

Defending the Media in Defamation Cases

Defamation can be described in a number of ways – but is broadly understood as the communication of a false statement that unjustly causes harm or detriment to legal or natural person's reputation.

Defamation laws vary from jurisdiction to jurisdiction. Therefore, the first step in defending any defamation claim is to identify the applicable jurisdiction and system of law in which proceedings are being brought or contemplated, and to take local legal advice. Additionally, certain jurisdictions distinguish between written and oral defamation, which are, for example, known as libel and slander respectively under English law.

It is an important precept that the free press, and media more generally, play a vital role in holding governments, state bodies and similarly powerful and influential corporates to account. The right to freedom of expression is at the heart of the reporting and publication that the free press and media does. Therefore, the right to freedom of expression will be at the heart of the defence in any defamation case involving a media organisation or individual. That right is enshrined in a number of international law instruments that we will come on to below. Such rights are sometimes enshrined in national law, and in some cases come into conflict with national defamation laws.

Whereas certain jurisdictions recognise defamation as a matter of civil law, others criminalise it. There is a consensus among human rights groups that criminalising defamation has a chilling effect on media organisations, media reporting and therefore on democratic accountability in a way that is antithetical to freedom of expression.

Through the concept of unjust harm to reputation, defamation laws tend to measure the right to freedom of expression against the right of a legal or natural person to maintain its, his or her reputation. Therefore, an analysis of the merits of a defamation case will require weighing up the two competing rights. An understanding of the law of defamation therefore also requires an understanding of human rights law jurisprudence.

This factsheet sets out certain general principles that may apply and the international and regional law frameworks, which may be relevant, according to the jurisdiction in question.

- I. International Law
 - (i) Human Rights Law Instruments

The United Nations International Covenant on Civil and Political Rights (ICCPR) sets out rights at Articles 17 and 19.

Article 17 states:

"1. 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.
2. Everyone has the right to the protection of the law against such interference or attacks"

Article 19 ICCPR states:

"1. Everyone shall have the right to hold opinions without interference.

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

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

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals."

While Article 17 could be used to support arguments made by claimants in defamation claims, defendants in those claims could draw support from on Article 19. It will be apparent that there is some tension between the rights endowed by these two articles, which is expressly acknowledged at 19.3, which states that the right to freedom of expression is qualified by a limited category of competing rights in certain circumstances, which includes the rights of others to their reputations.

(ii) Commentary and Interpretation by the United Nations Human Rights Committee

Adherence to the ICCPR by signatory States is monitored by the United Nations Human Rights Committee, which has produced guidance and commentary in its General Comment 34.

General

With regard to the right to freedom of expression and the application of that right the media, the Human Rights Committee stated that:

"13. A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society. The Covenant embraces a right whereby the media may receive information on the basis of which it can carry out its function. The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or

restraint and to inform public opinion. The public also has a corresponding right to receive media output.

14. As a means to protect the rights of media users, including members of ethnic and linguistic minorities, to receive a wide range of information and ideas, States parties should take particular care to encourage an independent and diverse media.

15. States parties should take account of the extent to which developments in information and communication technologies, such as internet and mobile based electronic information dissemination systems, have substantially changed communication practices around the world. There is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.

16. States parties should ensure that public broadcasting services operate in an independent manner. In this regard, States parties should guarantee their independence and editorial freedom. They should provide funding in a manner that does not undermine their independence.

17. Issues concerning the media are discussed further in the section of this general comment that addresses restrictions on freedom of expression."

Truth as a Complete Defence and Decriminalisation of Defamation

As to how the expansive right to freedom of expression fits with the law on defamation, the Human Rights Committee has stated that "*Defamation laws must be crafted with care to ensure that they comply with [the right to freedom of expression], and that they do not serve, in practice, to stifle [it]. All such laws, in particular penal defamation laws, should include such defences as the defence of truth.*

Moreover that "*State parties should consider the decriminalization 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*".

Defence of Opinion

The Human Rights Committee has also stated that that criminal defamation laws should **not extend** "*to those forms of expression that are not, of their nature, subject to verification*". In other words, value judgments and opinions. **More generally, the Human Rights Committee has affirmed that** "*all forms of opinion are protected, including opinions of a political, scientific, historic, moral or religious nature*" and that the ICCPR "**embraces even expression that may be regarded as deeply offensive**".

Public Interest Defence

Moreover, the Human Rights Committee has stated that a "*public interest in the subject matter of the criticism should be recognized as a defence [to defamation] and "At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice."*

(iii) Statements by UN Special Rapporteurs

Special Rapporteurs are individuals appointed by the UN, who, amongst other things, conduct fact-finding enquiries to investigate and comment on human rights issues.

Decriminalisation of Defamation

In 2002 the UN Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media and the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and released a joint statement that:

"Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws."

The issue is seen as particularly egregious where true statements are criminalised by expansive domestic defamation laws.

In 2010 the UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) released a joint statement on 'Ten Key Challenges to Freedom of Expression in the Next Decade'.

It also noted concerns, as in the 2002 joint statement, about the prevalence of criminal defamation laws and in particular that such laws typically have the following features potentially incompatible with freedom of expression:

"a) The failure of many laws to require the plaintiff to prove key elements of the offence such as falsity and malice.

b) Laws which penalise true statements, accurate reporting of the statements of official bodies, or statements of opinion.

c) The protection of the reputation of public bodies, of State symbols or flags, or the State itself.

d) A failure to require public officials and figures to tolerate a greater degree of criticism than ordinary citizens.

e) The protection of beliefs, schools of thought, ideologies, religions, religious symbols or ideas.

f) Use of the notion of group defamation to penalise speech beyond the narrow scope of incitement to hatred.

g) Unduly harsh sanctions such as imprisonment, suspended sentences, loss of civil rights, including the right to practise journalism, and excessive fines."

Defence of Truth and of Opinion

As can be seen, the statement expressed concern about penalising true or unprovable statements of opinion. Where a statement is true or is a value judgment/opinion (see above) it should not be defamatory.

Public Interest Defence

As can be seen, the statement also expressed concern about laws in certain jurisdiction **that penalise "accurate reporting of the statements of official bodies", which ought to be** permissible on the basis of public interest publication (and which would be defended on that basis) and privileged as against state bodies,

Defence of Reasonableness

In a joint declaration on 'Censorship by Killing and Defamation' in 2000, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression released a statement that:

"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".

II. Regional Law

(i) Europe

(ii) European Convention on Human Rights

The right to freedom of expression and information is enshrined in article 10 of the **European Convention on Human Rights ("ECHR")**.

Article 10(1) sets out the scope of the right:

"(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Similarly to the equivalent provision in ICCPR, Article 10 of the ECHR is qualified so as to permit certain restrictions of the right to freedom of speech when necessary to protect the reputation or rights of others, the competing right which potentially lies in Article 8 of ECHR (right to respect for private life¹).

Therefore, the European Court of Human Rights ("ECtHR") has recognised the balancing act between protection of freedom of expression and reputation.

Decriminalisation?

The ECtHR has not completely ruled out the possibility of criminal defamation in any circumstances. However, there is an overriding theme coming out of the ECtHR of the need for circumscription and proportionality of any criminal laws that stand. For example:

- The ECtHR has placed restrictions on criminal libel laws because of the freedom of expression provisions of the ECHR – see for example *Lingens v. Austria* (1986) in which a claim under the Austrian criminal code failed because it was held that the truth of a value judgment is by definition not susceptible to proof – therefore any finding under the Austrian criminal code would have infringed the publisher's Article 10 rights.
- The ECtHR has found that imprisonment is generally incompatible with the right to freedom of expression. In *Cumpana and Mazare v Romania* (2004) it found that **incarceration was appropriate** 'only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence'.

Defence of Truth

¹ See for example *Radio France v France* (2005) 40 EHRR 29 and *White v Sweden* (2008) 46 EHRR and *Lindon, Otchakovsky-Lauresn and July v France* (2008) EHRR 35. Whether Article 8 may be invoked in every defamation case and how far its coverage extends is the subject of debate.

The European Court of Human Rights has held that truth is an absolute defence to a suit of defamation. That is, if something is true, it cannot be defamatory. However, thought should be given to proving the truth of published statements. The burden of proof will depend on the procedural law of the national courts involved and the ECtHR has stated that placing a burden of proof on a defendant asserting freedom of expression is not incompatible with Article 10².

Defence of Opinion

As per the *Lingens* case noted above, a value judgment, which is an opinion by another name, is not susceptible to proof. How far does that principle extend? There is a high threshold for interference with the private life of individuals (Article 8) rising to a level that could justify restrictions on the freedom of expression of the media under Article 10(2). For example, in *De Haes and Gijssels* (1997) the ECtHR noted that "*journalistic freedom also covers possible recourse to a degree of exaggeration or even provocation*". There does not always appear to be a need, therefore, for there to be a firm factual basis for the opinion in question.

The ECtHR does not appear to have prescribed or defined the features of an opinion, or any other associated subjective criteria, to render it fit to benefit from the Article 10(2) protection. Indeed it has noted that minority opinions are equally protected under Article 10 and that it would be unreasonable to protect only generally accepted ideas³.

Public Interest Defence

The ECtHR's jurisprudence has established that Article 10 operates to protect the media where the relevant report is a matter of wider public interest. For example, in the case of *Bergens Tidende* (2000) **the doctor's interest in protecting his professional reputation** was not sufficient to outweigh the important public interest in protecting the freedom of the press to impart information on matters of legitimate public concern (in this case the doctor's practice and his competency).

Media organisations should be on particularly firm ground in availing their Article 10 rights to freedom of expression when commenting on and engaging in what is part of a pre-existing public debate and matter of public interest, particularly those involving public individuals. Where there is "political invective" there may well be some overspill into the personal sphere, which is one of the "*risks of politics and the open discussion of ideas that characterised a democratic society*"⁴.

² See *EuropaPress Holding DOO v Croatia* (2011) 53 EHRR 27, *McVicat v UK* (2002) 35 EHRR 22 and *Steel and Morris v UK* (2005) 41 EHRR 22.

³ *Hertel* (1998), Reports 1998-VI,

⁴ *Lopes Gomes Da Silva* (2000)

Defence of Privileged Reporting

Even where statements are defamatory, certain categories of reporting benefit from absolute privilege. Those include reports from ongoing Court proceedings and national legislature proceedings. Such privilege could also apply to other public bodies with a legislative function and other quasi-judicial institutions.

If Defence Fails? Damages Awards

The ECtHR has emphasised the need for damages award to be proportionate. Damages awards that are not are liable to be overturned by the ECtHR on the basis of incompatibility with Article 10⁵.

In a similar vein, the ECtHR has also criticised damage awards for defamation that are disproportionate in comparison to awards for serious violent crime. See for example *Iltalehti and Karhuvaara v. Finland* (2010): “*Finally, the Court has taken into account the severity of the sanctions imposed on the applicant company. It notes that the applicant company was ordered to pay B. EUR 5,000 plus interest as non-pecuniary damage and her costs and expenses. The severity of the amount of compensation must be regarded as substantial, given that the maximum compensation afforded to victims of serious violence was approximately FIM 100,000 (EUR 17,000) at the time.*”

In any event the sums involved must be subject to scrutiny to prevent such sums having a chilling effect on the press or media activity⁶.

Organization for Security and Cooperation in Europe

In 2017, the Organization for Security and Cooperation in Europe (“OSCE”) Office of the Representative on Freedom of the Media issued a report on criminal defamation and anti-blasphemy laws among its member states. It found that defamation is criminalised in nearly 75% of the 57 OSCE participating states. Many of them include specific provisions for harsher punishment for speech or publications critical of heads of state, public officials, state bodies and the state itself. The OSCE also reported that blasphemy and religious insult laws exist in around one third of OSCE participating states; many of these combine blasphemy and religious insult with elements of hate speech legislation.

Parliamentary Assembly of the Council of Europe

In a 2007 resolution⁷, the Assembly welcomed efforts to decriminalise defamation, while falling short of calling for wholesale decriminalisation in Europe - it called on: “*states whose laws still provide for prison sentences – although prison sentences are not actually*

⁵ *McVicar v. UK*, 2002 and *Tolstoy Miloslavsky v. UK*, 1995

⁶ *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*, 2005

⁷ Resolution 1577, 2007

imposed – to abolish them without delay so as not to give any excuse, however unjustified, to those countries which continue to impose them, thus provoking a corrosion of fundamental freedoms”.

(iii) American Convention on Human Rights

The American Convention on Human Rights (“ACHR”) evolved from and superseded the American Declaration of the Rights and Duties of Man. The interpretation and enforcement of the ACHR is entrusted to the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights. The right to freedom of thought and expression is enshrined in article 12 of the ACHR.

While the text of the ACHR itself does not expressly mention defamation, libel or slander, the rights enshrined in article 12 may be invoked as part of a defence in a court case taking place in a country that has ratified and which continue to adhere to the ACHR.

(iv) African Charter on Human **and Peoples’ Rights**

Freedom of speech and information in Africa is protected by article 9 of the African Charter on Human and Peoples’ Rights. The African Charter is enforced by the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights.

While the text of the Charter itself does not expressly mention defamation, libel or slander, the rights enshrined in article 9 may be invoked as part of a defence in a court case taking place in a country that has ratified and which continues to adhere to the Charter.

In 2010, the African Commission on Human and Peoples’ Rights adopted the Resolution on Repealing Criminal Defamation Laws in Africa, including the following text:

“Calls on States Parties to repeal criminal defamation laws or insult laws which impede freedom of speech, and to adhere to the provisions of freedom of expression, articulated in the African Charter, the Declaration, and other regional and international instruments”⁸

In 2014, the African Court on Human and Peoples’ Rights found that imprisonment for defamation should only be used in restricted circumstances⁹.

⁸ <https://www.achpr.org/sessions/resolutions?id=343>

⁹ *Konaté v Burkina Faso*, African Court of Human Rights, App. No. 004/2013, judgment 5th December 2014.

III. Further Reading

[OHCHR Jurisprudence](#)

[OHCHR Human Rights Treaty Bodies – General Comments](#)

[Media Laws Database: International Standards on Criminal and Civil Defamation Laws](#)

[OAS: International Mechanisms for Promoting Freedom of Expression – Joint Declaration](#)

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