

DEFAMATION AND LIBEL –

NATIONAL PRACTICES, INTERNATIONAL REGULATIONS.

CULTURAL TRENDS AND LEGAL TRAJECTORIES.

Lecture to Angolan media delegation, 25th of October 2018

The Governance Group / Norwegian centre for Human Rights

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What exactly is defamation ...

The dictionary says:

“the action of damaging the good reputation of someone; slander or libel”.

Slander

noun: the action of making a false spoken statement damaging to a person’s reputation.

verb: make false and damaging statements about someone.

Libel

noun: a published false statement that is damaging to a person’s reputation; a written defamation.

verb: defame someone by publishing a libel.

Slander & Libel

- **Slander** occurs when a person's character has been defamed *verbally*.
 - This includes spoken words, gestures, sounds, and even facial expressions.
 - **Slander** is often difficult to prove as the action is not recorded in any way.
- 90
- **Libel** occurs when a person's character has been defamed *in written form*.
 - This includes permanent visual and audio recordings, publications, and memos.
 - Over the past several years, there has been a significant increase in **libel** cases as a result of the Internet.



In common language use, i.e. outside of the strict legal definition of international law, defamation can also be ...

... the communication of a false statement that harms the reputation not only of an individual, but for instance of a business, a product, a group, a government, a religion or an entire nation.



Fundamental dilemma ...

On the one hand ...

“No one shall be subjected to ... unlawful attacks on his honour and reputation.”

Article 17.1 International Covenant on Civil and Political Rights



On the other hand ...

“Everyone shall have the right to freedom of expression. ... The exercise of the rights ... in ... this article may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: a) For the rights or reputations of others, b) ...”

Article 19.2 and 3 International Covenant on Civil and Political Rights

The general challenge is to strike an adequate balance between ...

... the right of the individual to freedom of expression and freedom of information vs. ...

... the obligation of the state to protect its citizens against unlawful attacks against their honour and reputation...

... among other things, in order to maintain the credibility in the promotion of the freedom of the media.

Freedom of expression ...

... includes the right to seek, receive and impart information.

Freedom of information is important because ...

- it is necessary for the realization of a number of other human rights,**
- it helps secure democracy. In fact, democracy would not work without it.**
- of its necessity for good development. In fact, without it, development would go wrong far more often. In order to make the right development choices, we need to know.**

Defamation

- Injuring a person's character or reputation is known as **defamation**.
- There are two basic types of defamation in civil law: **slander** and **libel**.
- There are also several basic defences used in defamation cases: **truth**, **absolute** and **qualified privilege**, and **fair comment**.
- In a **defamation** case, a plaintiff must prove:
 - The words used by the defendant were false.
 - The words used referred specifically to the plaintiff.
 - The words were read or heard by a third party.
 - The words caused harm and/or economic loss.



Over the years, there has been a shifting tendency in legal practice regarding defamation.

Previously, the legal practice was basically that in order not to be found guilty and sentenced for defamation, you had to prove that what you had expressed was the truth. In other words, once the truth of the matter was established, the court's decision was also pretty much determined.



Over the years, there has been a shifting tendency in legal practice regarding defamation

Nowadays, both international courts and national courts in even more countries also consider whether

- *the disputed statement addresses an issue of public interest or not,*
- *the disputed statement is the accused media's own or originates elsewhere and are simply repeated / quoted,*
-
- *the individuals named are public figures are of public interest or not,*
- *the claims are factual or value-based,*
- *sufficient investigations of facts have been made,*
- *the defamed's right of reply has been properly observed. Basically, did he / she get ample time, space and opportunity to express his / her version and opinion on the matter in question?*

This is the tendency for instance in ...

- **Norway**, where defamation is no longer a matter for the penal law. From 1 October 2015, it is instead regulated in legislation to do with compensation for damages, and as such, covered by our civil law.
- **ECtHR**, where national verdicts, including Norwegian, have ever more often been set aside and found invalid, with reference to the broader set of considerations / requirements that we just saw.

A clear consequence of the ECtHR practice is that the number of cases in for instance Norway has been significantly reduced, from more than 30 per year in the 80s and 90s, to an average of only 2 per year now.



At the level of the United Nations, the tendency is somewhat different:

There, particularly Islamic countries have consistently argued in favour of stronger legislation against defamation of religion (what they tend to consider both personally insulting and blasphemy).

Mostly western countries have argued against this, and mostly with reference to the damage such proposed legislation may do to the fundamental right to freedom of speech / expression, opinion / religion, and information and the media.

The UN Special Rapporteur on Freedom of Expression has also expressed concern about the increased tension and (in some places) shifting balance between the right not to be subjected to unlawful attacks on one's honour and reputation, and the right to freedom of expression, religion, opinion, and the media.

The United Nations, along side the Special Mandates of the OSCE and the OAS, have also...

- **Declared that criminal defamation is NOT a justifiable restriction on freedom of expression,**
- **Recommended that all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws,**
- **Addressed a large number of particular cases in countries as different as for instance Azerbaijan, Cameroon (not OSCE, obviously), and Norway.**

The ECtHR has declined to rule that criminal defamation laws are by definition a violation of the right to freedom of expression.



The UN Human Rights Council has also adopted numerous resolutions of relevance to defamation, perhaps most notably Res. 16/18 2011. Among others, this resolution:

- **Expresses concern about intolerance, discrimination and violence against persons based on their religion or belief,**
- **Condemns advocacy of discrimination on the basis of religion or belief,**
- **Recognizes that open debate may protect against religious intolerance,**
- **Encourages the adoption of measures to criminalize incitement to violence on the basis of religion or belief,**
- **Calls upon States to ensure that there is no discrimination on the basis of religion or belief,**
- **Calls upon States to counter religious profiling (the use of religion as a criterion).**



... and the **African Commission on Human and Peoples' Rights,**

in its Resolution 62 (XXXII) 02

Declaration of Principles on Freedom of Expression in Africa (2002)

establishes (Article XII, 1, Protecting Reputations) that

“States should ensure that their laws relating to defamation conform to the following standards:

(...)

-sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others.”



What constitutes defamation is very clearly culturally determined...



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This has consequences for how it is being legally pursued, and punished:

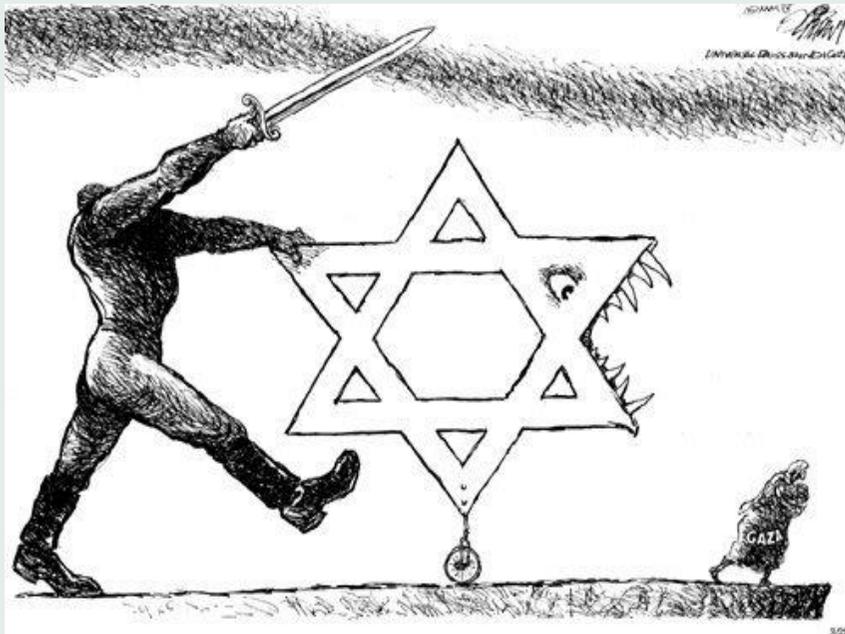
Essentially, once you have been subjected to an act or expression of defamation, you can do three things:

- You can seek to get the ‘defamer’ punished,**
- You can seek to get the defamation itself nullified,**
- You can seek compensation.**

Or, of course, any combination of the three ...

Different countries have different legislation and legal practices. Moreover, this field of law is in transition.

Countries who consider defamation a crime, punishable under their criminal law, tend primarily to apply this legislation in cases where the clergy, the state religion and / or high-ranking state officials, the head of state or the government itself have been defamed.



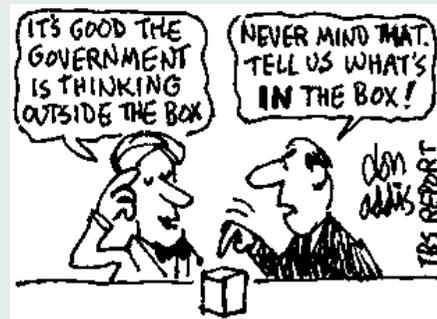
Countries who ‘only’ consider defamation a civil offence tend, on balance, to place a heavier emphasis on freedom of expression. This only applies, however, if the law

- Is formulated in a way that protects it from government abuse,**
- Ensures that those sued are able to mount a proper defence,**
- Sets reasonable limits to the amount of compensation that may be awarded.**

Source: Article 19

Regardless of whether a country's legislation treats defamation as a criminal or a civil law offence, there is still the potential to violate freedom of expression mainly by...

- **Delay, obstruct, discourage or prevent sharing and / or dissemination of information**
- **In various ways, discourage or prevent the public from seeking or receiving information.**



Finally, a few more words on

Defamation in the context of security, religion and blasphemy ...

Article 19.3. of the ICCPR reads:

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 of national security or of public order (ordre public), or of public health or morals”.



Finally, a few more words on
**Defamation in the context of security,
religion and blasphemy ...**

What often happens, is that Article 19.3.b of the ICCPR is misinterpreted as a pretext / permission and an excuse for temporary or permanent restrictions to and violations of the right to freedom of expression and religion, opinion, information and the media.



Finally, a few more words on

Defamation in the context of security, religion and blasphemy (cont.)...

Article 20.2. of the ICCPR reads:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.



Finally, a few more words on
**Defamation in the context of security,
religion and blasphemy (cont.) ...**

Likewise, Article 20.2 of the ICCPR can also easily come into conflict with (and be used to violate) the right to freedom of expression, peaceful assembly, and association, belief and religion, opinion, information, and the media.



Thank you!



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- **Questions?**
- **Clarifications?**
- **Points for discussion?**
- **Group challenges with short presentations ...**



What is defamation?



Elite '12 Gina K.
58 Damn, Gina!
220 Seattle, WA

☆☆☆☆ 5/4/2007

This restaurant sucks. The owner is a huge jerk, the servers were rude, and the food tasted terrible.



Elite '12 Gina K.
58 Damn, Gina!
220 Seattle, WA

☆☆☆☆ 5/4/2007

This restaurant sucks. The owner beats his employees, the server charged us double for the bottle of wine, and the shrimp gave me food poisoning.

