

*Module 5*  
**DEFAMATION**

*Modules on Litigating  
Freedom of Expression  
and Digital Rights  
in South and Southeast  
Asia*



Published by Media Defence: [www.mediadefence.org](http://www.mediadefence.org)  
 This module was prepared with the assistance of the Centre for Law and  
 Democracy (<https://www.law-democracy.org/live/>) and ALT Advisory  
 (<https://altadvisory.africa/>)

**June 2022**

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## MODULE 5

### DEFAMATION

- **Defamation is frequently used to unjustly stifle dissent. However, it can provide a genuine remedy for those whose reputations are harmed by the statements or actions of others.**
- **Criminal defamation is generally considered to be disproportionate under international law. Even civil defamation is often punished too harshly, going beyond just righting the wrong that was committed.**
- **Truth is a core defence against defamation claims.**
- **Some types of speech should not be subject to defamation actions, such as opinions and satire.**
- **The growth of SLAPP<sup>1</sup> suits by corporate actors using defamation laws to silence or intimidate those who criticise them is a concerning contemporary development that needs to be addressed.**

### INTRODUCTION

The use of meritless defamation proceedings 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 harm their reputation, they inevitably come into conflict with the right to freedom of expression. Correctly balancing the protection of freedom of expression and the public's right to information with protecting individuals' reputations is central to the appropriateness or otherwise of defamation laws and 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 proceedings have become a commonly used instrument wielded against the authors of statements published online, whether justifiably so or not, while also contributing to a significant increase in defamatory statements.

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 have adopted vague legal rules governing online defamation has led to an increase in online defamation cases and some ambiguity in how defamation applies online.<sup>2</sup>

<sup>1</sup> Strategic Lawsuits Against Public Participation.

<sup>2</sup> On the use of overbroad defamation provisions to target online speech, see International Commission of Jurists, *Dictating the Internet: Curtailing Free Expression, Opinion and Information Online in Southeast Asia*

Dealing with online defamation cases is particularly challenging for many reasons. The online environment can make it more difficult to identify or trace authors, and victims may want to consider whether to pursue the author or the system operator, since some legal systems consider anyone who participates in distributing defamatory statements to be equally liable. In addition, deciding the jurisdiction of the court to hear the matter can be difficult as messages posted online are available all over the world, and the parties to a dispute may come from and be located in different jurisdictions.

This module provides an overview of defamation laws in the context of South and Southeast Asia and how courts have attempted to strike a balance between various rights in recent jurisprudence, with a particular focus on online defamation cases.

## WHAT IS DEFAMATION?

Defamation is a false statement of fact that is harmful to someone's reputation.<sup>3</sup> The law of defamation dates back to the Roman Empire, but while the penalties and costs attached to defamation today are often not as serious as they once were, they can still have a notorious “chilling effect,” with prison sentences or massive compensation awards posing a particularly 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 restricting freedom of expression.<sup>4</sup> Reputation is therefore the underlying basis in any claim of defamation.<sup>5</sup>

There are many examples where defamation suits serve an important purpose in providing a remedy for victims of slanderous and harmful attacks on their reputations. However, defamation is also frequently misused, particularly by states and officials but also by non-state actors to stifle free speech, including through SLAPP suits.

## CRIMINAL DEFAMATION

Historically, defamation was usually a criminal offence. While many countries still have the offence of criminal defamation on their statute books, it is widely considered to be problematical as a restriction on freedom of expression, including by the United Nations (UN), which has urged states to reconsider such laws. For instance, the UN Human Rights Committee (UNHRCtte) [General Comment No. 34](#) provides that: “States Parties should consider the decriminalisation of defamation

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(2019) (accessible at: <https://www.icj.org/wp-content/uploads/2019/12/Southeast-Asia-Dictating-the-Internet-Publications-Reports-Thematic-reports-2019-ENG.pdf>).

<sup>3</sup> Article 19, Defamation ABC at p. 1 (accessible at <https://www.article19.org/data/files/pdfs/tools/defamation-abc.pdf>). Under some legal systems, especially common law jurisdictions such as India and Pakistan, libel is the term used for a written defamatory statement, while slander refers to spoken defamation.

<sup>4</sup> ICCPR: International Covenant on Civil and Political Rights (1976) (accessible at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>).

<sup>5</sup> For a fuller discussion on the law on defamation, see Article 19, Defamation ABC, note 3.

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".<sup>6</sup>

The use of criminal sanctions in defamation proceedings in Southeast Asia came under scrutiny by the UN Human Rights Committee in the case of *Alexander Adonis v. The Philippines*,<sup>7</sup> in which the Committee considered an individual complaint by a radio broadcaster who had been convicted of criminal defamation. The author of the complaint alleged that the conviction was inconsistent with article 19 of the ICCPR because less restrictive measures could have been employed instead, the unavailability of a defence of truth except in narrow circumstances, the unavailability of a defence of public interest and the presumption of malice that had the effect of placing the burden of proof on the defendant.<sup>8</sup> The Committee found that the conviction in these circumstances was an unjustifiable restriction on freedom of expression which was incompatible with article 19(3) of the ICCPR.<sup>9</sup>

Despite the evolution of international standards towards considering criminal defamation to be a disproportionate restriction on freedom of expression, many countries retain criminal defamation laws. There have, however, been certain positive developments over the years. Notably, in 2002, Sri Lanka amended its Criminal Code to remove the offence of criminal defamation.<sup>10</sup>

### Protections against criminal defamation laws

When a criminal defamation law remains on the statute book, there are a number of strict protections that should at a minimum apply to prevent defamation from being used to stifle freedom of expression:<sup>11</sup>

- The criminal standard of proof — beyond a reasonable doubt — should be fully satisfied.<sup>12</sup>
- 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 or suspensions of the right to freedom of expression or the right to practice journalism.<sup>13</sup>

<sup>6</sup> UN Human Rights Committee, 'General Comment No. 34 at article 47 (2011) (accessible at <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>).

<sup>7</sup> CCPR/C/103/D/1815/2008/Rev.1 (2008) (accessible at <https://juris.ohchr.org/Search/Details/1613>).

<sup>8</sup> *Id.* at para 7.7.

<sup>9</sup> *Id.* at para 7.10.

<sup>10</sup> Zee News, 'Sri Lanka abolishes criminal defamation' (2002) (accessible at [https://zeenews.india.com/news/south-asia/sri-lanka-abolishes-criminal-defamation\\_45922.html](https://zeenews.india.com/news/south-asia/sri-lanka-abolishes-criminal-defamation_45922.html)).

<sup>11</sup> Toby Mendel, *Defining Defamation Principles on Freedom of Expression and Protection of Reputation* (Article 19, 2000) at Principle 4 (accessible at: <https://www.article19.org/wp-content/uploads/2018/02/defining-defamation.pdf>).

<sup>12</sup> Inter-American Court of Human Rights, *Kimel v. Argentina*, (2008) (accessible at: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_177\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf)).

<sup>13</sup> See for example: African Court of Human and Peoples' Rights, *Konaté v. Burkina Faso*, Application No. 004/2013 (2014) (accessible at: <http://www.ijrcenter.org/wp-content/uploads/2015/02/Konate-Decision-English.pdf>).

- As a less restrictive means, states should not resort to criminal law when a civil law alternative is readily available.<sup>14</sup>

## CIVIL DEFAMATION

Despite widespread agreement that criminal punishment for defamation is no longer acceptable, there is nevertheless a need for some sort of remedy for those whose reputations have been unfairly harmed.

Therefore, almost all countries have domestic laws providing protection against defamation, but these laws vary by jurisdiction. In some countries, defamation laws are overly restrictive vis-à-vis freedom of speech, for example by limiting criticism of leaders or by providing for disproportionately harsh sanctions. Another challenge to freedom of expression is that some judges and juries elect to award disproportionately large damages in civil defamation matters.

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 raise a successful defence, the person who has suffered reputational harm is typically entitled to monetary compensation in the form of reasonably quantified civil damages. While civil defamation claims may serve the intended purposes of restoring reputation or honour, they can be abused and cause a “chilling effect” on the full enjoyment and exercise of freedom of expression.

## CAN A TRUE STATEMENT BE DEFAMATORY?

In most jurisdictions, consistent with international law, truth is an absolute defence to a defamation claim. However, in some jurisdictions, truth alone is not sufficient: it is further required that the public interest in the publication be established as well.

Courts in some jurisdictions have also held that even false statements may be protected against a defamation claim. In *Rajagopal & Anor v. State of Tamil Nadu*,<sup>15</sup> decided by the Indian Supreme Court, a key issue was whether public officials could prevent the publication of a biography that they claimed defamed them. The Court discussed a number of leading authorities and concluded that even untrue statements about officials would not sustain a defamation claim unless they were published recklessly:

In the case of public officials ... the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official established that the publication was made (by the defendant) with reckless disregard for truth.<sup>16</sup>

<sup>14</sup> See for example: European Court of Human Rights, *Amorim Giestas and Jesus Costa Bordalo v. Portugal*, Application No. 37840/10 (2014), para. 36 (accessible at: <https://hudoc.echr.coe.int/eng/?i=001-142084> in French).

<sup>15</sup> *Rajagopal & Anor v. State of Tamil Nadu*, [1994] 6 SCC 632 (SC) (accessible at: <https://indiankanoon.org/doc/501107/>).

<sup>16</sup> *Id.*, para 26.

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In their 2000 Joint Declaration, which focused, among other things, on defamation, the special international mandates on freedom of expression stated:

At a minimum, defamation laws should comply with the following standards:

...

- it should be a defence, in relation to a statement on a matter of public concern, to show that publication was reasonable in all the circumstances.<sup>17</sup>

Similarly, [General Comment No. 34](#) states that “a public interest in the subject matter of the criticism should be recognised as a defence”<sup>18</sup> 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.”<sup>19</sup> This is echoed in identical words in article 17 of the ICCPR.

Therefore, as indicated above, a balance often needs to be found between protecting individuals from false and harmful attacks on their reputation on the one hand and freedom of expression and the public’s right to information on the other.

### WHAT IS THE RIGHT WAY TO DEAL WITH ONLINE DEFAMATION?

When a person is found to have been defamed, they are entitled to a remedy. However, in practice, the rules on defamation are often punitive and disproportionate. We have already seen that sentences of imprisonment for criminal defamation are disproportionate due to their impact on freedom of expression.<sup>20</sup> Likewise, fines or damage awards should not be excessively punitive and should instead be aimed at remedying the harm done.

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 the demonstration of a causal relationship with the alleged defamatory statement.

<sup>17</sup> Joint Declaration on Current Challenges to Media Freedom (2000) (accessible at: <https://www.osce.org/files/f/documents/c/b/40190.pdf>).

<sup>18</sup> General Comment 34 above n 6 at p 12.

<sup>19</sup> 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](https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf)).

<sup>20</sup> General Comment 34 above n 6.

### Defamation on new media platforms

The growth of social media in recent years has raised questions about whether existing civil defamation laws and doctrines are adequate. One challenge is the difficulty of adapting remedies to the online era. As detailed in Module 2, once defamatory information is published online, it can be difficult to order it fully removed due to the potential for social media content to 'go viral'.

Another issue that has arisen in various jurisdictions is whether to treat hyperlinks to defamatory content as akin to publication of this content. Clearly a rigid approach that views all hyperlinks as amounting to publication would have a chilling effect on online expression. However, courts have had to grapple with the thornier question of whether such links can ever be treated as publications.

In *Crookes v. Newton*, the Supreme Court of Canada held that the use of basic hyperlinks cannot alone, in the absence of actually repeating specific content, count as publication of defamatory material.<sup>21</sup> However, the majority declined to offer any definitive approach to more complex links (such as those embedded in text or images that automatically display content without leaving the original webpage), noting the "inherent and inexorable fluidity of evolving technologies" that made it "unwise in these reasons to attempt to anticipate, let alone comprehensively address, the legal implications of the varieties of links that are or may become available".<sup>22</sup> A minority opinion did not agree with the majority's approach of not treating any basic hyperlinks as publications and instead preferred a more contextual approach to assessing whether "the text that includes the hyperlink constitutes adoption or endorsement of the specific content it links to"<sup>23</sup> while, in another separate opinion, one justice advocated for an approach based on assessing whether a defendant had, on a balance of probabilities, deliberately made defamatory content readily available.<sup>24</sup>

In *Magyar Jeti Zrt v. Hungary*<sup>25</sup>, the European Court of Human Rights established a more contextual approach towards assessing liability for use of hyperlinks to defamatory content, requiring an individual assessment, taking into account the following factors:

- (i) did the journalist endorse the impugned content;
- (ii) did the journalist repeat the impugned content (without endorsing it);
- (iii) did the journalist merely include a hyperlink to the impugned content (without endorsing or repeating it
- (iv) did the journalist know or could he or she reasonably have known that the impugned content was defamatory or otherwise unlawful;
- (v) did the journalist act in good faith, respect the ethics of journalism and perform the due diligence expected in responsible journalism?<sup>26</sup>

In *Loong v. Hiang*,<sup>27</sup> the High Court of Singapore considered a Facebook post that contained a link to an article that was alleged to contain defamatory material about Singapore's Prime Minister, in particular, reports that investigations were "trying to find the secret deals between the two corrupted Prime Ministers of Singapore and Malaysia."<sup>28</sup> The High Court rejected the 'bright line' approach to basic hyperlinks adopted by the majority of the Supreme Court of Canada, instead opting for a "more holistic assessment", citing Australian and British jurisprudence that the Court noted relied upon the European Court of Human Rights' judgment in *Magyar Jeti Zrt*.<sup>29</sup> In applying the contextual approach, the High Court found that the linked article should be deemed part of

the Facebook post after reasoning that the link contained no other content other than the link to the article and finding that there was no plausible interpretation of the article other than an endorsement of its content.<sup>30</sup>

Although *Loong v. Hiang* is an example of attempts to grapple with how to approach hyperlinks and of the cross-pollination of European Court of Human rights and national constitutional jurisprudence on this matter, the Court's ultimate decision to award damages in a case involving content critical of the Prime Minister raises significant concerns from an international human rights perspective. This case is part of an unfortunate pattern of Singapore's leaders bringing defamation suits against journalists and political opponents,<sup>31</sup> which can have a chilling impact on freedom of expression. The UN Human Rights Committee, the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights have all underscored that political speech directed against government officials deserves a particularly high degree of protection in view of the public interest in open political debate.<sup>32</sup>

## TYPES OF POTENTIALLY DEFAMATORY STATEMENTS

### *Opinions versus statements of fact*

We discussed 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,"<sup>33</sup> such as opinions and value judgments. It also notes: "All forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature."

<sup>21</sup> 2011 SCC 47, [2011] 3 SCR 269 (2011) (accessible at:

<https://www.canlii.org/en/ca/scc/doc/2011/2011scc47/2011scc47.html>).

<sup>22</sup> *Id.* at para 43 (opinion of Abella J for the majority, joined by Binnie, LeBel, Charron, Rothstein and Cromwell JJ).

<sup>23</sup> *Id.* at para. 50 (opinion of Fish J, joined by McLachlin C.J.).

<sup>24</sup> *Id.* at para. 93 (opinion of Deschamps J.)

<sup>25</sup> Application No. 11257 (2019) (accessible at:

<https://hudoc.echr.coe.int/eng#%7B%22fulltext%22%3A%5B%5C%22211257%2F16%22%2C%22documentcollectionid%22%3A%22GRANDCHAMBER%22%2C%22CHAMBER%22%2C%22itemid%22%3A%22001-187930%22%7D>).

<sup>26</sup> *Id.* at para 77.

<sup>27</sup> [2021] SGHC 66 (2021), (accessible at: [https://www.elitigation.sg/gd/s/2021\\_SGHC\\_66](https://www.elitigation.sg/gd/s/2021_SGHC_66)).

<sup>28</sup> *Id.* at para 5.

<sup>29</sup> *Id.* at para. 41.

<sup>30</sup> *Id.* at para. 42.

<sup>31</sup> Committee to Protect Journalists, 'New York Times to pay damages to Singapore's leaders' (2010) (accessible at: <https://cpj.org/2010/03/new-york-times-to-pay-damages-to-singapores-leader/>).

<sup>32</sup> General Comment 34 at para. 38; *Magyar Jeti Zrt v. Hungary*, above at n 44, paras. 81-82; *Ricardo Canese v. Paraguay*, Merits, Reparations and Costs, H.R. (ser. C) No. 111 (2004) at para. 103 (accessible at: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_111\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_111_ing.pdf); and *Ingabire Victoire Umuhoza v. Rwanda*, Application No. 003/2014 (2017) at para. 142 (accessible at: <https://www.african-court.org/en/images/Cases/Judgment/003-2014-Ingabire%20Victoire%20Umuhoza%20v%20Rwanda%20-%20Judgement%2024%20November%202017.pdf>).

<sup>33</sup> General Comment 34 at n 6 at p 12.

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To determine what counts as an opinion, courts tend to look at whether a reasonable person would understand the statement as asserting a statement of verifiable fact, which is capable of being proven to be 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 statement. The Singapore High Court has applied a somewhat broader definition of the 'ordinary reasonable person' as someone "assumed to possess general knowledge and experience of worldly affairs".<sup>34</sup>

The context in which the statement was made is critical to determining whether a reasonable person would understand it as an opinion or as a statement of fact. There are, for example, ways in which a statement of opinion may appear to be factual in nature.<sup>35</sup> In 2020, a US District Court dismissed a defamation lawsuit against controversial Fox News talk show host Tucker Carlson, noting 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'."<sup>36</sup>

### *Humour*

Similarly, content that a reasonable person would identify as humour or satire, rather than as stating a fact, should also be treated as an opinion. For example, the Malaysian Court of Appeal has stated that:

No reasonable person will read a cartoon with the same concentration, contemplation and seriousness as one would when reading a work of literature. Cartoons exaggerate, satirize and parody life, including political life. [...] The political cartoonist, unlike the serious political pamphleteer, seeks to ridicule persons and institutions with humour to deliver a message. It will be most exceptional if a political cartoon will have the effect of disrupting public order, security or the safety of the nation.<sup>37</sup>

The Supreme Court of India came to a similar conclusion in respect of a film containing a song that was deemed offensive to the Bata India footwear company, concluding:

[T]he song appears to have been written in the context of the theme of the film and ought not be taken as any kind of aspersion against the persons named in said song.<sup>38</sup>

### *Statements of others*

A point of consideration, particularly for journalists, is the extent to which they are liable for repeating defamatory statements of others since a central part of their work is reporting on the words of others.

<sup>34</sup> *Loong v. Hiang*, above at n 27 at para. 26.

<sup>35</sup> 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>).

<sup>36</sup> 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/>).

<sup>37</sup> Malaysian Court of Appeal, *Zulkiflee Bin SM Anwar Ulhaque v. Arikrishna Apparau (Zunar Case)*, Civil Appeal No. W-01-500-2011 (2014).

<sup>38</sup> *Bata India Limited v. Prakash Jsh Prodcutions And Others*, (Record of Proceedings), SLP (C) No. 32998 (2012) (accessible at: <https://www.casemine.com/judgement/in/56e0fa97607dba3896607a0a>).

The European Court of Human Rights (ECtHR) has found that a journalist is not automatically liable for quoting opinions of 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,”<sup>39</sup> provided they have not repeated potentially defamatory statements as their own, endorsed, or clearly agreed with them.

### *Privileged statements*

Privileged statements refer to certain statements which receive protection against defamation liability due to the public interest in this based on the circumstances in which they were made. Statements from legislature or judicial proceedings are usually considered absolutely privileged, meaning that neither the author of the statement nor a fair media report on it may be held liable for defamation. A number of other statements which involve social or moral responsibilities – such as giving a reference on someone or reporting a crime to the police – also enjoy qualified privilege, which means they are protected unless they were made with malice.

### *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 of falsity of the statement in cases brought by any public figure falls on the claimant.

However, in defamation cases concerning the public interest, international standards have been evolving towards the US approach to the burden of proof, as articulated by the Supreme Court in *New York Times v. Sullivan*.<sup>40</sup> The special international mandates on freedom of expression have called for the burden of proof to be on the plaintiff in such cases. For example, in their 2000 Joint Declaration, they noted that “the plaintiff should bear the burden of proving the falsity of any statements of fact on matters of public concern”.<sup>41</sup> The UN Special Rapporteur on Freedom of Expression has also affirmed that “where truth is an issue, the burden of proof lies with the plaintiff”.<sup>42</sup> Nevertheless, a clear consensus on this approach has not yet emerged, with the European Court of Human Rights’ dismissing arguments to adopt the *Sullivan* approach in their 2002 judgment in *McVicar v. United Kingdom*.<sup>43</sup>

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

<sup>40</sup> *New York Times Company v. Sullivan*, 376 U.S. 254 (1964) at para. 40.

<sup>41</sup> 2000 Joint Declaration on Current Challenges to Media Freedom (2000) (accessible at: <https://www.osce.org/files/f/documents/c/b/40190.pdf>).

<sup>42</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mission to Italy from 11 to 18 November 2013, (2014) at para. 23 (accessible at: <https://undocs.org/A/HRC/26/30/Add.3>).

<sup>43</sup> Application No. 46311/99 (2002) at para. 87 (accessible at: <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-60450&filename=001-60450.pdf>).

## Remedies and penalties

As discussed above, criminal penalties have been the focus of much attention by international bodies. It is notable that no international human rights court has ever upheld a custodial sentence imposed on a journalist. It is important that civil defamation laws contain sufficient checks and balances on the size of damage awards to prevent them from unduly stifling freedom of expression.

## TYPES OF CLAIMS

### SLAPP suits

Defamation suits are being abused to silence critics and journalists. The term “strategic lawsuits against public participation” (SLAPPs) is being used to describe cases which aim intentionally to bury critics under expensive and baseless legal claims in order to intimidate and silence them. The objective in these cases is not a positive judgment but rather to leverage the threat of financial damage through costly litigation. Defamation allegations are often used as the underlying complaints in SLAPP suits.

In many cases, courts have found against plaintiffs bringing such suits. For example, in the case of *Raub Australian Gold Mining Sdn Bhd v. Hue Shieh Lee*,<sup>44</sup> a mining company brought a complaint for libel and malicious falsehood before the Malaysian courts against the author of two articles. In these articles, the author had alleged the existence of medical complications suffered by residents in the vicinity of the company’s mining operations. Although the suit ultimately failed, the mere threat of costly, protracted litigation against well-financed corporations can have a chilling effect on the freedom of expression of activists and journalists.

A limited number of jurisdictions, such as certain provinces in Canada,<sup>45</sup> have adopted anti-SLAPP legislation to protect freedom of expression by allowing baseless defamation and other cases to be dismissed at an early stage of the proceedings and sometimes also to provide for special remedies for defendants to reclaim costs from the claimants. However, there is a need for much more widespread adoption of such anti-SLAPP laws to protect critical speech. A 2020 study from the Business & Human Rights Resource Centre found that in 2019 Southeast Asia was the region with the second highest incidence of recorded SLAPP suits (after Central America) and that the Philippines was the only state in the region with legislation defining SLAPPs, albeit with its application restricted to environmental cases.<sup>46</sup>

<sup>44</sup> Civil Appeal No. 02(f)-125-11/2017(W) (2017) (accessible at:

[https://elaw.org/system/files/attachments/publicresource/raub\\_fedcourt\\_2019.pdf](https://elaw.org/system/files/attachments/publicresource/raub_fedcourt_2019.pdf)).

<sup>45</sup> 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>).

<sup>46</sup> Business & Human Rights Resource Centre, ‘Strategic Lawsuits against Public Participation: Southeast Asia cases & recommendations for governments, businesses, & civil society’ (2020) (accessible at: [https://media.business-humanrights.org/media/documents/files/SLAPPs\\_in\\_SEA\\_2020\\_Final.pdf](https://media.business-humanrights.org/media/documents/files/SLAPPs_in_SEA_2020_Final.pdf)).

### Online harassment as a 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. Women journalists have been found to disproportionately be subjected to online harassment.<sup>47</sup> Online harassment can take many forms, including surveillance, posting threatening messages, hacking, doctoring or sharing personal images and other forms of 'doxing' (i.e. maliciously sharing personal or identifying information).

Anonymous harassing messages can be difficult to trace but, when part of a broader pattern of online harassment, they may be evidence of a state-sponsored campaign to harass dissidents. In Vietnam, for example, Amnesty International reported dozens of incidents of activists receiving threatening online messages.<sup>48</sup> The report noted that the deputy head of the Vietnamese military's political department had in December 2017 introduced a cyberspace military battalion made up of around 10,000 'cyber-troops' tasked with information warfare and correcting what the government deemed "distorted information on the internet".<sup>49</sup>

### Insult laws

A number of insult and other related laws are still in place across Asia and continue to pose risks for journalists and others critical of government. Thailand, for example, has particularly draconian 'lèse majesté' laws, with one individual receiving a 43-year prison sentence for insulting the royal family, a sentence that elicited condemnation by multiple UN special rapporteurs.<sup>50</sup> Likewise, the crime of sedition remains on the statute books in many countries and continues to be used to stifle freedom of expression. Seditious has been defined as the crime of "incitement of resistance to or insurrection against lawful authority."<sup>51</sup>

A more recent development has been the passing of 'false 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. Inasmuch as they generally prohibit the dissemination of false news, these laws represent a breach of the right to freedom of expression.

The UN Human Rights Committee and regional courts, including the [Inter-American Court of Human Rights](#), the [African Court on Human and Peoples' Rights](#) and the [European Court of Human Rights](#), have increasingly argued that public officials should enjoy less protection from criticism than others.<sup>52</sup> Because of their status, access to the media, and power, public officials can use their office

<sup>47</sup> UNESCO, 'Online violence against women journalists: a global snapshot of incidence and impacts' (2020), accessible at: <https://unesdoc.unesco.org/ark:/48223/pf0000375136>.

<sup>48</sup> Amnesty International, '“Let Us Breathe!” Censorship and Criminalization of Online Expression in Vietnam' (2020) at p. 51, s. 4.3.2. (accessible at: <https://www.amnesty.org/en/documents/asa41/3243/2020/en/>).

<sup>49</sup> *Id.* at s. 4.3.3, pp. 52-53.

<sup>50</sup> United Nations Office of the High Commissioner for Human Rights, 'Thailand: UN experts alarmed by rise in use of lèse-majesté laws' (2021) (accessible at: <https://www.ohchr.org/en/press-releases/2021/02/thailand-un-experts-alarmed-rise-use-lese-majeste-laws?LangID=E&NewsID=26727>).

<sup>51</sup> Merriam Webster Dictionary, 'Sedition' (accessible at: <https://www.merriam-webster.com/dictionary/sedition>).

<sup>52</sup> See sources in note 32.

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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 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 tolerance, especially when he himself makes public statements that are susceptible of criticism.”<sup>53</sup>

The Office of the High Commissioner for Human Rights (OHCHR) has also called for the abolition of the offence of ‘defamation of the State’,<sup>54</sup> and some jurisdictions have refused to allow public authorities, as such, to sue for defamation.<sup>55</sup> The ECtHR has limited such suits to situations which threaten public order, implying that governments cannot sue in defamation simply to protect their honour.<sup>56</sup>

### CONCLUSION

The criminalisation of defamation poses a serious risk to freedom of expression, particularly with the rise of social media platforms online. Defamation proceedings serve a legitimate purpose of protecting individuals’ reputations but are also often abused to silence and punish dissent. Despite the recent trend towards the decriminalisation of defamation, there remains a need to decriminalise in more countries, or at least to remove criminal punishments, to address excessive civil defamation awards, to ensure that defamation laws provide appropriate defences to defendants, and to adopt legal protections against SLAPP suits.

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<sup>53</sup>*Oberschlick v. Austria*, Application No. 20834/92 (1997), para 29 (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/>).

<sup>54</sup> OHCHR, Concluding Observations of the Human Rights Committee: Serbia and Montenegro, CCPR/CO/81/SEMO (12/08/2004) at para. 22 (accessible at: <https://www.refworld.org/docid/42ce6cfe4.html>).

<sup>55</sup> 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/freedomopinion/pages/annual.aspx>).

<sup>56</sup> *Id.*