

CRIMINAL DEFAMATION IN THE COMMONWEALTH – A CASE FOR ABOLITION

Paper prepared by the Commonwealth Press Union (CPU)

1. Courts around the world – both national and international – have started to reform defamation law in recognition of the importance of free speech and their obligation to respect constitutional and international guarantees of freedom of expression. Over the past half century, courts have protected freedom of expression by denying certain bodies the right to bring defamation cases, by enhancing the traditional defences, and by limiting the chilling effect of excessive damage awards and criminal sanctions.

2. This paper presents an overview of this jurisprudence and outlines the Commonwealth Press Union's (CPU) campaign to seek the abolition of criminal defamation throughout the Commonwealth.

BACKGROUND

3. Free expression plays a vital role in the democratic process. Without a free flow of information and ideas, the public cannot formulate opinions about its government, elected officials and other matters of public interest. The media plays a particularly important role, providing the public with information and acting as a watchdog, exposing corruption and inspiring political debate. As the US Supreme Court has noted, "*speech concerning public affairs is more than self-expression; it is the essence of self-government.*"¹

4. Indeed, this commitment to freedom of expression was recognised by the Commonwealth when it was included for the first time in the Coolum Declaration of 2002 where it states "*We stand united in: our commitment to democracy, the rule of law, good governance, freedom of expression and the protection of human rights*"²

5. In many Commonwealth countries, defamation law represents one of the most serious threats to the open discussion that underpins democracy. Most people agree defamation laws serve a legitimate purpose, protecting reputations by providing redress against certain types of statements, variously described as those: "*lowering the plaintiff in the estimation of right-thinking people generally*"; "*injuring the plaintiff's reputation by exposing him to hatred, contempt or ridicule*" and "*tending to make the plaintiff be shunned and avoided*".³ At the same time, political bodies and public figures often abuse defamation laws to silence their critics. In some cases, governments effectively muzzle debate and critical voices by invoking harsh defamation laws to imprison members of the opposition and journalists. In others, the technicalities of litigation and the cost of defending defamation actions serve to stifle free discussion on matters of public interest. Traditional common law defences offer inadequate protection in a modern democracy while procedural rules and heavy sanctions inhibit open political debate.

6. Criminal defamation laws – including those that provide special protection to the President and other public figures – are unnecessary to protect reputations and should be abolished. The threat of criminal sanctions – including a suspended sentence with the threat of imprisonment in case of subsequent breach – exerts a significant chilling effect on freedom of expression which cannot be

¹ *Garrison v. Louisiana* 379 US 64 (1964), pp. 74-75.

² The Coolum Declaration, *Commonwealth Secretariat March 2002*.

³ Robertson and Nicol, *Media Law* (London, Penguin Books, 1992), p. 46.

justified. Other laws provide sufficient protection in situations where there is a risk of a breach of the peace. Criminal defamation laws are frequently abused, being used in cases which do not involve the public interest and as a first, rather than last resort. In practice, criminal defamation laws do not provide a remedy for ordinary citizens, who cannot generally bring cases; they are far more likely to be used instead by politicians and senior public officials.

HISTORY

7. The offence of criminal defamation exists in the majority of Commonwealth countries, either as a common law offence (as in English law) or codified into Penal or Criminal Codes. In many countries - including Singapore, Uganda, Tonga, some Australian states, Bangladesh, Cameroon, Swaziland, The Gambia, Sierra Leone, Nigeria, Samoa and Malaysia - it is still active and, more or less, in use. In others, including Sri Lanka and Ghana, it has been abolished. In the United Kingdom it remains on the statute books but no cases have been brought since 1977. Indeed, the Law Commission in the United Kingdom has recommended its abolition⁴ and it has been pointed out that its scope conflicts with the European Convention on Human Rights which was adopted into UK law through the Human Rights Act 1998 which passed through Parliament in 2000.

8. Unquestionably people need the right to defend their reputation against defamatory statements, and have legal recourse should they need to defend that reputation in court if they consider themselves to have been libelled. Media independence does not, after all, mean the freedom to say what you want about anybody, regardless of truth or intention. But solving defamation through the criminal justice system is widely held to be an inappropriate anachronism. As successive review bodies in the UK, Australia, Canada and New Zealand have found, the offence is riddled with flaws which make it not so much an appropriate tool for repairing reputations - financial damages perform that task better - but more a gift to those who would muzzle legitimate criticism of public conduct. As a result, New Zealand has already expunged it from the statute books.

9. Originally, the offence was explicitly designed as a means of shielding the actions of public figures from comment or critique. Its 13th Century origins in the crime of "*scandalum magnatum*" are precisely that; and the development of the offence since has reflected its roots.

10. Unusually for criminal law - at least as far as English-derived systems are concerned - the presumption is of guilt. The defendant has to prove his innocence of the crime, and proving that is often far more difficult than defending a civil libel. Not only does the information published have to be entirely true; it also has to be "in the public interest". Trying to meet this high standard of proof has historically been a heavy burden for defendants. In addition, intent plays no part; whether the alleged defamation was accidental - the result of an entirely honest mistake, negligent or malicious - the result is the same.

11. This is a standing temptation for those who wish to control - as the evidence from the countries mentioned above amply demonstrates. In Bangladesh, for example, the courts need not be involved; government officials who feel they have been defamed can order immediate arrest, with up to 2 years in jail as the penalty.

12. It is usually public figures, political and administrative leaders, businessmen and those close to them, who use criminal defamation. But again, a sizeable body of legal opinion - including a judgement known as the "*Theophanus*" decision in Australia, several judgements from the European Court of Human Rights (ECHR) and accepted practice in the US - suggests that public figures should, if anything, have less recourse to defamation suits than their private counterparts, since their

⁴ The Law Commission, Consultation Paper No 84, HMSO 1982.

conduct is of necessity valid material for wide discussion. Indeed, the ECHR has passed judgements at least four times in the last 15 years which affirm that criminal defamation is contrary to the European Convention on Human Rights, going way beyond proportionate responses to the task of protecting reputations. It should, the Court declares, be abolished.

13. It is worth noting that civil defamation is also widely misused, and different jurisdictions can define it in such a way as to make defending defamation cases almost impossible. In New Zealand, for instance, judicial attitudes are moving towards making any part of a story actionable in isolation, without reference to balancing arguments or evidence elsewhere in the piece. The most trivial factual error, or an apparently loaded comment in the first paragraph which is not backed up until further down the article, might place the writer and the publication in jeopardy.

14. The criminalisation of a particular activity implies a clear State interest in controlling the activity and imparts a certain social stigma to it. In recognition of this, international courts have stressed the need for governments to exercise restraint in applying criminal remedies when restricting fundamental rights. In many countries, the protection of one's reputation is treated primarily or exclusively as a private interest and experience shows that criminalising defamatory statements is unnecessary to provide adequate protection for reputations.

15. In many countries, criminal defamation laws are abused by the powerful to limit criticism and to stifle public debate. The threat of harsh criminal sanctions, especially imprisonment, exerts a profound chilling effect on freedom of expression. Such sanctions clearly cannot be justified, particularly in light of the adequacy of non-criminal sanctions in redressing any harm to individuals' reputations. There is always the potential for abuse of criminal defamation laws, even in countries where in general they are applied in a moderate fashion. The illegitimacy of the use of criminal defamation laws to maintain public order, or to protect other public interests, has already been noted. For these reasons, criminal defamation laws should be repealed.

16. In many countries criminal defamation laws are still the primary means of addressing unwarranted attacks on reputation. To minimise the potential for abuse or unwarranted restrictions on freedom of expression in practice, we feel that it is essential that criminal defamation laws should be abolished. A basic principle of criminal law, namely the presumption of innocence, requires the party bringing a criminal case to prove all material elements of the offence. In relation to defamation, the falsity of the statement and an appropriate degree of mental culpability are material elements. The existence of a criminal defamation offence violates the presumption of innocence and cramps free speech. These concerns are exacerbated by the frequent abuse of criminal defamation laws by public officials, including through the use of State resources to bring cases. Defamation is fundamentally personal in nature, concerning the protection of one's reputation. As such it should be a civil matter. Criminal sanctions are disproportionate and potentate a chilling effect on freedom of expression.

17. Criminal defamation laws remain on the books of most common law countries, although the frequency of their use varies considerably. As has already been noted, excessive sanctions themselves breach the guarantee of freedom of expression. The key problem with criminal defamation is that a breach can lead to a custodial sentence. The fact that these are rarely applied mitigates the problem only slightly, since the severe nature of this sanction means it casts a long shadow. Suspended sentences, common in some countries, also exert a significant chilling effect as subsequent breach within the prescribed period means that the sentence will be imposed.

18. Criminal defamation laws vary from country to country. An analysis of the law in Britain serves to highlight some of the problems with criminal defamation. The Libel Act 1843 provides for a one year sentence for publication of a defamation in permanent form, increased to two years if the

author knew the material to be false.⁵ These provisions lay dormant for many years but have recently been relied on in a number of private prosecutions.⁶

19. It used to be thought that a distinctive feature of, and indeed the primary justification for, criminal libel was that it was available only where publication was likely to provoke a breach of the peace⁷ but the House of Lords has held that the proper test is whether the libel is “sufficiently serious to justify, in the public interest, the institution of criminal proceedings.”⁸ Procedurally, leave of a High Court Judge in chambers is required to institute criminal libel proceedings but they may be brought by any individual with a legitimate interest in the case. In *Gleaves v. Deakin*, several of their Lordships noted that this was most unsatisfactory and called for the law to be amended so that prosecutions could not be commenced without leave of the Attorney General. In theory, the Attorney General may terminate proceedings by issuing a *nolle prosequi*, but in practice this appears to be rare.

20. A key problem with criminal libel is that the defence of justification is much weaker than for civil libel. In particular, justification requires not only proof of the truth of the statements, but also proof that publication was for the public benefit. As Lord Diplock stated in *Gleaves v. Deakin*, “This is to turn article 10 of the [European Convention on Human Rights] on its head ... article 10 requires that freedom of expression shall be untrammelled [unless interference] is necessary for the protection of the public interest.”⁹ The other defences are similar to those for civil defamation claims.

21. A number of international bodies have condemned the threat of custodial sanctions, both specifically for defamatory statements and more generally for the peaceful expression of views. Two United Nations Special Rapporteurs on freedom of expression have seriously called into question the imposition of custodial sanctions for expression related matters.¹⁰ Since 1994, the UN Human Rights Committee has expressed concern about the possibility of custodial sanctions for defamation in a number of countries including Iceland, Norway, Jordan,¹¹ Tunisia, Morocco,¹² Mauritius¹³ and Iraq.¹⁴ In its annual resolution on freedom of expression, the UN Commission on Human Rights regularly expresses concern at the use of detention, “including through the abuse of legal provisions on criminal libel” against persons who exercise the right to freedom of expression.¹⁵ The UNESCO sponsored *Declaration of Sana’a* declared, “Disputes involving the media and/or the media professionals in the exercise of their profession...should be tried under civil and not criminal codes and procedures.”¹⁶

⁵ Sections 4 and 5.

⁶ See *Goldsmith v. Pressdram* [1977] QB 83, *Gleaves v. Deakin* [1980] AC 477 and *Desmonde v. Thorpe* [1982] 3 All ER 268. None of these cases have gone to trial because either the plaintiffs failed to obtain leave to proceed or the cases were discontinued.

⁷ Carter-Ruck and Walker, *Carter-Ruck on Libel and Slander* (London, Butterworths, 1995), p. 167.

⁸ *Gleaves v. Deakin*, *op. cit.*, p. 491, *per* Lord Scarman.

⁹ *Ibid.*, p. 483.

¹⁰ *The Right to Freedom of Opinion and Expression: Update of the preliminary report prepared by Mr. Danilo Turk and Mr. Louis Joinet, Special Rapporteurs*, Submitted to the Sub-Commission for the Prevention of Discrimination and Protection of Minorities, UN Document E/CN.4/Sub.2/1991/9, para.100.

¹¹ *Annual General Assembly Report of the Human Rights Committee*, 21 September 1994, Volume I, No.A/49/40, paras. 78, 91 and 236, respectively.

¹² *Annual General Assembly Report of the Human Rights Committee*, 3 October 1995, No. A/50/40, paras. 89 and 113, respectively.

¹³ *Annual General Assembly Report of the Human Rights Committee*, 16 September 1996, No. A/51/40, para. 154.

¹⁴ *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant. Concluding Observations of the Human Rights Committee on Iraq*, 19 November 1997, No. CCPR/C/79/Add.84, para.16.

¹⁵ See Resolution 1999/36, para. 3.

¹⁶ *Declaration of Sana’a*, 11 January 1996, endorsed by the General Conference by Resolution 34, adopted at the 29th session, 12 November 1997.

THE ROLE OF THE COMMONWEALTH PRESS UNION

22. The CPU represents the interests of the newspaper industry of the Commonwealth. Its origins go back to 1909 but in 1950 it changed its name to its present form and broadly adopted its principles to be in line with those of the new Commonwealth. Throughout its long history, the CPU has monitored and responded to threats to press freedom across the Commonwealth and, working with our members (over 750 newspaper houses, newspapers and wire services in 50 Commonwealth countries), has actively pursued issues of mutual concern.

23. The Commonwealth Press Union is required, by our charter, to “...give effect to the opinion of the members of the Union on all matters that might effect the freedom and interests of the Press throughout the Commonwealth...watching for and opposing all measures or proposals likely to affect the freedom of the Press...”. Throughout our existence we have vigorously and successfully defended press freedom and our stance on key issues is well established and recognised by Heads of Government throughout the Commonwealth.

24. The 2005 CPU Biennial Conference & Editors’ Forum in Sydney, Australia produced a unanimous resolution calling upon Commonwealth governments to abolish criminal defamation throughout the Commonwealth – starting with the United Kingdom.

25. The organisation has always lobbied for the abolition of this archaic law and in recent correspondence with the Lord Chancellor’s Department in the UK, has put forward a case for abolition in the UK, supported by the UK Society of Editors. We have received a sympathetic response from the Lord Chancellor and, we are now awaiting further developments. The CPU was also actively involved in the successful campaign to abolish criminal defamation in Sri Lanka in 2002 and the subsequent setting up of the Sri Lanka Press Complaints Commission, a self-regulatory body which is now active and effective.

26. It is our belief that if journalists seek freedom of expression, then they must take responsibility for their own actions and, as a priority, should set about instituting a self-regulatory body which oversees the ethical and professional behaviour of the press. We recommend to governments that alongside the abolition of criminal defamation there must be active encouragement to set up a self-regulatory body with an agreed code of practice which becomes the accepted norm for all participating newspapers and journalists. The process for achieving this is fully outlined in the comprehensive report published by the CPU in 2002.¹⁷

27. Governments are often concerned that self-regulatory bodies are too industry-centric and for this reason, we subscribe wholly to the UK model in which the commission has a strong lay majority, thus negating accusations of self-interest.

28. Imposed statutory bodies are not an acceptable alternative because “A press which is regulated by the government of the courts cannot be truly free. At best it is loosely tethered by light touch regimes; at worst, it is ruthlessly shackled.”¹⁸

¹⁷ *Imperfect Freedom*, Commonwealth Press Union 2002.

¹⁸ *Ibid.* p.7.

BRIEF OVERVIEW OF CRIMINAL DEFAMATION STATUS IN SELECT COMMONWEALTH COUNTRIES

Australia

29. Although provided for by state statute in most Australian jurisdictions, criminal convictions for defamation are rare in recent times. The last case of imprisonment for criminal defamation was more than 50 years ago.

Canada

30. The Law Reform Commission recommended the abolition of criminal libel in 1983. In Canada, prosecutions are rare and custodial sentences are even rarer. In the 10 year period from 1963 to 1973, only four such sentences were actually served, two of which involved sentences of fewer than 2 months.

Commonwealth Caribbean

31. In Guyana, Jamaica and St Vincent & The Grenadines, there have been few instances of prosecutions for criminal libel in recent years. The Guyana statute is typical in its definition of defamatory libel as a “matter published without any legal justification or excuse, designed to insult the person to whom it is published, or calculated to injure the reputation of any person by exposing him to hatred, contempt or ridicule”. Punishments range from a fine and imprisonment for one year to imprisonment for three years for offences involving threats, extortion and the like. Criminal libel laws are seldom used in Guyana. In the last 50 years, there have been three or four such cases, during times of political conflict. Similarly the offence of criminal libel exists in St Vincent & The Grenadines and in Jamaica but is very rarely used in either country.

Nigeria

32. Criminal defamation laws exist but are hardly ever used. There have been only two such prosecutions in the 1990s, neither of which have been concluded. The criminal defamation provisions in Nigeria are similar to those in other Commonwealth countries, save for some particularly harsh provisions such as Section 2 of the Defamatory and Offensive Publications Act. This provision makes it an offence, for which the alleged offender may be arrested without a warrant to, *inter alia*, “sing songs, play any instrument or recording of sounds or self, lend or hire any record of sounds, the words of which are likely to provoke any section of the community”.

CONCLUSION

33. It is now widely recognised that “*The law of criminal libel is an unnecessary relic of the past that is now generally agreed to have no place in modern jurisprudence.*”¹⁹

34. Additionally, the UK Privy Council pointed out that “*it would in any view be a grave impediment to the freedom of the press if those who print or distribute matter reflecting critically on the conduct of public authorities could only do so with impunity if they could first verify the accuracy of all statements of fact on which the criticism was based.*”²⁰

35. In almost every Commonwealth country there are adequate civil defamation laws in place to ensure protection of reputation. The continuing presence of colonial legislation on the statute books of these countries is not only incompatible with freedom of expression and a free press, but also a

¹⁹ Robertson and Nicol, *Media Law* (London, Penguin Books,1992), p.102.

²⁰ *Hector v A-G of Antigua & Barbuda*

direct bequest from the colonial era. Criminal defamation offences, Public Order and Security Laws, Internal Security and Official Secrets Acts, powers of detention without trial for up to two years, newspaper licensing, newsprint control, and crimes of insulting parliament, the prime minister or the president were all devised by colonial rulers as a means of direct repression of a subject people. That they still exist is unfortunate. That they are still widely deployed by the leaders of long-independent states could be construed as being in breach of the Harare Declaration's support for individual liberty under the impartial rule of law.

36. To this end, the Commonwealth Press Union, on behalf of our members, request Commonwealth Law Ministers to consider the abolition of criminal defamation throughout the Commonwealth.