not mean that it is no longer possible for individuals to take legal action against offensive statements – however, plaintiffs will have to show that the statement reduced other people’s estimation of them in order to be successful.
- Whether a law protects reputations or feelings depends on an analysis of the actual text and implications of a given law. In many cases a careful interpretation of the law’s terms will provide an answer, while in others it will be necessary to study how the law is applied in practice. The terminology employed in domestic laws varies widely in practice and it may not always be immediately clear to which category a particular law belongs.
- The term ‘honour’ is frequently used in domestic laws instead of, or in addition to, ‘reputation’ and ‘insult’. ‘Honour’ often has an ambiguous meaning: it may refer both to someone’s internal feelings of pride and to the community’s perception of that person. In all cases, as noted, the true character of a law depends on how it is interpreted and applied in practice.

Example

Article 267 of the Criminal Code of Denmark prohibits violation of “the personal honour of another by offensive words or conduct or by making or spreading accusations of an act likely to disparage another in the esteem of his fellow citizens.”

Taken alone, the second half of this provision would be a genuine reputation-protecting defamation law, since it seeks to protect the standing of individuals within their community. But the first half appears to go further by prohibiting acts which harm the subjective feelings of others – namely *offensive* words or conduct.

Civil versus criminal defamation

- In many countries, defamation is both a civil wrong and a criminal offence. The distinction between civil and criminal defamation laws reflects the wider division between civil and criminal law which exists in all advanced legal systems.
- Criminal law generally deals with acts which are deemed to harm the general public interest, such as assault or robbery. Although such acts may take place between two individuals, they are considered to pose a risk to everyone in society, since everyone is at risk of being attacked or robbed if such actions are not sanctioned. The authorities normally prosecute the case on behalf of the public, using public funds. If found guilty, the suspect can be required to make reparation to the community by paying a fine to the State, be punished through a prison term or have some other penalty imposed.
- Civil law, on the other hand, is concerned with private disputes between individuals or organisations. It covers such matters as contracts, property ownership, labour relations and family disputes, all of which are considered to be issues between the individuals involved. Those involved in a civil law dispute can take the matter to court, but must do so at their own expense. The purpose of the civil law is not to punish on behalf of society, but to restore the wronged party to their rightful situation. Civil courts can award compensation, but cannot impose fines or prison sentences.
- Criminal and civil law are not mutually exclusive categories; something that is forbidden under criminal law may also be wrongful under civil law, and vice versa. Assault is normally a criminal offence but many legal systems also allow for civil actions to recover private losses resulting from an assault, such as medical costs or loss of work.
- Criminal defamation laws are increasingly viewed as an unjustifiable limitation on freedom of expression (see Section 5 below) and, as a result, are nowadays rarely or never applied in most democracies. In recent years, a number of countries have formally decided to abolish their criminal defamation statutes.

4. DEFAMATION AND HUMAN RIGHTS

A conflict between two rights

- Defamation laws are by definition a limitation on one human right protected by international law – the right to freedom of expression – in favour of another important interest, the protection of reputation. There is no automatic hierarchy between these two but the balancing must take place in accordance with a clearly-defined set of rules, discussed below.

Human rights: general principles

- Human rights are those rights deemed to be so inherent to the equal dignity of all human beings that every individual, in every country of the world, may claim them against the State on whose territory he or she finds himself. Historically, human rights could only be invoked against States, not against private companies, organisations or individuals. However, there is a trend towards recognising the importance of other powerful social actors and, in some cases, States may be under an obligation to ensure that the enjoyment of rights is not hindered by private actors; in this way, human rights offer indirect protection against non-State actors.
- The most important statement of the various internationally recognised human rights can be found in the *Universal Declaration of Human Rights* (UDHR). The UDHR is not a binding treaty, but a resolution of the United Nations General Assembly, adopted without an opposing vote in 1948. A number of formally binding human rights treaties have been adopted which elaborate on the UDHR. The most important one for present purposes is the *International Covenant on Civil and Political Rights* (ICCPR), a United Nations treaty which has been ratified by a large majority of the world's States (160 as of 1 November 2006).

The right to freedom of expression

- The UDHR contains the leading definition of the right to freedom of expression, in Article 19:

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.

- The ICCPR defines freedom of expression in very similar terms, in Article 19(2):

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

- The international definition of freedom of expression has five main elements:
 - It belongs to *everyone* without distinction on grounds such as gender, race, nationality or religion. It belongs to children, foreigners, minorities and even prisoners.
 - It includes the right to *seek, receive and impart* information and ideas. In other words, it covers not only the right to speak but also the right to access the statements of others and to access information held by public bodies.
 - The right extends to *information and ideas of any kind*. Any fact or opinion which can be transmitted is in principle protected by the right, including statements which shock or offend, or which are considered to be false, misleading or unimportant. Many ideas which are now widely accepted were at one time considered heretical. Freedom of expression would be meaningless if it only protected statements that are generally accepted.
 - Freedom of expression is guaranteed *regardless of frontiers*. Individuals are entitled to seek, receive and impart information to and from other countries.
 - The right to freedom of expression may be exercised *through any media*. Individuals are entitled to use any method to communicate their message, whether modern or traditional, including newspapers, magazines, books, pamphlets, radio, television, the Internet, art and public meetings.

- International courts and other authoritative bodies have made it clear that freedom of expression is a positive right; in other words, governments must not only abstain from unjustified interference with it but must also implement measures to strengthen the ability of citizens to exercise the right.

The right to a reputation

- The right to a reputation is guaranteed by Article 12 of the UDHR (together with a number of related rights):

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

- The corresponding provision in the ICCPR is Article 17, which is virtually identical except that it prohibits only “*unlawful attacks*” (emphasis added) on honour and reputation. This qualification was inserted as an additional safeguard for freedom of expression and to allow States some scope to decide what sort of attacks they wish to make unlawful.
- The use of the word ‘attacks’ makes it clear that only *deliberate and serious* interferences with honour and reputation are covered. During the negotiations leading up to the adoption of the ICCPR, several States stressed that fair comments or truthful statements can never constitute ‘attacks’

- The significance of the distinction between ‘honour’ and ‘reputation’ in the UDHR and ICCPR is not completely clear. During the negotiation of the UDHR, some delegations opposed the word ‘honour’ on the grounds that it was too vague. The same objection arose during the drafting of the ICCPR. One reason why ‘honour’ was nevertheless retained in the final text is that some delegations viewed ‘reputation’ and ‘honour’ as two separate aspects of an individual’s standing in society. According to this view, ‘reputation’ relates to professional or social standing, while ‘honour’ relates to moral standing. Falsely accusing someone of, for example, incompetence would be an attack on reputation, while an accusation of theft would be an attack on honour. It would appear, then, that as used in these texts the word ‘honour’ is not synonymous with subjective feelings but, rather, an aspect of the objective esteem in which society holds the person. As used in this ABC, however, the word ‘reputation’ encompasses both concepts; it denotes an individual’s standing in society, whether moral, social or professional.
- The right to a reputation clearly applies against the State: public bodies are bound to refrain from unlawful attacks on the reputation of citizens. Article 12 of the UDHR and Article 17 of the ICCPR moreover require States to ensure that reputations enjoy “the protection of the law”. It is clear, then, that each country should have legislation which enables citizens to take legal action when State organs or officials tarnish their reputation. It is less clear whether or not the right to a reputation also has a positive aspect whereby States are required to adopt laws protecting reputations against attack by *private persons*. In practice, however, all States do have such laws on the books.

Balancing the two rights: the three-part test

- To what extent may freedom of expression be restricted in order to protect reputations? The ICCPR prescribes clear parameters within which all limitations on freedom of expression must remain:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 19(3) stipulates a three-part test: first, any restriction on the right to freedom of expression must be in accordance with a law or regulation; second, the legally sanctioned restriction must protect or promote an aim deemed legitimate under international law; and third, the restriction must be *necessary* for the protection or promotion of the legitimate aim. All three conditions must be met for a restriction on freedom of expression to be legitimate.

- ‘Restrictions’ on freedom of expression are any kind of formality, condition, restriction or penalty imposed by a public body on the exercise of the right, regardless of its severity. For example, a law which requires individuals who are found responsible for defamation

to publish a correction is a restriction on freedom of expression and is legitimate only if it complies with the three-part test.

- The first part of the test means that a restriction on freedom of expression cannot be merely the result of the whim of a public official but must be based on a pre-existing law or regulation. The requirement goes further, however: legislation restricting freedom of expression must also be *clear* and *accessible*, so that it enables citizens to reasonably foresee the consequences of their actions. This means that all aspects of defamation law should be well-defined, including the level of compensation that may be awarded.

There are several rationales for this. In the first place, it is a matter of fairness that citizens' rights should not be restricted without giving them adequate notice in advance of what is prohibited. Furthermore, laws which are unclear allow excessive scope for interpretation which may give rise to abuse. Similarly, vague laws have what is often called a 'chilling effect': because they create uncertainty about what is and what is not permitted, they encourage self-censorship and may prevent discussion on legitimate and important subjects.

- The second requirement for restrictions on freedom of expression is that they must serve a legitimate aim. This requirement is not open-ended; the list of legitimate aims provided in Article 19(3) of the ICCPR is exclusive and governments may not add to it. The list includes 'respect of the rights and reputations of others', providing a clear legal basis for *genuine* defamation laws. The list does *not* include the feelings or self-esteem of other individuals; laws protecting feelings therefore fail this part of the test.
- The final part of the test holds that a restriction on freedom of expression must be truly *necessary* for the achievement of its aim. This may seem self-evident: if a restriction on a right is not needed, why impose it? Nevertheless, in a great majority of the cases in which international courts have found a breach of the right to freedom of expression, this was because the impugned restriction was not deemed to be necessary. The requirement of 'necessity' imposes strict quality controls on laws which restrict freedom of expression:
 - First, a restriction on free speech must be in response to a *pressing social need*, not merely a matter of convenience.
 - Second, the least intrusive measure which would achieve the pressing social need must be employed since a more intrusive measure would not be necessary if a less intrusive option were available. For example, shutting down a newspaper for defamation is excessive; other remedies, such as a retraction or a modest damage award, provide adequate protection for reputation.
 - Third, the measure must impair the right as little as possible and, in particular, only affect the specific harmful speech. For example, a law which prohibited all attacks on reputation would not meet this test, since it would, among other things, prohibit critical but factually truthful statements.
 - Fourth, the impact of restrictions must be proportionate, meaning that a measure's harm to freedom of expression must not outweigh the benefits to the interest it aims to serve. A restriction which provides limited protection to a person's reputation but which seriously undermines freedom of expression would not meet this standard.

- Finally, in applying this test, courts and others should take into account all of the circumstances at the time the restriction is applied.

5. CRIMINAL DEFAMATION

The risks of criminal defamation

- Although many countries still prohibit defamation as a criminal offence, there is an increasing tendency to view criminal defamation as an unjustifiable restriction on freedom of expression and to abolish it in favour of civil defamation. Countries such as Bosnia-Herzegovina (2002), Georgia (2004), Ghana (2001), Sri Lanka (2002) and the Ukraine (2001) have already decriminalised defamation and a number of other countries are considering doing so. Yet other countries have limited the impact of criminal defamation laws, for example by doing away with the possibility of imprisonment.
- One of the main concerns with criminal defamation is the serious chilling effect it exerts on freedom of expression. Criminal defamation laws can lead to the imposition of harsh sanctions, such as a prison sentence, a hefty fine or, in the case of journalists, suspension of the right to practise their profession. Even if the maximum penalties are low, criminal defamation can still cast a long shadow: individuals prosecuted under it face the possibility of being arrested by the police, held in pre-trial detention and subjected to a criminal trial. Even if the court imposes only a minor fine, they may be saddled with a criminal record and face the social stigma associated with this. A common problem in many countries is the awarding of suspended jail sentences: the individual walks free but has nevertheless effectively been ‘shut up’ since any further conviction will lead to immediate imprisonment.
- The chilling effect of criminal defamation laws is significantly exacerbated due to the fact that, in many countries, it is powerful social actors – such as government officials, senior civil servants or prominent businessmen – who bring the vast majority of cases. These individuals seek to abuse such laws to protect themselves from criticism or from the disclosure of embarrassing but truthful facts.
- Another key objection to criminal defamation laws is that the goal of protecting individuals’ reputations can effectively be accomplished through the civil law. This is borne out by the experience of countries which have abolished or no longer use their criminal defamation laws. This raises serious doubts as to whether criminal defamation laws, by nature a more heavy-handed instrument, are justifiable since, as noted above, the least intrusive effective restriction must always be preferred.
- Criminal defamation laws are also criticised on other grounds. Defamation is arguably a private matter between two individuals, with which the State should not concern itself. Furthermore, a criminal conviction will usually not provide the defamed person with any compensation, since in most legal systems fines go directly into the State’s pocket.

International law on criminal defamation

- International bodies such as the UN have recognised the threat posed by criminal defamation laws and have recommended that they be abolished.
 - The UN Human Rights Committee has repeatedly expressed concern about criminal defamation laws, and has called on States to “ensure that defamation is no longer punishable by imprisonment” (Concluding Observations on Italy, 24

April 2006, para. 19). It has welcomed the abolition of criminal defamation laws where this has occurred.

- The UN Special Rapporteur on Freedom of Opinion and Expression stated in his 1999 annual report that “sanctions for defamation should not be so large as to exert a chilling effect on freedom of opinion and expression and the right to seek, receive and impart information; penal sanctions, in particular imprisonment, should never be applied.” In his reports the following two years, the Special Rapporteur went even further, calling on States to repeal all criminal defamation laws in favour of civil defamation laws.
- The UN Special Rapporteur also took up the question together with his counterparts at the OSCE and OAS. In Joint Declarations issued in November 1999, November 2000 and December 2002, these three special mandates on freedom of expression called on States to repeal their criminal defamation laws. The 2002 declaration stated: “Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.”
- The 1996 UNESCO-sponsored Sana'a Declaration states: “Disputes involving the media and/or the media professionals in the exercise of their profession...should be tried under civil and not criminal codes and procedures.”
- The European Court of Human Rights has held on many occasions that “the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings” in defamation cases. It has not completely ruled out criminal defamation, but has frequently stated that such measures should only be adopted where States act “in their capacity as guarantors of public order” and where they are “[i]ntended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith.”
- The Inter-American Court of Human Rights has also found a breach of the right to freedom of expression in two leading cases involving criminal defamation being applied to statements on matters of public interest, largely ruling it out in such cases.
- The Secretary General of the Council of Europe has called on all Member States to “abolish criminal provisions” in the area of defamation (Statement on 3 May 2006, World Press Freedom Day).

Interim measures towards decriminalisation

- Although there is a growing trend towards complete abolition of criminal defamation laws, there is still strong opposition to this in many countries. Where complete abolition of such laws is not practical or politically feasible, a number of interim measures can be taken to limit the negative impact of criminal defamation. These include the following:
 - Abolishing excessive sanctions, such as prison sentences, suspended prison sentences, heavy fines and suspension of the right to practise journalism or any other profession.

- Prohibiting public officials, public bodies or entities such as the flag or State from instituting criminal defamation actions.
- Where criminal prosecutions by private persons are possible, ruling out the participation of public authorities, including police and public prosecutors, in the initiation or prosecution of criminal defamation cases.
- Ensuring that nobody can be convicted for defamation unless the accusing party proves, beyond a reasonable doubt that:
 1. the statement in question was false;
 2. the person making the statement knew it was false or showed reckless disregard as to its truthfulness; and
 3. the statement was made with the intention of causing harm to the accusing party.

6. CIVIL DEFAMATION

Key elements of a good law

- Because they do not involve the State's criminal justice machinery, civil defamation laws can have a smaller footprint on freedom of expression than their criminal counterparts. In order for this to be the case, the law must be formulated in a way which:
 - insulates it against abuse by defining the scope of the law as narrowly as possible, including in relation to who may sue;
 - ensures that those sued for defamation are able to mount a proper defence; and
 - provides for a regime of remedies that allows for proportionate responses to defamatory statements.

Scope

Public bodies

- Several established democracies do not allow public bodies (such as ministries, government agencies or municipalities) to sue for defamation under any circumstances, both because of the importance of open debate about the functioning of such bodies and because they are not seen as having a 'reputation' entitled to protection. As abstract entities without a profit motive, public bodies lack an emotional or financial interest in preventing damage to their good name. Moreover, the bringing of defamation suits by these bodies is seen as an improper use of public money, particularly given the ample non-legal means available to them to respond to criticism, for example through a public counter-statement.
- A ban on defamation suits should apply to all public bodies, whether they are part of the legislative, executive or judicial branches of government, and whether they are at the national, regional or local level. Some countries have even extended the ban to State-owned corporations and political parties.

The State, objects and symbols

- Defamation laws which seek to protect the 'reputation' of the State or of objects, such as State or religious symbols, flags and national insignia, are an especially problematic restriction on freedom of expression. Like public bodies, these abstract entities do not have any financial or emotional interest to defend; it is even questionable whether they have a 'reputation' of any sort which might be undermined by a false accusation of fact. More often than not, the purpose of defamation laws which protect these abstract interests is to prevent the expression of unpopular opinions, which, as discussed above, are protected by the right to freedom of expression.

Public officials and politicians

- In many countries, defamation laws provide greater protection for certain public officials (often including the head of State) than for ordinary citizens. Sometimes, the level of criticism permitted against such individuals is lower, in other cases maximum penalties are higher or public officials enjoy special assistance from the State in bringing defamation actions. International human rights courts have consistently held, however, that public officials should tolerate *more*, not less, criticism than ordinary citizens. By choosing a profession involving responsibilities to the public, officials knowingly lay themselves open to scrutiny of their words and deeds by the media and the public at large. Moreover, vigorous debate about the functioning of public officials and the government is an important aspect of democracy. To ensure that this debate can take place freely, uninhibited by the threat of legal action, the use of defamation laws by public officials should be circumscribed as far as possible.
- At the same time, low-ranking civil servants have not deliberately exposed themselves to public scrutiny to the same extent as their more senior colleagues. In general, the more senior the public official, the more criticism he or she may be expected to tolerate, including of his or her behaviour outside of official duties. Politicians come at the top of the scale due to the importance of debate about candidates for election.

Defences

A defence is a legally recognised argument which, if successful, means that the defendant is not liable for an act which, absent the defence, would be wrongful. For example, most legal systems recognise a defence of ‘consent’ – the defendant will not be held liable for an act which the plaintiff agreed to. For example, if A borrows B’s car, and B then sues A for stealing the car, A can invoke the defence of consent – B agreed to lend out his car.

A strong system of defences which can be invoked against a defamation claim is essential if defamation laws are not unreasonably to restrict the free flow of information and ideas. The eight defences noted below – drawn from a comparison of the laws of different countries and the jurisprudence of international courts – are of particular importance.

Defence of truth

- A defence of truth is central to most defamation law regimes. In many countries, it is recognised that individuals should never be found liable for defamation unless they are shown to have made a false assertion of fact. In other words, truth is a complete defence to an allegation of defamation.
- The rationale for the defence of truth is that the law of defamation should serve to protect individuals against *unwarranted* attacks on their reputation, rather than to protect them regardless of whether or not their good reputation is deserved. Individuals may not wish to see true but unflattering statements about them published, but they should not be able to sue for damages for this. At the same time, an individual confronted with truthful revelations about his or her private life may still have a separate claim for invasion of privacy (see the discussion above about privacy laws).

- An important question is who should bear the burden of proof regarding the falsehood or truthfulness of a statement. The claim that a statement is false is central to a defamation suit and, as a result, it is fairest, and certainly least harmful to freedom of expression, for the plaintiff to bear the burden of proving this. Furthermore, the plaintiff, having raised the claim, often has best access to the evidence required to prove falsity. Finally, a risk of being taken to court and having to prove the truth of every single statement published would discourage journalists from writing about controversial topics.
- At a minimum, the burden of proof should fall upon the plaintiff in cases involving matters of public interest, such as discussion of the activities of politicians and public officials. While this may in some cases make it difficult for those individuals to pursue even a well-founded defamation claim, the hardship imposed on plaintiffs (usually public figures) is justified by the importance of safeguarding debate on matters of public interest. Requiring the defendant to prove the truth of his or her claims promotes self-censorship, as individuals will refrain from making statements not because they are false or believed to be false, but out of fear that they cannot be proven to be true in a court of law or because of the high cost of defending a defamation suit.
- Separate from the burden of proof is the *standard* of proof that must be met. In some countries, public figures and other plaintiffs in cases affecting the public interest are required to meet a higher standard of proof than in an ordinary case. The normal standard of proof in a civil case is a 'preponderance of the evidence': the party who presents the more convincing case, even by a small margin, will win. In some countries, plaintiffs in public interest cases are required to prove falsity by 'clear and convincing evidence'. This requires proof to the point where the court has fairly little doubt left that the statement was, indeed, false.

Defence of opinion

- Under international law, statements of opinion have been accorded very significant protection and, in some countries, no one can be found liable under defamation law for an opinion. This is because statements of opinion, which do not contain factual allegations, cannot be proven true or false; the law should not decide which opinions are correct and which are not, but should allow citizens to make up their own minds. There is a risk, of course, that some people will use the immunity the law provides them to express opinions which many people would consider insulting. This risk is overshadowed, however, by the dangers of allowing the authorities to determine which opinions are acceptable and which are not.
- Determining whether a statement is one of fact or of opinion can sometimes be difficult. If the burden to prove that the statement is false is on the plaintiff, he or she will have to identify some factual element in the statement to disprove, although this may still, of course, be contested. A statement that someone is 'good' or 'bad' is clearly an opinion, but what about a remark that someone is a 'crook'? Sometimes, a statement may contain elements which, taken literally, are of a factual nature, but which are clearly intended to be understood as an opinion. This is often the case with rhetorical devices such as jokes, figures of speech or exaggerations. Courts should study the context of statements to determine whether they should reasonably be interpreted as a factual allegation or as an opinion.

Defence of 'reasonable publication'

- Even if a statement of fact on a matter of public concern has been proven to be false, defendants in a defamation law suit should benefit from a defence of 'reasonable publication' (which in some countries is known as a defence of 'due diligence' or 'good faith'). This defence applies, as its name suggests, if it was reasonable in all of the circumstances for the defendant to have disseminated the contested material in the manner and form he or she did.
- The main purpose of the defence of reasonable publication is to ensure that the media can do their work of informing the public effectively. When an important news story is developing, journalists cannot always wait until they are completely sure that every fact is correct before publishing or broadcasting the story. Even the best journalists make honest mistakes; to leave them open to punishment for every false allegation would make their work very risky and so discourage them from providing the public with timely information. The defence of reasonable publication protects those who have acted reasonably in balancing the need to provide information against the need to avoid damaging reputations, while allowing plaintiffs to sue those who have not.
- While the defence of reasonable publication is most likely to be invoked by the media, it should be available to anyone. Situations may arise in which non-journalists, such as academic researchers or civil society activists, unintentionally publish false facts under circumstances in which it was reasonable to do so.

Absolute and qualified privileges

- There are certain occasions on which the ability to speak freely, without fear of legal consequences, is so vital that statements made there should never lead to liability for defamation. Such an 'absolute privilege' should apply, for example, to statements made in the course of legal proceedings, statements made by or before elected bodies, such as Parliament or a local authority, and fair reports of such statements. Certain other types of statements should enjoy a 'qualified privilege'; that is, they should be exempt from liability unless it is proven that they were made with ill will or spite. This latter category should include statements which the speaker is under a legal, moral or social duty to make, such as reporting a suspected crime to the police. The deciding factor should be whether the public interest in statements of that sort being made outweighs the harm that they may cause to private reputations.

Words of others

- Individuals should not be held liable for reporting or reproducing the defamatory statements of others where the following three conditions are met: first, the statements were part of a discussion on a matter of public interest; second, the individual refrained from endorsing the statements; and third, it is clear that the statements were originally made by someone else.
- The defence of 'words of others' recognises that the media have a responsibility to cover the news and that this may include reporting on remarks which undermine the reputation of others. Furthermore, journalists are not required specifically to distance themselves from the statements, or to check the truthfulness of every remark. This would make the work of the media very difficult and thereby harm the flow of information to the public.

Innocent publication

- Many countries recognise a defence of ‘innocent publication’, which applies when someone unknowingly publishes or contributes to the dissemination of a defamatory statement without having been careless or in any way responsible for the statement. The defence of innocent publication has traditionally been relied upon by individuals who participate in the production or dissemination of a publication but who have no control over its content, such as newspaper boys or graphic design companies. The defence has modern applications as well. For example, Internet service providers (ISPs) facilitate the dissemination of information over the Internet by their subscribers, but it is the role of the courts, not ISPs, to determine whether or not the material is defamatory. If ISPs were responsible for the information, they would have to engage in censorship on the basis of their own view of the material, which is clearly unsatisfactory. They may, therefore, also invoke the defence.

Consent

- As noted above, consent is a common defence against any tort claim. The defence of consent recognises that plaintiffs should not be able to complain in court for acts to which they consented, including defamatory statements. The defence of consent would apply, for example, in cases in which an individual provides false information about him- or herself to a newspaper, which the newspaper subsequently publishes.

Statute of limitations

- Most legal systems recognise a cut-off date after which a plaintiff can no longer sue for a tort, including defamation. There are various reasons for such ‘statutes of limitation’, principally that after a certain lapse of time, evidence may have been lost and witnesses’ memories will have faded, and that individuals should be able to get on with their lives and not have to live forever under the shadow of a possible lawsuit.
- These considerations are particularly acute in the case of defamation law, given that it is a restriction on freedom of expression, and the statute of limitations in this case should be short, generally not more than one year. A longer time limit can serve to chill freedom of expression, both because it makes mounting a defence difficult, and because living in uncertainty about the consequences of certain statements discourages further critical discussion. If the period prescribed by the statute of limitations has passed, the defendant should be able to raise this as a complete defence to the defamation claim.

Remedies

A ‘remedy’ is a form of reparation that can be awarded by a court to redress harm caused. Examples of common remedies across different legal systems are an order to pay financial compensation, to cease the wrongful conduct or to provide a correction or right of reply.

Type and role of remedies

- The discussion above shows that criminal defamation is increasingly seen as an illegitimate restriction on freedom of expression under international law. A key reason for this is that the penalties associated with criminal defamation – imprisonment, high fines,

stripping individuals of the right to practice journalism – are disproportionate and unnecessary. Reparation for defamation should instead be provided through civil law remedies.

- In contrast to the criminal law, whose goals include punishing unacceptable behaviour, the purpose of the civil law is to promote harmonious relations between individuals in society and to ensure that harm done by one person to another is redressed. Accordingly, when the civil law provides for remedies for defamatory statements, the goal of such remedies should be to redress the harm done to the plaintiff's reputation, not to punish the defendant(s).
- Sanctions for defamatory statements, which are also a form of restriction on freedom of expression, must, under international law, be justifiable as 'necessary'. This implies that they should be proportionate in the sense that the damage to the right does not outweigh the benefits in terms of protection of reputation. In effect, the authorities have an obligation to put in place a regime of remedies for defamatory statements which, while redressing the harm to reputation, does not exert an unduly chilling effect on freedom of expression.

Prioritising alternative remedies

- Traditionally, the most common remedy for defamation has been financial compensation or damages to be paid by the defendant to the plaintiff. There are a number of countries, however, where a culture of excessive awards has developed which has had a negative effect on freedom of expression and the free flow of information. A variety of less heavy-handed but still effective alternative remedies exist, such as a court order to issue a correction or reply, or to publish the judgment finding the statements to be defamatory. Such alternative remedies are more speech-friendly and should be prioritised; monetary awards should only be imposed if the plaintiff cannot adequately be compensated for the defamatory statement through other means.
- Where monetary awards are truly necessary, the law should specify clear criteria for determining the size of the award, which should take into account actual damages proven by the plaintiff, as well as any redress already provided through non-pecuniary remedies. A ceiling should be set for the level of compensation that may be awarded for non-financial harm to someone's reputation – that is, harm which cannot be quantified in monetary terms.
- In many countries, journalists have established voluntary self-regulatory bodies, to which a complaint can be submitted by individuals who believe that they have been negatively affected by unprofessional reporting. These bodies are normally unable to award financial compensation but they can recommend that the journalist or publication in question publishes a correction or other statement. Where an effective self-regulatory system of this kind exists, the defamation law should recognise it by requiring courts to take any satisfaction already provided in this way into account when assessing the appropriate legal remedy.

Injunctions

- In some countries, the law provides for the possibility of an *injunction* against a defamatory statement – that is, an order issued by a court to cease publication and distribution of an (allegedly) defamatory publication.
- The most intrusive type of injunction is an order not to distribute a publication which has not yet reached the public. Such injunctions amount to a form of prior censorship, which is viewed with great suspicion under international law. The problem with prior censorship is, principally, that it is wide open to abuse: if the authorities are able to prevent a publication from reaching the public, the public will not be able to judge whether the justification for this was legitimate, or whether the authorities were simply trying to suppress information that might embarrass them. In highly exceptional circumstances, prior censorship may be justified, such as to prevent the publication of information which would lead to the loss of human life. In the context of a defamation action, such a justification does not exist. Injunctions should never be used to prevent an allegedly defamatory statement from reaching the public, given the great dangers inherent in a system of prior censorship.
- Less problematic is a permanent injunction issued by a court *at the end* of a defamation suit, after a full and fair hearing of the merits of the case. The open court process allows for scrutiny of the authorities' motive in prohibiting further distribution of the statement. Permanent injunctions should not, however, go further than necessary: they should, for example, be limited to the specific statement found to be defamatory.
- Interim injunctions, that is, injunctions issued before a court case has been finally concluded, are more problematic because they will be decided on before all the evidence has been properly weighed. Nevertheless, they may be justifiable if the plaintiff can show both that he or she is almost certain to win the case, and that further publication would lead to damage which could not be repaired through subsequent remedies.

‘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 all frontiers.’

Article 19 of the Universal Declaration of Human Rights

DEFAMATION CAMPAIGNING TOOLS



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