

In the Egyptian Supreme Constitutional Court

B E T W E E N:

THE CENTRE FOR HUMAN RIGHTS AND LEGAL AID

Plaintiff

and

REPUBLIC OF EGYPT

Defendant

ADVICE TO THE CENTRE FOR HUMAN RIGHTS AND LEGAL AID ON THE
LEGITIMACY OF CUSTODIAL SANCTIONS FOR DEFAMATION UNDER
INTERNATIONAL HUMAN RIGHTS LAW SUBMITTED BY ARTICLE 19, THE
INTERNATIONAL CENTRE AGAINST CENSORSHIP AND INTERIGHTS,
THE INTERNATIONAL CENTRE FOR THE LEGAL PROTECTION OF
HUMAN RIGHTS

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Background

ARTICLE 19 and INTERIGHTS have been asked to advise the Centre for Human Rights and Legal Aid on whether the imposition of custodial sanctions for defamation under the relevant sections of the Egyptian Penal Code is consistent with Egypt's international obligations to respect the guarantee of freedom of expression.

In November 1998 the Helwan Misdemeanour Court granted the Centre for Human Rights and Legal Aid (CHRLA) permission to challenge the constitutionality of Articles 303(a), 306 and 307 of the Egyptian Penal Code in the Supreme Constitutional Court of Egypt, following the imprisonment of four journalists for defamation. All of these Articles provide custodial sanctions for defamation or insult.

ARTICLE19/INTERIGHTS take the view that custodial sanctions for defamation are a disproportionate and unnecessary means of protecting individual reputation. While such sanctions continue to be imposed in a number of countries, they have fallen into disuse in many others and cannot be justified in the light of the strict test for restrictions on expression developed under international human rights jurisprudence.

Egypt's Obligations to Protect Freedom of Expression Under International Human Rights Law

The Republic of Egypt's legal obligations to respect the international guarantee of freedom of expression are spelt out in Article 19 of the International Covenant on Civil and Political Rights (ICCPR), to which Egypt became a party in 1982. Article 19 states:

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

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

Since 1984 Egypt has also been a party to the African Charter on Human and Peoples' Rights, Article 9 of which also protects the right to "express and disseminate opinions".

The right to freedom of expression has been recognised as one of the most important democratic rights by the international community. According to the United Nations General Assembly it is:

A fundamental human right and...the touchstone of all the freedoms to which the UN is consecrated.¹

The international guarantee of freedom of expression imposes positive obligations on States to create and ensure conditions which enable citizens to receive and impart the widest possible range of information, ideas and opinions, subject only to restrictions recognised under international human rights law.

Recognising the importance of this right, the Egyptian Constitution itself guarantees freedom of expression, freedom of the press and forbids censorship.² The Egyptian Supreme Constitutional Court has declared freedom of expression to be inherent in the very nature of a democratic regime and essential to the free formation of the public will.³

Restrictions on Freedom of Expression

In order to satisfy the requirements of international human rights law, Egyptian laws which restrict freedom of expression must comply with the narrowly drawn provisions of Article 19(3) of the ICCPR. This states:

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and

¹ General Assembly Resolution 59(1), 14 December 1946.

² See Articles 47, 48, 206, 207 and 208 of the Constitution of the Arab Republic of Egypt, 1971.

³ *Case No.44*, Judicial Year 7, 7/5/88.

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 the respect of the rights or reputations of others;

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

This test for restrictions, which is partly mirrored in Article 27(2) of the African Charter on Human and Peoples' Rights, is a strict one. It establishes a heavy onus on the government to justify any interference. The European Court of Human Rights has interpreted a similar test in the European Convention⁴ as requiring that any restriction be "provided by law" and be "necessary" for the purpose of safeguarding one of the interests listed in the freedom of expression article. The test of "necessity" demands that a "pressing social need" be demonstrated and that restrictions must be justified by reference to reasons which are "relevant and sufficient".⁵ Most significantly for current purposes, any measures must be proportionate to the aim pursued and must not go beyond what is strictly required to satisfy the aim.⁶ This approach to

⁴ See Article 10(2) of the European Convention on Human Rights and Fundamental Freedoms.

⁵ See, for example, *Sunday Times v United Kingdom*, (1979), Series A, No.30, para.62, (European Court of Human Rights), interpreting a similar provision in the European Convention on Human Rights and Fundamental Freedoms.

⁶ See, for example, *Ibid.* and *Tolstoy Miloslavsky v United Kingdom*, 13 July 1994, Judgement 8/1994/455/536, (European Court of Human Rights).

the test for restrictions has been endorsed by the UN Human Rights Committee when interpreting Article 19(3) of the ICCPR.⁷

Defamation as a Restriction upon Freedom of Expression⁸

Laws imposing sanctions for defamation or insult, while clearly interfering with the exercise of the right to freedom of expression, have generally been held by the European Court to satisfy part of the test for restrictions by serving the legitimate aim of protecting the “rights or reputations of others”.⁹ Like all restrictions on the right to freedom of expression, however, the imposition of sanctions for defamatory speech must satisfy a “pressing social need”, be proportionate to the harm legitimately found to have been done and not go beyond what is strictly necessary in the particular circumstances.¹⁰ In general, a particular sanction will not be regarded as necessary where a less restrictive means could be employed to achieve the same end¹¹ or where the sanction itself is so overwhelming that it cannot be regarded as a proportionate response to the harm done, in this case, to reputation. Where the general practice of other States is not to apply such a sanction in similar

⁷ For example, see *Mukong v Cameroon*, No.458/1991, Views adopted 21 July 1994, 49 GAOR Supp. No.40, UN Doc. A/49/40, para.9.7.

⁸ This advice will not discuss the appropriate limits of defamatory speech from the perspective of international law. It will be confined to a discussion of the appropriateness or otherwise of custodial sanctions for speech which has legitimately been found to be defamatory.

⁹ See, for example, *Lingens v Austria*, 1986, No.103, 8 EHRR 407; *Oberschlick v Austria*, 1991, No. 204, 19 EHRR 389; *Thorgeirson v Iceland*, 1992, No.239, 14 EHRR 843; and *Schwabe v Austria*, 1992, No.242B (European Court of Human Rights).

¹⁰ See *Sunday Times v United Kingdom*, *op.cit.*

¹¹ See, for example, *Observer & Guardian v United Kingdom*, 1991, Series A, 216, para.69, (European Court of Human Rights).

circumstances the necessity of the sanction may also be called into question.¹²

International Approaches to Custodial Sanctions for Defamation

Jurisprudence

International jurisprudence has consistently emphasised the overriding importance of the guarantee of freedom of expression and therefore required a narrow interpretation of the scope of restrictions and sanctions.¹³ A determination as to the legitimacy of a restriction upon freedom of expression does not involve:

[A] choice between two conflicting principles but with a principle of freedom of expression which is subject to a number of exceptions which must be narrowly interpreted.¹⁴

The “chilling” effect which disproportionate sanctions, or even the threat of such sanctions, may have upon the free flow of information and ideas must also be taken into account when assessing the legitimacy of restrictions. It is in the light of such considerations that the imposition of custodial sanctions for defamation should be examined.

¹² This approach is evident in the jurisprudence of the European Court of Human Rights. See Harris, O’Boyle and Warbrick, *Law of the European Convention on Human Rights*, Butterworths, London, 1995, pages 9 & 411.

¹³ See, for example, the cases cited in note 8 above, and *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Inter-American Court of Human Rights, Advisory Opinion OC-5/85, 13 November 1985.

¹⁴ *Sunday Times v United Kingdom*, *op.cit.* para. 65.

Unlike the imposition of monetary damages or fines, deprivation of liberty is a very severe penalty affecting a fundamental human right. The right to liberty is protected by Article 9 of the ICCPR and Article 6 of the African Charter. According to the general principles applicable to Article 19(3) of the ICCPR, discussed above, severe penalties should be applied only in the most pressing circumstances and only where they represent a proportionate response to the harm done.

Although no case specifically challenging custodial penalties for defamation has come before an international judicial body, the European Court of Human Rights has stated that criminal measures should only be adopted where States act “in their capacity as guarantors of public order” and where such measures are:

Intended to react *appropriately and without excess* to defamatory accusations devoid of foundation or formulated in bad faith [emphasis added].¹⁵

In a case against the UK, the European Court explicitly stated that the guarantee of freedom of expression must be taken into account when formulating sanctions:

¹⁵ *Castells v Spain*, (1992) A 236.

An award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered.¹⁶

The court found that damages of £1.5 million awarded by a jury in a defamation case were disproportionately large and therefore failed to satisfy the “necessity” test for restrictions.

Accordingly, having regard to the size of the award in the applicant’s case in conjunction with the lack of adequate and effective safeguards at the relevant time against a disproportionately large award, the Court finds that there has been a violation of the applicant’s rights under Article 10 [guaranteeing freedom of expression] of the Convention.¹⁷

The importance of the free expression guarantee dictates that even a financial penalty may be a disproportionate and unnecessary means of protecting individual reputation. On this basis, ARTICLE19/INTERIGHTS take the view that, if specifically challenged, a penalty involving deprivation of the fundamental right to liberty of person would, *a fortiori*, be regarded as an inappropriate, excessive and disproportionate means of protecting such reputation.

¹⁶ *Tolstoy Miloslavsky v United Kingdom*, *op.cit.*, para.49.

Other Legal Sources

The legitimacy of custodial sentences for expression related matters, including for defamation, has also been called into question by a number of international actors whose task it is to interpret and apply international human rights law.

Two UN Special Rapporteurs on freedom of expression have seriously called into question the imposition of custodial sanctions for expression related matters,¹⁸ while the UN Human Rights Committee, in responding to regular country reports under the International Covenant on Civil and Political Rights, has frequently criticised States that maintain penal sanctions for such matters. In its 1994 annual report the Committee criticised Iceland for maintaining the possibility of custodial sanctions for defamation, even though these had apparently not been applied. The Committee similarly noted their concerns in this regard in relation to Norway and Jordan.¹⁹ In 1995 the Committee criticised Tunisia for its penalties in relation to defamation, insult and false information and concern was expressed about the continued imprisonment of journalists in Morocco.²⁰ In 1996 the Committee expressed its concern at the continued use of penal sanctions for defamation in Mauritius²¹ and in 1997

¹⁷ *Id.*, para. 51.

¹⁸ *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.

¹⁹ *Annual General Assembly Report of the Human Rights Committee*, 21/9/94, Volume I, No.A/49/40, paras. 78, 91 and 236.

²⁰ *Annual General Assembly Report of the Human Rights Committee*, 3/10/95, No. A/50/40, paras. 89 and 113.

²¹ *Annual General Assembly Report of the Human Rights Committee*, 16/9/96, No. A/51/40, para. 154.

Iraq was severely criticised for maintaining custodial sanctions and even the death penalty in relation to the offence of insulting the President.²²

In 1998 the United Nations Commission on Human Rights adopted a Resolution on the right to freedom of opinion and expression, paragraph three of which states:

[The Commission] expresses its concern at the extensive occurrence of detention, long-term detention...persecution and harassment, including through the abuse of legal provisions on criminal libel...directed at persons who exercise the right to freedom of opinion and expression.²³

In his 1998 report the UN Special Rapporteur on Freedom of Expression, commenting on the arrest and imprisonment of a Tunisian journalist for defamation stated:

Interference with the right to freedom of expression must be rigorously scrutinised as to the necessity and proportionality of the measures taken.²⁴

²² *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant. Concluding Observations of the Human Rights Committee on Iraq, 19/11/97, No. CCPR/C/79/Add.84, para.16.*

²³ United Nations Commission on Human Rights *Resolution on the Right to Freedom of Opinion and Expression, No.42 of 1998.*

²⁴ *Commission on Human Rights Report of the Special Rapporteur, Mr Abid Hussein submitted pursuant to Commission on Human Rights Resolution 1997/26, 28 January 1998,*

In May 1991 the United Nations Educational, Scientific and Cultural Organisation (UNESCO) conducted a seminar on “Promoting an Independent and Pluralistic African Press” in Windhoek, Namibia. The *Declaration of Windhoek*, adopted at the seminar and endorsed by the General Conference of UNESCO, included the following statement:

...African Governments that have jailed journalists for their professional activities should free them immediately.²⁵

Following a similar conference held at Sana’a in Yemen the General Conference of UNESCO endorsed the *Declaration of Sana’a* which included the following:

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.²⁶

The general consensus of these international actors is clearly that imprisonment is an inappropriate restriction upon the right to freedom of expression, particularly in the context of the protection of individual reputation.

²⁵ Paragraph 13 of the *Declaration of Windhoek*, 3 May 1991, Endorsed by the General Conference of UNESCO at its twenty-sixth session-1991.

²⁶ *Declaration of Sana’a*, 11 January 1996, endorsed by the General Conference by Resolution 34, adopted at the 29th session, 12 November 1997.

The Use of Custodial Sanctions for Defamation in Parts of Europe, the Commonwealth and North America

While custodial sanctions for defamation continue to be imposed in a number of countries, in large parts of Europe, the Commonwealth and North America such sanctions for defamation have either been abolished altogether or have effectively become obsolete.

The following is an illustrative rather than exhaustive examination of the use of custodial sanctions for defamation in these regions.

Europe

Defamation has traditionally been dealt with through the criminal law in continental Europe. Fines are generally imposed at levels significantly lower than civil damages in many common law countries, and custodial sentences remain theoretically possible in most States.

In Austria, there is a growing trend to make use of civil suits against defamatory speech and journalists benefit from specific safeguards. Imprisonment is virtually never ordered.²⁷ Similarly in Denmark, while criminal prosecutions are not uncommon, custodial sentences have not been ordered

²⁷ ARTICLE 19, *Press Law and Practice. A Comparative Study of Press Freedom in European and Other Democracies*, March 1993, United Kingdom, pp.29-30, and a letter to INTERIGHTS from Walter Berka, 30 January 1998.

for some time.²⁸ In Sweden, criminal prosecutions are relatively common but there do not appear to have been any custodial sanctions, at least against newspaper editors, ordered under the present 1965 law.²⁹ In Norway, criminal charges are rare. No custodial sentence has been ordered since 1933.³⁰ In both Germany and the Netherlands, criminal prosecutions are employed but the jurisprudence of the courts, drawing upon principles of proportionality developed by the European Court of Human Rights, support the conclusion that custodial sanctions could never be justified.³¹ In Spain, custodial sanctions remain but have, for all practical purposes, been replaced by a system of “daily fines”. The new system was introduced specifically to reduce the impact of deprivation of liberty in this area.³² In France, a prison sentence of up to six months is possible, although such sentences are rarely imposed.³³ In Hungary, custodial sanctions remain possible, but courts, referring to the necessity and proportionality principle developed by the European Court of Human Rights, are hesitant to apply them and prefer to impose fines.³⁴

Commonwealth and Common Law Countries

In the United Kingdom custodial sentences for defamation remain a theoretical possibility,³⁵ but criminal charges and custodial sanctions are

²⁸ Fax to ARTICLE 19 from Louise Krabbe of the Danish Centre for Human Rights, 6 February 1998.

²⁹ *Press Law and Practice, Op.cit.*, p.158.

³⁰ *Id.*, p.121.

³¹ *Id.*, pp.85 and 105 and letters from Ulrich Karpen and Ineke Boerefijn to INTERIGHTS of 20 January 1998.

³² Fax to INTERIGHTS from Blanca Rodriguez Ruiz, 28 April 1998.

³³ *Press Law and Practice, op.cit.*, p.57 and a letter from Roger Errera to INTERIGHTS of 19 January 1998.

³⁴ Fax to INTERIGHTS from Gabriella Cseh of the Constitutional and Legislative Policy Unit, Budapest, 7 February 1998.

extremely rare.³⁶ In Australia, most jurisdictions retain the possibility of imprisonment for defamation, although no such sentence has been served for more than fifty years.³⁷ In Canada, criminal prosecutions for defamation are rare and custodial sentences even rarer.³⁸ In Commonwealth countries in the Caribbean such as Guyana, Jamaica and St. Vincent and the Grenadines, criminal defamation laws and their corresponding custodial punishments have been obsolete for some time.³⁹ In parts of the African Commonwealth the situation is similar. In South Africa, the existing criminal law, including custodial sentences, has fallen into desuetude.⁴⁰ In Zimbabwe criminal defamation is rarely resorted to. In the only recent case, the penalty was a fine.⁴¹ Similarly, in Nigeria criminal defamation laws are no longer resorted to. The two cases prosecuted in the last few years were not concluded.⁴²

In the USA, criminal defamation laws, including their concomitant custodial penalties, fell into disuse many years ago.⁴³ In *Garrison v Louisiana*⁴⁴ the Supreme Court struck down a State criminal libel law, holding that it did not meet the *Sullivan v New York Times*⁴⁵ standard requiring that defamatory statements against “public figures” be made with actual malice or

³⁵ Except in Scotland where there is no criminal libel.

³⁶ Fax to INTERIGHTS from Andrew Nicol QC, 26 January 1998.

³⁷ *Press Law and Practice*, *op.cit.*, p.1.

³⁸ Law Reform Commission of Canada, *Criminal Law defamatory Libel*, Working paper 35, 1983.

³⁹ Letters to INTERIGHTS from Miles Fitzpatrick, S.C., Attorney, Guyana, 20 January 1998, Victor Duffy, Director, St. Vincent and the Grenadines Human Rights Association, 3 February 1998, and Lord Anthony Gifford, Q.C., Jamaica, 23 January 1998.

⁴⁰ Fax to INTERIGHTS from Tracy Cohen, Acting Head Media Project, Centre for Applied Legal Studies, University of Witwatersrand, South Africa, 19 February 1998.

⁴¹ Letter to INTERIGHTS from Scanlen and Holderness, Legal Practitioners, Zimbabwe, 4 February 1998.

⁴² Email to INTERIGHTS from Edetaen Ojo, Executive Director, Media Rights Agenda, Nigeria, 4 February 1998.

⁴³ See *Press Law and Practice*, *op.cit.*, page 198ff.

⁴⁴ See *Garrison v Louisiana*, 379 U.S. 64, 70, 74 (1964).

recklessness. The Court stated that even if the *Sullivan* standard were satisfied a criminal libel law could only apply to a statement likely to cause an imminent breach of the peace. While custodial sanctions remain a theoretical possibility, it is extremely unlikely that the Supreme Court would accept them in the light of *Garrison*.

Clearly, large parts of the world successfully address the problem of defamation using the “less restrictive means” of non-custodial penalties, usually civil damages or criminal fines. Experience in these countries demonstrates that there is no “pressing social need” to impose custodial penalties.

Conclusion

In many parts of the world custodial penalties for defamatory expression have fallen into disuse and are generally regarded as an anachronism. The clear view of both international jurisprudence and of the international bodies which have considered the matter is that the imposition of custodial sanctions is disproportionate and unnecessary to protect individual reputations. In these circumstances INTERIGHTS/ARTICLE 19 submit that the imposition of such sanctions, whether through Articles 303(a), 306 and 307 of the Egyptian Penal Code or otherwise, would be contrary to Egypt’s obligations under Article 19 of the International Covenant on Civil and Political Rights.

⁴⁵ *New York Times Co. v Sullivan*, 376 U.S. 254 (1964).