CHAPTER 4

Defamation

Defamation is defined as the "action of damaging the good reputation of someone."[115] In terms of modern human rights law, defamation can be understood as the protection against "unlawful attacks" on a person's "honour and reputation" contained in human rights instruments. Defamation can be a criminal offence or a civil wrong.

The offence of criminal defamation is clearly a limitation of the right to freedom of expression, but one which seeks to give effect to the need to protect others' reputations. However, that does not automatically make the limitation permissible. In the Zimbabwean case of *Madanhire v Attorney General*[116] the Court pointed out that the key question is whether the limitation is justifiable:

> "It certainly cannot be gainsaid that the offence of criminal defamation operates to encumber and restrict the freedom of expression enshrined in s 20(1) of the former Constitution. On the other hand, it is also not in doubt that the offence of criminal defamation falls into the category of permissible derogations contemplated in s 20(2)(b)(i), as being a provision designed to protect the reputations, rights and freedoms of other persons. What is in issue for determination by this Court is whether or not it is a limitation that is reasonably justifiable in a democratic society."[117]

Criminal Defamation

Many defamation laws originated as part of the criminal law of the state. This suggests that there is perceived to be a public interest in the state initiating criminal prosecutions against journalists or others – something that goes beyond the right of the individual to protect his or her reputation. It is closely related to the concept of sedition ("seditious libel" in the common law), which penalises speech and other expression that is critical of government or the state. Yet increasingly the whole notion of criminal defamation is seen as antiquated and anachronistic.

Calls for Decriminalisation

The African Commission, in Resolution 169, called on all states 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".[118]

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[115] Oxford English Dictionary.

[116] Zimbabwe Constitutional Court: *Madanhire and Another v Attorney General supra* note 24.

[117] *Id*, 8.

[118] African Commission: "Resolution 169 on Repealing Criminal Defamation Laws in Africa" 48th Ordinary Session (2010).

The UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has argued that "criminal defamation laws should be repealed in favour of civil laws as the latter are able to provide sufficient protection for reputations…", and because "[c]riminal defamation laws represent a potentially serious threat to freedom of expression because of the very sanctions that often accompany conviction."[119]

The Human Rights Committee has recommended that "States 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."[120]

Why is Criminal Defamation so Problematic?

The danger with criminal defamation – and one of the many reasons why defamation should be a purely civil matter – is that the involvement of the state in prosecuting alleged defamers shifts the matter very quickly into the punishment of dissent.

The consequences of being charged with criminal defamation, rather than sued in terms of civil law, are significant. First, the accused person has to go through the rigors of a criminal prosecution, which may include arrest and detention and a harrowing criminal trial. The experiences of a criminal prosecution will occur even if the accused is found not guilty. Second, a criminal conviction has far-reaching effects, and because a criminal conviction remains on an individual's record, those effects are felt even after a sentence has been served.

Another danger with the existence of the criminal defamation offence is the "chilling effect" it places on the practice of journalism; journalists fear reporting on sensitive or controversial stories out of concern that they may be charged with defamation and face a criminal trial. This was recognised by the ECtHR in *Dilipak v Turkey*[121] where the Court remarked that damages awarded against two journalists placed a heavy burden on the journalists themselves (one had had his house seized) but also had a chilling effect on all journalists.

This was also recognised by the Zimbabwean Court in *Madanhire*:

> "It is inconceivable that a newspaper could perform its investigative and informative functions without defaming one person or another. The overhanging effect of the offence of criminal defamation is to stifle and silence the free flow of information in the public domain. This, in turn, may result in the citizenry remaining uninformed about matters of public significance and the unquestioned and unchecked continuation of unconscionable malpractices."[122]

[119] 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).

[120] Human Rights Committee: General Comment 34 at para 47.

[121] ECtHR: *Dilipak and Karakaya v Turkey*, Application Nos 7942/05 and 24838/05 (2014).

[122] Zimbabwe Constitutional Court: *Madanhire v Attorney General supra* note 24, 11.

As a result of these deleterious effects, many courts have said that criminal law should only be used in the context of defamation in extreme circumstances. The Inter-American Court has argued that the use of criminal law to protect fundamental rights must be a last resort, as "[i]n a democratic society punitive power is exercised only to the extent that is strictly necessary in order to protect fundamental legal rights from serious attacks which may impair or endanger them".[123]

A number of courts have also held that even if criminal defamation is permissible in principle, the punishment for the crime must not be overly severe. The African Court, in *Konaté*, found Burkina Faso in violation of the African Charter, the ICCPR, and the Economic Community of West African States (ECOWAS) Treaty because of the existence of custodial sentences for defamation in its laws – in addition to the fact that it was imposed on Konaté. The Court made the same finding in relation to excessive fines and costs imposed upon him:

> "The Court further notes that other criminal sanctions, be they (fines), civil or administrative, are subject to the criteria of necessity and proportionality; which therefore implies that if such sanctions are disproportionate, or excessive, they are incompatible with the Charter and other relevant human rights instruments."[124]

Therefore, there are a number of very strict protections that should apply when a criminal defamation law remains on the statute book:

- If defamation is part of the criminal law, the criminal standard of proof – beyond a reasonable doubt – should be fully satisfied.[125]
- 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, that is when they are made with the knowledge that the statements were false or with reckless disregard as to whether they were true or false.
- Penalties should not include imprisonment – nor should they entail other suspensions of the right to freedom of expression or the right to practice journalism.[126]
- States should not resort to criminal law when a civil law alternative is readily available.[127]

[123] Inter-American Court: *Vélez Loor v Panama* Report No 95/06 (2007) at para 170.

[124] African Court: *Konaté v Burkina Faso supra* note 29 at para 166.

[125] Inter-American Court: *Kimel v Argentina* Series C No 177 (2008).

[126] African Court: *Konaté v Burkina Faso supra* note 29.

[127] See for example ECtHR: *Amorim Giestas and Jesus Costa Bordalo v Portugal* Application No 37840/10 (2014) at para 36.

What is reputation?

The concept of "reputation" is unclear, perhaps dangerously so, given that it can be used as the basis for limiting human rights. For example, what does it have to do with public profile or celebrity? Does a public figure have a greater reputation than an ordinary member of the public? Is reputation connected with how many people have heard of you? If the answer is yes, then presumably the damage to reputation will be much greater for such people. This opens up the possibility of abuse of defamation law by public figures. Perhaps a better approach is to tie the concept of "reputation" to human dignity. Human rights law has as its purpose the equal protection of dignity for all people, whether they are celebrities or not. This would mean that the ordinary person, whose first appearance in the media occurred when their reputation was attacked, would be as worthy of protection as the public figure whose activities are reported every day.

Is there a right to reputation?

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.

This is echoed in identical words in Article 17 of the ICCPR (and hence is binding law upon states that are party to that treaty), and there is also a separate reference in Article 19 of the ICCPR to protection of "the rights and reputation" of others as a legitimate grounds for restricting freedom of expression.

Defences to Defamation

Truth

Most courts have held there is no defamation if the statement is true, and so proving the truth of an allegation should always be an absolute defence to a defamation suit.

In a 1919 case, the United States Supreme Court remarked that freedom of expression services "the search for truth".[128]

This is the position taken by the African Commission in the Declaration of Principles on Freedom of Expression in Africa:

> "no one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances"[129]

[128] United States Supreme Court: Abrams v United States 250 US 616, 639 (1919).

[129] African Commission: "Declaration of Principles of Freedom of Expression in Africa" 32nd Ordinary Session (2002).

Note

In many (but not all) legal systems, the burden of proof lies not with the claimant – the person who says that they were defamed – but with the defendant. If the claimant can demonstrate that the defendant made the statement – usually fairly straightforward – it then becomes a matter for the defendant to show that the statement was true, and therefore not defamatory.

Reasonable Publication

If a statement is untrue, and it is damaging to a person's reputation, the jurisprudence indicates that this does not automatically mean that it is defamatory.

The past half century has seen a developing trend in which *reasonable publication* is not penalised, even if it is not completely accurate. The term "reasonable publication" encompasses the idea that the author took reasonable steps to ensure the accuracy of the content of the publication – and also that the publication was on a matter of public interest.

In *Trustco Group International Ltd and Others v Shikongo*,[130] the Namibian Supreme Court looked at the defence of reasonable publication:

> "The defence of reasonable publication holds those publishing defamatory statements accountable while not preventing them from publishing statements that are in the public interest. It will result in responsible journalistic practices that avoid reckless and careless damage to the reputations of individuals. In so doing, the defence creates a balance between the important constitutional rights of freedom of speech and the media and the constitutional precept of dignity."[131]

There are some factors that a court will take into account in determining whether the conduct was reasonable:

- The journalist made good faith efforts to prove the truth of the statement and believed it to be true.
- The defamatory statements were contained in an official report – with the journalist not being required to verify the accuracy of all statements in the report.
- The topic was a matter of public concern and interest.

The South African Supreme Court of Appeal ruled on the question of whether strict liability in defamation was compatible with the constitutional protection of the right to freedom of expression – concluding that it was not. In its place the Court considered an alternative approach of allowing a defence in defamation cases of "reasonable publication":

[130] Namibia Supreme Court: *Trustco Group International Ltd and Others v Shikongo* [2010] NASC 6.

[131] *Id* at para 56.

> "[W]e must adopt this approach by stating that the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time."[132]

Various factors should be considered to determine whether any given publication is reasonable:

> "In considering the reasonableness of the publication account must obviously be taken of the nature, extent and tone of the allegations. We know, for instance, that greater latitude is usually allowed in respect of political discussion, and that the tone in which a newspaper article is written, or the way in which it is presented, sometimes provides additional, and perhaps unnecessary, sting. What will also figure prominently, is the nature of the information on which the allegations were based and the reliability of their source, as well as the steps taken to verify the information. Ultimately there can be no justification for the publication of untruths, and members of the press should not be left with the impression that they have a licence to lower the standards of care which must be observed before defamatory matter is published in a newspaper … I have mentioned some of the relevant matters; others, such as the opportunity given to the person concerned to respond, and the need to publish before establishing the truth in a positive manner, also come to mind. The list is not intended to be exhaustive or definitive."[133]

Opinion

In some situations a statement may not be a statement of fact (which can be determined to be true), but rather an expression of opinion.

The ECtHR has a long established doctrine that distinguishes between facts and value judgments:

> "[A] careful distinction needs to be made between facts and value-judgements. The existence of facts can be demonstrated, whereas the truth of value-judgements is not susceptible of proof. … As regards value judgements this requirement [to prove their truth] is impossible of fulfilment and it infringes freedom of opinion itself".[134]

The ECtHR has taken a very robust view of this: no one can be restricted from expressing opinions. An opinion is exactly that: it is the journalist or writer's view, based upon her understanding of the facts. It is something different from the facts themselves.

However, countries with "insult" laws may penalise these expressions of opinion. When a political campaigner called the French President a "sad prick," he was found guilty of insult in France, and the ECtHR found that his right to freedom of expression had been violated.[135]

Alternatively, in the case of satire and other humorous expression, it could be argued that a

[132] South Africa Supreme Court of Appeal: *National Media Ltd v Bogoshi supra* note 56 at para 30.

[133] *Id* para 31.

[134] ECtHR: *Lingens v Austria* Application No 9815/82 (1986).

[135] ECtHR: *Eon v France* Application No 26118/10 (2013).

statement was not intended seriously and no reasonable person would understand it thus.

Absolute privilege

If the defamatory statement was reported from parliament or judicial proceedings, it would normally be absolutely privileged. That is, neither the original author of the statement nor the media reporting it could be found to have defamed. This rule may also apply to other legislative bodies and other quasi-judicial institutions (such as human rights investigations).

Parliamentary Privilege

Almost all legal systems encompass the concept of privilege for statements made in the legislature, and usually in other similar bodies (such as regional parliaments or local government councils). The purpose, clearly, is to protect freedom of political debate.

This privilege extends to reporting of what is said in parliament (or other bodies covered by the same privilege). Hence, as a general principle, not only would a member of parliament not be liable for a defamatory statement made in parliament, neither would a journalist who reported that statement.

The ECtHR has generally been very firm in upholding the principle of parliamentary privilege in defamation cases. In one case from the United Kingdom, a Member of Parliament (MP) had made a series of repeated statements that were highly critical of one of his own constituents. The MP gave both the name and address of the constituent, following which she was subject to hate mail, as well as extremely critical media coverage. The Court refused to find a violation of the right to have a civil claim adjudicated by a judge, since the protection of parliamentary privilege was "necessary in a democratic society."[136]

> "In light of the above, the Court believes that a rule of parliamentary immunity, which is consistent with and reflects generally recognised rules within signatory States, the Council of Europe and the European Union, cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1."[137]

In the *Jerusalem* case from Austria, the ECtHR deemed the applicant to have privilege, even though the alleged defamatory statements were made at a meeting of the Vienna Municipal Council and not parliament. This was justified in the following terms:

> "In this respect the Court recalls that while freedom of expression is important for everybody, it is especially so for an elected representative of the people. He or she represents the electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court."[138]

[136] ECtHR: *A v United Kingdom* Application No 35373/97 (2002).

[137] *Id* at para 83.

[138] ECtHR: *Jerusalem v Austria* Application No 26958/95 (2001) at para 36.

In the European Court of Justice (now the Court of Justice of the European Union), the Court stated that, in order to benefit from the immunity, the "connection between the opinion expressed and parliamentary duties must be direct and obvious".[139]

Qualified privilege

There is a degree of protection for media reporting other types of statement, even if they do not enjoy the privilege accorded to parliament or the courts. This might apply to, for example, public meetings, documents and other material in the public domain.

The *Reynolds* Defence

The Courts of England and Wales developed a strand of the qualified privilege defence in relation to the media's publication of information on matters of public interest. This defence is frequently referred to as the "*Reynolds* defence", which allowed the courts to give appropriate weight to the importance of freedom of expression by the media on all matters of public concern. In the House of Lords judgment in *Reynolds v Times Newspapers*,[140] Lord Nicholls set out a non-exhaustive list of matters that should be taken into account when determining whether a publication was subject to qualified privilege:

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
4. The steps taken to verify the information.
5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
8. Whether the article contained the gist of the plaintiff's side of the story.
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
10. The circumstances of the publication, including the timing.[141]

Following this judgment, a number of courts had applied the above criteria as "hurdles" to be overcome by anyone wanting to rely on the defence.[142] The House of Lords clarified, in

[139] European Court of Justice: *Criminal Proceedings Against Aldo Patriciello* Case C-163/10 (2011).

[140] United Kingdom House of Lords: *Reynolds v Times Newspapers* [2001] 2 AC 127.

[141] *Id*, 205.

[142] United Kingdom House of Lords: *Jameel v Wall Street Journal [2006] UKHL 44.*

Jameel v Wall Street Journal,[143] that this approach was not sufficient and that there needed to be a more realistic approach to how the media covered stories. The House of Lords clarified that the "non-exhaustive" list of matters set out by Lord Nicholls in *Reynolds* should not be treated as "hurdles", but rather as factors to be taken into account and, as necessary, balanced against each other.[144]

On 1 January 2014, the United Kingdom Defamation Act 2013 came into force, which abolished the "*Reynolds* defence"[145] and replaced it with the defence of "publication on a matter of public interest".[146] This provides for a defence to claims of defamation where a defendant can show (i) the statement was, or formed part of, a statement on a matter of public interest,[147] and (ii) the defendant reasonably believed that publishing the statement was in the public interest.[148] In determining whether it was reasonable for the defendant to believe that publishing the statement was in the public interest, the courts have to "make such allowance for editorial judgement as it considers appropriate".[149] Furthermore, in determining whether the defendant has met the criteria to rely on the defence, the court is to have regard to "all the circumstances of the case".[150] In light of the above, it is possible that the Courts of England and Wales will continue to make reference to similar matters as those set out by Lord Nicholls in *Reynolds v Times Newspapers* when applying the defence.

Statements of others

Journalists cannot be responsible for the statements of others, provided that they have not themselves endorsed them.[151] This would apply, for example, in the case of a live interview broadcast.

Remedies and Penalties

One reason why defamation suits – whether criminal or civil – are so feared is the impact of the penalties or awards often made against the media in such cases because of the "chilling effect" of heavy penalties or large defamation awards. The concern is not only for the journalist involved in any particular case, but also the deterrent that defamation law and the sanctions imposed can pose to vigorous, inquiring journalism.

No international human rights court has ever upheld a custodial sentence on a journalist for a "regular" defamation case. The leading case in Africa, the African Court case of

[143] *Id*, 44.

[144] *Id* at paras 33 and 56.

[145] United Kingdom Parliament: The Defamation Act 2013 (c 26), section 4(6).

[146] *Id*, section 4(1).

[147] *Id*, section 4(1)(a).

[148] *Id*, section 4(1)(b).

[149] *Id*, section 4(4).

[150] *Id*, section 4(2).

[151] ECtHR: *Jersild v Denmark*, Application No 15890/89 (1994) at para 35; ECtHR: *Thoma v Luxembourg* Application No 38432/97 (2001) at para 62.

Konaté[152] provides a useful explanation of why custodial sentences should not be used in defamation cases except in exceptional circumstances:

> "Apart from serious and very exceptional circumstances for example, incitement to international crimes, public incitement to hatred, discrimination or violence or threats against a person or a group of people, because of specific criteria such as race, colour, religion or nationality, the Court is of the view that violations of laws on freedom of speech and the press cannot be sanctioned by custodial sentences."[153]

The ECtHR will not rule out criminal defamation in principle, but it has commented several times on the penalties imposed, as in this Romanian case:

> "The circumstances of the instant case – a classic case of defamation of an individual in the context of a debate on a matter of legitimate public interest – present no justification whatsoever for the imposition of a prison sentence. Such a sanction, by its very nature, will inevitably have a chilling effect, and the fact that the applicants did not serve their prison sentence does not alter that conclusion, seeing that the individual pardons they received are measures subject to the discretionary power of the President of Romania; furthermore, while such an act of clemency dispenses convicted persons from having to serve their sentence, it does not expunge their conviction."[154]

In civil defamation cases, the principal cause of the "chilling effect" is large monetary awards against the media in favour of defamation claimants. In a civil suit, the purpose of the award is not to punish the defendant (the defamer), but to compensate the person who was defamed, for any loss or damage caused by the defamation. It follows that the claimant should be able to prove that there was actual loss or damage as part of their suit. If this cannot be demonstrated, then it is unclear why there should be any monetary award, and so, wherever possible, redress in defamation cases should be non-pecuniary and aimed directly at remedying the wrong caused by the defamatory statement. Most obviously, this could be through publishing an apology or correction. Monetary awards – the payment of damages – should only be considered, therefore, when other lesser means are insufficient to redress the harm caused. Compensation for harm caused (known as pecuniary damages) should be based on evidence quantifying the harm and demonstrating a causal relationship with the allegedly defamatory statement.

In any event, courts should take into account not only the damage to reputation, but also the potential impact of large monetary awards on the defendant – and also more broadly on freedom of expression and the media in society. Applying a remedy can be considered as part of the "necessity" consideration in the three-part test for limiting freedom of expression. A proportional limitation – which can be justified when defamation has been proved – is one that is the least restrictive to achieve the aim of repairing a damaged reputation.

Problems often arise when calculating non-pecuniary damages. This refers to monetary

[152] African Court: *Konaté v Burkina Faso supr*a note 29.

[153] *Id* at para 155.

[154] ECtHR: *Cumpana and Mazare v Romania* Application No 33348/96, (2004) at para 116.

awards made to compensate losses that cannot be accurately calculated in monetary terms – such as loss of reputation, anxiety and emotional distress. The ECtHR has been critical of large non-pecuniary monetary awards, even on occasions finding them to be "violations of the right in themselves". The landmark case was that of Tolstoy Miloslavsky, who was the author of a defamatory pamphlet confronted with damages of £1.5 million (in 1989) awarded by a British libel jury. The ECtHR found the award grossly disproportionate and that Tolstoy Miloslavsky's right to freedom of expression had thereby been violated, even though the fact that he had committed libel was not in dispute. The ECtHR repeated these comments in *Steel and Morris v United Kingdom* (the "McLibel" case). It should also be noted that the ECtHR itself very rarely awards non-pecuniary damages. It normally concludes that the finding that a right has been violated is sufficient – a principle that domestic courts might be advised to follow where possible. A similar approach has been taken by the African Court[155] and the Inter-American Court:

> "[T]he issuance of this Judgment, the extent of revoking the domestic decisions in their entirety, and the publication of this Ruling in various media streams, private means as well as those with wide circulation of social and official means, which includes the judiciary, are sufficient and appropriate measures of reparation to remedy the violations inflicted on the victims."[156]

Courts have also recognised that injunctions – the restraining of publication – as a remedy can, in themselves, amount to a disproportionate interference with freedom of expression. In *News Verlags GmbH & CoKG v Austria*[157] the ECtHR held that there was no proportionality between injunctions against a magazine and the aims of protecting the rights and reputations of others, and that the injunctions were therefore not necessary in a democratic society.[158]

Humour

The ECtHR has maintained a consistent position of allowing greater latitude for humorous and satirical comment. However, the mere fact of an alleged defamation being published in a satirical magazine would not be enough to protect it. In a Romanian case, a politician named Petrina applied successfully to the ECtHR, claiming that his right to respect for his private and family life had been violated by the false allegation that he was a former member of the notorious Communist secret police. The fact that the publication was in a satirical magazine was irrelevant. The message of the article was "clear and direct, devoid of any ironic or humorous element."[159]

The protection of satire has also been emphasised by courts elsewhere. For example, the Malaysian Court of Appeal has stated:

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[155] African Court: *Mtikila v Tanzania* Application No 011/2011 (2013).

[156] Inter-American Court: *Fontevecchia & D'Amico v Argentina* Case No 12.524 (2011) at para 110.

[157] ECtHR: *News Verlags GmbH & CoKG v Austria* Application No 31457/96 (2000).

[158] *Id:* ECtHR: Jerusalem v Austria supra note 138.

[159] ECtHR: *Petrina v Romania*, Application No 78060/01 (2008), translated from the French, "clair et direct, dépourvu de tout élément ironique ou humoristique."

> "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."[160]

Protection of Political Speech

Historically, the law has offered great protection to public officials from criticism – whether in the form of "insult" laws, defamation, sedition laws or other means of preventing unruly subjects from criticising their superiors. But, this protection does not square with the social and political benefit of openness, free debate and accountability that is such a crucial component of free expression. And so, in a modern age of democracy and human rights, the principle has been reversed, with special emphasis being laid on the importance of protecting the right of political criticism. Courts are encouraged to follow the example of the Ugandan Constitutional Court which said that public figures need "harder skins".[161]

Courts around the world have emphasised the need to protect political speech:

- The Nigerian High Court in *The State v The Ivory Trumpet Publishing Co*:[162] "Freedom of speech is, no doubt, the very foundation of every democratic society, for without free discussion, particularly on political issues, no public education or enlightenment, so essential for the proper functioning and execution of the processes of responsible government, is possible."[163]
- The Supreme Court in Sri Lanka in *M Joseph Perera v Attorney-General*:[164] "Freedom of speech and expression consists primarily not only in the liberty of the citizen to speak and write what he chooses, but in the liberty of the public to hear and read what it needs … The basic assumption in a democratic polity is that government shall be based on the consent of the governed. The consent of the governed implies not only that consent shall be free but also that it shall be grounded on adequate information and discussion aided by the widest possible dissemination of information from diverse and antagonistic sources… There must be untrammelled publication of news and views and of the opinions of political parties which are critical of the actions of government and expose its weakness. Government must be prevented from assuming the guardianship of the public mind."[165]
- The Constitutional Court in Spain in *Tribunal Constitucional, Sala Segunda. Recurso*

[160] Malaysia Court of Appeal: *Zulkiflee Bin SM Anwar Ulhaque v Arikrishna Apparau* 21NCVC-146-2011.

[161] Uganda Constitutional Court: *Mwenda v Attorney General* [2010] UGCC 5.

[162] Nigeria High Court: *The State v The Ivory Trumpet Publishing Co* [1984] 5 NCLR 736.

[163] *Id.*

[164] Sri Lanka Supreme Court: *M Joseph Perera v Attorney-General*, App. Nos 107-109/86 (SC).

[165] *Id.*

de amparo nº. 211/80:[166] "Article 20 of the Constitution [on freedom of expression] … guarantees the maintenance of free political communication, without which other rights guaranteed by the Constitution would have no content, the representative institutions would be reduced to empty shells, and the principle of democratic legitimacy … which is the basis for all our juridical and political order would be completely false."[167]

- The ECtHR in *Feldek v Slovakia*:[168] "The Court emphasises that the promotion of free political debate is a very important feature of a democratic society. It attaches the highest importance to the freedom of expression in the context of political debate and considers that very strong reasons are required to justify restrictions on political speech. Allowing broad restrictions on political speech in individual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned."[169]
- The ECtHR in *Lingens v Austria*:[170] "Freedom of political debate is at the very core of the concept of a democratic society."[171]
- The African Commission in *Media Rights Agenda v Nigeria*:[172] Freedom of expression is "vital to an individual's personal development, his political consciousness, and participation in the conduct of public affairs in his country."[173]
- The Human Rights Committee, in General Comment 34: "Concerning the content of political discourse, the Committee has observed that in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high".[174]

Criticism of Public Officials

Regional and domestic courts have increasingly argued that public officials should enjoy less protection from criticism than others and have higher legal standards to meet in order to be successful.

- The African Court in *Konaté*:[175] "[F]reedom of expression in a democratic society must be the subject of a lesser degree of interference when it occurs in the context of public debate relating to public figures. Consequently, as stated by the [African] Commission, 'people who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether'."[176]

[166] Spain Constitutional Court: *Tribunal Constitucional, Sala Segunda. Recurso de amparo* No 211/80 (1981).
[167] *Id*.
[168] ECtHR: *Feldek v Slovakia* Application No 29032/95 (2001).
[169] *Id* at para 42.
[170] ECtHR: *Lingens v Austria supra* note 134.
[171] *Id* at para 42.
[172] African Commission: *Media Rights Agenda v Nigeria supra* note 90.
[173] *Id* at para 54.
[174] Human Rights Committee, General Comment 34 at para 38.
[175] African Court: *Konaté v Burkina Faso supra* note 29.
[176] *Id* at para 155.

- The ECtHR in *Lingens v Austria*:[177] "Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society … The limits of acceptable criticism are, accordingly, wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed … and he must consequently display a greater degree of tolerance."[178]
- The ECtHR in *Oberschlick v Austria*:[179] "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."[180]
- The Nigerian Federal Court of Appeal in *Chief Arthur Nwankwo v The State*:[181] "The whole idea of sedition is the protection of the person of the sovereign … The present President is a politician and was elected after canvassing for universal votes of the electorate; so is the present State Governor. They are not wearing constitutional protective cloaks of their predecessors in 1963 Constitution … There is no ban in the Constitution 1979 against publication of truth except for the provisos and security necessities embodied in those sections."[182]
- The United States Supreme Court in *New York Times v Sullivan*:[183] "[P]ublic officials, in order to sustain an action for defamation, must prove the falsity of the allegedly defamatory statement as well as 'actual malice', i.e., that the defendant published a falsehood with knowledge that it was false or with reckless disregard of its truth or falsity." The Court said that if the regular standards were applied "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." [184]

Three main principles emerge from this jurisprudence:

- Freedom of political debate is a core and indispensable democratic value;
- The limits of criticism of a politician must hence be wider than for a private individual;
- The politician deliberately puts himself in this position and must hence be more tolerant of criticism.

The reasoning of the United States Supreme Court in *Sullivan* has also had far reaching consequences. In a later case, the Supreme Court extended the *Sullivan* rule to apply to

[177] ECtHR: *Lingens v Austria supra* note 134.

[178] *Id* at para 42.

[179] ECtHR: *Oberschlick v Austria* Application No 11662/85 (1991).

[180] *Id* at para 29.

[181] Nigerian Federal Court of Appeal: *Chief Arthur Nwankwo v The State* (1983).

[182] *Id* at para 237.

[183] United States Supreme Court: *New York Times v Sullivan* 376 US 254 (1964).

[184] *Id.*

all "public figures", on the basis that public figures have access to the media to counteract false statements.[185]

The *Sullivan* reasoning has been influential in common law jurisdictions such as England, India and South Africa, but also in the Philippines and in Europe. The argument in the American courts about the burden of proof lying with the plaintiff has *not* generally been accepted.[186] But the argument about greater latitude in criticising public figures has.

The ECtHR has been influenced by American free speech jurisprudence, although it seldom follows its reasoning fully. Where there is clearly common ground, however, is in the additional latitude given to criticism not only of public officials or politicians, but of the government specifically:

> "The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media."[187]

There is significant concern over whether the state should be able to sue in defamation. The Human Rights Committee called for the abolition of the offence of "defamation of the state". While the ECtHR has not entirely ruled out defamation suits by Governments, it appears to have limited such suits to situations which threaten public order, implying that Governments cannot sue in defamation simply to protect their honour. A number of national courts (for example, in India, South Africa, the United Kingdom, the United States, Zimbabwe) have also refused to allow elected and other public authorities to sue for defamation.[188]

A South African Appellate Division case, in 1946, held that organs of the state could not sue individuals for defamation:

> "The normal means by which the Crown protects itself against attacks upon its management of the country's affairs is political action, not litigation, and it would, I think, be unfortunate if that practice were altered. ... I have no doubt that it would involve a serious interference with the free expression of opinion hitherto enjoyed in this country if the wealth of the State, derived from the State's subjects, could be used to launch against those subjects actions for defamation because they have, falsely and unfairly it may be, criticised or condemned the management of the country."[189]

[185] United States Supreme Court: *Gertz v Robert Welch Inc* 418 US 323 (1974).

[186] See note on burden of proof under 'Defences to Defamation' on page 31.

[187] ECtHR: *Castells v Spain supra* note 59.

[188] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression *supra* note 119.

[189] South Africa Appellate Division: *Die Spoorbond v South African Railways* [1946] SA 999 (AD).

This reasoning was followed in a landmark British case in the House of Lords, *Derbyshire County Council v Times Newspapers Ltd*[190] where the Court held that public bodies could not sue in defamation:

> "It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.... What has been described as "the chilling effect" induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public."[191]

Although the ECtHR has admitted the possibility of corporate bodies suing for defamation, the Court has held that associations must have high tolerance for criticism. In *Jerusalem v Austria*, two associations sued a local government councilor for defamation for describing them as "sects." The Court found that there had been a violation of the councilor's rights under Article 10:

> "In the present case the Court observes that the IPM and the VPM were associations active in a field of public concern, namely drug policy. They participated in public discussions on this matter and, as the Government conceded, cooperated with a political party. Since the associations were active in this manner in the public domain, they ought to have shown a higher degree of tolerance to criticism when opponents considered their aims as well as to the means employed in that debate."[192]

However, despite this movement towards greater respect for freedom of expression, public officials can often rely on their status to try to curtail the right informally: they have almost automatic access to the media to put their point of view; they may use their office to prosecute critics under national security laws; and they may influence courts to impose harsher penalties for those who are found to "insult" public officials.[193]

[190] United Kingdom House of Lords: *Derbyshire County Council v Times Newspapers Ltd* [1992] 3 All ER 65 (CA).

[191] *Id*. Similar reasoning was adopted by the Supreme Court of New South Wales in Australia in *Ballina Shire Council v Ringland* [1999] NSWSC 11.

[192] ECtHR: *Jerusalem v Austria supra* note 138.

[193] There is also an interesting observation made in United Kingdom House of Lords: *AG v Guardian (No 2)* [1988] 3 All ER 545, where the Court said, albeit in the context of breach of confidence, that the Crown has no private life or personal feelings capable of being hurt.

Insult to Institutions

The principle that political speech should be protected is well-established, both at the European level and in many national jurisdictions. It is curious, then, that it should continue to co-exist with the notion that it is possible to defame or insult offices, institutions or even symbols.

Example: *Eon v France*

In 2008, French farmer and political activist Hervé Eon waved a small placard at a group including the President, Nicolas Sarkozy, approached. The placard read: "Casse-toi pauv' con" ("Get lost you sad prick"). The words had been previously spoken by Sarkozy to a farmer at an agricultural show who had refused to shake his hand.

Eon was charged and convicted under a 1881 law, which provided protection of the presidency as a symbol, and a suspended fine was imposed. After appealing unsuccessfully through the national courts, the case went to the ECtHR.

The question was whether, in this day and age, the President of France should be understood as a politician (and hence required to be tolerant of greater criticism than an ordinary person) or as a national symbol or office (hence meriting greater protection)?

The Court found in Eon's favour:

> "The Court considers that criminal penalties for conduct such as that of the applicant in the present case are likely to have a chilling effect on satirical forms of expression relating to topical issues. Such forms of expression can themselves play a very important role in open discussion of matters of public concern, an indispensable feature of a democratic society".[194]

The ECtHR in the Eon case did not go quite as far as it had in the earlier French case of *Colombani v France*.[195] In this case the issue was the section of the Press Law criminalising insult of a foreign head of state. A journalist on *Le Monde* newspaper had been convicted of insulting the King of Morocco in an article about the drugs trade in that country, which relied upon an official report. The Court concluded that the offence of insult to foreign leaders "amounts to conferring on foreign heads of State a special privilege that cannot be reconciled with modern practice and political conceptions."[196]

[194] ECtHR: *Eon v France supra* note 135 at paras 60-61.

[195] ECtHR: *Colombani v France* Application 51279/99 (2002).

[196] *Id* at paras 66-68.