THE COURT APPROACH TO DEFAMATION IN A WORLD OF CHANGING TRENDS ON DEFAMATION LAW

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EXECUTIVE SUMMARY

This thesis considers defamation law from the perspective of free speech. Defamation laws serve as a chilling effect on freedom of expression in that they sanction, or threat to sanction, speech. Defamation can be dealt with under criminal or civil law, and many states provide for both. Criminal defamation law is however considered particularly problematic from a free speech point of view, due to the severity of criminal sanctions, the stigma associated with criminal charges, and the difficult experience of facing criminal trial. Whether found guilty or not; in many cases the mere threat of a defamation suit will be sufficient to stifle criticism, as the process of proving innocence places a great burden on the individual.

Civil society and inter-governmental bodies have been urging states to decriminalize defamation and replace these laws with a civil model of defamation. States are proving slow in responding to this, and the majority of states still have criminal defamation laws on the books. In some states these laws lie dormant; in others they are actively used and abused in pursuing critical voices with claims of criminal defamation.

International legal standards on defamation are clear. In recognising the potential chilling effect defamation may pose on freedom of expression, international standards urge for the decriminalisation of defamation. At the very least, imprisonment should never be used as a punishment for defamation. Further, truth, fair comment, honest opinion and privilege should be recognised as defences to defamation claims. Overall, defamation laws ought to be designed with the protection of freedom of expression in mind – ensuring a proper balance is struck between freedom of expression on the one hand, and protection of reputation on the other.

Instrumental in ensuring that this balance is struck are human rights courts. Consequently, this thesis examines the case law of two regional human rights courts; the European and the Inter-American Court of Human Rights, and assesses the two courts' approaches to certain key

issues in relation to defamation. While the two courts take a fairly similar approach on several issues, differences do appear. Worth noting of both courts is that neither declare criminal defamation to be of itself a violation of the right to freedom of expression.

While the comparative analysis show neither court to be in strict compliance with international standards on defamation in their case law; on most issues, the Inter-American Court offers a higher protection of free speech than its European counterpart. This can be explained partly by the strong protection awarded to free speech in the American Convention on Human Rights, and partly by the strong links between the Inter-American Court and the US Supreme Court, whose protection of free speech is known to be of the strongest in the world due to the First Amendment blanket ban on legal limitations of free speech. A final factor to explain this would be the highly deferential approach of the European Court.

Despite this relatively high protection of free speech offered by the Inter-American Court, both courts show room for improvement in how they address defamation. In particular, both courts fail to properly address the issue of where the burden of proof ought properly to lie in establishing the defence of truth. Additionally, the jurisprudence of both courts is contradictory on the issue of defamation of public officials. Furthermore, it would seem that a recent case decided by the Inter-American Court sees its traditionally strong protection of free speech weakened, as the court accepted for the very first time that a charge of criminal defamation had not been a violation of Article 13 of the American Convention.

Finally, this thesis discusses what the civil alternative to a criminal defamation law should look like. Again the emphasis is on striking the appropriate balance between free expression and the right to reputation; a good civil model is one that recognizes key defences such as truth, fair comment, honest opinion and privilege. Additionally, legal safeguards must be in place to ensure the defendant is not prejudiced. The recent decriminalization of defamation in England and Wales is discussed as an example of a civil model of defamation. Though certain weaknesses of this model are identified, the overall conclusion is that the model serves as an example of good practice.

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"*The press provides an essential check on all aspects of public life. That is why any failure within the media affects all of us. At the heart of this enquiry, therefore, is one simple question; who guards the guardian?"*

- Lord Leveson in his opening statement to the Leveson Enquiries, 14 November 2011[1]

Introduction

Freedom of Expression and Defamation Law

Freedom of expression is a fundamental human right, forming an essential part of all major human rights instruments.[2] Its importance is generally considered as twofold; both for the development of the individual; to express and inform themselves, and for society as a whole; to provide state transparency and accountability.[3] The press plays a vital role in this, with a free and independent press performing the role of a "watchdog" of society,[4] reporting on issues of public interest and ensuring accountability of the state.

[1] Transcript from the Morning Session of November 14th 2011, found at http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Transcript-of-Morning-Hearing-14-November-2011.txt

[2] See Article 19 of the Universal Declaration on Human Rights, Article 19 of the International Covenant on Civil and Political Rights (ICCPR), Article 10 of the European Convention on Human Rights, Article 13 of the American Convention on Human Rights

[3] See the UN Human Rights Committee General Comment No.34, General Remarks, CCPR/C/GC/34, September 12, 2011, available from http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf.

[4] International tribunals repeatedly refer to the free press as a 'watchdog' of society, referring to the fact that the media play a vital role in notifying the wider public of possible issues in society – see for example the Case of Goodwin v The United Kingdom (Application no. 17488/90) para 39

Freedom of expression is not unlimited, however.[5] Therefore, provisions on the right to freedom of expression are usually subject to a corresponding limitation clause.[6] These limitation clauses vary from instrument to instrument, but what they all have in common is the recognition that freedom of expression may legitimately be limited in order to protect the good reputation of others.[7] Thus it is generally recognised that freedom of expression can legitimately be limited where an unjustifiable damage to someone's reputation has been done.

Normally, such limitation will be exercised in the form of defamation laws. Defamation is the common term for expression that has damaging effect on the reputation of another, defined in English tort law as

> "A statement which injures the reputation of another by exposing him to hatred, contempt or ridicule, or which tends to lower him in the estimation of right thinking members of society".[8]

Defamation laws aim to restrict such comments when they harm the reputation of others without legal justification.

The inherent danger of such defamation laws is their possible *chilling effect* on freedom of expression. Though the lack of a regulatory system would render people defenceless when met with unjust damages to their reputation, an overly forceful system may have the effect of stifling voices, due to the fear of being sued or even imprisoned for speaking

[5] As set out in Article 19 of the Universal Declaration on Human Rights, Article 19 of the International Covenant on Civil and Political Rights (ICCPR), Article 10 of the European Convention on Human Rights (ECHR), Article 13 of the American Convention on Human Rights (ACHR)
[6] See the corresponding limitation clauses of the articles mentioned in footnote 5 supra
[7] See for example Art 19(3)(a) of the ICCPR, Art 13(2)(a) of the ACHR, Art 10(2) of the ECHR
[8] B.S. Markensinis, and Simon F. Deakin. Tort Law, 3rd Edition, Clarendon Press, 1994, pp. 565-566

out. Thus defamation laws ought always to be drafted with this conflict in mind, and strike a reasonable balance between these interests; that of protecting freedom of expression and protecting the reputation of the individual.[9]

A key factor in determining this is whether defamation is dealt with under the civil or the criminal law. In recent years, there has been increased pressure towards governments to decriminalise defamation, favouring a civil model of defamation law. This pressure has stemmed from free speech NGOs, intergovernmental bodies and even the United Nations. The voice of the international community is clear: criminal defamation is disproportionate and fails to strike a fair balance between protecting reputation and protecting free speech. Nonetheless, criminal defamation laws exist in the majority of states today[10] and few states seem to be decriminalising.

At the core of this thesis is the following argument. Despite international civil society urging for the decriminalisation of defamation law, states have been slow to respond. While international standards are clearly not in favour of criminal defamation, the jurisprudence of regional human rights courts does not adequately reflect this.

In making this argument, the first part of this thesis will concern defamation laws, their chilling effect on freedom of expression, and the relevant international standards. The second part of this thesis will look at the jurisprudence of the European Court of Human

[9] See statements made by Lord Lester in his *"Free Speech, Reputation and Media Intrusion - British Law Reform and What It Means for Hong Kong and beyond"* on 2 November 2012, Video lecture, Accessed March 28, 2014, http://vimeo.com/52908892.
[10] See ARTICLE 19's map of defamation law, available at http://www.article19.org/defamation/map.html

rights and the Inter-American Court of Human Rights, and assess their approaches to key issues relating to defamation. Finally, this thesis will consider what an alternative civil model of defamation ought to look like, and assess the recent effort to decriminalise in the United Kingdom.

Jurisdictions

The European and the Inter-American Court of Human Rights

The comparative analysis will focus on the European Court of Human Rights ('the European Court') and the Inter-American Court of Human Rights ('the Inter-American Court'). This is due to a number of reasons. First, both courts have a considerable body of case law on this issue, making for a rich comparison. Including the African Court of Human and Peoples' Rights would of course have been very relevant to this analysis, but there are simply no judgments yet to consider.

Second, both courts have considerable influence on the practice of the contracting parties to the conventions, as well as a considerable impact on international law. Their approach towards defamation is therefore both worth examining for the effect this will have on the respective regions, and the impact their decisions can have worldwide. In both these regions, civil society is calling for the decriminalisation of defamation. Yet in both regions, states are slow to decriminalise. This makes the approach of these courts worth noting, because of its potential influence on state practice, or lack thereof.

The Supreme Court of the United States

Reference will at times be made to the United States Supreme Court ('the US Supreme Court'), though the court will not feature in the comparative analysis as such. The jurisprudence of the US Supreme Court is highly influential, and referred to both by the European and the Inter-American Court. However, its approach to defamation is markedly different to that of the human rights' courts, due, no doubt, to the fact that the First Amendment of the US Constitution includes a provides a blanket protection of free speech, with no exceptions for privacy or reputation.[11] As it stands, there is no law criminalising defamation at the federal level in the United States,[12] and it is notoriously difficult to bring a defamation case in US courts.[13] Therefore, where cases of the US Supreme Court are mentioned, it will mainly be with reference to the very strict standards set by the US Supreme Court on defamation.

An interesting note in relation to this is that US claimants have been successful in having their cases heard in the UK in several cases, forming part of a UK phenomenon labelled 'libel tourism', an issue the recent legal reform in the UK has sought to deal with. Thus we see an example of how the law in one jurisdiction will have effects reaching beyond this particular jurisdiction. Furthermore, we see how issues in terms of defamation laws are not specific to their region and not a problem in that region alone; rather they should be dealt with on an international scale.

[11] Adam Berkaw, *Presumed Guilty: How the European Court Handles Criminal Libel Cases in Violation of Article 6(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms*, Columbia Journal of Transnational Law 50, no. 3 (2012), p 781

[12] See the matrix provided by the OSCE on United States defamation law, starting at p 171 in the report: OSCE, *Libel and Insult Laws: A Matrix on Where We Stand and What We Would like to Achieve*, Vienna, 2005, http://www.osce.org/fom/41958.

[13] See Morris Lipson, PhD, JD, *Comparing the US and Europe on Freedom of Expression,* Open Society Institute, January 2010

The African Court of Human and Peoples' Rights

As mentioned, another regional human rights court relevant to this analysis is the African Court of Human and Peoples' ('the African Court'). However, due to the young age of the Court, there has yet to be any cases on criminal defamation decided by the Court. The Commission has issued opinions on criminal defamation,[14] urging for decriminalisation, but as they are not binding they would not serve for comparison in this paper. The first case regarding criminal defamation is currently pending a decision before the Court,[15] the case of *Lohé Issa Konaté v. Burkina Faso.*[16] This decision will be very interesting to read because it serves as the marker of the African Court's approach to criminal defamation. However, due to a lack of more extensive case law on this issue, the African Court will not serve as a comparator for this thesis, but will be mentioned in the final analysis.

Legal sources

This thesis will predominantly rely on the case law of the European and the Inter-American Court of Human Rights as the basis of its legal analysis. Additional case law from the US Supreme Court and the African Court of Human and Peoples' Rights will also be referred to for the purpose of comparison. Other sources of primary law will be international human rights conventions and declarations, primarily the European and the American Convention of Human Rights. Secondary sources such as academic journals, news articles and NGO reports will provide further basis for analysis.

[14] African Commission on Human and People's Rights, *169: Resolution on Repealing Criminal Defamation Laws in Africa*, Resolution, Banjul, The Gambia: African Commission on Human and People's Rights, 10 November 2010, http://www.achpr.org/sessions/48th/resolutions/169/.
[15] As per 6 August 2014
[16] Application No 004/2013, *Lohé Issa Konaté v. Burkina Faso, ACHPR*

Chapter I: Chilling effect, defamation and international standards

This thesis will present a comparative analysis of the jurisprudence of two regional human rights courts; the European and Inter-American Court of Human Rights, in cases that concern defamation. The context of this analysis is the argument that defamation laws have a "chilling effect" on freedom of expression. Due to this chilling effect, two fundamental rights will be implicated in a defamation case, the right to protection of one's reputation, and the right to freedom of expression. Therefore, all defamation cases must balance these two seemingly opposing rights against each other. It is essentially this balancing act that will be assessed when examining the jurisprudence of the European and the Inter-American Court in the comparative analysis in Chapter II of this thesis.

This chapter will present the background and theoretical framework of the comparative analysis in Chapter II. It will first explain two key concepts, chilling effect and defamation, as these two concepts form the basis of how the jurisprudence of the regional human rights courts will be assessed. Questions to be answered are firstly, what is meant by the term "chilling effect in this context", and secondly, why defamation laws serve to chill free expression. Finally, this chapter will present and explain the relevant international standards on defamation, including legal standards and civil society standards. These are the standards against which the courts' jurisprudence presented in Chapter II will be assessed.

I. Chilling effect

Through the course of this paper, and in any discourse on free speech, the term "chilling effect" will be used. Put simply, "a chilling effect occurs where one is deterred from undertaking a certain action X as a result of some possible consequence Y".[17] What this means in the context of free speech is generally that there are factors present that, in one way or another, are stopping someone from speaking out or raising their voices. In other words, something is 'chilling' their exercise of free speech.

One example of this would be a media landscape that is hostile towards journalists, where journalists are often facing threats and their safety cannot be sufficiently protected. Such a media landscape is one that 'chills' free speech in the way that journalists may restrain themselves from publishing on controversial issues, for the fear of their own safety or the safety of others. Technically, the journalists are free to say what they want, and there might not be direct limitation in terms of laws or regulations. In practice, however, this chilling effect has served to limit media freedom. Given its nature, a 'chilling' effect is difficult to quantify or measure. As one of the main negative consequences of a chilling effect is self-censorship, it is close to impossible to know what would otherwise have been published, had a chilling effect not been present. There is however a clear consensus that the chilling effect does exists, and this is recognised in law.

[17] Monica Youn, *The Chilling Effect and the Problem of Private Action*, Vanderbilt Law Review 66, no. 1437 (2013), http://www.vanderbiltlawreview.org/2013/10/the-chilling-effect-and-the-problem-of-private-action/, p 1481

The term chilling effect originates from the United States Supreme Court, and was first recognised in *Lamont v. Postmaster General,*[18] a free speech case decided in 1965 by Lord Justice Brennan. After this, the term appears to have taken hold, and is commonly referred to in several jurisdictions.[19] In *Akcam v. Turkey,*[20] the European Court of Human Rights held that "The Court […] notes the chilling effect that the fear of sanction has on the exercise of freedom of expression."[21] The Court further noted in *Akcam* that a chilling effect would exist "even in the event of an eventual acquittal, considering the likelihood of such fear discouraging one from making similar statements in the future" [22]. Thus the chilling effect of sanctions begins to have its effect even before sanctions are imposed; the fear of the sanctions alone is enough to deter free expression.

Chilling effect and criminal defamation

All defamation laws serve to 'chill' expression for the simple reason that expression is in one way or another penalised or sanctioned – however justifiable this sanction may be. This is where the balancing test comes into play; as the courts will need to decide whether the chilling effect of a sanction is justifiable and proportionate to the aim pursued. Much will depend on the circumstances of a case; the nature of the expression, the damage caused to a person's reputation and of course, the sanction used.

It is generally agreed however that *criminal* defamation, as opposed to *civil* defamation will, in most cases, have the greatest chilling effect on expression. The very simple

[18] *Lamont v. Postmaster General*, 381 U.S. 301 (1965)
[19] See the UK case of *Derbyshire County Council v Times Newspapers Ltd* (1993) AC 534
[20] *Altug Taner Akcam v. Turkey*, no. 27520/07, Judgment of 25 October 2011, ECHR
[21] Ibid. § 68
[22] Ibid. § 68

explanation to this is that criminal sanction is generally more intrusive on the person than what civil sanction will be, and going through a criminal will put more of a strain on the person than a civil procedure. Some would argue the contrary; claiming that civil defamation laws are easier to abuse because the legal safeguards in civil cases are lower. For the purpose of this thesis, however, the assumption will be made that criminal defamation laws have a greater chilling effect on freedom of expression than civil defamation laws, assuming those civil laws include necessary safeguards against abusive practices.

There are a number of ways criminal defamation can 'chill' expression. One example is where there is active use of criminal sanctions against journalists that cover controversial issues or criticise public officials. Firstly, this chills expression in the simple sense that the criminal sanction, depending on what it is, may render the journalist unable to work for some time, for example due to imprisonment. The same may be said of all legal proceedings, be they criminal or civil, as they will take up the journalist's time and resources. Further, legal sanctions may include limitations on the right to work. These are three examples of how defamation laws may *directly* chill free speech.

A further issue is one that is reported by several journalists, namely that due to their criminal conviction, they find it hard to work, having been branded 'a libellous journalist'. This damages their credibility, making people hesitant to speak to them. This was reported for example by the journalist Herrera Ulloa, who gave testimony of "constant self-censorship" due to his being branded a 'convicted or libellous' journalist in his case before the Inter-American Court. He also gave testimony to exercising self-

censorship due to the fear of facing another criminal prosecution[23]. In this context, the chilling effect is less direct than in the previous examples, because the journalist is still able to work, but finds it increasingly difficult. This is an example of how defamation cases – even if the defendant is not found guilty – can have an *indirect* chilling effect on free speech.

Further, the mere threat of facing trial for defamation may lead to increased self-censorship among journalists, in order to avoid criminal prosecution altogether. Criminal prosecution, though it may not end in criminal sanction, is time consuming, costly, and is a frightening process to go through. Thus, in a system where defamation is actively and routinely being prosecuted, the chilling effect would seem greater, as the threat of facing charges is higher. Again, defamation laws can have an *indirect* chilling effect on free speech, and again we see that is applies regardless of whether the defendant is found guilty or not.

The above examples can also hold true even if a country deals with defamation under the civil procedure. While persons may not face the threat of criminal sanctions, civil proceedings can still be lengthy, costly and can be very strenuous for the persons involved. Therefore, in promoting a civil model of defamation law, as opposed to the criminal, the model envisaged is one that is mindful of the potential chilling effect a*ny* defamation law might have, be it civil or criminal.

[23] See Herrera-Ulloa's testimony in *Herrera-Ulloa v. Costa Rica*, Judgment of 2 July 2004, IACHR, starting on p13, specifically pp. 15-16

Evidence of a chilling effect

The threat of legal proceedings, whether civil or criminal, would make anyone think twice before publishing, especially on controversial issue. Nani Jansen, senior legal counsel for the Media Legal Defence Initiative, points to a 'drying up' of defamation cases in the African region as an example[24] of the chilling effect in practice. Whereas the region used to be relatively busy in terms of defamation cases brought against journalists, this appears to have let up recently. Though this development could have been due to fewer people choosing to litigate on defamation, Jansen suggests a different explanation. The reason for this, she suggests, is the closing down of independent media and increased self-censorship, effectively meaning there are less people to prosecute, as controversial issues are simply not being commented on.

In US jurisprudence, the chilling effect is routinely taken into account in First Amendment cases.[25] The Courts approach to the chilling effect has been refined over the past 60 years or so and now follows a clear pattern. First, the chilling effect is used as a concept to invalidate governmental actions that may suppress free speech. Second, the chilling effect is used to invalidate laws that can produce unwarranted legal uncertainty, for example by being too vague or overly broad. Finally, the chilling effect has been substantively incorporated into First Amendment jurisprudence as a burden on the First Amendment.[26]

[24] Comments made in interview with Nani Jansen, Legal Director of the Media Legal Defence Initiative, London, March 2014

[25] Monica Youn, *The Chilling Effect and the Problem of Private Action,* Vanderbilt Law Review 66, no. 1437 (2013), p 1495

[26] Monica Youn, *The Chilling Effect and the Problem of Private Action,* Vanderbilt Law Review 66, no. 1437 (2013), p 1495

This approach taken by the US courts is one that incorporates the chilling effect into three levels when considering free speech; in assessing government actions; procedural aspects; and the substantive level. This approach is comprehensive, and illustrates the strong emphasis given to the First Amendment in US jurisprudence. It illustrates the importance a court can play in redressing the negative impact certain government actions can have on civil liberties, and as such shows that courts will play an important role in terms of 'checks and balances' of executive power.

II. International standards on defamation

The relevant international standards on defamation come from two main sources; international human rights law, and interpretations and guidelines of this law provided by inter-governmental bodies and civil society actors. Generally, international human rights law will set out the basic rights, and inter-governmental bodies or civil society actors specialising in the field will issue guidelines or interpretations to accompany these rights. The following will set out the relevant human rights provisions to defamation law, and the relevant civil society standards. Note that further examination will be made of the American and the European Convention on Human Rights in Chapter II.

International human rights law

Freedom of expression forms a cornerstone in any democratic society, and is protected in all major human rights documents.[27] As a basic principle, these articles set out the right to

[27] As expressed in Article 19 of the Universal Declaration of Human Rights, Article 19 of the International Covenant on Civil and Political Rights, Article 10 of the European Convention on Human Rights, Article 13 of the American Convention on Human Rights, and Article 9 of the African Charter on Human and Peoples' Rights

free expression and the right to hold opinions, as well as the right to seek information.[28] If this right is to be limited, it must be in the pursuit of a legitimate aim, one such legitimate aim being the protection of a person's reputation.[29] This is key to understanding defamation law within a human rights framework, as the legitimate aim pursued in defamation laws is the protection of a person's reputation.

In addition to the pursuit of a legitimate aim, the limitation of the right to free expression must be in compliance with the limitation test commonly applied to human rights, as formulated in the Siracusa Principles by the United Nations in 1984[30]. This test generally follows three steps. First it provides that limitations of fundamental right must be prescribed by law. Second, they must pursue a legitimate aim. Third, the limitation must be necessary in a democratic society. As part of this third step, it must be determined whether the measure taken is the least restrictive available, and whether it is proportionate to the aim pursued.[31]

Civil society standards

In addition to the international legal standards set out in the human rights documents, civil society actors have added greatly to this body of law, by providing legal explanations, definitions, guidelines and more. In July 2000, ARTICLE 19 – an organisation devoted to the promotion of free speech - published a report on the

[28] ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation* , International Standards Series, July 2000, p 9
[29] Ibid. p 9
[30] United Nations, Economic and Social Council, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, 1984. http://www1.umn.edu/humanrts/instree/siracusaprinciples.html.
[31] Ibid.

international standards on defamation law, titled "*Defining Defamation Principles on Freedom of Expression and Protection of Reputation".*[32]

Principles emerging from civil society standards

These principles have received extensive international endorsement from leading bodies on freedom of expression, such as the Special Rapporteur on Freedom of Expression and Opinion to the United Nations, the Special Rapporteur on Freedom of Expression to the OAS as well as the OSCE Representative on Freedom of the Media.[33] Due to the significant endorsement these standards have enjoyed internationally, they will be considered authoritative for the purpose of this thesis, and will form the background on which judicial practice in regional human rights courts will be assessed. These standards will be considered further in the following.

a) The truth should not be penalised

As explained, the legitimate aim of defamation law is the protection of reputation. Such protection is offered to individuals or entities with the right to sue and be sued, and can only be justified where individuals or entities suffer harm to their reputation.[34] Reputation in this context is to be understood as "the esteem in which one is held within the community"[35], and protection should only be offered to the reputation an individual or entity in fact enjoys or merits. In other words, defamation laws should not be used to protect a reputation that is better than what the individual or entity in fact has. This

[32]ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation,* International Standards Series, July 2000

[33]International Press Institute, *PART III: INTERNATIONAL STANDARDS*, Accessed 11 August 2014, http://www.freemedia.at/ecpm/part-iii-international-standards.html.

[34] ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation,* International Standards Series, July 2000, p 5

[35] Ibid., p 5

explains the corresponding defence of truth; and it is generally accepted that truth shall serve as a defence in defamation proceedings.[36]

b) Defamation laws should not stifle criticism

Defamation laws cannot be justified if their purpose is to unduly stifle criticism or prevent reporting on public wrongdoings. Such aims unduly restrict free expression and interfere with the public's right to know. Many states provide for the defamation of state symbols or institutions, essentially making it a crime to criticise the state. This is in clear contravention with international standards.[37] Further, defamation laws are not justifiable means of protecting national security, public order or promoting god relations with other states. These aims are better pursued by other means, specifically designed for this purpose.[38] Likewise, legitimate aims such as combating hate speech is better pursued by specific legislation tailored to this aim, not through defamation laws.

This principle is not observed in many states. In the two focus regions of this paper, Europe and the Americas, a large number of states have laws protecting symbols and institutions of the state. In the EU countries alone, nine out of 28 member states have criminal offences protecting the state, ten states single out foreign officials and 16

[36] Ibid. p 10

[37] In the EU context alone, IPI found that sixteen EU countries, as well as four candidate countries criminally penalize insult of state symbols, and ten member states, as well as four candidate states, have criminal offences protecting the honour of the state, see Scott Griffen, International Press Institute, *Out of Balance: Defamation Law in the European Union and Its Effect on Press Freedom, A Provisional Overview for Journalists, Civil Society, and Policymakers*, Vienna: International Press Institute, July 2014, p 17

[38] ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation, International Standards Series*, July 2000, p 5

member states have criminal penalties for the insult of state symbols, according to a recent report on defamation laws published by the International Press Institute.[39]

c) Inherently problematic areas of defamation law

In terms of defamation law and international standards, ARTICLE 19 has noted a few particular issues that are inherently problematic and warrant particular attention. One is reputation of the deceased. Reputation is personal and cannot be inherited; thus allowing for defamation claims on behalf of the deceased is inappropriate. Furthermore, allowing such claims opens up for abuse and could prevent legitimate debate.[40] However, these international standards are not upheld as many states keep laws on their books providing protection for the reputation of the deceased.[41]

Another issue worth particular note is that of public officials, as well as public bodies. Though the two differ in terms of one being an individual and one being an entity, both warrant special attention due to their public status. Public bodies should, in accordance with international standards, not be allowed to bring defamation cases. The reason for this is twofold. Firstly, allowing criticism of such bodies is vital in any open democracy as it forms a crucial part of state accountability. Secondly, public bodies have considerable power to prevent criticism of their functions. Allowing for defamation

[39] Scott Griffen, International Press Institute, *Out of Balance: Defamation Law in the European Union and Its Effect on Press Freedom, A Provisional Overview for Journalists, Civil Society, and Policymakers*, Vienna: International Press Institute, July 2014, p 17

[40] ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation,* International Standards Series, July 2000, p 6

[41] The IPI found that 17 EU member states allow for criminal charges to be brought on behalf of the deceased, see Scott Griffen, International Press Institute, *Out of Balance: Defamation Law in the European Union and Its Effect on Press Freedom, A Provisional Overview for Journalists, Civil Society, and Policymakers*, Vienna: International Press Institute, July 2014, p 21

claims would further increase this power, awarding public bodies an undue amount of power in this regard.[42]

As for public officials, international standards make it clear they must show a greater tolerance for criticism.[43] This principle is based on two grounds. Firstly, in accepting a public role, the public official also accepts that they may be subject of public criticism; this is inherent to their role. Secondly, matters concerning public officials fall within the ambit of the public interest. Providing special protection for public officials in cases of defamation limits the public right to know, thus falling foul of international standards.[44]

Again with the abovementioned principles, there is a discrepancy between international standards and state practice. A number of states allow public entities to file defamation claims, and likewise provide special protection for public officials.[45] This is especially alarming due to the public role they serve; these laws hinder accountability and open up for a wide array of abuse, and it is critical that states' practice is in conformity with these international standards on this issue.

d) Conclusion: international standards

In conclusion, international standards on defamation are clear. Defamation laws are legitimate only when they serve to protect a person or entity's reputation, they cannot be

[42] ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation,* International Standards Series, July 2000, p 7
[43] Ibid. p 11
[44] Council of Europe, *Declaration on freedom of political debate in the media*, adopted by the Committee of Ministers 12 February 2001
[45] Scott Griffen, International Press Institute. *Out of Balance: Defamation Law in the European Union and Its Effect on Press Freedom, A Provisional Overview for Journalists, Civil Society, and Policymakers*. Vienna: International Press Institute, July 2014, p 11

justified by any other means. Further, truth should always serve as a defence in defamation cases; one cannot seek to protect a reputation one does not deserve. Where the onus lies in this respect is important; requiring the defendant to prove the falsity of their claims can place an undue burden on the defendant. It is therefore considered good practice that the onus of proof lie with the complainant in these cases, as the better placed party to prove the falsity of claims. As a minimum international standard, the onus of proof should always lie with the complainant when the disputed statement involves matters of legitimate public concern.[46]

Public entities should not be allowed to sue for defamation, nor should heirs. Finally, public officials must show wider tolerance towards criticism, and awarding them special protection contravenes international standards on defamation. As an overall principle, defamation laws must be construed in a manner that balances the protection of reputation against freedom of expression, and shall not be constructed with the purpose of stifling criticism or hindering state accountability. Despite these standards being clear, a discrepancy between legal practice and international standards remains. Though there are many reasons why laws on defamation may vary between states, culture and heritage being among them, we cannot ignore the fact that defamation laws prove very useful to states in order to stifle criticism and protect their power, and this is undoubtedly one of the reasons why international standards on defamation laws are simply not being met.

[46] ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, International Standards Series, July 2000, p 10

III. Criminal defamation

Is criminal defamation compatible with international legal standards?

In terms of the Siracusa limitation test, limitations on fundamental rights must be prescribed by law, pursue a legitimate aim and be necessary in a democratic society.[47] When deciding whether something is "necessary in a democratic society", one must take into account whether the measure is proportionate to its aim and whether it is the least restrictive option available. It is on these two counts that criminal defamation laws cannot be justified. Firstly, criminal sanction will usually be disproportionate to the aim pursued through defamation laws, i.e. protecting reputation. Sanctions such as imprisonment and restrictions on freedom are in most cases unduly harsh for having harmed someone's reputation. Further, criminal sanctions do little to rectify the person's reputation, rendering such sanctions inappropriate in most defamation cases. Thus to even apply the proportionality test to criminal sanctions on defamation seems useless, because a measure that is inappropriate can never be proportionate.

Adding to this argument is the fact that civil sanctions capable of addressing the issue are readily at hand. Civil remedies applicable to defamation cases can include retracting a story, a written apology, the right to reply or payment of damages. These remedies, in addition to being better suited to remedy the damage done, also pose less of a threat to free expression, as they would not penalise expression to the same extent. Thus, in the strict legal sense, criminal defamation laws fail the limitation test and should not be applied in defamation cases.

[47] United Nations, Economic and Social Council. *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights,* 1984

Abuse as a means to stifle criticism

The second argument against criminal defamation is that which was mentioned above: the abuse of defamation as a means to stifle criticism. By using the threat of criminal defamation charges, states are able to stifle critical voices, by imprisoning journalists, imposing huge fines or simply using legal proceedings as a way of hindering journalistic work. Lengthy legal proceedings are not only costly, but require time and effort; time and effort that could otherwise be spent reporting on key issues. The stigma associated with criminal charges may cause undue harm to journalist's professional reputation, and the mere threat of such charges can lead to self-censorship within the media.

Keeping dormant laws sets a poor example

Though the abuse of criminal defamation laws is perhaps the clearest threat to freedom of expression, their mere existence on the books, even without being used, is in itself a problem. Several countries keep their criminal defamation laws on the books, justifying this by the fact that they are never, or rarely, used. Within the Council of Europe Member States, for example, many states still provide for imprisonment as a sanction in defamation cases but, with the notable exception of Belarus[48] and Italy,[49] have agreed not to apply imprisonment in defamation cases.[50] Some states, such as Finland, have also chosen to abolish the use of imprisonment in most defamation cases, reserving the use of

[48] ARTICLE 19. *Defamation Law and Practice in Belarus, Moldova and Ukraine: Global Campaign for Free Expression*, London, 2006, http://www.article19.org/data/files/pdfs/publications/the-right-to-criticise.pdf

[49] ARTICLE 19, *Italy: Urgent Need to Reform Defamation Laws*, Accessed March 28, 2014, http://www.article19.org/resources.php/resource/37122/en/italy:-urgent-need-to-reform-defamation-laws.

[50] Scott Griffen, International Press Institute. *Out of Balance: Defamation Law in the European Union and Its Effect on Press Freedom, A Provisional Overview for Journalists, Civil Society, and Policymakers*. Vienna: International Press Institute, July 2014, p13

imprisonment for the most serious cases only.[51] Thus the defence for keeping criminal defamation laws on the books is that in practice, they are rarely used, and never abused. Such a defence is unsatisfactory.

Firstly, the mere existence of criminal defamation laws sets a poor example to other states and serves as a negative precedent. They may not be used at present, but as long as they remain on the books there are no legal guarantees that they will not be used in future. Though there may be a Council of Europe consensus that imprisonment is not an appropriate punishment in defamation cases, so long as national legislation provides for it, there is no legal bar on using these provisions. Case in point is the previous examples of Belarus and Italy; both part of the Council of Europe; both still using imprisonment as a sanction in defamation cases.[5253]

Secondly, when countries keep their criminal defamation laws on the books, it undermines the overall efforts to decriminalise. It is a clear double standard to urge some states to decriminalise, while others keep their criminal defamation laws on the books, and such double standards do not go unnoticed. Failing to recognise the negative impact the keeping of laws in one jurisdiction will have on another, means failing to recognise how international comparative law works. Separate legal systems do not exist in a

[51]Scott Griffen, International Press Institute. *Out of Balance: Defamation Law in the European Union and Its Effect on Press Freedom, A Provisional Overview for Journalists, Civil Society, and Policymakers*. Vienna: International Press Institute, July 2014, p13

[52] ARTICLE 19. *Defamation Law and Practice in Belaru: Moldova and Ukraine. Global Campaign for Free Expression*, London, 2006

[53] ARTICLE 19, *Italy: Urgent Need to Reform Defamation Laws,* Accessed 28 March 2014

vacuum, and countries are actively taking lessons and influence from one another, particularly in common law countries and human rights courts.[54]

A recent example of this is Ireland, where a provision on blasphemy was included in the new Defamation Act 2009, keeping blasphemy as a criminal offence under the new law.[55] The Irish law was again cited by Pakistan and the Organization of Islamic States in their submission to the UN, urging the UN to recognise "defamation of religions" as a norm of international law.[56] Though the Irish legislature may not have had concerns that such a provision would be abused in Ireland, they ought to have been concerned with the possible international ramifications of this law.

Not only are lawmakers drawing comparisons with one another, courts are too. As mentioned, regional human rights courts regularly refer to one another in their rulings,[57] as do national courts. One example is the UK Supreme Court[58] in one of its leading cases on defamation, *Reynolds v Times Newspapers.*[59] In *Reynolds,* over thirty citations were made to the decisions of other jurisdictions, including the European Court of Human

[54] See Helfer, Laurence R., and Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo,* California Law Review 93 (2005), pp. 7-11, https://www.princeton.edu/~slaughtr/Articles/IntlTribunals.pdf.
[55] See Part 5 Article 36 of the Irish Defamation Act 2009
[56]Derek C. Araujo, *Pakistan Pushes Irish Blasphemy Law Language at the UN Center for Inquiry,* 23 November 2009, http://www.centerforinquiry.net/blogs/entry/pakistan_pushes_irish_blasphemy_law_language_at_the_un/.
[57] Council of Europe, *Research Report: References to the Inter-American Court of Human Rights in the Case Law of the European Court of Human Rights,* 2012, http://www.echr.coe.int/Documents/Research_report_inter_american_court_ENG.pdf.
[58] Previously the House of Lords
[59] *Reynolds v. Times Newspapers Ltd and Others* [1999] UKHL 45

Rights.[60] This shows the interplay between courts and jurisdictions, and how the law of one jurisdiction inevitably influences the law in another.

It can therefore be argued that criminal defamation laws are not in compliance with international legal standards on defamation. Criminal sanction is in most cases unable to address the damage done in a defamation case, and a disproportionate way of pursuing this aim. Keeping criminal defamation laws on the books, even if they remain unused, is a problem in itself because it sets a negative precedent and undermines the efforts to get abusive states to decriminalise. It would therefore seem clear that states ought to decriminalise defamation.

Is there an international trend towards decriminalizing defamation?

When speaking of a "trend" towards decriminalising defamation, civil society pressure and state practice indicate very different tendencies. While there is clear pressure from free speech organisations and inter-governmental organisations urging states to decriminalise, states have been remarkably slow in their response. The implications of these two different trends will be discussed further in the following.

Civil society pressure

Free speech organisations such as ARTICLE 19,[61] the Media Legal Defence Initiative,[62] Human Rights Watch,[63] and Index on Censorship,[64] to mention but a few, have made it

[60] Dario Milo, *Defamation and Freedom of Speech*, 1st ed., New York: Oxford University Press Inc., 2008, foreword by Eric Barendt

[61] ARTICLE 19, "Criminal Defamation" Accessed 28 March 28 2014, http://www.article19.org/pages/en/criminal-defamation.html.

very clear that criminal defamation laws are problematic, and ought to be replaced by a civil system of defamation that strikes a reasonable balance between free speech and the right to reputation.

Likewise, the UN Human Rights Committee[65] has spoken out against criminal defamation, urging states to consider decriminalisation and condemning the use of imprisonment in defamation cases. In a joint declaration, the UN Special Rapporteur on Freedom of Opinion and Expression, together with the OAS Special Rapporteur on Freedom of Expression, the OSCE Representative on Freedom of the Media, and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information identified criminal defamation as a key challenge to freedom of expression in this decade.[66]

State practice

State practice, however, is not as uniform as this. Today, most states in the world have a provision on defamation in their criminal law. I assisted ARTICLE 19 in updating their map on criminal defamation provisions worldwide, and our research was clear; the

[62] Media Legal Defence Initiative, *Explaining the Issues: Criminal Libel,* Accessed 28 March 2014. http://www.mediadefence.org/stories/explaining-issues-criminal-libel.
[63] Human Rights Watch has urged decriminalization of defamation in several countries, notably recently in Libya as part of their legislative reform, see Human Rights Watch, *Priorities for Legislative Reform* Accessed 28 March 2014. http://www.hrw.org/reports/2014/01/21/priorities-legislative-reform-0.
[64] See Index on Censorship's input on the libel reform in the UK, *Index on Censorship | Campaigns and Advocacy,* Accessed March 28, 2014, http://www.indexoncensorship.org/campaigns-and-advocacy/.
[65] UN Human Rights Committee (HRC), *CCPR General Comment No.34: Article 19 (Freedoms of Opinion and Expression),* July 11, 2011, CCPR/C/GC/34, available at http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf
[66] Organization of American States, *Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade*, 2010, available at http://www.oas.org/en/iachr/expression/showarticle.asp?artID=784&lID=1.

overwhelming majority of states still keep criminal defamation on their books.[67] In some states these provisions will be dormant; in others they are actively being used.

In terms of state practice, the period between 2009-2013 could have given anti-criminal defamation campaigners grounds for optimism. This period saw several states decriminalise defamation, among them Argentina,[68] El Salvador,[69] Mexico,[70] Grenada,[71] Jamaica,[72] Moldova,[73] Czech Republic,[74] Estonia,[75] and the United Kingdom.[76] This apparent "wave" of decriminalisation was however followed by attempts to reintroduce criminal libel in several countries, including Russia[77], Grenada[78], Ukraine,[79] and Romania[80]. Not all these attempts succeeded, but they nonetheless illustrate a general

[67] The 2012 version of their map can be accessed here: http://www.article19.org/defamation/map.html
[68] Committee to Protect Journalists, *Criminal Defamation Eliminated in Argentina*, November 19, 2009. http://cpj.org/2009/11/criminal-defamation-eliminated-in-argentina.php.
[69] Freedom House, *Report 2013: El Salvador*, Accessed 22 November 2014. https://freedomhouse.org/report/freedom-press/2013/el-salvador#.VHCvH9SsVwR.
[70] http://cpj.org/2007/04/cpj-welcomes-calder%C3%B3ns-signature-on-landmark-defam.php
[71] International Press Institute, *IPI Campaign to Repeal Criminal Defamation in the Caribbean,* Accessed 23 November 2014, http://www.freemedia.at/in-focus/criminal-defamation.html
[72]International Press Institute, *Jamaica Decriminalises Defamation,* 6 November 2013. http://www.freemedia.at/newssview/article/jamaica-decriminalises-defamation.html.
[73] Freedom House, *Report: Moldova, Freedom of the Press*, Accessed 22 November 2014. https://freedomhouse.org/report/freedom-press/2013/moldova#.VHCvbNSsVwR.
[74] Freedom House, *Report 2013: Czech Republic*, Accessed 22 November 2014. https://freedomhouse.org/report/freedom-press/2013/czech-republic#.VHCvCtSsVwR.
[75] Freedom House, *Report 2013: Estonia,* Accessed 22 November 2014. https://freedomhouse.org/report/freedom-press/2013/estonia#.VHCvJdSsVwR.
[76] OSCE, *OSCE Media Freedom Watchdog Welcomes United Kingdom's Decriminalization of Defamation, Urges Other States to Follow*, 17 November 2009, http://www.osce.org/fom/51593
[77] Human Rights Watch, *Russia: Criminal Libel Law a Blow to Free Expression*, 16 July 2012, http://www.hrw.org/news/2012/07/16/russia-criminal-libel-law-blow-free-expression.
[78]International Press Institute, *Once Withdrawn, Electronic Defamation Bill Passes in Grenada*, 9 September 2013. http://www.freemedia.at/home/singleview/article/once-withdrawn-electronic-defamation-bill-passes-in-grenada.html
[79] Freedom House, *Freedom House Calls on Ukraine to Put Stop to Criminal Defamation Bill*, 1 October 2012, https://freedomhouse.org/article/freedom-house-calls-ukraine-put-stop-criminal-defamation-bill#.VHICudSsVwQ.
[80]Reporters Without Borders, *In an Attack on Free Expression, Insult and Libel to Be Recriminalized in Romania*, 20 December 2013, http://en.rsf.org/romania-in-an-attack-on-free-expression-20-12-2013,45657.html

political resistance to decriminalise, and would certainly disprove any claim that decriminalisation is a growing practice for states worldwide.

There are many reasons why states would hesitate to remove criminal defamation laws; primary amongst them is that they serve as a very useful tool in preventing public criticism. Criminal defamation laws enable states to impose criminal sanctions on those guilty of defamation, and this threat of criminal sanction is likely to deter people from speaking out. Notably it may deter the media from reporting on contentious issues, an essential part of their job. In Russia, for example, possible criminal sanctions for defamation are fines, imprisonment, corrective labour or restrictions on freedoms.[81] The threat of these sanctions will often be enough to deter someone from speaking out, rendering their actual use unnecessary. It is clear that keeping criminal defamation laws in place is a very useful tool to any state interested in preserving their power.

This is not a fictional threat, and charges of criminal defamation are actively being used by several states[82] as a means to stifle criticism and keep the media in check. Note for instance the situation in Azerbaijan, where press freedom is considered to be seriously limited,[83] with reports from recent years showing an active persecution of bloggers and journalists. Italy has been seriously criticised lately for upholding the prison sentence of a

[81] Information is available on the states of certain states by scrolling over the relevant country on ARTICLE 19s defamation map: http://www.article19.org/defamation/map.html?dataSet=defamation_legislation_2012
[82] Council of Europe, *Parliamentary Assembly Resolution 1577: Towards decriminalisation of defamation*, 2007, para 11, available at http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/eres1577.html
[83] ARTICLE 19: International Freedom of Expression Mission to Azerbaijan, *Azerbaijan's Deteriorating Media Environment*, London, 7 September 2010

newspaper editor for charges of criminal defamation,[84] imprisonment for defamation charges being deemed against the European consensus on the matter. In Ecuador, criminal libel has received considerable attention after the Ecuadorian President, Rafael Correa, won his third defamation suit within the fifth year of his presidency.[85] These are only a few examples of what is recognised as a threat to free speech worldwide.

Thus the "trends" on criminal defamation laws seem rather conflicting. Whereas NGOs and regional bodies seem to clearly oppose these laws, states are slow in decriminalising. While a small 'wave' of decriminalisation may have taken place between 2009-2013, it would be premature to see this as indicative of anything larger, especially considering the small wave of "recriminalisation" taking place within the same timeframe. When moving on to consider the case law of international human rights courts on this issue, this lack of a trend – or state consensus – is worth keeping in mind.

Chapter II: Defamation and regional human rights courts

Method and purpose

a) Method

In this chapter, the jurisprudence of the Inter-American Court of Human Rights will be compared to that of the European Court of Human Rights in cases concerning defamation. Key issues of defamation law will be identified, and the approaches of the two courts on each issue will be compared. As the European Court has issued a large

[84] OSCE Representative on Freedom of the Media, *OSCE Media Freedom Representative Deplores Italian Criminal Defamation Ruling, Urges Law Reform*, Accessed 28 March 2014, http://www.osce.org/fom/94351

[85] TIME, *Ecuador's Correa Wins Another Libel Case: Are the Latin American Media Being Bullied?* Accessed 28 March 2014. http://world.time.com/2012/02/10/ecuadors-correa-wins-libel-case-the-latest-episode-in-the-war-on-latin-american-journalists/

number of judgments in defamation cases, emphasis has been placed on Grand Chamber judgments and cases that have been noted by the Court itself as particularly important in the "modification, clarification or modification of the Court's case-law".[86] Where no such case has been found to directly address a specific issue, additional case-law has been consulted. The Inter-American Court has issued fewer judgments on this issue and as such, all judgments of the Inter-American Court concerning defamation have been considered relevant.

b) Purpose

The purpose of this comparison is to highlight the similarities and differences of the two courts' approach to defamation. Such a comparison serves several purposes. First, the approaches taken by human rights courts are worth notice because these courts hold considerable influence in their regions, and their judgments are binding on the Member States. Second, the jurisprudence of these courts also forms part of international law, as stated in Article 38(1) of the Statute of the International Court of Justice. Thus not only are the courts bound by international law when making their decisions, when made, these decisions form part of international law in return. Regional human rights courts are therefore influential not only in their own regions, but also internationally, as the precedent set by these courts ultimately form part of the body of international law.

[86] Note that the European Court of Human Rights uses a scale of 1-3 to denote how important the Court deems a case to be in its own jurisprudence, cases marked with importance level 1 are considered to "make a significant contribution to the development, clarification or modification of the Court's case-law", see HUDOC User Manual. European Court of Human Rights, 2012, p 11. http://www.echr.coe.int/Documents/HUDOC_Manual_2012_ENG.pdf.

It is also worth noting where the two courts *differ* in their jurisprudence on defamation law. While their approaches may be tailored to their different regions, there is nonetheless scope for each court to learn from the approach of the other, and one approach may well be preferable to the other from a free speech perspective. International courts refer extensively to one another in their decisions, and a negative or positive approach in either court is of great relevance to the other, as well as to international standards as a whole.

The conventions and legal framework

Before comparing the jurisprudence of the two courts, regard should be had to the two legal frameworks in which these courts work, with emphasis on the conventions to which the courts are bound when issuing decisions. Inherent differences within the conventions serve to explain much of the difference in their approach. Additionally, in both regions explanatory notes and guidelines regarding the conventions have been issued both by the Organization of American States and the Council of Europe. Notably, the Office of the Special Rapporteur for Freedom of Expression issued in 2009 specific principles to be followed in a report titled "The Inter-American Legal Framework regarding the Right to Freedom of Expression"[87]. In 2004, the Council of Europe issued a "Declaration on freedom of political debate in the media"[88], referred to by the European Court of Human Rights in their case law[89].

[87] Office of the Special Rapporteur for Freedom of Expression Inter American Commission on Human Rights, *The Inter-American Legal Framework Regarding the Right to Freedom of Expression*, December 30, 2009, available at http://www.oas.org/en/iachr/expression/docs/publications
[88] Council of Europe, Committee of Ministers, *Declaration on Freedom of Political Debate in the Media*, 12 February 2004, https://wcd.coe.int/ViewDoc.jsp?id=118995&Lang=en.
[89] See *Otegi Mondragon v. Spain, no. 2034/07*, Judgment of 15 March 2011, ECHR § 30

The Conventions

Though the two conventions, the European Convention on Human Rights[90] and the American Convention on Human Rights,[91] offer a relatively similar protection of free speech as well as reputation, notable differences do exist. In the European Convention, Article 10 provides that

> Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.[92]

Protection of reputation is provided for in subparagraph two of Article 10, listed as one of the legitimate grounds for which the right to free expression can be limited[93]. It should also be noted that in the European Court's more recent case law concerning defamation, the Court has accepted the protection of reputation to fall within the right to private life, as set out in Article 8 of the Convention[94].

In the American Convention on Human Rights, the right to freedom of expression is set out in Article 13, providing that,

> Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.[95]

[90] The European Convention on Human Rights, 1950, available at http://www.echr.coe.int/Documents/Convention_ENG.pdf.
[91] The American Convention on Human Rights 1969, available at https://www.oas.org/dil/access_to_information_American_Convention_on_Human_Rights.pdf
[92] Article 10(1) of the European Convention on Human Rights, 1950
[93] Article 10(2) of the European Convention on Human Rights, 1950
[94] See *Chauvy and others v. France*, no. 64915/01, Judgment of 29 June 2004, ECHR §70, as well as *Putistin v. Ukraine*, no. 16882/03, Judgment of 21 November 2013, ECHR §32
[95] Article 13(1) of the American Convention on Human Rights 1969

In subparagraph two of the Convention, it states that there may be subsequent imposition of liability to ensure "respect for the rights of reputation of others",[96] but this must not extend to prior censorship. This clarification on prior censorship deserves notice, as it is a marked difference between the American and European systems, explaining why the two courts would take a different approach on the issue of prior censorship.

Further, the American Convention expressly provides for a right of reply in a separate article. As per Article 14(1) of the Convention,

> "Anyone injured by inaccurate or offensive statements or ideas disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make a correction using the same communications outlet, under such conditions as the law may establish".

This correction or reply shall not, however, "remit other legal liabilities that may have been incurred",[97] thus the American system does not provide exclusively for the right of reply or correction as a remedy to damage to reputation. However, as is made clear in case law, the specific mention of a right of reply within the American Convention can explain the Inter-American Court's larger emphasis on this recourse, compared to the European Court.

Additionally, Article 11(1) of the American Convention on the right to privacy provides that "everyone has the right to have his honor respected and his dignity recognized".[98] This provision is markedly different to the right to privacy contained in Article 8 of the European Convention, providing that "Everyone has the right to respect for his private

[96] Article 13(2)(a) of the American Convention on Human Rights 1969
[97] Article 13(2) of the American Convention on Human Rights 1969
[98] Article 11t of the American Convention on Human Rights 1969

and family life, his home and his correspondence".[99] This marked difference would explain why the European Court has struggled to hold that the right to privacy includes protection of reputation,[100] whereas the Inter-American Court has not.

Thus, from these conventions themselves, it is clear that although the two conventions provide for largely the same rights in terms of freedom of expression and opinion, the conventions are worded in a slightly different way. Furthermore, the express exclusion of prior censorship in the American Convention, as well as the inclusion of a right of reply in a separate article, and the protection of reputation as part of the right to privacy, serves as an explanation of why the jurisprudence of the two respective courts differ in certain areas.

Key issues to be examined

The jurisprudence of the two courts will be compared with a focus on seven key issues. These are issues that have been identified in this thesis as particularly important when addressing the balance to be struck between freedom of expression and protection of reputation.

The first and perhaps most important issue is that of criminal defamation; where do the two courts stand on the issue of criminal defamation as a whole? Second to be considered is the defence of truth and the burden of proof in establishing this defence. Addressing

[99] Article 8(1) of The European Convention on Human Rights 1950

[100] Until recently, the European Court did not recognize Article 8 as including protection of reputation. Two recent judgments, however, saw a change in this approach, notably *Axel Springer AG v. Germany,* n. 39954/08 and *Von Hannover v. Germany (no.2),* nos. 40660/08 and 60641/08, both judgments of 7 February 2012, ECHR

this issue second is intended to signify its importance; in defamation cases, the defence of truth is key. Third, and linked to the defence of truth, is the issue of statements of facts versus statements of opinion. Fourth is how the courts treat defamation cases where the statements concern matters of public interest. Fifth is that of public officials and sixth is the matter of legal clarity and defamation law. Seven concerns *civil* defamation, notably remedies – with an emphasis on the right of reply – and liabilities – with an emphasis on damages.

The approach of the Courts on key issues

1. Criminal defamation

Neither the European nor the Inter-American Court of Human Rights has held criminal defamation in itself to be contrary to freedom of expression. The Inter-American Court made this very clear in *Kimel v. Argentina,*[101] in stating that "the Court does not deem any criminal sanction regarding the right to inform or give one's opinion to be contrary to the provisions of the Convention", rather, it would depend on the circumstances of the case.[102] The Court went on to stress the seriousness of these measures, measures that would be subject to a test of "absolute necessity".[103]

The European Court has taken a relatively similar position, phrased in a slightly different way. In *Cumpănă and Mazăre v. Romania,*[104] the European Court held that imposing prison sentences for press offences is compatible with Article 10 only in exceptional

[101]*Kimel v. Argentina*, Judgment of May 3 2008, IACHR
[102]Ibid. § 78
[103]Ibid. § 78
[104]*Cumpănă and Mazăre v. Romania* [GC], no 33348/96, Judgment of 17 December 2004, ECHR

circumstances, such as incitement to violence or hate speech.[105] In assessing the necessity of such measures, the European Court focuses largely on the proportionality of the measure.[106] Thus the Court does not hold criminal defamation to be a violation of the Convention, but sets a high standard for the use of imprisonment in defamation cases.

The two courts have made it clear that criminal defamation is inherently problematic and should be construed narrowly. One example is that both courts have made note of the inherent problem of criminal sentences as they go on a person's criminal record, which in itself serves a chilling effect on freedom of expression.[107] Thus both courts are accepting the seriousness of using criminal sanctions in defamation cases. Despite the courts' agreement on a narrow construction of criminal defamation, their understanding of this does differ somewhat, as can be seen in their judicial approach. Whereas the Inter-American Court places its emphasis on "absolute necessity" [108] of the measure, the European Court places a higher emphasis on the proportionality of the measure.[109] In the Inter-American Court, if a measure is deemed unnecessary, whether or not it is proportionate becomes irrelevant. In the European Court, however, necessity forms part of the proportionality test. [110]

Considering that both courts place their emphasis on necessity and proportionality in assessing cases of criminal defamation, one could argue that the existence of civil

[105] *Cumpănă and Mazăre v. Romania* [GC], no 33348/96, Judgment of 17 December 2004, ECHR , § 116
[106] Ibid. §120
[107] *Scharsach and News Verlagsgesellschaft mbh v. Austria*, no. 39394/98, Judgment of 13 November 2001, ECHR, § 32 and *Usón Ramírez v. Venezuela*, Judgment of November 20, 2009, IACHR, § 81
[108] *Tristán Donoso v. Panamá*, Judgment of January 27, 2009, IACHR, § 120
[109] *Stoll v. Switzerland,* no. 69698/01, Judgment 10 December 2007, ECHR, § 153
[110] Ibid. § 153

remedies to defamation means a blanket approach against criminal defamation is within the competency of both courts. A claim was made earlier in this paper that civil remedies are better suited to addressing harm against reputation than criminal sanctions, as well as being less intrusive, posing less of a threat to free expression. Thus, criminal sanctions in defamation cases are neither proportionate nor necessary, because civil remedies are readily available. It is disappointing that the European Court, the Court that was able to deliver a trailblazing judgment on *refoulement* in *Soering v. the UK*[111] is now taking such a cautious approach to an issue as serious as this. It appears that both courts continue to be deferential on this matter – and in the case of the Inter-American Court, even increasingly so.

This deference was made especially clear in the most recent case of the Inter-American court on criminal defamation, *Mémoli v. Argentina.*[112] In *Mémoli,* the Court emphasised that freedom of expression is not an absolute right, and states may impose responsibilities and penalties in order to achieve a balance between protecting free speech as well as the right to reputation.[113] The case has been extensively criticised as being a step backwards for the Inter-American Court on criminal defamation,[114] as the case was the very first in which the Court held that a charge of criminal defamation was *not* a violation of Article 13 of the American Convention. Whether or not this marks a negative trend for the Inter-American Court remains to be seen, but as of now there is little to indicate that the Inter-

[111] *Soering v. the United Kingdom*, no. 14038/88, Judgment of 7 July 1989, ECHR
[112] *Mémoli v. Argentina*, Judgment of August 22, 2013, IACHR
[113] Ibid. § 142
[114] Eduardo Bertoni, *Setbacks and Tension in the Inter-American Court of Human Rights*, 17 December 2013, http://www.mediadefence.org/blog/setbacks-and-tension-inter-american-court-human-rights#.VHM4KdSsVwQ

American Court is increasing its protection of free expression, rather, it would appear it is doing the opposite.

2. Defence of truth and burden of proof

A second issue that is key in defamation cases is the defence of truth. A good defamation law includes the defence if truth; a person cannot defend a reputation they do not in fact have or deserve.[115] This is recognised as good practice, and followed by many states.[116] The impugned may of course still have recourse under privacy law, but in defamation cases, the truth should serve as a defence.[117] Complicating the defence of truth however is the burden of proof. In proving the truthfulness of a defamatory statement, the burden of proof is often placed with the defendant. Not only does this go against the presumption of innocence normally awarded the accused – it will also often place an undue burden on the accused, as they are not the best placed to provide such evidence. The person alleging to have been defamed will normally be better placed in proving the falsity of any statements concerning them.

This is especially problematic in public interest cases. The fact that the defamed is normally better placed to prove the falsity of statements holds especially true where public persons or institutions are concerned, as much information about them will be restricted. The negative impact this has on freedom of expression is made stronger by the public's right to know in these cases. Thus, in cases concerning matters of public concern, the importance of enabling public debate justifies a heavier burden being placed

[115]ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation,* International Standards Series, July 2000, p 10
[116]Ibid. p 10
[117]Ibid. p 10

on the plaintiff to prove the falsity of a statement, rather than the defendant proving its truthfulness.[118]

In the case law of the US Supreme Court, the principle of placing the burden of proof on the plaintiff in cases concerning matters of public interest is made very clear. In *New York Times v. Sullivan,*[119] the US Supreme Court first acknowledged the difficulty in establishing that an "alleged libel was true in all its factual particulars".[120] In doing this, "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is, in fact, true, because of doubt whether it can be proved in court or fear of the expense of having to do so".[121] On the basis of this, the US Supreme Court held that the burden of proof should lie with the plaintiff in cases involving matters of public concern.

This approach of the US Supreme Court illustrates how the chilling effect is considered a burden on the First Amendment, as explained in the previous chapter on the chilling effect. It again shows the strong protection awarded to the First Amendment. Both regional courts echo the approach of the US Supreme Court in that their emphasis has been largely on the burden of proof in matters of public concern. The question is therefore left open as to whether the courts would claim that the burden of proof should *always* lie with the defamed.

[118] ARTICLE 19, *Defences & Remedies*, Accessed 2 September 2014. http://www.article19.org/pages/en/defences-remedies.html
[119] *New York Times Co. v. Sullivan* 376 U.S. 254 (1964)
[120] Ibid. Page 376
[121] Ibid. Page 376

As the first example, the European Court held in *Dalban v. Romania*[122] that placing the burden of proof on the defendant in a defamation case cannot be justified when the defendant is a journalist. The Court stressed the important function of a free press in a democratic society.[123] According to the Court, it would be unacceptable to require a journalist to prove the truthfulness of a "critical value judgment".[124] It would seem here that the European Court qualifies its finding on two grounds; firstly, the defendant must be a journalist and secondly, the statements concerned should be "critical value judgments".

The Inter-American Court has taken a similar, but less qualified approach to this. In *Kimel v. Argentina,*[125] the Court held that "the burden of proof must fall on the party who brings the criminal proceedings [at all stages]".[126] Judge Ramirez confirms this in his separate concurring opinion in the case, stating that this principle is "a general guarantee in the relationship between the state and individuals". Worth noting is that this principle is extended only to criminal cases. This in fact forms one of the crucial arguments *against* decriminalising defamation; the fact that the criminal process offers stronger safeguards against the accused and is such more difficult to abuse. It would therefore be important for both courts to recognise that this principle should hold as a general rule in all defamation cases, be they civil or criminal.

[122] *Dalban v. Romania,* no. 28114/95, Judgment of 28 September 1999, ECHR
[123] Ibid. § 49
[124] Ibid. § 49
[125] *Kimel v. Argentina*, Judgment of 2 May 2008, IACHR,
[126] Ibid. § 78

Again, we see the Inter-American Court taking a stronger stance than its European counterpart on defamation issues, as the principle seems to extend to all criminal defamation cases, not just those concerning journalists making critical value judgments. However, neither court seems to extend this principle to all defamation cases, a practice that would be more in keeping with international standards on defamation law.

3. Statements of facts v opinions

There is an important distinction between statements of facts and statements of opinions in defamation cases. Whereas statements of facts can be proved, and thus may be subject to the defence of truth, opinions cannot. It is therefore worth noting what the courts deem as a statement of fact versus a statement of opinion. Beyond this, the duty to check the accuracy of information is crucial. Keeping in mind the duty on the State to ensure a responsible and accurate press, it can nonetheless prove detrimental to the press to require *absolute* certainty when checking the accuracy of information, as this standard is often impossible to achieve, and would consequently chill expression.

It is clear from the jurisprudence of both courts that both statements of facts and opinions must have some factual basis. What makes them different is the *degree of factual basis required.* In the European Court's case law, this was clarified in *Scharsach and New Verlagsgesellschaft v. Austria.*[127] In *Scharsach*, the Court held that value judgments are to be considered different from statements of facts. What makes a value judgment a "fair comment" in terms of Article 10 of the European Convention is whether or not the value

[127] *Scharsach and News Verlagsgesellschaft mbh v. Austria*, no. 39394/98, Judgment of 13 November 2001, ECHR

judgment is based on "sufficient facts".[128] What makes a value judgment different from a statement of fact, in this respect, is "the degree of factual proof which has to be established".[129]

The Inter-American Court has taken a broadly similar approach. In *Tristán Donoso v. Panama,*[130] the Court found the statements made by Mr. Donoso "not groundless"; because Donoso had based himself on information he had grounds to believe. Though factually inaccurate, the information had been supported by two important institutions, and as such Mr. Donoso had been justified in believing it.[131] In *Usón Ramírez v. Venezuela,*[132] the Court found that, not only was the statement by Mr. Ramirez a statement of opinion – and consequently not "subjected to truthful requirements"[133] - but furthermore, the opinion was worded in such a way that the Court could not read into it "specific intention to insult, offend or disparage".[134]

Thus it seems the Inter-American Court of Human Rights is more permissive of opinions than that of the European Court. Whereas the European Court requires "sufficient factual basis" in order to deem something a "fair comment", the Inter-American Court has held that opinions are not "subjected to truthful requirements". Furthermore, the Inter-American Court seems to focus more on intention rather than factual basis. By setting the standard lower on what factual grounds are necessary, the risk of a chilling effect on

[128] *Scharsach and News Verlagsgesellschaft mbh v. Austria*, no. 39394/98, Judgment of 13 November 2001, ECHR, § 40
[129] Ibid. § 40
[130] *Tristán Donoso v. Panamá,* Judgment of January 27, 2009, IACHR, § 125
[131] Ibid. § 126
[132] *Usón Ramírez v. Venezuela,* Judgment of November 20, 2009, IACHR
[133] Ibid. § 86
[134] Ibid. § 86

opinion is consequently lower. Again one can conclude that the Inter-American approach offers stronger protection of the right to freedom of expression.

4. Matters of public interest

Though the Inter-American Court has not held criminal defamation contrary to the Convention per se, it has held that where "matters of public interest or political statements in the context of an electoral campaign"[135] are concerned, punitive measures *cannot* be justified, as there is no "imperative social interest" involved. This was made clear in *Canese v. Paraguay* in 2004. [136] In the same judgment, the Court criticised the reformed criminal code of Paraguay, as the reformed code was still used as "an instrument to create an intimidating environment that inhibits statements of public interest",[137] in violation of Article 13 of the American Convention.

The Inter-American Court sets a high standard on this, stating that laws that restrict Convention rights must go beyond serving "useful" or "desirable" purposes, their function must "clearly outweigh the social need for the full enjoyment of […] Article 13".[138] In the case, Mr.Canese, a journalist, was tried and charged with slander for questioning the suitability and integrity of a presidential candidate in the debates leading up to the 1993 Paraguayan presidential elections. He was sentenced to two months of imprisonment and a fine the equivalent of USD 1,400.[139] In the reasoning of the Court, the fact that these statements were made in the context of an electoral campaign and

[135] *Ricardo Canese v. Paraguay*, Judgment of August 31, 2004, IACHR § 72(h)
[136] Ibid. § 72(h)
[137] Ibid. § 72(u)
[138] Ibid. § 96
[139] Ibid. § 2

concerned matters of public interest is given great importance.[140] Under the circumstances, the Court deemed the sanctions imposed on Mr. Canese both unnecessary and excessive, and ultimately in breach of Article 13 of the American Convention.

In Europe, the European Court has been clear that "in political debate on matters of general interest, […] restrictions on the freedom of expression must be interpreted narrowly*"*.[141] The Court has given a wide interpretation of "matters of general interest" in this respect, extending it beyond pure political debate, to include all matters of public concern. This has been reiterated throughout the Court's case law on Article 10, and is seen for example in *Chauvy and others v. France.*[142] In *Chauvy,* the Court makes it very clear that not only does the press have a duty to impart information of public concern, but the public also has a right to receive such information. As such, "the national margin of appreciation is circumscribed by the interest of democratic society in enabling the press to exercise its vital role of 'public watchdog' in matters of general interest".[143] Further, the European Court stressed in *Barfod v. Denmark*[144] that members of the public voicing their opinions on matters of public concern is important, and should not be discouraged by use of criminal or civil sanction.[145]

That being said, the Court does not deem political debate to be without its limits, and will allow states to impose restrictions or penalties, subject to the Court's own supervision.

[140] *Ricardo Canese v. Paraguay,* Judgment of August 31, 2004, IACHR, § 105
[141] *Lopes Gomes da Silva v. Portugal*, no. 37698/97, Judgment of 28 September 2000, ECHR
[142] *Chauvy and Others v. France*, no. 64915/01, Judgment of 29 June 2004, ECHR, §§ 67-68
[143] Ibid. §§ 67-68
[144] *Barfod v. Denmark*, no. 11508/85, Judgment of 22 February 1989, ECHR
[145] Ibid. § 29

This was held in *Castells v. Spain*[146] and was further elaborated on by the Court's Grand Chamber in *Öztürk v. Turkey*[147]. In *Öztürk*, the Court made it very clear that, despite there being little scope for restrictions on political speech under the Convention, measures – even of a criminal nature – may legitimately be used by the State "in their capacity as guarantors of public order".[148]

The wording of the Court is crucial in this respect. Note that the Court does not restrict the use of measures, even criminal, to limit public debate only to ensure public order, rather, it awards the state with a general power to restrict public debate due to state's role as "guarantors of public order". Thus the Court seems to go as far as placing a positive duty on the state to restrict public debate in some circumstances. Further, the Court states in *Öztürk* that in cases where speech incites to violence or hatred against an individual, the margin of appreciation in imposing restrictions is wider.[149] This statement is reiterated by the Courts in several cases,[150] and forms a clear principle in the European Court's approach to cases concerning free speech.

In conclusion, both courts place a strong emphasis on the importance of political debate and matters of public concern. The Inter-American Court however, goes further than the European Court in stating that criminal defamation is contrary to the Convention in matters of public concern or in the context of electoral campaigns.

[146] *Castells v. Spain*, no. 11798/85) Judgment of 23 April 1992, ECHR, § 46
[147] *Öztürk v. Turkey* [GC], no 22479/93, Judgment of 28 September 1999, ECHR
[148] Ibid. § 66
[149] Ibid. § 66
[150] See for example *Ceylan v. Turkey* [GC], no. 23556/94 and *Okçuoğlu v. Turkey* [GC], no. 24246/94, Judgments of 8 July 1999, ECHR

5. Public officials

Neither the Inter-American Court, nor the European Court has excluded the use of criminal defamation in matters concerning public officials; though both Courts emphasize that public officials must be more tolerant towards criticism. This approach is similar to that taken by the US Supreme Court in *New York Times v Sullivan.*[151] The principle is, as mentioned earlier, founded on two main precepts. First, public officials serve a public function, and thus there is a public interest in ensuring their accountability. Second, public officials have chosen to enter into a public role, and as such *knowingly* lay themselves open to a higher level of scrutiny and criticism than that of private persons. Both regional courts broadly follow this line of reasoning.

Principle 10 of the OAS Declaration of Principles on Freedom of Expression[152] makes it clear that in cases where "the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest" only civil sanctions are to be used. Furthermore, for such cases to succeed, it must be proven that the news was communicated with the "specific intent to inflict harm", and with awareness that the news were false, or gross negligence in determining the truthfulness of the news.[153] Though these standards set by the OAS on this are seemingly clear, the approach taken by the Inter-American Court has not been quite as strict on this.

[151] *New York Times v. Sullivan*, 376 US 254 (1964)
[152] OAS Special Rapporteur on Freedom of Expression, *Declaration of Principles on Freedom of Expression*, Accessed 22 November 2014.
http://www.oas.org/en/iachr/expression/showarticle.asp?artID=26&lID=1
[153] Ibid. Principle 10

In *Kimel v. Argentina,*[154] the Inter-American Court decided on a case of criminal defamation charges brought by a member of the judiciary. The Commission argued that members of the judiciary are public officials, and as such "should be more tolerant of criticism from individuals".[155] The Court does not disagree with this statement, but makes it clear that members of the judiciary are nonetheless protected by Article 11 of the Convention (Right to Privacy), and as such have the right to protection of their honour.[156] Further, the Court recognises criminal proceedings as a suitable means of ensuring such protection.[157] Thus the Court does not exclude the use of criminal proceedings in cases of public officials, rather, it goes on to assess whether the measure in the given case is "necessary and proportionate".[158]

In their assessment in *Kimel*, the Inter-American Court reiterates the arguments that public officials are subject to greater scrutiny than private persons, as "their activities go beyond the private sphere and enter the realm of public debate".[159] Furthermore, the Court considers the seriousness of criminal sanction, emphasizing the stigmatising effect of a criminal sentence, the latent risk that Mr. Kimel might be deprived of his liberty, the considerable amount he was fined as well as the overall impact of criminal proceedings on Mr. Kimel.[160] On these grounds, the Court finds the use of criminal defamation proceedings to have been unnecessary and disproportionate and as such contrary to

[154] *Kimel v. Argentina*, Judgment of May 2, 2008, IACHR
[155] Ibid. § 68
[156] Ibid. § 71
[157] Ibid. § 71
[158] Ibid., §71
[159] Ibid., § 86
[160] Ibid. § 85

Article 13 of the American Convention.[161] But the fact that the expression concerned a public official was not in and of itself enough to find a violation.

The Committee of Ministers of the Council of Europe provides the European guidelines on this same issue. In their declaration on freedom of political debate in the media,[162] it is clearly stated that the state or political institutions "should not be protected by criminal law against defamatory statements"[163] and political figures "should not enjoy greater protection of their reputation […] than other individuals.[164] Clearly, this standard is not as strict as in the American context, though the approach taken by the European Court is relatively similar to that of the Inter-American Court.

In the landmark case of *Lingens v. Austria*[165] the European Court stressed firstly that the press not only has a duty to inform on political issues, the public also has a right to receive this information.[166] Further, the limits of acceptable criticism are wider for a politician than for an individual, because a politician *knowingly* "lays himself open to close scrutiny of his every word and deed by both journalists and the public at large".[167] The emphasis of the Court is worth notice. While the Court does say that the press has a general duty to inform on political matters, and the public has a corresponding right to know, the Court seems to hold that the main reason politicians must tolerate wider criticism is their *choice* to take on a role as politician and thus subjecting themselves to a

[161] *Kimel v. Argentina*, Judgment of May 2, 2008, IACHR, § 94.
[162] Council of Europe Committee of Ministers, *Declaration on Freedom of Political Debate in the Media*, February 12, 2004
[163] Ibid. Principle II
[164] Ibid. Principle VI
[165] *Lingens v. Austria,* no. 9815/82, Judgment of 8 July 1986, ECHR
[166] Ibid. § 41
[167] Ibid. § 42

higher level of public scrutiny. This is important to note, as it serves to explain the different approach taken by the Court with regard to civil servants.

The distinction made by the European Court between politicians and civil servants is made clear in *Janowski v. Poland.*[168] In *Janowski,* criminal defamation charges had been brought against the applicant for using abusive words against municipal guards. The Court did not accept the reasoning of the Commission in this case, that civil servants were subject to wider limits of acceptable criticism because they were acting in an official capacity. Rather, the Court held that civil servants cannot be said to "knowingly lay themselves open to close scrutiny" in the same way as politicians.[169] The Court did accept that civil servants may "in some circumstances" be subject to wider limits of criticism than private individuals, but did not accept that they should be placed on an equal footing as politicians in this regard.[170]

As a matter of fact, the European Court stressed the importance public confidence plays in civil servants' ability to perform their public duties, sometimes rendering it important to protect civil servants against verbal attacks when on duty.[171] This protection must be weighed against the interest of press freedom and discussion of matters of public concern, but in the case of *Janowski,*[172] this would not be necessary as the case concerned neither press freedom nor a discussion of public matters.[173] The Court ultimately found the criminal conviction of the applicant to be a proportionate measure in the circumstances.

[168] *Janowski v. Poland,* no. 25716/94, Judgment of 21 January 1999, ECHR
[169] Ibid. § 33
[170] Ibid. § 33
[171] Ibid. § 33
[172] *Janowski v. Poland,* no. 25716/94, Judgment of 21 January 1999, ECHR
[173] Ibid. § 33

The Court did not, however, engage in the adverse effects a criminal conviction in itself would have on the applicant. This is noteworthy, as the statements made by the applicant were not deemed to incite to violence and hatred,[174] despite the European Court's insistence that this - incitement to hatred and violence - is an important threshold in assessing whether criminal sanctions may be justified.

Thus both courts appear to be backtracking on this issue, revealing inconsistencies in both approaches to defamation. In the Inter-American Court, the clear prohibition of using criminal sanctions in defamation cases concerning public officials is set aside for the judiciary, by using the privacy provision of Article 11 of the convention. In the European Court, a criminal conviction was deemed proportionate even though the statements did not incite to violence or hatred – the standard normally used by the Court. Despite the legal framework in the American region may have been stringer on this issue, it would seem that neither court is taking a clear approach to this – and clarification is necessary in both regions.

6. Legal Clarity

Legal clarity is important in any area of law; if laws are to be followed, they must be both accessible and understandable. Moreover, it is important that legal consequences are reasonably foreseeable, so that people can modify their behaviour accordingly. In the area of defamation law, however, legal clarity is of the utmost importance. This is due to the potential chilling effect of defamation laws on freedom of expression. Uncertainty in terms of what the law is and what the legal consequences might be, serves to enhance this

[174] *Janowski v. Poland,* no. 25716/94, Judgment of 21 January 1999, ECHR § 28

chilling effect, as journalists and others would exercise increased self-censorship due to a fear of unknown consequences. In order to remain "well within the law", we run the risk of journalists exerting too much caution, unduly stemming the free flow of information.

Assessing whether an interference was "prescribed by law" provides regional human rights courts with an opportunity to assess the quality of the given law – and in this vein, legal clarity. Both regional courts will do this, but follow a slightly different discourse. While both courts seem to agree vague laws pose a particular threat to freedom of expression, the Inter-American court goes on step further, and sets an even higher standard when the law in question is of a criminal nature.

The European Court has established that in order for an interference to be "in accordance with the law"; the law in question must be "accessible to the person and foreseeable as to its effects".[175] In *Altug Taner Akcam v. Turkey*,[176] the Court held there had been an violation of Article 10 because the relevant law on defamation, Article 301 of the Turkish Criminal Code, was considered too wide and vague, and as such constituted "a continuing threat to the exercise of freedom of expression".[177] Consequently, the interference did not fulfil the requirement of being prescribed by law, because the law in question was not of sufficient quality, and did not provide the level of foreseeability required by the Court.[178] Thus the Court, when deciding on legal clarity, is not satisfied merely with whether or not national legislation regulating defamation is in place. Rather,

[175] *Amann v. Switzerland*, no. 27798/95, Judgment of 16 February 2000, ECHR, § 50
[176] *Altug Taner Akcam v. Turkey*, no. 27520/07, Judgment of 25 October 2011, ECHR
[177] Ibid. § 93
[178] Ibid. § 95

the Court engages with the legislation, scrutinizing its quality under the given circumstances. The Court also takes into consideration how national courts have interpreted the law,[179] and whether sufficient safeguards are put in place to prevent abusive application by the judiciary.[180]

In the Inter-American Court of Human Rights, restrictions on freedom of expression and information must first and foremost be "formally and materially provided for by law".[181] The law sets even further requirements if the restriction in question is of a criminal nature. This is a clear example of how the Inter-American Court emphasizes the seriousness of criminal defamation, contrasting somewhat with the European Court.

If the restriction is of a criminal nature, the law in question must meet the *nullum crimen nulla poena sine lege praevia* principle, that is, no punishment without law.[182] This principle requires the law to be "formulated previously, in an express, accurate, and restrictive manner".[183] Criminal definitions should be written in "restrictive and unequivocal terms, which clearly limit the punishable conducts".[184] This is important not only to allow individuals to regulate their conduct, but also to limit the discretion of the authorities. The Court deems this especially important when sanctions "severely affect fundamental rights, such as life or freedom".[185] In the case of *Kimel v. Argentina,* the law applied was deemed to be in violation of the American Convention, as the criminal

[179] *Altug Taner Akcam v. Turkey*, no. 27520/07, Judgment of 25 October 2011, ECHR, § 92
[180] Ibid. §93
[181] *Kimel v. Argentina*, Judgment of May 2, 2008, IACHR, § 63
[182] Ibid. § 63
[183] Ibid. § 63
[184] Ibid. § 63
[185] Ibid. § 63

definition did not sufficiently delimit the criminal conducts, and was not deemed sufficiently accurate.[186]

What is interesting in the case of *Kimel,* however, is that despite deeming the law in question unsatisfactory, the Court proceeded to assess the suitability of the restriction. The Court finally concluded that the measure taken against Mr Kimel had been "overtly disproportionate", and as such a violation of the Convention, and a violation of Mr Kimel's right to freedom of expression.[187] Thus it seems that the deficiencies in the law were not in themselves grounds enough to deem a violation, in comparison with the approach taken by the European Court in for example the case of *Altug Taner Akcam v. Turkey.*[188]

In conclusion, the two Courts both place great emphasis on legal clarity in defamation cases. The European Court, having deemed a law inadequate, will find a violation on these grounds alone. The Inter-American Court, however, will continue to assess the infringement even where a law is deemed inadequate. In this context, the legal standards set by the European Court would place a greater emphasis on legal clarity. On the other hand, the Inter-American Court places a greater emphasis on criminal defamation, setting a higher standard on legal clarity when criminal defamation is concerned.

[186] *Kimel v. Argentina*, Judgment of May 2, 2008, IACHR, §§ 65-66
[187] Ibid. § 93
[188] *Altug Taner Akcam v. Turkey*, no. 27520/07, Judgment of 25 October 2011, ECHR

7. Civil remedies: the right to reply

As the American Convention expressly makes provision for the right of reply,[189] the recourse is strongly emphasised in the American system. In the legal framework on freedom of expression,[190] the Organization of American States has stated that the right of correction or reply is always to be the first instance recourse to damage to reputation.[191] It is only when this recourse would be insufficient that legal liabilities "more costly" to the individual can be imposed, as per the strict necessity test to be applied by the Inter-American Court of Human Rights.[192] This approach echoes the approach of the US Supreme Court in *New York Times v. Sullivan*.[193]

Furthermore, the legal framework of the Inter-American system provides special standards for journalists and communications professionals.[194] According to Principle 10 of the IACHR Declaration of Principles on Freedom of Expression, if statements are made by "social communicators", "it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news."[195] The similarity between the US Supreme Court and Inter-American Court approach on this is illustrative of the influence the US Supreme Court

[189] Article 14 of the American Convention on Human Rights 1969
[190] Office of the Special Rapporteur for Freedom of Expression Inter American Commission on Human Rights, *The Inter-American Legal Framework Regarding the Right to Freedom of Expression*, OAS, December 30, 2009.
[191] Ibid. Para 108
[192] Ibid. Para 108
[193] *New York Times v. Sullivan*, 376 US 254 (1964)
[194] Office of the Special Rapporteur for Freedom of Expression Inter American Commission on Human Rights, *The Inter-American Legal Framework Regarding the Right to Freedom of Expression*, OAS, 30 December 2009, Para 109
[195] Ibid. Para 109

carries in the region, and also serves to explain the difference between the European approach and the American approach on this.

The European Convention on Human Rights does not include a specific reference to the right of reply, and such a remedy is not set out as the initial recourse in defamation cases. This could explain why this remedy gets considerably less notice in the case law of the European Court. The Court nonetheless recognised the right of reply as falling within Article 10 of the Convention in *Melnychuk v. Ukraine.*[196] This right does not, however provide "unfettered access" to the media, and the media retains certain discretion in its decisions on whether or not to publish the reply, so long as their decision not to publish a reply is not arbitrary or a disproportionate interference with a person's rights under Article 10.[197]

The approach to the right of reply serves as a further example of how the Inter-American Court places a greater emphasis on a civil system of defamation in comparison to the European Court. While the right of reply may have a specific importance within the American context, it still serves as a good example for the European Court to adopt.

Conclusion: the jurisprudence of regional human rights courts in defamation cases

This comparative analysis started by identifying seven key issues in defamation law. These were criminal defamation, the defence of truth and burden of proof, statements of facts versus opinions, matters of public interest, public officials, legal clarity and civil

[196] *Melnychuk v. Ukraine, no*. 28743/03, Judgment of 5 July 2005, ECHR
[197] Council of Europe, *Freedom of Expression in Europe: Case-Law Concerning Article 10 of the European Convention on Human Rights*, Human Rights Files. No.18. Council of Europe, p 55

remedies. From this analysis it has emerged that on most of these issues, the Inter-American Court has taken a stronger stance in protecting freedom of expression than the European Court. Three factors can explain this difference.

First, the American Convention on Human Rights provides strong safeguards on freedom of expression. As was noted initially in this chapter, there are several differences between the European and the American Conventions on Human Rights and their relation to freedom of expression. Notable differences are the prohibition of prior censorship in the American Convention, as well as the provision of a separate article containing the right of reply. In addition to the Convention, additional guidelines provided by different OAS bodies provide strong protection to freedom of expression.

A second factor would be the strong link between the US Supreme Court and the Inter-American Court of Human Rights. This link is clear from the Court's case law. The US Supreme Court, with its strong protection of the First Amendment, provides what is possibly the strongest constitutional protection of free speech in the world. It is clear when examining the Inter-American Court's case law that it adopts many of the approaches taken by the US Supreme Court. It is perhaps no surprise, then, that a strong protection of free speech should follow.

The third and final factor would be *deference.* It seems that in criminal defamation cases, the European Court often defers to the margin of appreciation awarded to states. This difference between the two courts may not persist, however, as it seems the Inter-American Court is following suit in becoming increasingly more deferential. In some

aspects, the approach of both courts is so deferential to national sovereignty; one being better than the other is hardly high praise. This is particularly so when looking at the two courts' approach to criminal defamation, with neither court taking the clear stance that criminal defamation in and of itself violates freedom of expression. Further, both courts' approach to public officials seems contradictory and requires clarification. Finally, both courts should clarify their stance on the burden of proof in *all* defamation cases, not just criminal cases. As such, the approach of neither court is perfectly compatible with international standards of defamation, and the approaches of both courts could be greatly improved.

Chapter III: A civil model of defamation

This chapter will set out a proposed model of civil defamation, and assess a recent example of libel reform as it compares to this model. As anyone who has studied defamation and its relationship with freedom of expression will quickly have realised; criminal defamation is only part of the problem. Though the fear of criminal prosecution can serve as a very strong deterrent against speaking out, so can the fear of civil sanctions, such as having to pay huge damages. Some will even argue that civil defamation laws can pose more of a threat to freedom of expression, because civil procedure omits a number of the safeguards offered the accused in criminal proceedings.

It is of little value to repeal criminal defamation laws if a civil system striking the correct balance between freedom of expression and protection of reputation is not put in its

place. "If you are to get rid of the one, you seem to need to reform the other".[198] If the civil system does not work well, or worse still; does not even exist, complainants are left without recourse in defamation cases, and journalists and other actors are left with legal uncertainty. Therefore, if an argument in favour of decriminalising defamation is put forward, it is essential to clarify what kind of civil system is imagined in its stead.

The civil model

If a civil model of defamation is to ensure the proper balance between freedom of expression and protecting reputation, proper defences must be recognized and all sanctions must be proportionate. A key defence is truth; statements should not be deemed defamatory if they can be proved to be truthful. This is made clear in the relevant international standards, and most states appear to comply with this principle.[199]

The burden of proof should lie on the defendant in this case; they will be best placed to dispute the truthfulness of a statement. This principle is not yet clear as an international standard, and is in fact not upheld uniformly by regional human rights courts.[200] However, it is argued by ARTICLE 19 that this ought to be recognised as an international legal standard. [201] This thesis supports this argument, because failing to do so can easily place an undue burden on the defendant in defamation cases – regardless of whether the procedure is criminal or civil. At the very minimum, the burden of proof as regards

[198] Comment by Edward Pittman, program coordinator at the Open Society Program on Independent Journalism, Open Society Foundations, Interview in London, 12 March 2014
[199] ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, International Standards Series, July 2000, p10
[200] See the foregoing discussion of the jurisprudence of the Inter-American and the European Court of Human Rights in Chapter II, "*Defence of truth and burden of proof"*
[201] ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, International Standards Series, July 2000, p10

falsity ought always to lie with the complainant when the statement concerns matters of public interest.[202] Further defences should be honest opinion or fair comment, reasonable publication and privileged statements.[203]

On the issue of damages, there should not be a presumption of damages in defamation cases. The argument for this is twofold. Firstly, presumptive damages stem from the argument that quantifying loss of reputation would be too difficult, placing an undue onus on the complainant. But for a defamation case to succeed in the first place, the complainant must prove harm to their reputation. The quantifying of such harm could be done without a presumption in place, as is done in other areas of private law such as the award of non-pecuniary loss in personal injury cases.[204] Secondly, presumptive damages are based on the presumption that damages are necessary for the vindication of a person's reputation. This presumption, however, can be rebutted on the basis that other remedies, such as apology or declaration of falsity, may well be more effective in addressing the harm done.[205]

Additionally, it can be argued that specificity is of the utmost importance in a civil system of defamation. There may well be areas where legal flexibility is beneficial; defamation is not one. This was explained in the foregoing and is mainly due to the possible chilling effect of unclear defamation laws. The risk is increased self-censorship

[202] ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, International Standards Series, July 2000, p10
[203] Scott Griffen, International Press Institute, *Out of Balance: Defamation Law in the European Union and Its Effect on Press Freedom, A Provisional Overview for Journalists, Civil Society, and Policymakers*, Vienna: International Press Institute, July 2014, p 22
[204] Dario Milo, *Defamation and Freedom of Speech*, 1st Ed., New York: Oxford University Press Inc., 2008, p 231
[205] Ibid. p 233

among journalists due to the fear of being sued for defamation. A law that is as clear as possible minimises the risk of self-censorship because journalists and others have a better chance of predicting the legal outcome of any given case. It is therefore crucial that defamation laws be precise and accessible.

Issues such as inordinate sums of damages, lengthy court proceedings or difficult standards of proof may all feature in a civil system. These are all problematic, and can all have a chilling effect on free expression. It is therefore suggested that a civil system of defamation ought to have a cap on damages, and ensure that legal proceedings are carried out in such a way so as not to prejudice the defendant. If the civil system of dealing with defamation is not working well, this can be used as an argument for keeping the criminal system in place, because without it, complainants would be left without recourse in defamation cases.

To conclude, a good civil model of defamation law is one that is mindful of the balance between protection of reputation and freedom of expression. The defence of truth must be recognised, and the burden of proof ought to lie with the party bringing the proceedings. Additional defences should be honest opinion or fair comment, reasonable publication and privileged statements. Damages should be capped and there should not be presumptive damages. Finally, legal safeguards to ensure the proceedings are fair and to protect against abusive practices are essential.

A civil model exemplified: England and Wales

It was noted in Chapter I of this thesis that even though states are slow to respond to the pressure to decriminalise, the past five years have seen some notable developments. Among these is the decriminalisation of defamation in England and Wales in 2009. Special notice should be taken to the decriminalisation process in this particular country for two reasons; firstly, the UK is still greatly influential in common law countries and secondly, the UK's capital London has traditionally been hailed as the "libel capital of the world".[206] For these reasons, the recent libel reform in the UK will be examined further, with an assessment of the law and its compliance with international standards, and a discussion of where there is room for improvement.

The UK Defamation Act 2013

The reform of libel law in England and Wales came after years of campaigning, spearheaded by Index on Censorship, English PEN and Sense About Science[207] and serves as a positive example of how legal reform can be achieved through active campaigning. The campaign resulted in the Defamation Act 2013,[208] an act that sets out a civil system on defamation. The Act deserves further notice not only because the UK is influential on common law countries, but also because the UK is an influential member of the Council of Europe, meaning its decision to reform libel law can potentially influence a number of other countries.

[206] Sarah Staveley-O'Carroll, *Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment*? New York University Journal of Law & Liberty 4:252 (2009): p 266
[207] See the campaign's website at http://www.libelreform.org/
[208] More information on the act can be found at http://www.legislation.gov.uk/ukpga/2013/26/contents/enacted

As for the specifics of the Defamation Act 2013, one notable change from the previous law is the requirement of "serious harm" set out in Section 1 of the Act.[209] The provision sets out the requirement that only those who have suffered, or are likely to suffer, serious harm due to a defamatory statement are entitled to sue, or in terms of entities trading to profit, only those who have suffered, or are likely to suffer, serious financial loss. Such a requirement hinders trivial claims, and serves as a safeguard against abusive claims aimed at the media and others to stop critical reports. In this way, the requirement for serious harm serves as a safeguard of free speech and is an example of good practice that other jurisdictions ought to consider.

The defences provided in the Defamation Act 2013 are that of truth, honest opinion and publication on matter of public interest.[210] These defences are in compliance with previously mentioned international standards on defamation law, making this an example of good practice. It should however be noted that for all defences, the onus of proof lies with the defendant.[211] As has been mentioned, it is considered good practice that the onus of proof should lie with the party bringing the claim in defamation cases. As a minimum, the onus of proof should always lie with the complainant on matters of public concern[212] and it is regrettable that the Defamation Act 2013 does not comply with this.

[209] See Section 1 of the Defamation Act 2013 Chapter 26, 25 April 2013
[210] Sections 2,3 and 4 of the Defamation Act 2013
[211] As per Sections 2(1), 3(1) and 4(1) of the Defamation Act 2013
[212] ARTICLE 19, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation,* International Standards Series, July 2000, p 10

The Defamation Act 2013 provides a separate section for the operators of websites,[213] bringing the act into the digital age. This is positive, especially concerning the lack of clarity seen in this area recently, as exemplified in the recent judgment by the European Court of Human Rights in *Delfi AS v. Estonia.*[214] According to Section 5(2) of the Act, if the operator can show that they did not post a statement on their website, it serves as a defence. The section is also accompanied by separate regulations,[215] providing specific rules relating to operators or websites. This is a positive inclusion due to the otherwise uncertainty facing web-operators in terms of user-generated content, and serves as an example of good practice.

Sections 6 and 7 of the Act provide for privileged statements. As per Section 6 of the Act, publications in scientific or academic journals are privileged, subject to certain requirements. As per Section 7 of the Act, reports of courts proceedings enjoy absolute privilege, and statements of public interest enjoy qualified privilege. What is to be understood as qualified privilege is further clarified in the Act itself.

The Defamation Act further addresses two issues specific to the UK; that of the "single publication rule,"[216] and placing a limit on actions brought by persons not domiciled in the UK or the EU/EEA area.[217] These sections are in response to concerns specific to the UK; the confusion surrounding what is to be considered a "single publication", and the issue of so-called "libel tourism".

[213] Section 5 of the Defamation Act 2013
[214] *Delfi AS v. Estonia*, no. 64569/09, Judgment of 10 October 2013, ECHR
[215] The Defamation (Operators of Websites) Regulations 2013
[216] Section 8 of the Defamation Act 2013
[217] Section 9 of the Defamation Act 2013

The Defamation Act 2013 is a relatively short act, consisting of only 17 Sections. The Act is clear and relatively concise. This is a benefit in any Act, but particularly so in a defamation act, as specificity is key in defamation law. The Act does not, however, make any mention of costs or damages, and this is unfortunate. As has been mentioned, the issue of damages, as well as costs, can be a key contributor to the chilling effect of defamatory suits. Thus we see that the clarity and conciseness of the Act may have come at the cost of specificity; a good defamation law requires both.

Though the Defamation Act 2013 is not perfect, it is a great improvement on the previous law, and the reform sets positive examples in several ways. Firstly, it is in general compliance with international standards, by decriminalising defamation, and providing the relevant defences of truth, honest opinion and public interest. The inclusion of privileged statements is positive, as is the inclusion of a separate section on web operators. Further, the serious harm threshold aims to prevent trivial suits. These are all examples of good practice that other states could learn from.

One final and very positive aspect of the UK reform is that the overall system was developed keeping in mind the promotion and protection of freedom of expression, and taking into account international standards on free speech.[218] From the perspective of free speech, a reform with this aim in mind is clearly preferable to a reform that only does the bare minimum to ensure technical compliance with international standards. While decriminalising defamation is in itself a very positive step, decriminalising in and of itself

[218] Interview with Boyko Boev, Senior Legal Officer, ARTICLE 19, London, 4 March 2014

is of little use if the civil system taking its place is not developed in such a way that it takes into account the proper balance between protection of reputation and freedom of expression. In this aspect, a useful comparison can be drawn to the current reform proposed in Italy.

The Italian reform, currently up for debate in the Upper House, is a response to outside criticism to the Italian criminal defamation law, based on law inherited from the Mussolini regime.[219] The UN Human Rights committee called for Italy specifically to abolish imprisonment as a sanction for defamation, in line with the position taken by the European Court of Human Rights as well as the Council of Europe.[220] The Italian law seems to be tailored quite narrowly in addressing this criticism, ensuring the new law is in compliance with the bare minimum of Council of Europe standards. Apart from abolishing prison sentences in defamation cases [221] and proposing a cap on damages, [222] the proposed bill does little to improve the law on defamation. Reforming defamation law today without decriminalising is neither in compliance with international standards, nor is it in keeping with the current attitudes of the region. In this respect, the UK reform seems far more progressive, and consequently the better practice.

In conclusion, a repeal of the criminal defamation, in order to have positive effect on freedom of expression, usually needs to be coupled with legal reform of the civil law.

[219] ARTICLE 19, *Italy: Urgent Need to Reform Defamation Laws,* ARTICLE *19 Press Release*. 25 June 2013. http://www.article19.org/resources.php/resource/37122/en/italy:-urgent-need to-reform-defamation-laws
[220] Ibid.
[221] Ibid.
[222] Ibid.

Beyond this, however, there is also the issue of how such a reform takes place. A reform of the civil law, in order for it to have the desired impact on free expression, will usually need to be framed in a way that tried to safeguard free expression, taking into account the delicate balance between freedom of expression and the right to protection of reputation.

iv. Conclusion

The purpose of this thesis was to examine how regional human rights courts, notably the European and the Inter-American Court of Human Rights, are approaching defamation cases. It was argued that defamation laws, although intended to provide legitimate safeguards against harm to reputation, are consistently used and abused as a way to stifle criticism and limit freedom of expression.

The central argument of this thesis has been that international legal standards on defamation are clear: defamation should be decriminalised and dealt with under a civil system striking the appropriate balance between protecting freedom of expression and the right to reputation. Civil society is pushing for this to happen, with free speech organisations and inter-governmental bodies actively campaigning for states to reform their defamation laws. However, despite strong pressure from the civil sphere, most states have kept their criminal defamation laws intact, with only a handful or so of countries decriminalising in the past five years. Against this backdrop, this thesis wanted to examine how these two regional human rights courts were approaching defamation cases, and assess whether the courts' jurisprudence were a reflection of international legal standards.

The choice of these two courts for comparison was rather simple; the jurisprudence of both these courts is greatly influential not only in their own regions, but in jurisprudence worldwide. These courts also borrow extensively from one another, and this was made clear when examining their case law more closely. Finally, both these courts had decided a number of relevant cases on defamation - the only reason the African Court of Human and Peoples' Rights did not feature in this comparison was that is has yet to decide on its first defamation case.

In examining the jurisprudence of the two courts, it becomes clear that the courts follow a broadly similar approach on many issues. It would appear however that the Inter-American Court applies stricter standards on the protection of freedom of expression as compared to the European Court in almost all the issues discussed. Three reasons for this were suggested. First was the strong protection of free speech in the American Convention on Human Rights. Secondly, the close links between the US Supreme Court – famous for its strong protection of free speech and the First Amendment – and the Inter-American Court. And last but not least, deference. The tendency of the European Court seems clearly to defer to states in several matters concerning defamation.

The European Court is not alone in this, however, as the latest developments in the jurisprudence of the Inter-American Court in the case of *Mémoli* suggests the Inter-American Court is taking a more deferential approach to defamation too. Thus the conclusion would be that despite the Inter-American Court offering slightly stronger protection of free speech than its European counterpart, neither court appears to be living up to their mandate in upholding international legal standards on defamation. With state

practice being so out of touch with legal standards as well, it would seem that defamation, and its chilling effect on freedom of expression, is a problem that will not go away.

Change for the positive can however be achieved, and creating a civil model that complies with international legal standards *is possible.* The latest reform of the defamation law in England and Wales provides grounds for some optimism. Not only is this a good example of how campaigning for reform can actually bring about results, but the resulting law – though not perfect – is an example of good practice. Considering the influence English law has on other common law countries, and London being hailed as "the libel capital of the world", the reform was both timely and necessary, and hopefully more states will follow in their footsteps.

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