

Module 7

Defamation and Reputation

*Modules on Digital Rights
and Freedom of
Expression Online in
Europe*



ISBN 978-0-9935214-1-6

Published by Media Defence: www.mediadefence.org

This module was prepared with the assistance of ALT Advisory: <https://altadvisory.africa/>

Published in May 2024

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MODULE 7

1. INTRODUCTION

Defamation is a notorious tactic used to suppress freedom of expression, notably affecting journalists. While defamation laws intend to safeguard individuals from public statements that could tarnish their reputation or dignity, they frequently clash with the right to free expression entrenched in multiple international and domestic legal frameworks. It is, thus, important that a balance is struck between safeguarding fundamental rights and shielding individuals from detrimental statements in terms of legitimate defamation claims.

Europe has witnessed a surge in online defamation cases in recent years due to the ease of posting content on social media platforms and the internet, often without the same level of scrutiny applied in traditional media. Coupled with a lack of comprehensive legislative frameworks addressing online defamation in many countries, this has led to an increase in defamation cases and a degree of uncertainty in applying defamation laws to the online realm.

Navigating online defamation cases poses unique challenges. The internet, lacking clear internationally recognised boundaries, complicates the identification of perpetrators. Moreover, determining the jurisdiction to adjudicate the matter becomes intricate as messages can originate from diverse global locations, involving parties scattered across different jurisdictions.

This module examines defamation laws in Europe and explores recent jurisprudence in which courts strive to strike a balance between conflicting rights. Additionally, it delves into emerging trends and examples specific to Europe, showcasing the evolving landscape of defamation law in the digital era.

1.1. What is Defamation

Definition of 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.¹

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 imprisonment 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 protects against unlawful attacks on a person's honour and reputation. Article 19(3) of the ICCPR also refers to the rights and reputation of

¹ Electronic Frontier Foundation, 'Online Defamation Law' (accessible [here](#)).

others as a legitimate ground for limitation of the right to freedom of expression.² Reputation is therefore the underlying basis in any claim of defamation, whether slander or libel.³

Defamation can be an important legal remedy for those who genuinely need it, but it can also be a weapon to quash dissent. There are many real examples where defamation may provide 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 for women seeking justice for the non-consensual sharing of images.

However, defamation is also frequently misused, particularly by states and powerful private individuals to stifle free speech, as well as by non-state actors in the context of Strategic Litigation against Public Participation (SLAPP) suits (which will be further discussed in this module).

1.2. 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](#), the European Union (EU), and the [Council of Europe](#), who have urged states to decriminalise defamation claims to protect the rights to freedom of speech and expression.⁴ 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.”⁵

In 2007, the [Parliamentary Assembly of the Council of Europe](#) affirmed its commitment to advocate for the decriminalisation of defamation in [Resolution 1577](#) towards the decriminalisation of defamation and the corresponding [Recommendation 1814](#).⁶ The Parliamentary Assembly urged member states of the Council of Europe to promptly eliminate imprisonment for defamation, prevent the misuse of criminal proceedings for defamation, preserve the independence of prosecutors in such cases, precisely define defamation in legislation to avoid arbitrary application and ensure effective civil law protection for the dignity of individuals affected by defamation.⁷

Within the region, currently, only Ireland, Romania, Estonia, the United Kingdom, Ukraine, Norway, Moldova, Macedonia, and Montenegro have completely decriminalised defamation

² International Covenant on Civil and Political Right, 23 March 1976.

³ 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’, MLDI at pp. 48-64 (2018) (accessible [here](#)). See Vaughan, ‘What’s the difference between libel and slander?’ (accessible [here](#)) for the definitions of libel and slander.

⁴ Human Rights Council, ‘General Comment No. 34’ (2011) (CCPR/C/GC/34 (accessible [here](#)); Council of Europe, ‘Defamation,’ (accessible [here](#)).

⁵ Id.

⁶ Parliamentary Assembly, ‘Towards decriminalisation of defamation’ (2007) Resolution 1577 at para 17.

⁷ Id.

against private persons, although many of these countries still criminalise libel and slanderous statements against the state, state officials, and/or its armed forces.⁸ Bulgaria's Justice Ministry has proposed amendments to its [Penal Code](#) which would replace criminal liability for defamation with an administrative penalty.⁹ In May 2023, the Hungarian Parliament also voted to partially decriminalise defamation committed by members of the press under certain circumstances.¹⁰

Protections against criminal defamation laws

When a criminal defamation law remains enforced, several safeguards should be in place to prevent defamation from being used to stifle freedom of speech and expression:

- The criminal standard of proof — beyond a reasonable doubt — should be fully satisfied.¹¹
- Criminal sanctions should be implemented by states to preserve public order, not to safeguard reputations, especially where the statements made are true.¹²
- It must be ensured that individuals accused of defamation have adequate means for their defence under the law, especially methods that involve verifying the accuracy of their statements whilst considering the broader public interest.¹³
- Penalties should not include imprisonment, nor should they enforce damages that are disproportionate to the injury suffered.¹⁴
- As a less restrictive means, states should not resort to criminal law when a civil law alternative is readily available.¹⁵

1.3. 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 have faced injury to their reputation and dignity following the dissemination of false and damaging statements. 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,

⁸ Scott Griffen, 'Defamation Law in the European Union: A Comparative Overview for Journalists, Civil Society and Policymakers' (2015) p. 6 (accessible [here](#)); European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2023 Communication on EU Enlargement policy' (2023) at p. 44 (accessible [here](#)); Danielsen, 'Defamation and Privacy Law in Norway' *Norway Media Guide* (accessible [here](#)).

⁹ Gigov, 'Justice Ministry proposes less severe penal sanctions for defamation' (2022) (accessible [here](#)).

¹⁰ Committee to Protect Journalists, 'CPJ welcomes Hungary vote to partially decriminalize defamation' (2023) (accessible [here](#)).

¹¹ Inter-American Court of Human Rights, *Kimel v Argentina*, (2008) (accessible [here](#)).

¹² *Castells v Spain* App No 11798/85, A/236, (1992) 14 EHRR 445, IHRL 2936 (ECHR 1992) at para 38.

¹³ *Id.*

¹⁴ Above n 6.

¹⁵ See for example: European Court of Human Rights, *Amorim Giestas and Jesus Costa Bordalo v. Portugal*, Application No. 37840/10 (2014) at para 36 (accessible [here](#) in French).

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 purpose of restoring reputation or honour, they can be misused and cause a “chilling effect” on the full enjoyment and exercise of freedom of expression.

Safeguards should, thus, equally be applied when addressing civil defamation matters to ensure that administrative remedies are not similarly used to stifle freedom of speech and expression. The Parliamentary Assembly of the Council of Europe has called on Member States to establish reasonable and proportionate maximum amounts for damages and interest in defamation cases to safeguard the viability of media defendants and provide legal safeguards against disproportionate awards.¹⁶

Libel tourism

Libel tourism is the practice of filing defamation lawsuits in jurisdictions that are deemed likely to provide favourable judgments, often chosen based on legal fees being contingent on the outcome (“no win, no fee”) or the potential cost of the legal process acting as a deterrent to the defendant. It is a cause for concern as it can be misused to intimidate and silence the media, journalists, and academics, particularly those critical or investigative in nature.¹⁷

In 2012, the Council of Europe adopted a [Declaration](#) addressing libel tourism which states that:

The prevention of libel tourism should be part of the reform of the legislation on libel/defamation in member States in order to ensure better protection of the freedom of expression and information within a system that strikes a balance between competing human rights... Further, if there is a lack of clear rules as to the applicable law and indicators for the determination of the personal and subject matter jurisdiction, such rules should be created to enhance legal predictability and certainty, in line with the requirements set out in the case law of the Court. Finally, clear rules as to the proportionality of damages in defamation cases are highly desirable.¹⁸

1.4. Can a true statement be defamatory?

In most states in Europe, truth is generally a defence for defamatory statements, with some exceptions.¹⁹ The ECtHR has held that truth is an absolute defence to a suit of defamation, provided that it can be proved.²⁰ If a factual statement can be proven to be true, it cannot be

¹⁶ Parliamentary Assembly, ‘Towards decriminalisation of defamation’ (2007) Resolution 1577 para 17.

¹⁷ Above n 18 at paras 5-10.

¹⁸ Council of Europe, ‘Declaration of the Committee of Ministers on the Desirability of International Standards Dealing with Forum Shopping in Respect of Defamation, “Libel tourism” To Ensure Freedom of Expression’ (2012) at paras 11-12 (accessible [here](#)).

¹⁹ Above n 8 at p. 8.

²⁰ Tarlach McGonagle, ‘Freedom of Expression and Defamation: A study of the case law of the European Court of Human Rights,’ Council of Europe (2016) (accessible [here](#)) at p. 43.

See, for example, [Bergens Tidende and Others v Norway](#) (2001).

defamatory, and the defendant will generally be absolved of liability.²¹ It follows naturally that any practices that unreasonably restrict the ability of defendants to establish the truth of their allegations should be avoided.²²

This is bolstered by [General Comment No. 34, which](#) states that “all such laws including penal defamation laws, should include defences such as the defence of truth.”²³

This principle arises from the notion that an individual's reputation should be based on truth, not on false or undeserved grounds. Although accuracy in reporting facts is crucial, in journalistic scenarios, especially during breaking news, absolute accuracy may be challenging, requiring some flexibility.²⁴ In [Observer and Guardian v the United Kingdom](#) (1991), the European Court of Human Rights (ECtHR) acknowledged the time-sensitive nature of news and the potential loss of its value if publication is delayed.²⁵ In this regard it is relevant and important that journalistic practices integrate fact-checking procedures, encouraging access to credible sources and documents that could serve as evidence in potential defamation claims.²⁶

The defence of truth applies solely to ascertainable facts, as statements of opinion or value judgments are not subject to factual proof.²⁷

Untrue statements

On the other hand, a statement that cannot be proven to be true should not always be automatically considered defamatory, as it depends on whether it was made in good faith, without intent to defame, or whether it may be covered by other possible defences such as reasonable publication.

General Comment No. 34 states that:

At least with regard to comments about public figures, consideration should be given to avoiding penalising or otherwise rendering unlawful untrue statements that have been published in error but without malice...[A] public interest in the subject matter of the criticism should be recognised as a defence.²⁸

The importance of truth is discussed in the case of [Kosova and Apostolov v North Macedonia](#) (2022) in the ECtHR, which held that North Macedonia violated the applicant's freedom of expression when its domestic courts found against the editor-in-chief of a weekly magazine and a journalist in a civil defamation suit, holding that the articles published were

²¹ Article 19, ‘Defining Defamation: Principles on Freedom of Expression and Protection of Reputation’ Principle 7 (accessible [here](#)).

²² *Id.*

²³ Above n 5 at p. 12.

²⁴ *Id.*

²⁵ *Observer and Guardian v United Kingdom, The Observer Ltd and ors and ‘Article 19’ (the International Centre against Censorship) (intervening) v United Kingdom* (Application no. 13585/88) (1992) para 60.

²⁶ Above n 8 at p. 44.

²⁷ *Id.*

²⁸ Above n 5.

of public interest capable of contributing to public debate and that the journalists could not be criticised for failing to ascertain the truth of the statements which emanated from a source. It also criticised the large amount of the award for having a chilling effect on the media.

As is implicit above, the element of truth is closely related to that of the public interest. In the case of [Udovychenko v Ukraine](#) (2023), the ECtHR discussed the public interest in the context of a woman who had given a witness statement to police implicating certain individuals in a road accident. She was subsequently sued by those individuals for defamation, with the domestic courts finding against her. The ECtHR held that the penalties imposed were disproportionate because her statement related to a matter of public interest and she had acted in good faith in making it.

1.5. The Right to 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 which states that: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”³⁰

This is mirrored within the European system in Article 8 of the European Convention on Human Rights ([ECHR](#)), which protects the right to respect for private and family life, read with Article 10(2) which provides that the right to freedom of expression may be constrained for the protection of the reputation of others.

However, as indicated, a balance often needs to be found between 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.

²⁹ UN General Assembly, ‘Universal Declaration of Human Rights, Resolution 217 A (III)’ (1948) ([accessible here](#)).

³⁰ Article 17(1) of the ICCPR.

A balancing act

When examining the necessity of an interference in a democratic society in the interests of the 'protection of the reputation or rights of others', the Court may be required to verify whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely, on the one hand, freedom of expression protected by Article 10 and, on the other, the right to respect for private life enshrined in Article 8.³¹

1.6. 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.³² Heavy fines have also been subject to scrutiny by the courts as a disproportional and unjustifiable restriction of the right to freedom of expression.

Whenever possible, redress in defamation cases should, therefore, 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.

1.7. Remedies

The following remedies apply to civil defamation matters:

Damages

In, *Tolstoy Miloslavsky v the United Kingdom* (1995), the ECtHR determined that compensation for defamation should reasonably relate to the harm caused to one's reputation.³³ Other factors that could influence the proportionality of damages and fines are the inclusion of "success fees" for legal teams, the potential threat to the economic stability of the applicant company, or the risk of closing a media outlet.³⁴ For example, in *Timpul Info-Magazin and Anghel v Moldova* (2008), a severe fine resulted in the closure of a newspaper, which the ECtHR acknowledged could suppress open discussion on matters of public concern, essentially silencing a dissenting voice.³⁵

³¹ *Axel Springer AG v Germany*, judgment of the Grand Chamber of the ECtHR (2012) at paras 83-84 (accessible [here](#)).

³² Above n 5.

³³ *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442 at para 69 (accessible [here](#)).

³⁴ Tarlach McGonagle, 'Freedom of expression and defamation: A study of the case law of the European Court of Human Rights' (2016) at pp. 51-52 (accessible [here](#)).

³⁵ *Timpul De Dimineata v Moldova* App no.16674/06 (2006) (accessible [here](#)).

Further, the proportionality of civil damages should not be solely evaluated in monetary terms. In *Reznik v Russia* (2013), despite a negligible monetary penalty of 20 Russian roubles, the initiation of defamation proceedings against the President of the Moscow City Bar was deemed capable of significantly chilling his freedom of expression due to the importance of his position.³⁶

Public apology

This remedy encourages defendants to show acknowledgement and to be accountable, making it a better-suited remedy to address the emotional requirements of offended parties compared to monetary compensations.³⁷ Consequently, apologies could foster a sense of reconciliation in strained relationships and prompt forgiveness from the victims, thereby facilitating a healing process.³⁸

Right to reply

The right of reply stems from the necessity to contest misleading information and ensure a diversity of viewpoints, particularly in areas of broad interest such as literature and politics.³⁹ In *Melnychuk v Ukraine* (2005), a newspaper declined to publish an author's reply to a critical book review, citing the inclusion of "vulgar and offensive language" about the reviewer. Despite communicating the reasons for refusal and offering the opportunity to edit the response, the applicant declined. The ECtHR highlighted that the right to freedom of expression does not grant unrestricted access to media for airing opinions and that:

Newspapers and other privately owned media must be free to exercise editorial discretion in deciding whether to publish articles, comments and letters submitted by private individuals. However, there may be exceptional circumstances in which a newspaper may legitimately be required to publish, for example, a retraction, an apology or a judgment in a defamation case.⁴⁰

Injunction

Injunctions play a crucial role in regulating or restricting certain activities, often related to the publication or dissemination of allegedly defamatory material. An injunction, in this context, is a court order that prohibits an individual or entity from publishing or further disseminating specific information deemed defamatory.⁴¹

These injunctions might take different forms:

- **Interim Injunctions:** These are provisional measures issued during the early stages of legal proceedings and are aimed at preventing imminent harm or maintaining the status quo until the case is resolved.⁴²

³⁶ *Reznik v Russia* -4977/05 (2013) (accessible [here](#)).

³⁷ Wannes Vandebussche, 'Rethinking non-pecuniary remedies for defamation: The case for court-ordered apologies' (2021) *Journal of International Media & Entertainment Law* 155 (accessible [here](#)).

³⁸ *Id.*

³⁹ Above n 34 at p. 53.

⁴⁰ *Melnychuk v Ukraine* (App no 28743/03) (2001) p. 6 (accessible [here](#)).

⁴¹ David Adria, 'Freedom of speech, defamation, and injunctions' (2013) 55(1) *William & Mary Law Review* 6-7 (accessible [here](#)).

⁴² Above n 34 at pp. 54-55.

- **Permanent Injunctions:** These are issued as part of the final judgment in a defamation case and prohibit certain actions permanently, such as prohibiting the continued publication or dissemination of defamatory material. They are typically issued after the court has determined that the material in question is indeed defamatory.⁴³

Courts must strike a balance between protecting an individual's reputation and ensuring the right to freedom of expression.⁴⁴ This balance is crucial in determining the proportionality of the injunctions issued in defamation cases. Courts often assess whether the injunctions imposed are necessary and proportionate to the harm caused by the alleged defamation, ensuring they do not unduly restrict freedom of speech.

Recent defamation matter against journalist

On 2 May 2023, the Court of General Jurisdiction in Yerevan, Armenia, issued an order to freeze assets amounting to 9 million Dram (€21,890) belonging to journalist Davit Sargsyan and his publisher employer, 168 Hours.⁴⁵ This followed a civil defamation lawsuit filed by Yerevan's Deputy Mayor, Tigran Avinyan, in response to a video report released by Sargsyan on 5 February 2023. The report alleged a steady increase in Avinyan's family wealth through political influence since Prime Minister Nikol Pashinyan's assumption of power in 2018. Avinyan contested the assertion that these facts amounted to corruption, although he did not challenge their accuracy.

Sargsyan defended his report on Facebook, stating that he based his claims on previously published materials that Avinyan had not earlier refuted and that he believed the lawsuit aimed to silence him by inflicting substantial financial harm. Head of the Committee to Protect Freedom of Speech, Ashot Melikyan, noted that this marked the first instance where a media outlet faced the maximum 9 million Dram penalty following legal amendments that tripled the fines for insult and defamation in 2021. Aramazd Kiviryan, a lawyer representing 168 Hours, expressed concern over the freeze, highlighting its significant impact on the outlet's operations and noting that while it intended to petition for the freeze's removal, its continuation until the court's final verdict, which might take years, posed a substantial challenge.

On 16 May 2023, Avinyan's lawyer announced an application to lift the freeze, clarifying that their intent was not to bankrupt any media outlet or create financial hardships. However, the substantive proceedings are ongoing.

The case comes in the midst of a rising number of lawsuits filed against journalists and the media in Armenia based on insult and defamation.⁴⁶

⁴³ Above n 34 at p. 55.

⁴⁴ Dominika Bychawska-Siniarska, *A handbook for legal practitioners* (2017) at p. 44 (accessible [here](#)).

⁴⁵ More insight on the matter is accessible at Safety of Journalists Platform, 'Assets of Journalist Davit Sargsyan and Outlet 168 Hours Frozen in Defamation Proceedings' (accessible [here](#)).

⁴⁶ Marianna Danielyan, 'The Number Of Lawsuits Against Journalists In Armenia Has Increased,' *media.am* (2023) (accessible [here](#)).

2. TYPES OF DEFAMATORY MATERIAL

2.1. *Opinion versus fact*

We have addressed factual statements that may be defamatory. However, it is important to differentiate expressions of opinion 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,”⁴⁷ 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.”

To distinguish fact from opinion, the following should be considered:⁴⁸

- **Statements of facts:** Statements claiming facts need to be proven true by the author or publisher in court, while opinions require a demonstration of a sufficient factual basis.
- **Verifiability:** Facts are objectively verifiable information, and if challenged as false, the burden lies on the speaker to prove their accuracy. Opinions, on the other hand, are subjective viewpoints based on available information. They cannot be objectively proven as true or false. However, critical opinions should have some basis in reality. The level of factual basis varies with the seriousness of the allegation. Severe claims demand more robust and reliable factual support.

Opinions are generally protected under the defence of “honest comment” or “fair comment,” allowing individuals to express their views on matters of public interest, even if those opinions are strong or biased.⁴⁹ However, when statements are presented as factual assertions and are proven false, leading to harm or damage to someone’s reputation, they can be subject to defamation claims.

The requirements for an honest comment defence were outlined by the United Kingdom Supreme Court in [Spiller v Joseph](#) (2010) which identified the requirements as follows:⁵⁰

1. The comment must be on a matter of public interest.
2. The comment must be recognisable as comment, as distinct from an imputation of fact.
3. The comment must be based on facts that are true or protected by privilege.
4. The comment must explicitly or implicitly indicate, at least in general terms, the facts on which it is based.
5. The comment must be one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views.
6. The comment must not have been published maliciously.

⁴⁷ Above n 5 at p. 12.

⁴⁸ Human Rights Guide, ‘Distinction: fact or opinion’ (accessible [here](#)).

⁴⁹ Withersworldwide, ‘Social network activities and their legal implications in the EU: defamation and data protection’ (2021) (accessible [here](#)).

⁵⁰ [2010] UKSC 53 at para. 83 (accessible [here](#)).

Case law analysis

In the context of the UK, the *Waterson v Lloyd and Carr* (2013) case presented a critical examination of where the line between fact and opinion lies within defamation law.⁵¹ In this case, a Member of Parliament (MP) initiated a libel claim against the Eastbourne Liberal Democrats, due to the distribution of two campaign newsletters during the 2010 General Election. These newsletters, designed to resemble local newspapers, labelled the MP as an “Expenses Scandal” MP both in headlines and internal articles. The Eastbourne Liberal Democrats defended their actions by invoking the defence of honest comment, asserting that the statements were expressions of opinion rather than factual allegations.

Two of the judges in the England and Wales Court of Appeal viewed the statements made as expressions of opinion or comment, emphasising that they primarily centred on the MP's expense claims without expressly insinuating any unlawful behaviour. One dissenting judge argued for a clearer distinction between broader MP expense scandals and the specific facts of the MP's claims. This dissent underscored the potential impact of language nuances in differentiating between statements of fact and expressions of opinion within defamation cases.

The case highlighted the ongoing challenge in defamation law regarding the demarcation between factual assertions and opinions or comments, particularly in the politically charged arena.

2.2. Humour

The ECtHR has held that satire is “a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate.”⁵² While humour, especially satire, is recognised as a form of expression and social commentary deserving protection, its subjective and elusive nature makes drawing a clear line between harmful speech and protected expression challenging.⁵³

In the case of *Petrina v Romania* (2008), the ECtHR found that allegations broadcast on a television programme and in a humorous magazine had violated the subject's freedom of expression because, although the publication was satirical in nature, the articles themselves had been liable to offend the applicant as they had no factual basis, and because they directly concerned him in his personal rather than professional capacity, resulting in speech that overstepped the boundaries of reasonableness.⁵⁴ In contrast, in *Sousa Goucha v Portugal* (2004), the Applicant, an openly gay TV host, filed a complaint for defamation and insult after he was described in a television comedy show as “The best Portuguese female TV host.”⁵⁵ The

⁵¹ [2013] EWCA Civ 136 [2013] EMLR 17 (accessible [here](#)).

⁵² *Vereinigung Bildender Künstler v Austria* (2007) 68354/01 at para 33 (accessible [here](#)).

⁵³ Alberto Godioli and others, ‘Laughing Matters: Humor, Free Speech and Hate Speech at the European Court of Human Rights’ (2022) 35 *International Journal of Semiotics of Law* 2242 (accessible [here](#)).

⁵⁴ European Court of Human Rights, ‘Factsheet: Protection of reputation,’ (2023) (accessible [here](#)).

⁵⁵ Application No 36109/03 (2008) (accessible [here](#)).

ECtHR held that there had been a fair balance between the Applicant's right to protection of his reputation and the media's right to freedom of expression and found no violation of the Applicant's rights.

The matter of [Nikowitz and Verlagsgruppe News GmbH v Austria](#) (2007) provides further guidance from the ECtHR on the pertinent characteristics of a satirical article in the context of a defamation suit.

2.3. *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 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,"⁵⁶ provided they have not repeated potentially defamatory statements as their own, endorsed, or agreed with them.

Principle 15 of the [Principles on Freedom of Expression and Protection of Reputation](#) notes that "individuals should not face legal responsibility for accurately reporting the statements of others" and "no one should be held accountable under defamation laws for a statement they did not create, edit, or publish, and when they had no knowledge or reason to believe that their actions contributed to spreading a defamatory or otherwise unlawful statement."⁵⁷

With increased social media use, it is notable that individuals may, however, be responsible for statements made by others if they actively participate in or endorse the publication of defamatory content.

2.4. *Privileged statements*

Privileged statements are those reported from places which are covered by different forms of privilege. For example, statements reported from legislative or judicial proceedings typically have absolute privilege. This means that neither the statement's author nor the media reporting it can be held liable for defamation. Some other types of statements reported from public meetings, documents, or materials in the public domain may also enjoy qualified privilege.

Absolute privilege grants individuals the clear right to make statements in certain situations, regardless of their truth or intent.⁵⁸ However, the same statement by the same person may be protected by absolute privilege in one context and not in another.⁵⁹ For instance, a defamatory statement made during testimony at a trial would be absolutely privileged, while the same statement made outside the trial could lead to a successful defamation lawsuit.

⁵⁶ *Nenkova-Lalova v Bulgaria* Application No. 35745/05 (2012) (accessible [here](#)).

⁵⁷ Article 19, 'Defining Defamation: Principles on Freedom of Expression and Protection of Reputation' (2017) (accessible [here](#)).

⁵⁸ Charles Crain, 'Privileges and Defenses in Defamation Cases' (accessible [here](#)).

⁵⁹ *Id.*

Other forms of communication also fall under qualified privilege. This privilege protects those acting in good faith who make statements to fulfil a duty or serve a positive purpose and may apply to other fora such as other legislative bodies and quasi-judicial institutions.⁶⁰ Unlike absolute privilege, qualified privilege does not shield individuals if they abuse it.⁶¹

Case law on privilege

- *Keller v Hungary* (2006): In declaring the application inadmissible, the ECtHR stated that the public insinuations made against a minister did not benefit from the privilege afforded to parliamentary debate because some of them were made outside of Parliament itself.
- *Reynolds v Times Newspapers* (1999): the Judicial Committee of the House of Lords in the UK dismissed an appeal in a defamation case, holding that although the defence of qualified privilege is available to the media, there is no generic defence for the communication of political information, and defined what has come to be known as the “Reynolds test.”
- *Gordon v The Irish Race Horse Trainers Association* (2020): the High Court of Ireland elaborated on the defence of qualified privilege and when it is defeated by express malice.

2.5. Whose burden of proof?

A general principle of law is that the burden of proof lies with 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 and would rely on one of the abovementioned grounds of justification.⁶²

3. STRATEGIC LITIGATION AGAINST PUBLIC PARTICIPATION

3.1. SLAPP Suits

Other legal methods are also increasingly used to silence critics and journalists. One such example is Strategic Lawsuits Against Public Participation (SLAPP), which aim to intentionally bury critics under expensive and often baseless legal claims 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 — typically against persons and organisations that cannot reasonably pay for the damages sought in the lawsuit. Libel and defamation are often used as

⁶⁰ Above n 58.

⁶¹ Id.

⁶² Council of Europe, ‘Defamation and freedom of expression’ (2003) at p. 3 (accessible [here](#)).

the underlying complaints in SLAPP suits. In Europe, the number of SLAPP suits has been steadily rising in recent years, reaching 161 in 2022.⁶³

In acknowledging these risks, in 2023, the Legal Affairs Committee of the European Parliament voted in support of new rules designed to ensure EU-wide safeguards against unjustified SLAPP suits, building on a series of existing resolutions aimed at preventing the legal harassment of journalists and activists.⁶⁴ This included broadening the definition of cross-border cases to include situations where the subject matter of the case is pertinent to more than one country and can be accessed electronically.⁶⁵ It also builds on the European Commission's existing recommendations for domestic cases that particularly address legal support for those targeted.

The proposed measures include the option for those targeted by a SLAPP to seek early dismissal of their case, placing the burden of proof on the claimant to demonstrate that their case is not blatantly unfounded.⁶⁶ Claimants would also be responsible for covering all legal expenses, while victims of SLAPPs would have the right to seek compensation for damages, including harm to their reputation and defamation cases would only be admissible in the defendant's national court.⁶⁷ On 30 November 2023, the EU Council and Parliament agreed on and passed the new directive.⁶⁸

The rise of anti-SLAPP laws

Several countries around the world have sought to address the surge of SLAPP suits against journalists and activists by passing dedicated anti-SLAPP legislation. This includes, for example, the United States, Australia, and Canada.⁶⁹ As the Reporters Committee for Freedom of the Press states:⁷⁰

Under most anti-SLAPP statutes, the person sued makes a motion to strike the case because it involves speech on a matter of public concern. The plaintiff then has the burden of showing a probability that they will prevail in the suit — meaning they must show that they have evidence that could result in a favorable verdict. If the plaintiff cannot meet this burden and the suit is dismissed through anti-SLAPP proceedings, many statutes allow defendants to collect attorney's fees from the plaintiff.

In 2023, the UK also introduced an anti-SLAPP law giving judges the power to dismiss lawsuits they deem to be attempting to silence those speaking out justifiably on economic

⁶³ The CASE, 'SLAPPs,' (accessible [here](#)).

⁶⁴ European Parliament, 'Anti-SLAPP: EU protection against legal actions that silence critical voices' 27 June 2023 (accessible [here](#)).at p. 64.

⁶⁵ *Id.*

⁶⁶ Above n 64 at p. 56.

⁶⁷ *Id.*

⁶⁸ Nathalie Weatherald, 'EU institutions strike deal on Anti-SLAPP Directive,' Euractiv (2023) (accessible [here](#)).

⁶⁹ Linda Maria Ravo and others, 'Protecting Public Watchdogs Across the EU: A Proposal for an EU Anti-SLAPP Law,' A call for action signed by multiple non-governmental organisations from across Europe (accessible [here](#)).

⁷⁰ Reporters Committee for Freedom of the Press, 'Understanding Anti-SLAPP law,' (accessible [here](#)).

crime.⁷¹ The law defines what constitutes a SLAPP and provides a cost protection scheme for cases that proceed. However, it is limited only to those covering economic crimes.

International human rights bodies have also increasingly begun to recognise SLAPPs. For example, the 2022 UN Human Rights Council Resolution on the safety of journalists made commitments acknowledging the growing risks of SLAPPs and called on governments to “take measures to protect journalists and media workers from strategic lawsuits against public participation, where appropriate, including by adopting laws and policies that prevent and/or alleviate such cases and provide support to victims.”⁷² This has also been recognised by several reports of the special mandates.⁷³

The ECtHR has made some progress toward recognising SLAPPs, including in the case of *OOO Memo v Russia* (2022), in which it explicitly referred to “the growing awareness of the risks that court proceedings instituted with a view to limiting public participation bring for democracy.”

3.2. Insult Laws

Insult laws aim to safeguard the “esteem and character” of individuals, even public officials, and are, unlike defamation laws, usually oblivious to whether the statements are true.⁷⁴ Several insult laws are still at play across the continent and continue to pose risks for journalists and others critical of the government. Poland stands out as a country in which insult cases remain common, while across the rest of the continent they are rare despite remaining laws which often aim to protect heads of state.⁷⁵

Regional courts have increasingly argued that public officials should enjoy *less* protection from criticism than others. 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.⁷⁶ 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 ECtHR has found in *Oberschlick v Austria* (1997):

A 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.⁷⁷

⁷¹ Lucy Nash, ‘UK introduces first anti-SLAPP law – but critics say it doesn’t go far enough,’ The Bureau of Investigative Journalism (2023) (accessible [here](#)).

⁷² A/HRC/RES/51/9 (accessible [here](#)).

⁷³ Global Freedom of Expression: Columbia University, ‘How are courts responding to SLAPPs? Analysis of selected court decisions from across the globe,’ (2023) (accessible [here](#)) at p. 10.

⁷⁴ Joel Simon and others, ‘Weaponizing the Law: Attacks on Media Freedom’ (2023) at p. 16 (accessible [here](#)).

⁷⁵ Antonia Zimmerman, ‘European countries where insulting the head of state can land you in prison,’ Politico (2021) (accessible [here](#)).

⁷⁶ *Id.*

⁷⁷ Application No. 11662/85 (1991) at para 59 (accessible [here](#)).

The Office of the High Commissioner for Human Rights ([OHCHR](#)) has also called for the abolition of the offence of “defamation of the State,”⁷⁸ and some jurisdictions have refused to allow elected and other public authorities to sue for defamation.⁷⁹ The ECtHR has limited such suits to situations which threaten public order, implying that governments cannot sue in defamation simply to protect their honour.⁸⁰

3.3. Abuse of process

Lastly, those seeking to silence critics and journalists may abuse court processes to meet their objectives.⁸¹ Even when the legal framework does not offer specific safeguards against SLAPPs, there may be other legal mechanisms available for dismissing such cases.⁸² These mechanisms could include provisions addressing the “abuse of process” or prohibiting frivolous litigation.⁸³ Some courts have started to entertain defendants’ requests for case dismissals using these provisions, although their application has been inconsistent.⁸⁴

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 reflects 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,⁸⁵ which may enable you to have the comments taken down. However, they are unlikely to provide further recourse beyond removing the offending content.
- **If you have been targeted by a SLAPP suit** that uses defamation charges to silence or intimidate you may:

⁷⁸ OHCHR, Concluding Observations of the Human Rights Committee: Serbia and Montenegro, CCPR/CO/81/SEMO (12/08/2004) at para 22 (accessible [here](#)).

⁷⁹ 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 [here](#)).

⁸⁰ *Id.*

⁸¹ Global Freedom of Expression, ‘How are courts responding to SLAPPs? Analysis of selected court decisions from across the globe,’ (2023) (accessible [here](#)).

⁸² *Id.*

⁸³ *Above n 81.*

⁸⁴ *Id.*

⁸⁵ For Facebook, see [here](#). For X (formerly ‘Twitter’), see [here](#).

- 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 on 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 European Court of Human Rights or the Court of Justice of the European Union. There may be jurisprudence in your country opposing the use of disproportionate penalties for defamation.

4. CONCLUSION

While defamation laws aim to shield individuals from infringements on their rights to dignity and privacy, their frequent abuse tends to subdue and penalise dissenting voices. The ongoing shift towards decriminalising defamation signifies a progressive step but necessitates a comprehensive execution of judicial verdicts. Concurrently, the elimination of criminal penalties associated with other insult laws becomes imperative. This module has also underscored the importance of instituting legal safeguards against alternative coercive tactics such as the use of Strategic Lawsuits Against Public Participation (SLAPP) suits.

A holistic approach encompassing not only the decriminalisation of defamation but also the eradication of punitive measures, coupled with protective measures against silencing methodologies, is needed to fortify the terrain of unfettered expression and dissent.