

RIGHTS VS REPUTATIONS

Campaign against the abuse of defamation and insult laws



Defining Defamation: Principles on Freedom of Expression
and Protection of Reputation

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Rights Vs Reputations

Campaign against the abuse of defamation and insult laws

If you work in the media, you need to know about defamation and insult laws.

Freedom of expression is under threat. Governments and government officials are abusing defamation and insult laws to suppress criticism of official wrongdoing, maladministration and corruption, and to avoid public scrutiny. These laws often flout international principles and standards. They are also often unconstitutional.

Journalists and media workers are being prosecuted, charged and convicted under these laws. Some are fined; others are imprisoned. Some suffer harassment and violence.

Newspapers, publishers and printers have faced imprisonment and/or excessive fines on many occasions.

ARTICLE 19 is campaigning against such abuse of the law. We believe that defamation laws should be interpreted strictly. Government officials should not use these laws to threaten, gag and punish the media by suing for unreasonable compensation.

ARTICLE 19 is categorically against criminal defamation and insult laws. Defamation should always be considered a civil offence. The criminalisation of defamation allows courts to order prison sentences against media workers.

ARTICLE 19 also wants to see alternative means of resolving disputes put in place. Mechanisms such as the right of reply and reprimand by professional bodies would dispense with the need for court actions.

This pack will help you understand more about defamation and insult laws, and how they affect media workers and journalists.

It will tell you:

- what defamation is;
- what insult laws are;
- how the abuse of these laws affects the media;
- what you can do about it; and
- how you can support a campaign against the abuse of such laws.



What's in the pack?

The pack contains a booklet outlining:

- the legal issues surrounding defamation and insult laws;
- a set of simplified principles that ARTICLE 19 is campaigning for, to discourage the abuse of defamation laws; and
- a set of Frequently Asked Questions to help you understand the issues involved.

You will also find:

- an A3 poster;
- an A5 insert/advertisement;
- an editorial piece that you can also use as a radio script; and
- an overview of the current situation in your region.

ARTICLE 19 draws the following definitions and principles from widely accepted international standards developed by international human rights bodies, such as the UN Human Rights Committee, the African Commission on Human and Peoples' Rights, the European Court of Human Rights, the Inter-American Court of Human Rights and a number of national courts.

In most cases, national legislations do not conform with these international principles ■



What is defamation?

According to international standards, defamation is the legal term for accusing a person of a precise fact that harms their reputation. The fact must be printed, broadcast, spoken or otherwise communicated to others.

Defamation laws exist to protect people against malicious and untrue stories about them. They aim to balance the right to freedom of expression and the need to protect people's reputations.

Defamation can be either:

- libel, which is a statement in a written or other form; or
- slander, which is a verbal statement or gesture.

Who can bring a claim for defamation?

A claim for defamation can be brought by:

- any living person; *(some jurisdictions however recognise a reputation for dead people)* or
- any legal entity *(for example, any entity that can sue and be sued).*

How can a statement be proved to be defamatory?

To qualify as defamatory, a statement must be:

- published;
- harmful to reputation; and
- false. *(in some jurisdictions the burden of proof for truth lies on the defendant)*

To 'publish', you must print, broadcast, speak 'or otherwise communicate' the accusation in public. To be false, the statement must state a fact that can be proven to be false. Opinions and jokes, for example, cannot be defamatory.

How can I defend myself against a claim?

You can refer to these international standards to defend yourself against a claim for defamation. However, if they conflict with your national legislation, a court may not necessarily accept your arguments.

1. **Truth.** The claim should fail if you can prove that the statement you have made is true.
2. **Reasonable publication.** Even if a statement is later shown to be false, you should be able to argue that it was reasonable to publish it - on the basis that it was a matter of public concern - and made in good faith and with due diligence.



WHAT IS DEFAMATION?

3. **Opinion.** Nobody should be able to sue you for defamation for publishing an opinion. An opinion, in this context, is any statement that either:
 - does not contain a statement of fact that could be proved false; or
 - cannot be reasonably interpreted as stating fact. Cartoons, satire or obviously humorous pieces, for example, would count as 'opinions'.
4. **Consent.** If someone has permitted the statement to be published, they cannot later sue for defamation.
5. **'Prescription'.** A person may sue for defamation only within a 'prescribed' time frame.
6. **Privilege.** This covers certain categories of statements made in the public interest. There are two types of privilege: absolute and qualified.
 - **Absolute privilege.** This offers complete defence to people who have a public duty to speak. For example, elected bodies in parliament, lawyers, judges and witness in courts cannot be sued for what they say in these fora.
 - **Qualified privilege.** Accurate and fair comments made in the public interest, where the status of the material justifies its dissemination, should be exempted from liability under defamation law.

How are the defamation and insult laws used?

Governments often abuse defamation and insult laws to stifle the media and restrict freedom of speech.

In many African countries, defamation laws virtually contradict the right to freedom of expression protected in their constitutions and recognised in international law. Some of these are old colonial laws that have not been repealed; others are newly passed by governments.

In many cases, a government official need only threaten to use the law to silence a journalist or newspaper. In some countries, victims are often intimidated, arrested and subjected to lengthy interrogations, only to be released without charges. They may be obliged to report to the police regularly. Government institutions, influential individuals and political parties often use the pretext of defamation to incite violence against journalists, newspaper vendors or even readers of a newspaper.

Civil or criminal?

Many countries have made defamation a criminal offence.

Civil and criminal offences carry different penalties. Civil offences are settled by an award – usually a fine or financial compensation. Criminal offences carry fines and sentences, including imprisonment.



The trend in international law is to regard defamation as a civil offence. Experience shows that civil law is adequate to protect reputations, while maintaining an open society and a free press.

Criminal defamation allows governments to gag the media much more effectively. The threat of imprisonment is a particularly powerful means of suppressing criticism.

Criminal defamation laws are therefore always liable to be abused. For this reason, a number of international bodies have condemned the use of criminal defamation laws.

What about other restrictive laws?

Besides defamation laws, public figures often use other laws and restrictions to silence the media. These laws have the broad purpose of restricting criticism or dissent, and may contain references to defamation. Such laws generally deal with insults, false news, sedition, national security and public order. They allow governments and security forces to decide what should and should not be published.

What is ARTICLE 19's position on defamation and insult laws?

ARTICLE 19 is not against defamation law as such. We believe that the right to freedom of expression should be balanced against the right of individuals to protect their reputations.

ARTICLE 19 is however, categorically against criminal defamation and insult laws. Defamation should only ever be regarded as a civil offence. Insult laws should be repealed.

ARTICLE 19 wishes to see civil defamation applied fairly and according to international standards. Governments and public figures use civil defamation law unfairly to stifle the media, by suing for unreasonable damages.

We also want to see other ways of resolving disputes in place in all African countries. These alternative dispute resolution mechanisms - such as the right of reply and reprimand by professional bodies - would do away with the need to go to the courts in the first place ■



Principles on Freedom of Expression and Protection of Reputation

ARTICLE 19 has published a set of 19 principles on the appropriate use of defamation laws. They form the foundation of our campaign against the abuse of defamation laws.

In this booklet, we have included a simplified version of these nineteen principles. To see a full version of these principles, go to our web site - www.article19.org - and enter the words 'Defining Defamation' in the search facility.

The principles set out to balance the human right to freedom of expression and the need to protect individual reputations. They are based on the premise that, in a democratic society, freedom of expression must be guaranteed. Governments should only restrict this fundamental human right in narrowly defined ways, and to protect legitimate interests, such as reputation.

The principles are limited to the question of balancing freedom of expression and injury to reputation. They do not refer to any restrictions designed to protect other interests – including such areas as privacy, self-esteem or hate speech – which deserve separate treatment.

The principles are based on international standards and practice. ARTICLE 19 believes that they set minimum standards to which all defamation laws should conform.

Support ARTICLE 19 by campaigning for these principles to be recognised in all countries.



Principle 1: Freedom of Opinion, Expression and Information

Everyone has the right to freedom of expression. This right may be restricted to protect a person's reputation.

Any restriction on free expression must be prescribed by law.

Restricting free expression, including to protect the reputations of others, can only be justified if it can be proven to be necessary in a democratic society.

Principle 2: Legitimate Purpose of Defamation Laws

Defamation laws cannot be justified unless they aim to protect the reputations of individuals.

Principle 3: Defamation of Public Bodies

Public bodies of all kinds should be prohibited altogether from bringing defamation actions.

Principle 4: Criminal Defamation

All criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.

Principle 5: Procedure

An individual should only be able to sue for defamation within one year of the date of publication.

Principle 6: Protection of Sources

Journalists and media workers have the right not to disclose the identity of their confidential sources. Under no circumstances should this right be overturned in a defamation case.

Principle 7: Proof of Truth

In all cases, if a statement is true, its author should not be held answerable for defamation.

Principle 8: Public Officials

Under no circumstances should defamation law provide any special protection for public officials, whatever their rank or status.

Principle 9: Reasonable Publication

Even where a statement of fact on a matter of public concern has been shown to be false, defendants should benefit from the defence of reasonable publication, if the statement was made in the public interest, with due diligence and in good faith.



Principle 10: **Expressions of Opinion**

Nobody should be sued for publishing an opinion.

Principle 11: **Exemptions from Liability**

Certain types of statements, such as those made in the course of legislative, judicial proceedings and quoted accurately from them, should never be punishable under defamation law.

Principle 12: **Scope of Liability**

No one should be sued for a statement of which they were not the author, editor or publisher and did not know, and had no reason to believe that the statement was false.

Principle 13: **Role of Remedies (Reparations)**

The amount of any reparation awarded for defamation should be decided on the merits of each case.

Principle 14: **Non-Pecuniary Remedies (Non-monetary reparations)**

Courts should try to use non-financial remedies before awarding financial damages.

Principle 15: **Pecuniary Awards (Monetary)**

Courts should award financial damages only where other forms of award are inadequate.

Principle 16: **Interim Injunctions (Interim orders)**

In the context of a defamation action, courts should not issue a ban prior to publication except in highly exceptional cases (when permanent harm would be caused by the statement or if the statement is unarguably defamatory).

Principle 17: **Permanent Injunctions (Permanent orders)**

Permanent orders should only be imposed by courts, and after a full and fair hearing of the merits of the case; their scope should be limited to the defamatory statement.

Principle 18: **Costs**

In awarding costs, courts should consider carefully the potential effect of the award on freedom of expression.

Principle 19: **Malicious Plaintiffs (Malicious complainants)**

Defendants should benefit from effective protection against malicious charges of defamation, especially where the intention is to stifle freedom of speech rather than defend a reputation.



FREQUENTLY ASKED QUESTIONS ON DEFAMATION

The definitions and statements contained in the following section and in the booklet as a whole are based on international standards recognised by international and regional bodies dealing with human rights and fundamental freedoms.

They are by no means the reflection of the current position in many countries.

Nevertheless, there is an important trend around the world to incorporate these principles in domestic laws.

Q. What is 'defamation'?

A. Defamation occurs when a false statement about an identifiable person is published to a third party, causing injury to the subject's reputation.

Q. That sounds like libel.

A. Libel is a written form of defamation; slander is oral defamation. The term defamation includes both.

Q. Why are there defamation laws?

A. Well, if there were not any, people could publish untrue stories about anyone without remedy. This can cause unjustified injury to people's reputations.

Q. What does it mean to harm someone's reputation?

A. To harm their reputation, you have to make a statement of fact that would lower them 'in the estimation of right-thinking people generally', or expose them to 'hatred, contempt or ridicule'.

Q. I am told that defamation laws can only be used by government. Is that correct?

A. No! In fact, according to international standards, a government cannot legitimately bring a claim for defamation at all. Only an identifiable individual, corporations and other legal entities can bring a claim.

Q. What's an 'identifiable individual'?

A. A living person. The law also considers any entities that can sue and be sued as 'persons'.



FREQUENTLY ASKED QUESTIONS

Q. So who else precisely can be considered a person?

A. Well, commercial companies, NGOs and professional bodies, for example. But international law has increasingly ruled that certain public bodies should not be considered as persons, and should not therefore be able to bring claims for defamation.

Q. Do you mean that public bodies can't sue?

A. Increasingly, international law has ruled that governments, government departments, local authorities, state-owned corporations, and most recently, even political parties, are not allowed to sue for defamation. Of course, individual members of these bodies can sue – and they often do.

Q. But it sounds as if defamation laws are limiting my right to freedom of expression.

A. That's right. That's exactly what they do, to avoid abuses. That's why it's so important that they are constructed and applied fairly.

Q. I've noticed that many countries have constitutions protecting human rights such as freedom of expression or information. Are you saying that these rights be restricted?

A. Yes! Countries usually use laws to give effect to certain rights enshrined in their constitutions. But in fact, sometimes, these laws violate constitutional rights. Almost every constitution sets out the grounds for restrictions and only those in accordance with these may be legitimate. They vary from one country to another. However, there is a recognised international standard: a good test of any restriction is to ask whether it has a legitimate purpose and is it necessary in a democratic society.

Q. But, surely criticizing the government is not good for our country's development? I have been told, for example, that adverse reports about the government can affect the strength of the currency?

A. Freedom of expression is one of the cornerstones of democracy. The media should be able to act as 'watchdogs': indeed, a healthy government will encourage the media to provide legitimate criticism. And that will raise the country's reputation abroad. Moreover, open criticism will reduce corruption and mismanagement, which are far more harmful to the economy. All of the world's strongest economies allow open criticism.



Q. What about national security issues?

A. National security issues are often used as an excuse to threaten or 'gag' the media. There are of course instances where genuine national security issues, if reported, could compromise the safety and security of citizens. In these instances, expression and information may be restricted - but in the interests of safety and security, and not in the interests of saving the reputation of a government official from a statement that is true.

Q. So how can I tell if someone is using the law of defamation legitimately?

A. Look at the purpose of the action. For example, if it's clear that someone is bringing an action to stop the public learning about proven government corruption or maladministration, they are abusing the defamation laws. Their action should fail in courts if there is a good constitution and where the judiciary is independent of the state.

Bear in mind that, in some countries, some members of the judiciary are not independent; this can have a bearing on the outcome of the trial, irrespective whether the defendant has a good defence or not.

Q. So defamation covers –

A. Defamation is harm to personal reputation, and nothing else.

Q. And what must I do to if I am accused of defamation?

A. According to international standards, the plaintiff – that's the person 'complaining' that their reputation is being harmed – the person accusing you of defamation – must prove that the statement harms their personal reputation; that it's false; and that you published it intentionally or negligently. These standards may not apply in all jurisdictions.

Q. Wait a minute. What do all these legal terms mean? For example, what's a 'false statement'?

A. A statement is false if it contains a fact that can be proved to be untrue. So an opinion, for example, cannot be true or false. The plaintiff should not be able to sue successfully over a statement that was just an opinion. The word 'opinion' usually covers other kinds of statement, like jokes, satirical comments or cartoons.



FREQUENTLY ASKED QUESTIONS

Q. So I have to make sure that everything I write, that isn't opinion, is exactly correct?

A. Well, ideally yes, you should always strive to be accurate; but there may be defences, such as reasonableness, even for false, defamatory statements.

Q. And what does 'publication' mean?

A. Publication occurs when the statement is communicated to a person other than the plaintiff via print, electronic media or any other means. This can include headlines, drawings, cutlines or photographs. The full context of a publication should be considered when determining liability.

Q. What about these other terms: 'intention' and 'negligence'?

A. The plaintiff should prove that you published either intentionally or negligently, with specific intention to cause harm. You may still be able to claim a defence such as reasonableness or privilege.

Q. So making a mistake is being negligent?

A. That would be for the court to decide. There is a difference between a slip and reckless disregard for the truth.

Q. Could an editing error count as defamation?

A. Yes. Be cautious when editing. Make sure the story does not convey the wrong information because of a hasty rewrite. Also, watch for headlines and cutlines that might be defamatory. But, in principle, there is greater leeway, as these are presumed to be elaborated in the story. Make sure news promos or teasers used to stir audience interest are not misleading or defamatory.

Q. How do I make sure that my facts are correct?

A. Check sources thoroughly. Get independent corroboration whenever possible.

Q. What if I am just reporting something someone else said?

A. A news organisation can be sued for republishing, even if someone else made the original statement. Republishing also includes printing letters to the editor. So be careful. Check out any factual allegations contained in letters as carefully as you would statements in a news story. If you seek clarification from the original author or comment from the person to whom the statement refers, this can help establish the reasonableness defence.



- Q. 'Criminal defamation'. I've heard that phrase. It sounds bad.**
- A. It is bad. It gives defamation the reputation of a serious crime and it allows a court to impose serious penalties such as imprisonment. That makes it a powerful and excessive weapon for any government keen to suppress criticism or silence the media.
- Q. I've heard that defamation should not be a criminal offence in a democratic society.**
- A. That's right. Most international bodies and standards find criminal defamation unnecessary and dangerous. It's better to regulate defamation by civil law, where the guilty party must compensate the complainant financially. With criminal defamation, a person could be deprived of their liberty. Criminal defamation allows governments to 'lean' much more heavily on the media. The threat of imprisonment can be pretty effective at keeping the media quiet.
- Q. But what about a newspaper that is pro-government and continuously defames my newspaper because we are legitimately critical of government?**
- A. Even in this case, civil defamation ought to provide sufficient protection.
- Q. Okay, so what if this same newspaper is vigorously promoting hate speech and inciting ethnic violence?**
- A. This is an excellent question: it highlights a common misconception about defamation laws. They protect personal reputations. Other laws regulate hate speech and these are the laws to apply in those instances.
- Q. If I am sued for defamation, how can I defend myself?**
- A. According to international standards, you should be able to defend yourself in a number of ways. These defences may not be available in all jurisdictions. The first one is 'truth': if you can prove that the statement is in fact true, your defence is complete. The second defence is 'reasonable publication'. If the matter is something the public has a right to know about, you should have the right to publish if due diligence is taken– even if you can't prove that the statement is true, and even if it has been proved to be false later! This is what is known as 'reasonable publication'. The third defence is 'opinion': nobody should be liable under defamation law for the expression of an opinion. The fourth defence is privilege.



FREQUENTLY ASKED QUESTIONS

This is designed to protect certain categories of statements made in the public interest. There are two types of privilege: absolute and qualified. The fifth one is consent: if a plaintiff has permitted the statement to be published, they cannot then later sue for defamation. The final defence is 'prescription'. This means that there is a prescribed period after the publication, within which the plaintiff must sue.

Q. How does a civil court decide the amount of damages that ought to be paid?

A. The court is supposed to award damages that are appropriate given the injury to the plaintiff's reputation. The court might lower the damages if a newspaper or broadcaster has offered the plaintiff an apology, correction, retraction, or the right to reply. In many instances, though, courts have awarded unreasonable and inappropriate amounts of damages, given the injury involved. These judgements have often resulted in newspapers closing down – which is, of course, often the intention of the government official bringing the claim.

Q. What should we do to defend ourselves against a civil claim or a criminal charge of defamation?

A. Hire a lawyer – quickly. The lawyer should have experience in this field and be conversant with international trends and standards on freedom of expression.

Q. What if we can't afford to hire a lawyer?

A. Where possible, seek legal aid from NGOs, universities and other sympathetic organisations. A professional support body may be able to help.

Q. I am somewhat apprehensive about dealing with lawyers. Is there a way media ought to work with them?

A. Having a constructive relationship with a good media lawyer is important and knowing how to contact this lawyer 24 hours a day is very important in an emergency.

Q. Should I always do what the lawyer suggests?

A. No! Remember that the lawyer is there to give you legal advice. But you need to balance the lawyer's advice with other considerations. Ultimately, you must make those final publishing decisions.



Q. I know that government officials can use defamation laws for ulterior motives, but what are the other threats to the media and their reporting?

A. In many countries, violence is often used and so are bannings and suspensions. Sometimes, supporters of government and political parties' militants are involved in physically attacking journalists, newspaper vendors, and even people who read the newspaper.

Q. Should I confront the subject with the comment to be published before publication?

A. Strictly speaking, you should always provide them an opportunity to comment.

Q. I have just been assigned to cover court cases. What precautions should I take?

A. Make certain you understand the way criminal and civil trials work. This will make it easier when reporting; but do bear in mind that you must report everything accurately: the charge, what the witnesses say, the judgement and the sentence.

Q. What should I do if I am told by someone that they are going to sue me for defamation?

A. Be polite, but do not admit error or fault. Talk the case over with your editor, supervisor or attorney immediately, and follow procedures established by your news organization.

Q. What can I do to work against criminal defamation?

A. Well, for one thing, you can join campaigns that are working against criminal defamation, and help by reporting on the campaign and on cases of criminal defamation. You can also report on why criminal defamation ought not to be a criminal offence in a democratic society.

Q. Is civil defamation the only way a plaintiff may seek redress for harm to their reputation?

A. No! This is a very interesting question. Ideally, an independent body regulating the media could significantly reduce the need for court redress. Plaintiffs could take their complaints to this body, which would hold an inquiry and decide the case. This would be less expensive than a civil trial and would resolve the matter much more quickly. In addition, such a body might be far more



FREQUENTLY ASKED QUESTIONS

independent than some judges in some countries, who use their judgements to promote their government's agenda.

- Q. It sounds like a good idea. So, what can I do to promote the establishment of a body such as this?**
- A. You and other media people can look at the experiences of other countries, which have established this type of regulatory body - and try to do the same in your country. In some cases, there might be a lot of resistance from government, for obvious reasons. Establishing a body like this is a long and difficult process and largely depends on how truly democratic the government is.
- Q. Sometimes, when I am 'out in the field', it feels like I am very much alone, despite the fact that I have my colleagues back at the office. We all work under very threatening conditions and our work is very dangerous. It would be really nice to have support from our colleagues in other countries and abroad. Is that possible?**
- A. Yes, many local, national, regional and international organisations support the work of media people. You may choose to become associated or a member of these organisations. Please contact ARTICLE 19.

