

# **International Seminar on Defamation: Building a Regional Advocacy Platform**

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## **Legal Standards and Developments**

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### **Problem Statement**

Defamation is a serious problem for the media and others who seek to communicate in the public interest throughout Southeast Asia and indeed most of the world. The problem is not the protection of reputations *per se*, which is not only legitimate but recognised both under international law and in the national law of every State. The problem is that existing legal frameworks fail to strike an appropriate balance between the need to protect reputations and the fundamental right to freedom of expression.

The problem of criminal defamation, which normally brings with it the threat of imprisonment and other serious sanctions, has been well documented. This problem is far from theoretical in Southeast Asia as high-profile cases from Indonesia – for example that of Bambang Harymurti – and Thailand – for example, that of Supinya Klangnarong – as well as Cambodia – where a number of well-known journalists and human rights activists were charged in late 2005 and early 2006 – and even the Philippines demonstrate. The threat of these harsh sanctions is compounded by the fact that individuals steer well clear of the prohibited zone, which is itself often unduly broad, so as to avoid any risk of sanction.

More complex, but also very serious, is the problem of civil defamation laws, with the threat of massive damage awards, often for perfectly legitimate criticism. Again, the problem is very much a reality in the region. Recent cases involving massive damage awards or claims in Indonesia (*Time vs. Suharto*, with damages of some \$100m awarded) and Thailand (where Tesco Lotus has brought a number of multi-million dollar claims, one for over \$33m) have made international headlines but similar problems have also been witnessed in the Philippines, Malaysia and Singapore.

These cases exert a serious chilling effect on freedom of expression and in many instances are aimed not at protecting (deserved) reputation but at preventing legitimate criticism or the exposure of corruption and other forms of wrongdoing. At the heart of the problem are poorly designed legal frameworks for defamation that envisage liability for legitimate statements, that give undue protection to officials or even State bodies, that do not provide for adequate defences and that allow for excessive, sometimes absurdly harsh, sanctions and damage awards.

This paper outlines the key legal reforms that freedom of expression campaigners should be asking for, as well as the international legal underpinning for them. It also outlines some opportunities for campaigners, as well as some elements of a successful campaign strategy. As such, it aims to help those working to address defamation problems in Southeast Asia to develop concrete and effective plans to achieve their goals.

## **Key Legal Reforms**

This section of the paper outlines seven key legal reforms that, if achieved, would substantially redress the imbalances between protection of reputation and respect for the right to freedom of expression noted above. These are decriminalisation of defamation, limitation of the scope of defamation laws, doing away with special protections for public officials, the defence of truth, recognition of special protection for opinions, the defence of reasonable publication and limiting penalties for breach of defamation laws.

### **Decriminalisation**

Criminal defamation, as noted above, has a particularly severe impact on freedom of expression and activists in many countries have made this a key objective of their defamation campaigns. The mere threat of imprisonment, even if this is rarely awarded or sentences are normally suspended, is enough to make journalists think twice before they take any risks. Criminal defamation is particularly pernicious because its application tends to be biased towards situations of important public interest, since in many countries only the powerful have the ability in practice to invoke the criminal law.

There have been some successes within the region. Cambodia, for example, has done away with the possibility of imprisonment for defamation while in Indonesia the Supreme Court has held that criminal defamation law should be resorted to in cases involving the media only where remedies under the Press Law have failed to redress the harm. There have also been notable successes globally. A number of countries – including Cyprus, Sri Lanka, Georgia, New Zealand, Ukraine, Ghana, Bosnia-Herzegovina, Mexico, Estonia and the United States – have abolished criminal defamation entirely at the national level while a number of others – including Macedonia, France, Croatia, Bulgaria, Montenegro and Serbia – have followed the Cambodian approach of doing away with imprisonment for defamation.

The position regarding criminal defamation under international law is frustrating for campaigners. On the one hand, the principles seem quite clear. International law requires restrictions on freedom of expression to be necessary, including in the sense that States must use the means which are least harmful to freedom of expression when protecting competing social interests. Given that civil laws provide adequate protection for reputations, as demonstrated by the experience of those countries which have abolished them, and yet are less heavy-handed than criminal defamation laws, it is hard to see how the latter could be considered ‘necessary’.

Despite this, international courts have shied away from condemning criminal defamation laws outright, although they have expressed considerable concern about the abuse of these laws, particularly where there is a threat of imprisonment, noting

the chilling effect this has on freedom of expression and calling on States to resort to criminal charges only as last resort. The three special international mandates on freedom of expression – the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – have been more direct, stating in a Joint Declaration adopted on 10 December 2002:

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.

ARTICLE 19 has also called for the complete repeal of criminal defamation laws (see its principles on defamation, *Defining Defamation: Principles on Freedom of Expression and the Protection of Reputation*, Principle 4).<sup>1</sup>

### **Scope of Defamation Laws**

In some countries, defamation law is used to protect organs of the State, such as elected bodies or ministries. This can easily lead to abuse, as these bodies often have considerable powers at their disposal to bring defamation cases and such cases are often motivated by a desire to limit criticism directed at them for their official activities, which should be the subject of wide public debate.

Courts in a number of countries – including South Africa, the United Kingdom, Zimbabwe, the United States and India – have held that public bodies should be barred altogether from suing in defamation. The rationale for this is threefold. First, criticism of government and public bodies is vital to the success of a democracy and defamation suits inhibit free debate about vital matters of public concern. Second, defamation laws are designed to protect reputations. Public bodies should not be entitled to sue in defamation because they do not have any reputation of their own, perhaps apart from as a public collective, whereas the public, on balance, benefits from uninhibited criticism. Finally, most public bodies have ample ability to defend themselves from harsh criticism by other means, for example by responding directly to any allegations. Allowing public bodies to sue is, therefore, an inappropriate use of taxpayers money, particularly given the risk of abuse by governments intolerant of criticism.

International courts have not produced a clear ruling on this matter, in part because cases brought directly by public bodies are rare. In one case where the government did bring a case, the European Court of Human Rights found a breach of the right to freedom of expression but did not specifically rule out cases brought by government. The Court did at least make it clear that the limits of criticism government were wider even than for politicians.

### **Special Protection for Public Officials**

Many countries still provide greater protection for public officials than for ordinary citizens. This protection may take the form of a lower threshold for what constitutes defamation, greater sanctions or procedural benefits, for example in the form of the State bringing defamation cases on behalf of officials. This is sometimes justified on

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<sup>1</sup> (London: ARTICLE 19, 2000). Available at: <http://www.article19.org/pdfs/standards/definingdefamation.pdf>.

the basis that reputation is more important to these officials than it is for ordinary citizens. This, however, is to turn the matter on its head since it is clear that, in a democracy, officials are supposed to serve the people and, as such, should be more tolerant of criticism. Indeed, the history of these laws in countries around the world has shown that they are often roundly abused by powerful figures who wish to avoid any criticism, whether or not it is legitimate.

There have been some positive developments in the region in this area. For example, a landmark judgment by the Indonesian Constitutional Court of 6 December 2006 ruled that criminal law provisions that provided enhanced protection to the President and Vice President were unconstitutional. Unfortunately, the Court also indicated that senior political figures could still rely on the general criminal defamation rules, thereby suggesting that these were legitimate. At the same time, many rules remain in place around the region which provide special protection to officials.

This is an area where international courts have been quite clear: public officials and other public figures must tolerate a higher degree of criticism than ordinary citizens. As the European Court of Human Rights noted in a case from Austria: “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 by both journalists and the public at large, and he must consequently display a greater degree of tolerance.”<sup>2</sup> Other international courts have supported this and it has been extended to a wide range of public figures and, indeed, to all statements on matters of public interest.

### **The Defence of Truth**

It seems obvious that one should not be able to sue in defamation for critical statements which are accurate. This reflects the basic principle that one cannot defend a reputation one does not deserve. Furthermore, it is clear that a failure to observe this principle would very seriously undermine open public debate and put journalists and others whose work is precisely to uncover and expose the truth in an impossible situation.

Many countries around the world recognise this in their defamation law. In common law countries, ‘justification’ or proof of truth, has long been recognised as an absolute defence against a claim of defamation and in many civil law countries as well, proof of truth is either always or almost always a full defence. At the same time, in many countries in Southeast Asia, the defence truth is qualified. In some cases, the defendant must prove good faith in addition to truth while in other cases he or she must also prove that the statements were on a matter of public concern. This places an undue burden on defendants.

Here again, international courts have established some clear principles. First, one should always be allowed to prove the truth of one’s statements. The clear implication is that such proof should absolve the defendant of liability. Second, no one should be required to prove the truth of statements of opinion or value judgements. These are by definition personal views and hence incapable of being proven true or false.

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<sup>2</sup> *Lingens v. Austria*, 24 June 1986, Application No. 9815/82, para. 42.

### **Protection for Opinions**

There is a very important difference between statements of fact and statements of opinion. The former are either true or false whereas, as noted above, the latter are incapable of verification. A statement that someone is an idiot, even if that person is known to be intelligent, can be legitimate as an opinion in many ways, for example if the intelligent person behaves irresponsibly or lacks common sense. On the other hand, practically any opinion can be deemed by others to be ill-founded. In other words, the matter of whether an opinion is deemed ‘good’ or ‘bad’ is inherently subjective.

There are clear problems with penalising subjective views, since one cannot possibly know in advance whether or not one’s statements will be deemed legitimate or not. As a result, penalising statements of opinion is very problematical from the perspective of freedom of expression. ARTICLE 19 has taken a clear position on this, stating that opinions should never result in liability for defamation (see Defining Defamation, Principle 10).

Very few countries provide absolute protection for opinions, in line with the argument above, although this is the situation in the United States. Instead, in many countries, opinions receive a high degree of protection but defendants are required to show that there is some factual basis for them. This is a far lower standard than proving the truth of statements, but it does still require that some evidence be produced to support an opinions.

This is also the situation under international law. The European Court of Human Rights, for example, has generally provided protection for opinions unless they are entirely without any basis. In a case decided in 2002, the Court protected a statement of opinion even while acknowledging the absence of hard proof for the allegations, as well as the strong language used. The Court stressed that the discussion was on a matter of important public concern and stated: “It is true that the applications, on a slim factual basis, published harsh criticism in strong, polemical language. However, it must be remembered that the right to freedom of expression also protects information or ideas that offend, shock, or disturb.”<sup>3</sup>

### **Reasonable Publication**

In certain circumstances even false, defamatory statements of fact should be protected against liability. A rule of strict liability for all false statements is particularly unfair for the media, which are under a duty to satisfy the public’s right to know where matters of public concern are involved and which often cannot wait until they are sure that every fact alleged is true before they publish or broadcast a story. Even the best journalists make honest mistakes and to leave them open to punishment for every false allegation would be to undermine the public interest in receiving timely information. The nature of the news media is such that stories have to be published when they are topical, particularly when they concern matters of public interest.

This has been recognised by top courts in many countries around the world, as well as by international courts. The standards vary – from a requirement of malicious publication (for example, in the United States and New Zealand) to a generalised set of

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<sup>3</sup> *Dichand and others v. Austria*, 26 February 2002, Application No. 29271/95, para. 52.

factors that will absolve the defendant from liability (in a large number of other countries). The particular factors vary from country to country and from one context to another but they include attempts to verify the accuracy of the statement, attempts to present the views of the plaintiff, the degree of public interest in the issue, the urgency of publication and so on.

One feature of most systems is that the defence only applies to statements on matters of public concern. In other words, if you are going to engage in superficial gossip, you need to get it right whereas if you are contributing to a debate on a matter of public interest, it is enough if you take reasonable steps to verify the accuracy of your statements.

This standard has been clearly affirmed by international courts which have on many occasions held that the publication of even false statements of fact are protected by international guarantees of freedom of expression. The European Court of Human Rights, for example, has protected media defendants as long as “they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.”<sup>4</sup>

### **Penalties**

The problems with excessive sanctions for defamatory statements, over and above whether the statements should be protected, have already been noted. Basically, faced with the risk of harsh sanctions – whether in the form of imprisonment or massive damage awards – individuals will exercise caution in making any form of criticism. This problem is exacerbated where powerful individuals bring completely illegitimate defamation cases, knowing they will lose, simply to deter others from criticising them.

The problem of excessive sanctions remains serious within Southeast Asia and, indeed, beyond. In a few countries, steps have been taken to limit the scope of damage awards for defamation cases and in many European countries these remain, in practice, relatively low although at the same time they are increasing in many countries.

International courts have been very clear on this issue and, indeed, have to some extent lead the way. The European Court of Human Rights, for example, has clearly stated that “the award of damages and the injunction clearly constitute an interference with the exercise [of the] right to freedom of expression.” As a result, sanctions for defamation must bear a “reasonable relationship of proportionality to the injury to reputation suffered” and this should be specified in national defamation laws.<sup>5</sup>

### **Opportunities**

The last section of this paper laid out the standards that freedom of expression activists should push for when reforming defamation laws. This section looks at two key contexts in which it has proven easier in practice to secure reform.

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<sup>4</sup> *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93, para 65.

<sup>5</sup> *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, Application No. 18139/91, paras. 35 and 49.

### **Regime Change**

One of the best times to effect reform is in the period immediately after a regime change. Regime change here refers to a significant political change which can range from the fall of a long-standing one-party or one-person regime to a democratic change of government after a long period of rule by one party. The period immediately following on from such a change is often ripe for reform.

This was demonstrated in dramatic fashion here in Indonesia following the fall of the Suharto government in May 1998. This heralded in an unprecedented period of 'reformasi', during which some very important reforms, including the 1999 Press Law, were achieved. After some time, however, reform became more difficult and, indeed, the challenge now is to prevent backsliding. Unfortunately, defamation did not seem a particularly priority at the time of reform of the press law, and so the 1999 Press Law does not address it in any detail although, as noted above, it has proven to be somewhat of a bulwark against abuse of defamation laws.

There are strong parallels in other countries. Sri Lanka is the only Asian country to have fully decriminalised defamation and this arguably came after a form of regime change. Although a long-standing democracy, Sri Lanka has at the same time been characterised by the dominance of one political party. The same party, under the same leadership, held power between 1994 and 2001. Although this government had originally promised significant reform in the area of freedom of expression, in practice little or no reform was delivered. When that government fell unexpectedly in late 2001, the new government, the former opposition, which had been highly critical of the control tactics of the old government, moved quickly to abolish the criminal defamation law, and this happened in 2002.

A similar situation applied in Mexico, where the criminal defamation law was repealed in 2007, under the aegis of a government which had come into power for the first time after some 65 years of rule by another party.

### **They go Too Far**

A second scenario where reform is more likely is where officials, or sometimes other powerful social actors, are excessive in their abuse of the defamation laws, creating a public backlash, often international in nature, which generates momentum for reform. In France, for example, it was the imposition of a penal sanction for defamation after decades during which such sanctions had lain dormant, that led to public pressure to do away with imprisonment as a possible sanction for defamation. The public were outraged to realise that one could still be imprisoned for defamation and this forced the government to react.

The same situation pertained in Cambodia in late 2005/early 2006, when a number of leading editors and human rights activists were charged with criminal defamation. This generated widespread local as well as international condemnation and the government was forced to take steps to amend the law, following the French example of doing away with imprisonment for defamation.

The same is true of the celebrated cases of Bambang Harymurti here in Indonesia who, despite being the editor of a leading magazine, was threatened with

imprisonment for defamation. This generated a groundswell reaction both locally and internationally. Although the case did not lead to law reform as such, it did generate a novel and important precedent, whereby the Supreme Court held that criminal defamation cases could be brought only where plaintiffs had first taken advantage of the remedies offered under the Press Law. Although this has not been applied consistently, it nevertheless represents a very important victory for freedom of expression.

## **Strategies**

This section of the paper looks at some strategies to help civil society take advantage of the strategic opportunities noted above when they present themselves, as well as to be able to push for reform even in the absence of an opportunity.

### **Core Civil Society Groups**

In any campaign, there will be ‘core’ groups for whom the focus issue is a major priority and ‘support’ groups who identify with the campaign objectives but who will only engage actively from time-to-time. When the issue is law reform, the core groups need to be committed, well-organised and have a long-term perspective. This will allow them to take advantage not only of the strategic opportunities presented above, but also of ongoing opportunities, such as a law reform effort by the government. A key strategy should be to build wider awareness of and support for the campaign among a broad community of supporters.

### **Good Networks**

There should be a large potential community of support for defamation law reform. This community needs first to be nurtured and engaged and then used strategically during the campaign. Few members will be active on a continuous basis but many may be prepared to engage strategically at key campaign moments. The core groups need to identify carefully when to call on this wider community for support. Some of the key sectors that will form part of this community are the media, civil society organisations, legislators, businesses, the legal community and the international community. The campaign should take advantage of support wherever it may be found, for example working with supportive opposition parties and finding champions inside of government.

### **Media**

The media are key to raising awareness and creating pressure for defamation law reform. At the same time, the issue should not be seen as a media issue, but a core democracy issue. The campaign should be rooted in the wider notion of the public’s right to know and the idea that intimidating and silencing the media is a denial of everyone’s right to receive information.

### **Legal Support**

Legal support is needed both to engage in strategic litigation for reform and to take maximum advantage of existing legal protections, such as they may be. The former requires a small group of high-powered and innovative legal experts probing constitutional and other structures to push for reform through legal interpretation. The latter requires a wide network of lawyers with at least some specialised defamation



law knowledge who can provide support to media and others who have been charged or harassed for publishing allegedly defamatory statements.

### **Remove the Problem**

In many countries, a key problem facing defamation law reform campaigners is poor media reporting. If the media produce low-quality work and frequently publish defamatory statements, it will be very difficult to build support for the campaign, as well as to present it as a wider 'public's right to know' issue. In other words, the media needs to put its own house in order.

There are several possible strands to this. First, awareness should be raised among media workers and houses about the limits imposed by defamation law, so that they may better avoid making defamatory statements. Second, alternative remedies should be provided for those who feel they have been harmed by media reporting. These may include internal complaints systems/in-house ombudsmen, the development of codes of conduct and ethical codes, and industry-wide complaints bodies (or press councils). Third, effort needs to be put into removing certain motivations for bad practice, such as low pay prompting envelop journalism, corruption within the media and so on.

### **Conclusion**

There is fairly broad consensus among those promoting freedom of expression and a free media about the main reforms that are needed in the area of defamation law, namely the seven reforms listed above, although different issues will be a greater priority in different contexts. The real challenge is putting in place an effective campaign to achieve these reforms. Experience in the region as well as more broadly suggests that there are some key external opportunities which make reform more possible. But the key to campaigning success is to have a well-organised campaign which builds a wide network of support among potential allies across different social sectors.