

Module 5

DEFAMATION

*Summary Modules on
Litigating Digital Rights
and Freedom of
Expression Online*



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MODULE 5

DEFAMATION

- Defamation is frequently used to unjustly stifle dissent. However, it can provide a genuine remedy for those harmed by the statements or actions of others.
- Criminal defamation is generally considered to be disproportionate in terms of international law. Even civil defamation is often punished too harshly rather than righting the wrong that was committed.
- Truth is a core defence against defamation claims.
- Some types of speech are excluded from defamation laws, such as opinion and satire.
- The growth of SLAPP¹ suits by corporate actors using defamation laws to silence or intimidate is a concerning contemporary development that needs to be challenged.

INTRODUCTION

Defamation is a notorious method of stifling freedom of expression and dissent, particularly of journalists. While defamation laws aim to provide individuals with a remedy for public statements that may harm their reputation or honour, they frequently come into conflict with the right to freedom of expression, which is enshrined in a number of international law instruments and national laws. Balancing the protection of fundamental rights with protecting individuals from harmful statements is central to the appropriateness or otherwise of defamation claims.

The impact of the internet, and particularly social media networks, has meant that it is easier than ever to publish content to a wide audience. As a result, defamation has become a commonly used defence against statements published online, whether justifiably so or not.

The ability to freely post information on social media and the internet without the same degree of thought and review as traditional media, combined with a lack of awareness about defamation laws and the fact that many countries lack clear legislative frameworks dealing with defamation in the online space has led to an increase in online defamation cases and some ambiguity in how defamation applies in the online sphere.²

¹ Strategic Lawsuits Against Public Participation, see page 10.

² SAFLII Speculum Juris, 'An Analytical Look Into the Concept of Online Defamation in South Africa.' Desan Iyer, (2018) (accessible at: <http://www.saflii.org/za/journals/SPECJU/2018/10.pdf>).

Dealing with online defamation cases is particularly challenging for many reasons.³ “The internet is not an easily identifiable body that is administered or regulated within the confines of strict internationally recognised parameters or boundaries.”⁴ The online environment can make it more difficult to identify or trace perpetrators, and victims may want to consider whether to pursue the perpetrator or the system operator, since some legal systems consider anyone who participates in distributing defamatory material equally liable.⁵ In addition, deciding the jurisdiction of the court to hear the matter can be difficult as messages can be posted from all over the world, and the parties to a dispute may come from and be located in different jurisdictions, or the message may have been posted somewhere else entirely.

This module provides an overview of defamation laws in Africa, and how the courts have attempted to find the balance between various rights in recent jurisprudence, particularly in dealing with online defamation cases.

WHAT IS DEFAMATION?

Defamation is a false statement of fact that is harmful to someone’s reputation, and published “with fault,” meaning as a result of negligence or malice.⁶

The law of defamation dates back to the Roman Empire, but while the penalties and costs attached to defamation today are not as serious as they once were, they can still have a notorious “chilling effect,” with prison sentences or massive compensation awards posing a serious risk to freedom of expression, journalistic freedom, and dissent in many countries.

The foundation for defamation in international law is article 17 of the International Covenant on Civil and Political Rights ([ICCPR](#)), which provides for protection against unlawful attacks on a person’s honour and reputation. Article 19(3) of the ICCPR also makes reference to the rights and reputation of others as a legitimate ground for limitation of the right to freedom of expression.⁷ Reputation is therefore the underlying basis in any claim of defamation, whether slander or libel.⁸

Defamation can be an important legal remedy to those who genuinely need it, but it can also be a weapon to quash dissent. There are many real examples where defamation may provide

³ *Ibid* at section 3.

⁴ *Ibid* at p 127.

⁵ For example, South African law, as seen in *National Media Ltd and Others v Bogoshi*, per note 22.

⁶ Electronic Frontier Foundation, ‘Online Defamation Law’ (accessible at <https://www.eff.org/issues/bloggers/legal/liability/defamation#:~:text=Generally%2C%20defamation%20is%20a%20false,slander%20is%20a%20spoken%20defamation>). Under some legal systems, most commonly English law jurisdictions such as Tanzania or Zambia, libel is the term used for a written defamation, while slander refers to spoken defamation.

⁷ ICCPR: International Covenant on Civil and Political Rights (1976) (accessible at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>).

⁸ For a fuller discussion on the law on defamation, see the training manual published by Media Defence on the principles of freedom of expression under international law: Richard Carver, ‘Training manual on international and comparative media and freedom of expression law’, Media Defence at pp 48-64 (2018) (accessible at:

<https://www.mediadefence.org/sites/default/files/resources/files/MLDI.FoEManual.Version1.1.pdf>).

See also above no. 6 for a definition of libel and slander.

an important defence, for example in the non-consensual distribution of intimate images, a growing trend in the online era that disproportionately affects women. In these cases, defamation may provide recourse to women to seek justice for the non-consensual sharing of images.

However, defamation is also frequently misused, particularly by states and powerful individuals to stifle free speech, as well as by non-state actors in the context of SLAPP suits.

CRIMINAL DEFAMATION

Historically, defamation was usually a criminal offence. While some countries still have the offence of criminal defamation on their statute books, it is widely opposed, most notably by the United Nations (UN) and the Africa Commission on Human and People's Rights (ACHPR) who have both urged states to reconsider such laws. For instance, the UN Human Rights Council (UNHRC) [General Comment No. 34](#) provides that: "States Parties should consider the decriminalisation of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty".⁹ Moreover, Principle XIII(1) of the [Principles on Freedom of Expression in Africa](#) calls on states to review all criminal restrictions on content to ensure that they serve a legitimate interest in a democratic society.

In a landmark decision handed down by the African Court on Human and Peoples' Rights ([African Court](#)) in 2013 in the matter of [Konaté v Burkina Faso](#),¹⁰ it was held that imprisonment for defamation violates the right to freedom of expression, and that criminal defamation laws should only be used in restricted circumstances. Since the African Court's decision, there have been important developments in domestic courts on the continent. For instance, in the 2016 case of [Misa-Zimbabwe et al v Minister of Justice et al](#),¹¹ the Constitutional Court of Zimbabwe declared the offence of criminal defamation unconstitutional and inconsistent with the right to freedom of expression as protected under the Zimbabwean Constitution. Most recently, in 2018 the Constitutional Court of Lesotho struck down the provisions of the Penal Code relating to criminal defamation in [Peta v Minister of Law, Constitutional Affairs and Human Rights](#),¹² stating that they violated the right to freedom of expression as protected in the Lesotho Constitution. Sierra Leone also repealed its criminal defamation laws in 2020.¹³

Additionally, the ECOWAS Court has upheld that criminal defamation and libel laws should be repealed, as evidenced in the 2018 judgment in [Federation of African Journalists and Others](#)

⁹ UN Human Rights Council, 'General Comment No. 34 at article 47 (2011) (accessible at <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>).

¹⁰ African Court, Application No. 004/2013 (2013) (accessible at: <https://en.african-court.org/images/Cases/Judgment/Judgment%20Appl.004-2013%20Lohe%20Issa%20Konate%20v%20Burkina%20Faso%20-English.pdf>).

¹¹ Constitutional Court of Zimbabwe, Case no. CCZ/07/15 (2015) (accessible at: <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Order-3-Feb-2016.pdf>).

¹² Constitutional Court of Lesotho, Case no. CC 11/2016 (2018) (accessible at: <https://www.southernafricalitigationcentre.org/wp-content/uploads/2018/05/2018-05-21-Judgement.pdf>).

¹³ Media Foundation for West Africa, 'Major Boost for Press Freedom as Sierra Leone Scraps Criminal Libel Law after 55 years' (24 July 2020) (accessible at: <https://www.mfwa.org/major-boost-for-press-freedom-as-sierra-leone-scraps-criminal-libel-law-after-55-years/>).

v The Gambia which “recognised that the criminal laws on libel, sedition and false news disproportionately interfere with the rights of Gambian journalists and directed that The Gambia “immediately repeal or amend” these laws in line with its obligations under international law.”¹⁴

Despite this, many countries retain criminal defamation laws, even where they have been declared unconstitutional and are clearly contrary to international law instruments. Some countries, such as Rwanda and Zambia,¹⁵ continue to apply criminal defamation laws with vigour, while others such as South Africa have pledged to get rid of them but thus far have failed to do so.¹⁶

Protections against criminal defamation laws

When a criminal defamation law remains on the statute book, there are a number of strict protections that should apply to prevent defamation from being used to stifle freedom of expression:¹⁷

- The criminal standard of proof — beyond a reasonable doubt — should be fully satisfied.¹⁸
- Convictions for criminal defamation should only be secured when the allegedly defamatory statements are false, and when the mental element of the crime is satisfied, i.e. when they are made with the knowledge that the statements were false or with reckless disregard as to whether they were true or false.
- Penalties should not include imprisonment, nor should they entail other suspensions of the right to freedom of expression or the right to practice journalism.¹⁹
- As a less restrictive means, states should not resort to criminal law when a civil law alternative is readily available.²⁰

¹⁴ Media Defence, ‘Update: ECOWAS Court delivers landmark decision in one of our strategic cases challenging the laws used to silence and intimidate journalists in the Gambia’ (2018) (accessible at: <https://www.mediadefence.org/news/update-ecowas-court-delivers-landmark-decision-in-one-of-our-strategic-cases-challenging-the-laws-used-to-silence-and-intimidate-journalists-in-the-gambia/>).

¹⁵ In 2012 Rwanda convicted a journalist of defaming the President, but in 2020 the African Commission of Human and People’s Rights found that it violated her right to freedom of expression and that Rwanda’s criminal defamation law violates article 9 of the African Charter. For more see here: <https://www.mediadefence.org/news/african-commission-finds-rwandan-authorities-violated-journalists-right-to-freedom-of-expression/>. In Zambia, the law on criminal defamation is contained in Sections 191-198 of the Penal Code (accessible here: <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/66208/62114/F-489934566/ZMB66208.pdf>), while there is a separate Defamation Act of 1953, Chapter 68, that covers civil defamation (accessible here: <http://www.parliament.gov.zm/node/792>).

¹⁶ Bregman Moodley Attorneys, ‘Criminal Defamation’, (2019) (accessible at: <https://www.bregmans.co.za/criminal-defamation/>).

¹⁷ Carver, above at n 8 at p 49.

¹⁸ Inter-American Court of Human Rights, *Kimel v. Argentina*, (2008) (accessible at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf).

¹⁹ African Court, above at n 10.

²⁰ See for example: European Court of Human Rights, *Amorim Giestas and Jesus Costa Bordalo v. Portugal*, Application No. 37840/10 (2014), par. 36 (accessible at: <https://hudoc.echr.coe.int/eng/?i=001-142084> in French).

CIVIL DEFAMATION

Despite widespread agreement that criminal punishment for defamation is no longer acceptable in a democratic society, there is nevertheless a need for some sort of remedy for those who believe that their reputation or honour has been unfairly harmed.

Therefore, many countries have domestic laws regarding civil claims for defamation, but these laws vary by jurisdiction. In some countries such as Zambia, defamation laws date back to the colonial era and are considered overly restrictive on freedom of speech by limiting criticism of leaders or by instituting disproportionately harsh sanctions.²¹

If a person is able to prove a civil claim for defamation, and the person responsible for the statement or publication is not able to successfully raise a defence, the person who has suffered reputational harm is typically entitled to monetary compensation in the form of civil damages. While civil defamation claims may serve the intended purposes of restoring reputation or honour, they can be misused and cause a “chilling effect” on the full enjoyment and exercise of freedom of expression.

Defamation used against survivors of gender-based violence

The case of Shailja Patel in Kenya is instructive of how defamation has been used specifically as a tool to silence victims of gender-based violence. Patel, a renowned Kenyan poet, playwright and activist, publicly accused a fellow writer, Tony Mochama, of sexual harassment at a writers’ workshop the two attended. Mochama sued for defamation, claiming the allegations were false and Patel had a pre-existing grudge against him. In 2019, a judge found against Patel, ordered her to pay damages of more than \$87,000, to apologise, and to never publish defamatory statements against Mochama again. The magistrate also castigated Patel for initially turning to social media for justice as she did not believe the justice system would treat her case fairly.²²

Online ‘naming and shaming’ has become a popular recourse for victims of gender-based violence in recent years, particularly in countries where there is little trust in the criminal justice system to fairly investigate their crimes, and in which women are frequently blamed, including by police and the courts, for their own role in supposedly enabling the crime. In some cases, public ‘registers’ have even been compiled of accused perpetrators with the aim of warning future potential victims and raising awareness about the pervasiveness of these crimes. Allegations such as these are generally considered defamatory, and the people who originate or distribute such statements may be held liable.

²¹ Quartz Africa, Jonathen Rozen ‘Colonial and Apartheid-era laws still govern press freedom in southern Africa’ (2018) (accessible at: <https://qz.com/africa/1487311/colonial-apartheid-era-laws-hur-southern-africas-press-freedom/>).

²² BuzzFeed News, Tamerra Griffin, ‘She Was Ordered to Pay Damages and Apologize to the Man who Allegedly Assaulted Her – So She Left the Country.’ (2019) (accessible at: <https://www.buzzfeednews.com/article/tamerragriffin/shailja-patel-defamation-sexual-assault-kenya-exile>).

The best defence against such suits is if the accusations can be proven true and in the public interest to share. In civil cases, the standard of proof is generally lower than in criminal cases, only needing to prove truth ‘on the balance of probabilities’ rather than ‘beyond reasonable doubt.’ An additional defence is that of privilege: “statements made by someone who is under a moral or legal duty to make them or has an interest in making them to someone else who has an interest in hearing them or a duty to do so.” This would require making the argument that the criminal justice system cannot provide adequate redress for the victim, and there is therefore a need for the public to hear the allegations, though success in this argument is likely to be difficult.²³

CAN A TRUE STATEMENT BE DEFAMATORY?

In most jurisdictions, truth is a defence to defamation claims, provided it can be proven. However, in some jurisdictions, truth alone is not sufficient: it is further required that the public interest in the publication be established as well.

From a continental perspective, the ACHPR states in the [Declaration of Principles on Freedom of Expression and Access to Information in Africa](#) that “[n]o one shall be found liable for true statements, expressions of opinions or statements which are reasonable to make in the circumstances.”²⁴

Courts in some jurisdictions, notably South Africa, have even found that false statements may still not constitute defamation. In [National Media Ltd and Others v Bogoshi](#), the court developed the defence of reasonable publication, finding that:

“[T]he publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time.”²⁵

The term “reasonable publication” encompasses the idea that the author took reasonable steps to ensure the accuracy of the content of the publication, and also that the publication was on a matter of public interest.²⁶ In [Trustco Group International Ltd and Others v Shikongo](#), the Namibian Supreme Court found that “[t]he defence of reasonable publication holds those publishing defamatory statements accountable while not preventing them from publishing statements that are in the public interest.”²⁷

²³ The Conversation, Helen Scott, Where South Africa defamation law stands on ‘naming and shaming,’ (2016) (accessible at: https://theconversation.com/where-south-african-defamation-law-stands-on-naming-and-shaming-58246#:~:text=In%20South%20African%20law%20the,%E2%80%9Crigh%2Dthinking%20people%E2%80%9D.)).

²⁴ African Commission on Human and Peoples' Rights, ‘Declaration of Principles on Freedom of Expression in Africa’, (2019) (accessible at: <https://www.achpr.org/legalinstruments/detail?id=69>).

²⁵ Supreme Court of Appeal of South Africa, Case No. 579/96 (1998) (accessible at: <http://www.saflii.org/za/cases/ZASCA/1998/94.pdf>).

²⁶ Carver above at n 8 at p 52.

²⁷ Supreme Court of Namibia, Case No. SA 8/2009 (2010) (accessible at: https://namibii.org/system/files/judgment/supreme-court/2010/6/2010_6.pdf).

Similarly, [General Comment No. 34](#) states that “a public interest in the subject matter of the criticism should be recognised as a defence”²⁸ against defamation.

THE RIGHT TO PROTECTION AGAINST ATTACKS ON REPUTATION

The right to protection against attacks on reputation is firmly established in international law. Article 12 of the [Universal Declaration of Human Rights](#) provides that: “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.”²⁹ This is echoed in identical words in article 17 of the ICCPR.

However, as indicated, a balance often needs to be found against offending statements which constitute an attack on a person’s reputation and the justifiable limitations on the right to freedom of expression and any associated rights.

WHAT IS THE RIGHT WAY TO DEAL WITH DEFAMATION?

When a person is found to have been defamed, they are entitled to a remedy. However, the remedies imposed are often punitive and disproportionate. We have already seen that sentences of imprisonment for criminal defamation are widely regarded as disproportionate due to their impact on freedom of expression.³⁰ Likewise, heavy fines, whether in criminal or civil cases, are aimed at punishing the defamer rather than redressing the wrong to the defamed.³¹

Whenever possible, redress in defamation cases should be non-pecuniary (non-financial) and aimed directly at remedying the wrong caused by the defamatory statement, such as through publishing an apology or correction.

Monetary awards — the payment of damages — should only be considered when other less intrusive means are insufficient to redress the harm caused. Compensation for harm caused (pecuniary damages) should be based on evidence quantifying the harm and demonstrating a causal relationship with the alleged defamatory statement.

Defamation on new media platforms

The growth of new media, including social media, in recent years has raised questions about whether existing civil defamation laws are adequate for the times and these new technologies. The 2019 judgment of the High Court of South Africa in [Manuel v Economic Freedom Fighters and Others](#)³² provides insight into how courts may use existing

²⁸ UNHRC above at n 9 at p 12.

²⁹ UN General Assembly, ‘Universal Declaration of Human Rights, Resolution 217 A (III)’ (1948) (accessible at: https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf).

³⁰ UNHRC above at n 9.

³¹ African Court, above at n 10.

³² High Court of South Africa, Gauteng Division, Case no. 13349/2019, (2019) (Accessible at: <http://www.saflii.org/za/cases/ZAGPJHC/2019/157.pdf>).

defamation laws to deal with cases involving statements in online publications. The Court's judgment contained a number of novel findings:³³

- Because it centred on a statement posted on Twitter, the Court explained that “[t]he hypothetical ordinary reader must be taken to be a reasonable representative of Twitter users who follow the EFF and Mr Malema and share his interest in politics and current affairs”. The EFF is a controversial South African far-left political party, of which Mr Malema is the President and “Commander-in-Chief”. Both parties have been repeatedly accused of using language that incites violence, particularly of a racial form, in their efforts to achieve ‘radical transformation’ of society and the economy.
- The Court referred to the ‘repetition rule,’ whereby persons who repeat a defamatory allegation made by another “are treated as if they made the allegation themselves, even if they attempt to distance themselves from the allegation.” This has implications for others who play a role in disseminating defamatory statements further, such as by ‘retweeting.’ The Court did not explicitly address this point further.
- The Court also stated that the reasonable publication defence is applicable beyond just the media to ordinary members of the public too, provided they take all reasonable steps to verify the information as normally required under that defence.
- Although the judgment ordered the defendants to remove the impugned statement from their media platforms within 24 hours, the deletion of a tweet on Twitter does not necessarily remove it from all platforms, as there are other ways in which the content may have been distributed not addressed by the deletion (such as retweets in which persons added a comment of their own). This is a particular challenge that social media platforms pose when seeking to find an effective remedy to a claim of defamation.

The matter will soon be heard on appeal at the Supreme Court of Appeal in November 2020.³⁴

TYPES OF DEFAMATORY MATERIAL

Opinion versus fact

We have dealt with above factual statements that may be defamatory. However, expressions of opinion are differentiated from factual statements. [General Comment No. 34](#) states that defamation laws, particularly penal defamation laws, “should not be applied with regard to those forms of expression that are not, of their nature, subject to verification,”³⁵ such as opinions and value judgments. It also notes that “[a]ll forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature.”

³³ ALT Advisory Africa, Avani Singh, ‘Social media and defamation online: Guidance from Manuel v EFF’, (2019) (accessible at: <https://altadvisory.africa/2019/05/31/social-media-and-defamation-online-guidance-from-manuel-v-eff/>).

³⁴ Likewise, the case of *Stocker v Stocker* from the United Kingdom Supreme Court is instructive. The ruling was notable for its creation of a new sub-category of the ‘reasonable reader’ of a social media post in analysing the intended meaning of a statement, rather than relying on a more traditional and formal understanding of language. For more see: <https://inform.org/2019/04/05/case-law-stocker-v-stocker-supreme-court-overturns-judge-on-meaning-of-tried-to-strangle-oliver-cox/>).

³⁵ UNHRC above at n 9 at p 12.

To determine what counts as opinion, courts tend to look at whether a reasonable reader or listener would understand the statement as asserting a statement of verifiable fact, which is capable of being proven true or false. In the context of social media, a reasonable reader tends to be defined as someone who would ordinarily be following and reading the content of the person who has made the allegedly defamatory statement (per the example of *Manuel v Economic Freedom Fighters* above). The context in which the statement was made is critical to determine whether a reasonable reader or listener would understand it as opinion or as a statement of fact. There are, for example, ways in which a statement of fact may be made to appear as opinion.³⁶ In 2020, a US District Court dismissed a slander lawsuit filed against controversial Fox News talk show host Tucker Carlson, citing the fact that the "general tenor" of the show should then inform a viewer that [Carlson] is not 'stating actual facts' about the topics he discusses and is instead engaging in 'exaggeration' and 'non-literal commentary.'³⁷

Humour

Similarly, content that a reasonable reader or listener would identify as humour or satire, and not reasonably interpret as stating fact, is also not liable for defamation.

A prime example is that of the South African cartoonist Jonathan "Zapiro" Shapiro, who was sued for defamation by former South African President Jacob Zuma for a cartoon in which he depicted the former President, who was previously charged with rape and accused of undermining the justice system to avoid charges of corruption, preparing to sexually assault a symbolic Lady Justice. Right before the case was to be heard, Zuma withdrew his suit, which Shapiro hailed as "an important signal that the president respects the right of the media to criticise his conduct."³⁸

Statements of others

A point of consideration, particularly for journalists, is the extent to which they are liable for the potentially defamatory statements of others since a central part of their work is reporting on the words of others. The European Court of Human Rights (ECtHR) has found that a journalist is not automatically liable for the opinions stated by others, and is not required to "systematically and formally" distance themselves from "the content of a statement that might defame or harm a third party,"³⁹ provided they have not repeated potentially defamatory statements as their own, endorsed, or clearly agreed with them. The ruling of the High Court of South Africa in *Manuel v Economic Freedom Fighters and Others*⁴⁰ raises some questions about the extent to which this principle holds up in African courts, particularly in the online domain.

³⁶ Electronic Frontier Foundation above at n 6.

³⁷ US District Court, Southern District of New York, Case No. 1:2019cv11161 - Document 39' (2020) (accessible at: <https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2019cv11161/527808/39/>).

³⁸ Mail & Guardian, Verashni Pillay, 'Zapiro cartoon: Zuma surrenders, drops lawsuit,' (2012) (accessible at: <https://mg.co.za/article/2012-10-28-zuma-avoids-zapiro-court-showdown-over-cartoon/>).

³⁹ European Court of Human Rights, Application No. 1131/05 (2007).

⁴⁰ High Court of South Africa above at n 32.

Privileged statements

Privileged statements refer to those made in the public interest. Statements that are reported from the legislature or judicial proceedings are usually considered absolutely privileged, meaning that neither the author of the statement nor the media reporting it are liable for defamation. Some other types of statements reported from public meetings, documents and other material in the public domain may also enjoy qualified privilege.

Whose burden of proof?

A general principle of law is that the burden of proof lies with the claimant — the person who brings the suit or makes the “claim”. However, with defamation, this principle is generally reversed, and the responsibility lies with the defendant — the person who made the allegedly defamatory statement — to prove that the statement did not damage the claimant’s reputation, either because it is true or for one of the other reasons listed above. The United States is a prominent exception to this rule, wherein the burden of proof in cases brought by any public figure falls on the claimant.

Remedies and penalties

As discussed above, criminal penalties have been the focus of much attention by international bodies, to the fear of many journalists. However, it is notable that no international human rights court has ever upheld a custodial sentence on a journalist for a ‘regular’ defamation case. In *Konaté v Burkina Faso*, the African Court held that:

“Apart from serious and very exceptional circumstances for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion or nationality, the Court is of the view that violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences.”⁴¹

It is important that civil defamation laws contain sufficient checks and balances to prevent them being used to unduly stifle freedom of expression, such as limits on financial penalties. Even in Ghana, the first African country to decriminalise defamation, “there has been an increase in civil suits for libel brought by powerful individuals, leading, in some cases, to damages payouts of such large proportions to powerful individuals as to threaten the existence of some media outlets.”⁴²

ALTERNATIVE CLAIMS

SLAPP suits

Alternative methods are also used to silence critics and journalists. One such example is strategic lawsuits against public participation (SLAPP), which aim to intentionally bury critics

⁴¹ African Court above at n 10.

⁴² PEN South Africa, ‘Stifling Dissent, Impeding Accountability: Criminal Defamation Laws in Africa,’ p 4 (2017) (accessible at: <http://pensouthafrica.co.za/wp-content/uploads/2017/11/Stifling-Dissent-Impeding-Accountability-Criminal-Defamation-Laws-in-Africa.pdf>).

under expensive and often baseless legal claims in order to intimidate and silence them. Usually, the objective in these cases is not a positive judgment, but rather to leverage the threat of financial damage. Libel and slander are often used as the underlying complaints in SLAPP suits.

Once case which may have a profound impact on the freedom of expression landscape in the future is that between Mineral Commodities Resources (Pty) Ltd, an Australian Mining Company, and a group of six activists who have been sued by the company for defamation, and who claim the litigation is an attempt to intimidate them and silence their criticism of the company's mining activity in the environmentally sensitive area of Xolobeni in South Africa.⁴³

Concerningly, contemporary SLAPP suits now often target the lawyers representing defendants. In South Africa, a mining company Atha-Africa Ventures (Pty) Ltd, recently filed heads of argument suggesting that the public interest lawyers representing the claimants in the matter, the Centre for Environmental Rights, were inherently conflicted because their organisation aligns with the cause of the claimants, in this instance a clean and safe environment.⁴⁴ This new tactic, which finds no reference in previous precedent or case law, appears to be an attempt to intimidate not only the claimants but their lawyers as well.

A limited number of states, such as Canada,⁴⁵ have adopted anti-SLAPP legislation to ensure the protection of freedom of expression, which enables cases to be heard quickly and may allow defendants to reclaim costs from the claimant. However, there is a need for much more widespread adoption of such anti-SLAPP laws to protect critical speech and access to the courts.

Online harassment as an alternative method of suppressing dissent

Online harassment of journalists using non-legal means is another too-often used method of stifling freedom of expression and dissent in Africa, and one that has a particularly gendered nature. The case of Karima Brown in South Africa is instructive in this regard. Brown, a journalist and talk-show host, received countless death and rape threats on social media after Economic Freedom Fighters leader Julius Malema posted her phone number online (known as doxing) in retaliation for what he believed was an attempt by Brown to surveil the EFF.⁴⁶

In its ruling, the High Court of South Africa ruled that Malema had breached the Electoral Commission Act that protects journalists from facing any harassment, intimidation, threats

⁴³ Centre for Environmental Rights, 'Mining company's SLAPP suit against CER lawyers, activist in court today' (2019) (accessible at: <https://cer.org.za/news/mining-companys-slapp-suit-against-cer-lawyers-activist-in-court-today>).

⁴⁴ See *Endangered Wildlife Trust & Another v Director General, Department of Water and Sanitation*, High Court of South Africa, Pretoria, Case No. A155/19.

⁴⁵ Osler, O'Brien and Tsilivis, 'Ontario Court of Appeal clarifies test under "anti-SLAPP" legislation' (2018) (accessible at: <https://www.osler.com/en/resources/regulations/2018/ontario-court-of-appeal-clarifies-test-under-anti-slapp-legislation>).

⁴⁶ Daily Maverick, Rebecca Davis. 'EFF court losses mount as Karima Brown wins battle, but faces criticism of her own' (2019) (accessible at: <https://www.dailymaverick.co.za/article/2019-06-06-eff-court-losses-mount-as-karima-brown-wins-battle-but-faces-criticism-of-her-own/>).

by political parties. In particular, the judge ruled that the EFF had failed to “instruct and take reasonable steps to ensure that their supporters do not harass, intimidate, threaten or abuse journalists and especially women”.⁴⁷

Insult laws

A number of other insult laws are still at play across the continent and continue to pose risks for journalists and others critical of government. For example, under the Lesotho Penal Code, the crime of *scandalum magnatum* (offences against the royal family) is created as a separate crime to defamation, and thus remains on the statute books despite criminal defamation recently being declared unconstitutional. *Scandalum magnatum* is increasingly being used by the government of Lesotho against its detractors.⁴⁸

Likewise, the crime of sedition remains on the statute books in many countries, and continues to be used to stifle freedom of expression. Seditious is commonly defined as the crime of “incitement of resistance to or insurrection against lawful authority.”⁴⁹ The Nigerian Federal Court of Appeal has distinguished between an outmoded notion of the “sovereign,” who is protected by sedition laws, and the contemporary politician who is regularly subjected to a process of democratic accountability.⁵⁰

A more recent development has been the passing of ‘fake news’ laws in various countries. These laws are justified by states as being necessary to protect national security or public order and to deal with the misinformation pandemic that has been unleashed by the growth of the internet and social media, but are frequently in tension with the right to freedom of expression.

Regional courts, including the [African Court on Human and People's Rights](#), have increasingly argued that public officials should enjoy *less* protection from criticism than others.⁵¹ Because of their status, access to the media, and power, public officials can often use their office to try to curtail freedom of expression and prosecute critics. Additional protections for those who criticise them may therefore be warranted, to counter this imbalance of power. In addition, there is a real need for those serving in public office to be open to criticism and public input. As the European Court of found:

“The [politician] inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of

⁴⁷ High Court of South Africa, Gauteng Division, Case No. 14686/2019 (accessible at: <http://www.saflii.org/za/cases/ZAGPJHC/2019/166.html>).

⁴⁸ Hoolo ‘Nyane, ‘Abolition of criminal defamation and retention of *scandalum magnatum* in Lesotho’, African Human Rights Law Journal (2019) (accessible at: http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962019000200010).

⁴⁹ Merriam Webster Dictionary, ‘Sedition’, (accessible at: <https://www.merriam-webster.com/dictionary/sedition>).

⁵⁰ Federal Court of Appeal of Nigeria, Chief Arthur Nwankwo v. The State, 6 NCLR 228 (1983), par. 237.

⁵¹ African Court on Human and Peoples’ Rights, Application No. 004/2013, at par. 155 (2014) (accessible at: <https://en.african-court.org/index.php/55-finalised-cases-details/857-app-no-004-2013-lohe-issa-konate-v-burkina-faso-details>).

tolerance, especially when he himself makes public statements that are susceptible of criticism.”⁵²

The Office of the High Commissioner for Human Rights ([OHCHR](#)) has also called for the abolition of the offence of ‘defamation of the State,’⁵³ and some jurisdictions have refused to allow elected and other public authorities to sue for defamation.⁵⁴ The ECtHR has limited such suits to situations which threaten public order, implying that governments cannot sue in defamation simply to protect their honour.⁵⁵

Abuse of process

Lastly, those seeking to silence critics and journalists may abuse court processes to meet their objectives. Recently in South Africa, a mining company, Tharisa Minerals (Pty) Ltd, filed for a protection order against two community activists. The mine ultimately withdrew the application which is largely reserved for victims and survivors of domestic abuse.⁵⁶

Practical steps on defamation

- **If you have been a victim or survivor of the non-consensual distribution of intimate images**, you may be able to use defamation as a remedy.
 - If you are able to show that the distribution of the images harmed your reputation, you may have success in a defamation case.
 - The challenge with using civil defamation as a remedy is that the images may technically be ‘true’, or even taken with the victim’s consent. However, if it can be shown that there existed an associated implication about the subject of the images (e.g. that reflect on their character) which can be proven false, a defamation claim is more likely to have success.
- **If someone has posted slanderous comments about you online**, and you are also a user of the same social media platform, you may have recourse with that social media company.
 - Most social media companies have defamation reporting processes,⁵⁷ which may enable you to have the comments taken down. However, they are unlikely to provide further recourse beyond removing the offending content.

⁵² European Court of Human Rights, Application No. 11662/85 (1991), par. 59 (accessible at: <https://hudoc.echr.coe.int/eng?i=001-58044>). For more on this topic, see the seminal case establishing the need for public officials to face a higher threshold of criticism, *New York Times v Sullivan* in the United States Supreme Court, 376 US 254 (1964) at paras 279-80 (accessible at: <https://supreme.justia.com/cases/federal/us/376/254/>).

⁵³ OHCHR, Concluding Observations of the Human Rights Committee: Serbia and Montenegro, CCPR/CO/81/SEMO (12/08/2004), par. 22 (accessible at: <https://www.refworld.org/docid/42ce6cfe4.html>).

⁵⁴ OHCHR, ‘Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,’ E/CN.4/2000/63 (2000) (accessible at: <https://www.ohchr.org/en/issues/freedomofopinion/pages/annual.aspx>).

⁵⁵ *Ibid.*

⁵⁶ See Power Singh Inc, ‘Protecting and promoting freedom of expression in Marikana,’ (accessible at: <https://powersingh.africa/2020/09/22/protecting-and-promoting-freedom-of-expression-in-marikana/>).

⁵⁷ For Facebook, see here: <https://www.facebook.com/help/contact/233704034440069>.

- **If you have been targeted by a SLAPP suit** that uses defamation charges to silence or intimidate you:
 - Approach a reputable public interest law firm or human rights lawyers for assistance. Sometimes, lawyers may be able to act *pro bono* (free of charge) or rely on legal defence funds for their fees.

- **If you live in a country that has defamation laws that infringe regional and international human rights**, you may be able to do something about it:
 - Consider whether you have access to other regional or international human rights courts, such as the African Court of Human Rights, or regional courts such as the ECOWAS Community Court of Justice.
 - There may be jurisprudence in your country opposing the use of disproportionate penalties for defamation, but which have not yet been implemented by the judiciary or criminal justice system.

CONCLUSION

The criminalisation of defamation poses a serious risk to freedom of expression, particularly with the rise of new media platforms online. Defamation serves a real purpose to protect individuals from affronts to their dignity, but is too often abused to instead silence and punish dissent. Despite the recent trend towards the decriminalisation of defamation, there remains a need to ensure the implementation of judgments, to remove criminal punishments for other insult laws, and to institute legal protections against alternative methods of silencing activists such as SLAPP suits.

For Twitter, see here: <https://help.twitter.com/forms/abusiveuser>.