AMICUS CURIAE BRIEF

Submitted by

PAKISTAN FEDERAL UNION OF JOURNALISTS (PFUJ)

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

In Re.: W.P. No. 3211/2022

Sadaf Khan

Petitioner

Versus

Federation of Pakistan, through Secretary Ministry of Law and Justice

Respondents

WRIT PETITION UNDER ARTICLE 199 OF THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN, 1973 CHALLENGING CRIMINAL DEFAMATION PROVISIONS OF PPC ON THE TOUCHSTONE OF ARTICLE 19.

Developed by

The Institute for Research, Advocacy and Development (IRADA)

with the technical support of

The Centre for Law and Democracy (CLD)

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Amicus Curiae Brief
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Respectfully Sheweth:

1. Interest and Expertise of Authors

(1) The Institute for Research, Advocacy and Development (IRADA) is an independent Pakistani research and advocacy organization, registered under the Companies Act, 2017, which focuses on social development and civil liberties. IRADA aims to strengthen: democracy through inclusivity and pluralism; governance through

accountability; and justice through fundamental rights. IRADA has conducted a comprehensive review of the legal framework governing media in Pakistan.[1]

(2) The Centre for Law and Democracy (CLD) is an international human rights organisation based in Halifax, Canada, which focuses on law and policy issues relating to foundational rights for democracy, including freedom of expression. In relation to this case, CLD's expertise lies in its knowledge of international and comparative law standards on freedom of expression and, specifically its expertise on defamation law.[2]

2. Statement of Facts and Petition

(3) The petitioner is a concerned citizen of Pakistan and a civil rights activist who seeks to challenge the criminal defamation Sections 499, 500, 501 and 502 of the Pakistan Penal Code, 1860, on grounds that these provisions are inconsistent with the fundamental right of freedom of speech and expression granted to every citizen of Pakistan under Article 19 of the Constitution of the Islamic Republic of Pakistan, 1973, as well as being offensive to Pakistan's obligations under the *International Covenant of Civil and Political Rights* (ICCPR).[3]

(4) The petitioner argues, among other things, that the impugned sections do not constitute a "reasonable restriction" on freedom of speech and expression, as criminal defamation is unnecessary given that civil defamation laws, which are less instrusive restrictions on freedom of expression, are sufficient. In addtiion, even truth simpliciter is not a defence under the criminal defamation provisions. Furthermore, it is argued that the defences to the offence are broad and open to interpretation by courts, which deters people from engaging in legitimate criticism or even making statements of facts, and that this restriction on speech is a serious infringement of the right to freedom of expression.

(5) The petition further argues that criminal defamation should not be allowed to be an instrument in the hands of the State. This is especially so since the Code of Criminal Procedure, 1898 (CrPC), gives public servants an unfair advantage by allowing State prosecutors to stand in for them when they claim to have been

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[1] www.iradapk.org

[2] See, generally, http://www.law-democracy.org/. For a recent Expert Statement by Toby Mendel, Executive Director, Centre for Law and Democracy, before the Inter-American Court of Human Rights, based on an invitation by the Inter-American Commission on Human Rights, see: https://www.law-democracy.org/live/inter-american-court-of-human-rights-appearance/.

[3] UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976, https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf.

defamed by the media or political opponents, a violation of Article 25 of the Constitution of the Islamic Republic of Pakistan.

(6) The petition also places reliance on international human rights law. In addition to violating Article 19 of the Constitution of the Islamic Republic of Pakistan, 1973, the impugned sections also violate Article 19 of the ICCPR, which Pakistan has both signed and ratified. Therefore the existence of the impugned sections is in violation of Pakistan's international human rights obligations under the ICCPR.

(7) The petition prays that the Court strike down the impugned sections, i.e. Sections 499 to 502 of the Pakistan Penal Code, as being offensive to the Constitution of Pakistan and in violation of the fundamental right to freedom of expression and speech granted to every citizen of Pakistan thereunder, in addition to being in violation of Pakistan's international commitments as a State Party to the ICCPR.

3. General International Standards

a. International Human Rights Law as a Source of Authority for Pakistani Courts

(8) International human rights law has increasingly been used by Pakistani courts as source of authority to make decisions on human rights matters. In the case of *Sadaf Aziz v. Federation of Pakistan and Others* (2021 PCrLJ 205), the Lahore High Court that the two-finger test was illegal and discriminatory, and hence unconstitutional. In order to reach this decision, reliance was placed on the jurisprudence of the European Court of Human Rights, particularly the case of *Aydin v. Turkey*[4] where it was held that the "two finger test failed to meet the needs of an effective investigation." In the same case, the Court referred to the United Nations (UN) Committee on the Elimination of All Forms of Discrimination against Women,[5] the UN Committee on the Rights of the Child, the UN Special Rapporteur in Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the UN Special Rapporteur on Violence Against Women, its Causes and Consequences, which have all declared virginity testing to be a harmful practice.

(9) The Court further stressed: "*These international obligations cast a responsibility on the Government of Pakistan to ensure that all necessary steps are taken to prevent discrimination and specifically to prevent carrying out virginity testing….*"

[4] 27 January 2011, Application No. 16637/07.

[5] General Assembly Resolution 34/180, adopted 18 December 1979, entered into force 3 September 1981.

(10) In another case, *Mst. Khatoon Bibi v. The State and Others* (2021 PCrLJ 5931), in a habeas corpus petition aimed at obtaining the recovery of three allegedly unlawfully confined detenus, the Court arrived at the conclusion that the individuals were unlawfully detained and therefore were to be awarded compensation from the offending police officers. The Court made a point to draw attention to the dilapidated conditions of the detenus when produced before the Judge to highlight how the detenus' fundamental rights were violated. When discussing the inviolable dignity of human beings protected under Article 14 of the Constitution, the Court also cited Article 5 of the *Universal Declaration of Human Rights* (UDHR)[6] and Article 7 of the ICCPR, both of which hold that no one shall be subjected to torture, inhuman or degrading treatment.

(11) The Court also noted that by signing and ratifying the UN Convention Against Torture (UNCAT)[7] in 2008 and 2010 respectively, Pakistan assumed responsibility for taking effective legislative, administrative and judicial measures to prevent acts of torture in the country and to educate law enforcement personnel regarding the prohibition against torture during custody, interrogation, detention and imprisonment. Before concluding, the Court directed the Inspector General of Police Punjab to ensure that appropriate steps be taken to educate police personnel in line with Articles 10 and 11 of the UNCAT.

(12) In the case of *Bashir Ahmad v. District Police Officer and Others* (Crl. Misc. No.3831/H/2021), involving an application for recovery of a prisoner from alleged illegal custody, the Lahore High Court affirmed the importance of international human rights standards and demanded that a commission of an inquiry into the potential abuse of power by the police be conducted. The Court held that the "right to liberty and security is sacrosanct" and that States are obligated under international human rights law to protect it as without guaranteeing these rights, all other human rights become illusory. The Court cited the UDHR, the ICCPR, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)[8] and five more core human rights conventions which Pakistan has ratified.

(13) The Lahore High Court also referred to relevant principles from the UN Code of Conduct for Law Enforcement Officials, the UN Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment to illustrate how the police's conduct in the case fell short of international standards. The Court

[6] UN General Assembly Resolution 217A(III), 10 December 1948.
[7] General Assembly Resolution 39/46, 10 December 1984, entered into force 26 June 1987.
[8] UN General Assembly Resolution 2200A (XXI), 16 December 1966, entered into force 3 January 1976.

also noted that the rights to life, liberty and security are protected under Articles 4, 9 and 10 of the Constitution of Pakistan, 1973, and that the CrPC, the Police Order 2002, and the Police Rules 1934 contain details on how to ensure their protection.

(14) In the case of *Jamila v. The State* (2019 PCrLJ 1176), the Islamabad High Court also relied on international human rights standards. The Court, while reaching its decision, cited the Committee on the Rights of the Child, the UN Rules for the Protection of Juveniles Deprived of their liberty (Havana Rules), the Beijing Rules, the Tokyo Rules and the UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), which together place an obligation on Pakistan to provide protection under the law to juvenile offenders in line with the standards they set out.

b. The Right to Freedom of Expression and Permissible Restrictions

(15) Article 19 of the *Universal Declaration of Human Rights*,[9] widely considered to be binding on all States as a matter of customary international law, proclaims the right to freedom of expression in the following terms:

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek to receive and impart information and ideas through any media regardless of frontiers.

(16) Pakistan is bound by the international guarantee of freedom of expression which is spelt out in Article 19 of the ICCPR:

> (1) Everyone shall have the right to hold opinions without interference.
>
> (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> (a) For respect of the rights and reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

i. The Fundamental Nature of Freedom of Expression

[9] UN General Assembly Resolution 217A(III), 10 December 1948, https://www.ohchr.org/en/human-rights/universal-declaration/translations/english.

(17) The overriding importance of freedom of expression as a human right has been widely recognised, both for its own sake and as an essential underpinning of democracy and means of safeguarding other human rights. At its very first session in 1946 the United Nations General Assembly declared:

> Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.[10]

(18) The UN Human Rights Committee, the body of independent experts appointed under the ICCPR to monitor compliance with that covenant, has described freedom of opinion and expression as "indispensable conditions for the full development of the person", "essential for any society" and constitutive of "the foundation stone for every free and democratic society".[11]

(19) Analagous statements about the fundamental importance of freedom of expression have been made by all three regional human rights courts. For example, the Inter-American Court of Human Rights has stated:

> Freedom of expression is a cornerstone upon which the very existence of a democratic society rests.[12]

(20) Similar views have been expressed by the African Court on Human and Peoples' Rights, the European Court of Human Rights and numerous national courts of last instance around the world.

(21) The right to freedom of expression is also widely recognised as both limiting what States may do (negative guarantees) and imposing obligations on States to take measures to promote freedom of expression (positive guarantees).[13] For example, the European Court of Human Rights has stated:

> Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require

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[10] Resolution 59(1), 14 December 1946, UN Doc. A/RES/59 (I) http://www.worldlii.org/int/other/UNGA/1946/87.pdf.

[11] General Comment No. 34, Article 19: Freedoms of opinion and expression, 12 September 2011, UN Doc. CCPR/C/GC/34 (UN Human Rights Committee), para 2, https://www.undocs.org/CCPR/C/GC/34. The Committee adopts general comments from time to time to provide authoritative interpretations of different aspects of rights with reference to the Committee's prior jurisprudence. General Comment No. 34 is the most recent one on freedom of expression.

[12] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, 13 November 1985, Series A, No. 5, para. 70, https://www.oas.org/en/iachr/expression/showDocument.asp?DocumentID=27.

[13] General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004 (UN Human Rights Committee), UN Doc. CCPR/C/21/Rev.1/Add. 13, para. 6, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%252fC%252f21%252fRev.1%252fAdd.13. See, also, for example, *Vgt Verein gegen Tierfabriken v. Switzerland*, 28 June 2001, Application No. 24699/94 (European Court of Human Rights), para. 45, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-59535%22]}; and *Miranda v. Mexico*, 13 April 1999, Report No. 5/99, Case No. 11.739 (Inter-American Commission on Human Rights), paras. 48-56, https://cidh.org/annualrep/98eng/Merits/Mexico%2011739.htm.

positive measures of protection, even in the sphere of relations between individuals.[14]

ii. Restrictions on Freedom of Expression

(22) The right to freedom of expression, as protected under the ICCPR applies to expressions in any form and in any place. It extends to the expression of all sorts of statements, without exception. This includes even "deeply offensive" speech, subject only to the regime of permissible restrictions on free speech.[15] The right also protects all means of expressing opinions, including the different types of media, ranging from broadcasting and publishing to new forms of digital communications.

(23) Despite its broad application, the right to freedom of expression is not absolute. Every system of international and domestic rights recognises carefully drawn and limited restrictions on freedom of expression in order to take into account the values of individual dignity and democracy. Under international human rights law, for countries which have ratified the ICCPR, national laws which restrict freedom of expression must comply with the provisions of Article 19(3) of the ICCPR.

(24) In particular, under Article 19(3) of the ICCPR restrictions must meet a strict three-part test.[16] First, the restriction must be provided by law. Second, the restriction must pursue one of the exhaustive list legitimate aims listed in Article 19(3). Third, the restriction must be necessary to secure that aim.

iii. Provided by Law

(25) International law and most constitutions permit only restrictions on the right to freedom of expression that are set out in law. This implies not only that the restriction is set out in domestic law, but also that the restriction should be "concrete, clear and unambiguous".[17] In other words, it must be "formulated with sufficient precision to enable the citizen to regulate his conduct".[18] In determining what constitutes an

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[14] *Özgür Gündem v. Turkey*, 16 March 2000, Application No. 23144/93, para. 43, https://hudoc.echr.coe.int/ukr#{%22itemid%22:[%22001-58508%22]}.

[15] General Comment No. 34, note 11, para. 11.

[16] This test has been affirmed by the UN Human Rights Committee. See, *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, UN Doc. CCPR/C/51/D/458/1991, para. 9.7, https://undocs.org/Home/Mobile?FinalSymbol=CCPR%2FC%2F51%2FD%2F458%2F1991&Language=E&DeviceType=Desktop&LangRequested=False. Substantially similar tests for restrictions have been applied by regional human rights courts. See for example, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 12, paras. 38-46; and *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, (European Court of Human Rights), para. 45, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%226538/74%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-57584%22]}.

[17] Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression, 20 April 2010, UN Doc. A/HRC/14/23, para. 79(d), http://undocs.org/A/HRC/14/23.

[18] General Comment No. 34, note 11, para. 25; See also *Sunday Times,* note 16, para. 49.

adequate level of precision, the European Court of Human Rights uses a test of whether the limitation imposed by the restriction is reasonably foreseeable. In other words, can a person reasonably foresee in advance whether his or her conduct is prohibited by the restriction?[19]

(26) Vague provisions are susceptible of wide interpretation by both authorities and those subject to the law. As a result, they are an invitation to abuse and authorities may seek to apply them in situations that bear no relationship to the original purpose of the law or to the legitimate aim sought to be achieved. Vague provisions also fail to provide sufficient notice of exactly what conduct is prohibited or prescribed. As a result, they exert an unacceptable 'chilling effect' on freedom of expression as individuals stay well clear of the potential zone of application in order to avoid censure.

(27) Courts in many jurisdictions have emphasised the chilling effects that vague and overbroad provisions have on freedom of expression. The US Supreme Court, for example, has cautioned:

> The constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within "narrowly limited classes of speech." … [Statutes] must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.[20]

(28) The requirement that restrictions be "provided by law" also prohibits laws that grant authorities excessively broad discretionary powers to limit expression. For example, the Inter-American Court of Human Rights has noted, in this regard:

> Regarding the first requirement, strict legality, the Court has established that restrictions must be previously established by law to ensure that these are not left to the discretion of the public authorities.[21]

(29) The UN Human Rights Committee likewise has expressed concern about excessive discretion being granted to authorities, specifically in the context of broadcast licensing:

> The Committee expresses its concern … about the functions of the National Communications Agency, which is attached to the

[19] *Sunday Times*, *ibid*., para. 49.
[20] *Gooding v. Wilson*, 405 U.S. 518 (1972), p. 522, https://supreme.justia.com/cases/federal/us/405/518/.
[21] *Álvarez Ramos v. Venezuela*, 30 August 2019, Series C, No. 380, para. 105, https://www.corteidh.or.cr/docs/casos/articulos/seriec_380_ing.pdf.

Ministry of Justice and has wholly discretionary power to grant or deny licences to radio and television broadcasters.[22]

iv. Legitimate Aim

(30) The ICCPR provides an exhaustive list of the aims that may justify a restriction on freedom of expression. It is quite clear from both the wording of Article 19(3) of the ICCPR and the views of the UN Human Rights Committee that restrictions on freedom of expression which do not serve one of the legitimate aims listed in Article 19(3) are invalid.[23] This is also the position under the American Convention on Human Rights and European Convention on Human Rights.[24]

(31) It is not sufficient, to satisfy this second part of the test for restrictions on freedom of expression, that the restriction in question has a merely incidental effect on the legitimate aim. The restriction must be primarily directed at that aim. As the Indian Supreme Court has noted:

> So long as the possibility [of a restriction] being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly unconstitutional and void.[25]

v. Necessary in a Democratic Society

(32) The third part of the test for restrictions on freedom of expression requires restrictions to be "necessary". This part of the test presents a high standard to be overcome by the State seeking to justify the restriction, apparent from the following quotation, cited repeatedly by the European Court of Human Rights:

> Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.[26]

(33) The European Court of Human Rights has noted that necessity involves an analysis of whether:

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[22] Concluding Observations on Kyrgyzstan's Initial Report, 24 July 2000, CCPR/CO/69/KGZ, para. 21, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fCO%2f69%2fKGZ.

[23] This test has been affirmed by the UN Human Rights Committee. See, *Mukong v. Cameroon*, 21 July 1994, Communication No. 458/1991, para. 9.7.

[24] This has been confirmed by the Inter-American Court of Human Rights, which has held that the test for restrictions under Article 13(2) of the ACHR is substantially similar to that applied under the ICCPR and the European Convention on Human Rights. See *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 12, paras. 38-46. For an elaboration of the test under the European Convention on Human Rights, see *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para. 45. However, the African Commission on Human and Peoples' Rights has interpreted that instrument as requiring that restrictions to freedom of expression "serve a legitimate interest and be necessary in a democratic society". See *Elgak and others v. Sudan*, March 2014, Communication 379/09 para. 114, https://www.escr-net.org/sites/default/files/caselaw/achpr15eos_decision_379_09_eng_0.pdf.

[25] *Thappar v. State of Madras*, (1950) SCR 594, p. 603, https://indiankanoon.org/doc/456839/.

[26] See, for example, *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para. 63, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%2213778/88%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-57795%22]}.

> [There is a] "pressing social need" … [whether] the interference at issue was "proportionate to the legitimate aim pursued" and whether the reasons adduced…to justify it are "relevant and sufficient."[27]

(34) The UN Human Rights Committee has also elaborated on the specific meaning of the necessity part of the test, confirming the high threshold this establishes for restrictions:

> Restrictions **must not be overbroad**. The Committee observed in general comment No. 27 that "restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; **they must be the least intrusive instrument amongst those which might achieve their protective function**; **they must be proportionate to the interest to be protected**…The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law". The principle of proportionality must also take account of the form of expression at issue as well as the means of its dissemination. For instance, the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain.
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> When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.[28]

(35) The first factor noted by the UN Human Rights Committee, namely that restrictions should not be overbroad, is uncontroversial. In practice it means that restrictions should apply to only harmful speech and not go beyond that. In applying this factor, courts have recognised that there may be practical limits on how finely honed and precise a legal measure may be. But subject only to such practical limits, restrictions must not be overbroad. Other courts have also stressed the importance of restrictions not being overbroad. For example, the US Supreme Court has noted:

> Even though the Government's purpose be legitimate and substantial, that purpose cannot be pursued by means that stifle fundamental personal liberties when the end can be more narrowly achieved.[29]

(36) Another factor noted by the UN Human Rights Committee—that restrictions be the least restrictive option to protect a legitimate aim—is also uncontroversial and has also been adopted by the European

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[27] See *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras. 39-40, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%229815/82%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-57523%22]}.
[28] General Comment No. 34, note 11, paras. 34 and 35 [Emphasis Added].
[29] *Shelton v. Tucker*, 364 US 479 (1960), p. 488, https://supreme.justia.com/cases/federal/us/364/479/.

Court of Human Rights.[30] Clearly a measure cannot be "necessary" if another effective measure which is less harmful to freedom of expression exists. In practice, this means that when imposing restrictions on freedom of expression States must carefully design those measures so that they do indeed represent the least restrictive way of protecting the legitimate aim. It is a very serious matter to restrict a fundamental right and, when considering imposing such a measure, States are required to reflect carefully on the various options open to them.

(37) Finally, both of the statements above also reflect another factor articulated by the UN Human Rights Committee, that restrictions must be proportionate in the sense that the harm to freedom of expression must not be greater than the benefits in terms of protecting the legitimate aim. **A restriction which provided limited protection to reputation but which seriously undermined freedom of expression would, for example, not pass muster.** This again is uncontroversial. Freedom of expression is a fundamental right and it is only when, on balance, the greater public interest is served by limiting that right that such a limitation can be justified. This implies that the benefits of any restriction must outweigh the costs for it to be justified.

4. Substantive Issues: Freedom of Expression and Criminal Defamation

a. Principled Arguments as to why Criminal Defamation is Illegitimate

(38) Most courts, both international and national, considering criminal defamation rules have found that they fail to meet the necessity or other equivalent part of the test for restrictions on freedom of expression. **There are two main principled reasons this. The first is that a criminal prohibition is a disproportionate response to the problem of harm to reputation. The second is that criminal defamation laws are not the least restrictive means to achieve the legitimate aim of protecting reputations; civil laws are sufficient to serve this goal and, being a less intrusive remedy, should be preferred over criminal laws.**

i. Proportionality

(39) As noted above, restrictions on freedom of expression meet the necessity part of the test only if they are proportionate, in the sense

[30] *Glor v. Switzerland*, 30 April 2009, Application no. 13444/04, para 94, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-92525%22]}.

that the goal or benefit they secure outweighs the harm done to freedom of expression. As the Inter-American Court of Human Rights has stated: "[T]o be compatible with the Convention, the restrictions must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees."[31]

(40) Of particular importance here is the **chilling effect** that criminal prohibitions on defamation have on freedom of expression. **The "chilling effect" refers to the fact that such restrictions affect expression well beyond the actual scope of the prohibition.** Individuals will be deterred from publishing anything which, even on a slight probability, may risk falling foul of the rules due to the extreme consequences this may entail.

(41) Both international and national courts have noted this "chilling effect" in their jurisprudence. In *Lingens v. Austria*, the European Court of Human Rights recognised that **criminal sanctions for defamation can lead to the censorship of important expression**. Referring to the fine imposed on the applicant for defamation, the Court stated:

> In the context of political debate, such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog.[32]

As a result of this threat, the Court recognised the need for restraint when applying criminal sanctions for abuse of the right to freedom of expression.

(42) The chilling effect of criminal sanctions has also been noted by the Inter-American Commission on Human Rights which notes, in the conclusion of its *Report on the Compatibility of "Desacato" Laws With the American Convention on Human Rights*, "the inevitable chilling effect [criminal sanctions] have on freedom of expression".[33]

(43) The chilling effect of criminal defamation on statements increases considerably when they concern a public official and/or relate to a matter of public importance. The important 'watchdog' role of the media[34] requires that, at least in this respect, they be free to report without fear of criminal sanction. The chilling effect is further compounded where the sanctions involved may include imprisonment, although the mere fact of being designated as a

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[31] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 12, para. 46.
[32] *Lingens v. Austria,* note 27, para.44.
[33] 1994 Annual Report of the Inter-American Commission on Human Rights, Chapter V, https://cidh.oas.org/annualrep/94eng/chap.5.htm.
[34] See note 32.

criminal and entered into the register of criminals is, of itself, a severe form of sanction.

(44) As set out below, in addition to the obvious and serious chilling effect of criminal defamation laws is the question of whether any additional benefit may be secured by criminal, as opposed to civil, defamation laws. We submit that such benefits are non-existent. Indeed, the success of civil defamation laws in addressing harm to reputation in the many countries where criminal defamation laws have been repealed demonstrates this.

ii. Least Restrictive Measure

(45) It is well established that the guarantee of freedom of expression requires States to use the least restrictive effective remedy to secure the legitimate aim sought. **This flows directly from the need for any restrictions to be necessary; if a less restrictive remedy is effective, the more restrictive one cannot be necessary.** This reasoning also forms part of the jurisprudence of the Inter-American Court of Human Rights, which has stated:

> [I]f there are various options to achieve [a compelling governmental interest], that which least restricts the right protected must be selected.[35]

Similarly, the UN Human Rights Committee has noted that **to be legitimate, restrictions "must be the least intrusive instrument amongst those which might achieve their protective function"**.[36]

(46) As a result, insofar as civil defamation laws effectively redress harm to reputation, there is no justification for criminal defamation laws. Perhaps the best evidence of the sufficiency of civil defamation laws in redressing harm to reputation comes from the growing number of jurisdictions where they are either the preferred means of redress or growing in popularity. A growing number of countries have completely abolished criminal defamation laws (see below). There is no evidence that these countries have experienced any noticeable increase in defamatory statements, either of a qualitative or quantitative nature, since they abolished criminal defamation.

(47) It may be concluded that the experience of a range of countries where criminal defamation laws have been struck down by the courts or repealed by the authorities shows that such laws are not necessary to provide appropriate protection for reputations. In these countries, civil defamation laws have proven adequate to this task. Furthermore, this experience is not limited to established

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[35] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, note 12, para. 46.
[36] General Comment No. 34, note 11, para. 34.

democracies but also includes countries undergoing a transition to democracy, and from different regions of the world.

b. International Law Statements and Decisions

(48) International courts have addressed the issue of criminal defamation and criminal penalties for defamation in a large number of cases. Other authoritative international bodies have also made persuasive statements about this issue. These decisions and statements are the subject of this part of the brief.

i. Court Decisions

(49) International human rights courts have addressed defamation extensively. Across the board, they have placed strong limits on criminal defamation. For criminal defamation resulting in imprisonment, the courts have either found that it is always disproportionate or indicated that it will almost always be disproportionate. **The African Court on Human and Peoples' Rights has ruled against all forms of criminal defamation resulting in imprisonment (see below). The European and Inter-American regional human rights courts have found that imprisonment as a penalty for public interest speech about public figures is always disproportionate.**[37] Both courts appear to rule out criminal defamation in other circumstances as well, unless the penalty is a suspended prison sentence or a fine, and is accompanied by a number of additional safeguards. This section of the brief surveys this jurisprudence.

(50) Regional courts in Africa have taken the strongest stance against criminal defamation resulting in imprisonment, finding it is never valid under the *African Charter on Human and Peoples' Rights* (ACHPR). The dominant case here is *Lohé Issa Konaté v. Burkina Faso*. In that case, the African Court on Human and Peoples' Rights noted that "any custodial sentence relating to defamation is inconsistent" with the protections for freedom of expression under the ACHPR.[38] The case involved a journalist who, after publishing articles accusing a prosecutor of misconduct, received a 12-months prison sentence after being convicted for defamation, insult and contempt of court. **The Court found that the custodial sentence was a "disproportionate interference in the exercise of freedom of expression by journalists in general and especially in the**

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[37] The Inter-American Court of Human Rights has ruled this most explicitly, but this conclusion can also be derived from the decisions of the European Court of Human Right, as described below.

[38] *Lohé Issa Konaté v. Burkina Faso*, 5 December 2014, Application No. 004/2013, para. 167, https://www.african-court.org/en/images/Cases/Judgment/Judgment%20Appl.004-2013%20Lohe%20Issa%20Konate%20v%20Burkina%20Faso%20-English.pdf.

Applicant's capacity as a journalist."[39] It unanimously determined that Burkina Faso had violated Article 9 of the ACHPR and Article 19 of the ICCPR because of the custodial sentences for defamation in its laws.[40]

(51) **The African Court, in the same case, also found that the non-custodial criminal sanctions imposed on the journalist, including fines and costs on the journalist and a six-month suspension of the newspaper, were neither necessary nor proportionate.** The Court determined that Burkina Faso had not shown why the fines and suspension were necessary or that the high fine was not excessive given the income of the journalist, which seemed particularly harsh given the loss of revenue from the publication of the newspaper during the six-month suspension.[41]

(52) After the landmark decision in *Lohé Issa Konaté v. Burkina Faso*, the Community Court of Justice of the Economic Community of West African States (ECOWAS) came to a similar conclusion in *FAJ and Ors. v. The Gambia*.[42] The case was brought by journalists to challenge criminal defamation provisions in the Gambian Criminal Code. The ECOWAS Court cited cases from the United Kingdom and Zimbabwe, highlighting that changing historical circumstances, the emergence of civil defamation law and modern democratic norms meant that criminal defamation was no longer justifiable. It suggested that the existence of criminal defamation and insult were "unacceptable instances of gross violation of free speech and freedom of expression".[43] Citing human rights law authorities and comparative jurisprudence extensively, it stressed that restrictions on freedom of expression must be narrowly drawn and not disproportionate. In this case, "the practice of imposing criminal sanctions" for defamation and libel "has a chilling effect that may unduly restrict the exercise of freedom of expression of journalists."[44] The criminal sanctions imposed on the journalists were disproportionate and not necessary in a democratic society. The Court directed the Gambia to review and decriminalise its criminal libel and defamation laws.[45]

(53) The East African Court of Justice followed shortly with another ruling finding fault with criminal defamation. In *Media Council of Tanzania*

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[39] *Ibid.,* para. 164.
[40] *Ibid.*, para. 176(3).
[41] *Ibid.*, para. 171.
[42] *FAJ and Others v. The Gambia*, 13 March 2018, No. ECW/CCJ/APP/36/15, https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2016/04/FAJ-and-Others-v-The-Gambia-Judgment.pdf.
[43] *Ibid.*, p. 40.
[44] *Ibid.*, p. 47.
[45] *Ibid.*, p. 48.

and Ors. v. Attorney General of Tanzania,[46] the Court considered several provisions of the Tanzanian Media Services Act, including those establishing criminal defamation offences. After noting issues with the clarity of the provisions in question, the Court cited the *FAJ and Ors* case and the UN Human Rights Committee's General Comment No. 34 that restrictions on freedom of expression should be proportionate and "the least intrusive instrument amongst those which might achieve their protective function".[47] It determined that the criminal defamation provisions in the Media Services Act violated provisions of the Treaty for the Establishment of the East African Community requiring respect for human rights.

(54) The Inter-American Court of Human Rights has found violations of freedom of expression in numerous cases involving criminal defamation. In 2008, in *Kimel v. Argentina*,[48] the Inter-American Court commented extensively on the matter of criminal defamation. The case was brought by an Argentine historian who had been sentenced to a one-year suspended sentence of imprisonment and a fine based on claims he made in a book about a massacre of clergymen during Argentine's dictatorship. Ultimately, the Court found that Argentina had failed to comply with its obligations to respect freedom of expression. The relevant provisions of the Argentine criminal code were insufficiently precise, raising legality issues. In addition, the penalties were unnecessary and disproportionate.

(55) In Kimel, the Inter-American Court held that a number of conditions and safeguards were necessary to ensure that any criminal penalties imposed on free speech were strictly necessary and proportionate:

> 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; however, this possibility should be carefully analyzed, pondering the extreme seriousness of the conduct of the individual who expressed the opinion, his actual malice, the characteristics of the unfair damage caused, and other information which shows the absolute necessity to resort to criminal proceedings as an exception. At all stages the burden of proof must fall on the party who brings the criminal proceedings.[49]

In finding the penalties imposed on Mr. Kimel disproportionate, the Court stressed that the respective harm to the rights to freedom of expression and to reputation should be considered. In this case, the nature of the criminal proceedings constituted a substantial restriction on Mr. Kimel's right to freedom of expression:

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[46] *Media Council of Tanzania and Ors. v. Attorney General of Tanzania*, 28 March 2019, No. 2 of 2017, https://www.eacj.org/wp-content/uploads/2019/03/Referene-No.2-of-2017.pdf.
[47] UN Human Rights Committee, General Comment No. 34, note 11, para. 34. See paras. 90-91 of *Media Council of Tanzania and Ors. v. Attorney General of Tanzania*, *ibid.*
[48] 2 May 2008, Series C, No. 177 (Inter-American Court of Human Rights), https://www.corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf.
[49] *Ibid*., para. 78.

> Regarding the degree of impairment of the right to freedom of thought and expression, the Court deems that that effects of the criminal proceedings in themselves, the application of a sanction, Mr. Kimel's addition to the criminal offenders registry, the latent risk for him to be deprived of his liberty, and the stigmatizing effect of the criminal sentence imposed thereon show that the subsequent liability imposed on Mr. Kimel was serious. Even the fine constitutes in and of itself a serious impairment of the right to freedom of thought and expression, given the considerable amount set in relation to the beneficiary's income.[50]

In addition, the statements made by Mr. Kimel related to matters of public concern and referred to a judge, a public official who should be subject to public scrutiny. Such persons enjoy a "different threshold of protection" because they have voluntarily made themselves subject to public scrutiny.[51] Open debate about public figures is very important in democratic societies. Given these factors, the imposition of criminal sanctions in such a case was disproportionate.

(56) A number of other cases from the Inter-American Court of Human Rights have reached similar conclusions. In *Ricardo Canese v. Paraguay*, for example, the Court found that eight-year criminal defamation proceedings against a presidential candidate were unnecessary and disproportionate, even though the candidate was eventually acquitted. The proceedings "limited the open debate on topics of public interest or concern" and restricted the ability of the candidate to exercise his freedom of expression during his electoral campaign.[52] In *Tristán Donoso v. Panama*, an attorney was required to pay a criminal fine and damages after he made a statement alleging that the Attorney-General had illegally wiretapped his phone. Although these allegations were later found to be untrue, the Inter-American Court noted that the lawyer had reasons to believe his statements were accurate. The Court also stressed the importance of public debate about the conduct of public officials. It found that the fine imposed, while not excessive, was unnecessary and therefore violated the right to freedom of expression.[53]

(57) In two later cases, the Inter-American Court drew a clear line between defamation cases involving public interest speech and those involving mere private disputes. In these cases, the Court clearly held that criminal sanctions for defamation were a disproportionate response to public interest speech involving public figures.[54] In the

[50] *Ibid*., para. 85.
[51] *Ibid*., para. 86.
[52] *Ricardo Canese v. Paraguay*, 31 August 2004, Series C No. 11, para. 106, https://www.corteidh.or.cr/docs/casos/articulos/seriec_111_ing.pdf.
[53] *Tristán Donoso v. Panama*, 27 January 2009, Series C No. 193, para. 129, https://corteidh.or.cr/docs/casos/articulos/seriec_193_ing.pdf.
[54] *Palacio Urrutia v. Ecuador*, 24 November 2021, Series C, No. 446, paras. 117-120, 127, https://www.corteidh.or.cr/docs/casos/articulos/seriec_446_ing.pdf; and *Álvarez Ramos v. Venezuela*, 30 August 2019, Series C, No. 380, paras. 121-123, 129, https://www.corteidh.or.cr/docs/casos/articulos/seriec_380_ing.pdf.

first case, *Álvarez Ramos v. Venezuela*, the Court considered a criminal defamation sentence of two years' and three months' imprisonment imposed on a journalist who alleged financial irregularities at Venezuela's National Assembly. In finding that the conviction violated the right to freedom of expression, the Court noted:

> It is understood that in the case of speech that is protected because it concerns matters of public interest, such as the conduct of public officials in the performance of their duties, the State's punitive response through criminal law is not conventionally appropriate to protect the honor of an official …. Indeed, the use of criminal law against those who disseminate information of this nature would directly or indirectly constitute intimidation which, in the end, would limit freedom of expression and would impede public scrutiny of unlawful conduct, such as acts of corruption, abuse of authority, etc. Ultimately, this would weaken public controls over the State's powers, causing grave damage to democratic pluralism.[55]

(58) Subsequently, in *Palacio Urrutia v. Ecuador*, the Court issued a similar ruling after Ecuador's President brought criminal defamation proceedings against several journalists. **The Court echoed its reasoning and language in Álvarez Ramos, re-affirming it previous holiding that criminal sanctions were not appropriate for public interest speech. It also stressed that non-criminal remedies were instead the appropriate means to protect the reputation of public officials or public individuals:**

> Journalistic conduct can produce liability in another legal sphere, such as in civil law, or require correction or public apologies, for example, in cases of possible abuses or excesses of bad faith. However, this case involves the exercise of an activity protected by the Convention, which precludes its criminal characterization and, therefore, the possibility of being considered a crime and being subject to penalties. In this regard, it must be made clear that this is not a question of excluding a prohibition through justification or special permission, but rather of the free exercise of an activity that the Convention protects because it is indispensable for the preservation of democracy.[56]

(59) In sum, the Inter-American Court of Human Rights will strike down criminal defamation convictions imposed as a response to public interest speech about public officials. Criminal defamation is also likely disproportionate for public interest speech involving other persons. In considering other cases, courts would need to consider factors such as whether the statement was made maliciously and the harshness of the sentence and its impact on the speaker in light of the reputational harm caused. In order for States in the Americas to

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[55] *Álvarez Ramos v. Venezuela*, 30 August 2019, Series C, No. 380, paras. 121-122, https://www.corteidh.or.cr/docs/casos/articulos/seriec_380_ing.pdf.

[56] *Palacio Urrutia v. Ecuador*, 24 November 2021, Series C, No. 446, para. 119, https://www.corteidh.or.cr/docs/casos/articulos/seriec_446_ing.pdf.

conform with this jurisprudence, they likely either need to abolish criminal defamation entirely, or place very strict conditions on its use, including exceptions for public interest speech and non-custodial penalties.

(60) The jurisprudence of the European Court of Human Rights indicates that it will not except a custodial sentence as a penalty for defamation, although the Court has never explicitly stated that such a penalty is inherently disproportionate. On numerous instances, the Court has found that sentences of imprisonment or suspended imprisonment for defamation violate the right to freedom of expression.[57] For example, in *Sallusti v. Italy*, the European Court agreed with the Italian courts that a journalist had made defamatory statements when falsely reporting that a minor had been forced to obtain an abortion, and affirmed that sanctions could be imposed on the journalist. However, it stated that there was no justification for a suspended prison sentence, citing the potential chilling effect of a custodial sentence for a media offence.[58]

(61) In several criminal defamation cases, the European Court of Human Rights has also indicated that prison sentences are not appropriate as sanctions for speech on public interest issues and relating to public figures or public officials performing their official duties.[59] One can conclude, from this jurisprudence, that the European Court will almost certainly find imprisonment for defamation to be disproportionate, if not in all cases at least when the speech concerns matters of public interest about a public figure.

(62) This conclusion is supported by the decision of the Grand Chamber of the European Court of Human Rights in *Cumpănă and Mazăre v. Romania*, involvign an article by a journalist and editor of a local

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[57] See, for example, *Castells v. Spain*, 23 April 1992, Application No. 11798/85, https://hudoc.echr.coe.int/eng?i=001-57772 (Grand Chamber); *Dalban v. Romania*, 28 September 1999, Application No. 28114/95, https://hudoc.echr.coe.int/eng?i=001-58306 (Grand Chamber); *Belpietro v. Italy*, 24 September 2013, Application No. 43612/10, https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2015/02/AFFAIRE-BELPIETRO-c.-ITALIE.pdf; *Sallusti v. Italy*, 7 March 2019, Application No. 22350/13, para. 62-63, https://hudoc.echr.coe.int/eng?i=001-191360; *Cumpănă and Mazăre v. Romania*, 17 December 2004, Application No. 33348/96, https://hudoc.echr.coe.int/eng?i=001-67816 (Grand Chamber); *Šabanović v. Montenegro*, 31 May 2011, Application No. 5995/06, https://hudoc.echr.coe.int/eng?i=001-104977; *Marchenko v. Ukraine*, 19 February 2009, Application No. 4063/04, https://www.legal-tools.org/doc/7a92c6/pdf/; and *Mariapori v. Finland*, 6 July 2010, Application No. 37751/07, https://hudoc.echr.coe.int/fre?i=001-99778. The authors of this brief could not identify a single case where the European Court of Human Rights has upheld a custodial sentence for defamation. In one case, it allowed a suspended four-month prison sentence. Notably this case was decided before the major *Cumpănă and Mazăre v. Romania* Grand Chamber case discussed below. It also appeared that the Court's view was that it did not involve public interest speech in a manner that should preclude a criminal defamation penalty, as suggested by subsequent cases. *Lešník v. Slovakia*, 11 March 2003, Application No. 35640/97, https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-60974&filename=CASE%20OF%20LESNIK%20v.%20SLOVAKIA.docx&logEvent=False.

[58] *Sallusti v. Italy*, 7 March 2019, Application No. 22350/13, paras. 62-63, https://hudoc.echr.coe.int/eng?i=001-191360.

[59] See, for example, *Cumpănă and Mazăre v. Romania*, 17 December 2004, Application No. 33348/96, paras. 115-116, https://hudoc.echr.coe.int/eng?i=001-67816 (Grand Chamber); *Šabanović v. Montenegro*, 31 May 2011, Application No. 5995/06, para. 43, https://hudoc.echr.coe.int/eng?i=001-104977; *Marchenko v. Ukraine*, 19 February 2009, Application No. 4063/04, para. 52, https://www.legal-tools.org/doc/7a92c6/pdf/; and *Mariapori v. Finland*, 6 July 2010, Application No. 37751/07, para. 68, https://hudoc.echr.coe.int/fre?i=001-99778.

newspaper about government corruption. They were sentenced to three-months' imprisonment for insult and seven-months' for defamation and the loss of certain civil rights, and were prohibited from working as journalists for one year after serving the prison sentence. The Grand Chamber determined that the sanctions were disproportionate and accordingly violated the right to freedom of expression. In particular, it commented on the chilling effect of criminal sanctions on journalist activity and implied that criminal sanctions cannot be proper as a penalty for speech on matters of public interest:

> [T]he Court considers that the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence…The circumstances of the instant case – a classic case of defamation of an individual in the context of a debate on a matter of legitimate public interest – present no justification whatsoever for the imposition of a prison sentence.[60]

(63) The European Court of Human Rights has also found criminal fines to violate freedom of expression, particularly in cases where the statement related to matters of public interest. In *Morice v. France*, a lawyer received a criminal fine for public defamation of a judge based on an article published by the media quoting the lawyer complaining about the impartiality and fitness of the judge. A Grand Chamber of the European Court of Human Rights determined that the criminal fine was a violation of the lawyer's right to freedom of expression. In finding the penalty disproportionate, it considered several factors, including the public interest value of the speech in question and the fact that the comments had a sufficient factual basis, rather than being an unfounded and gravely damaging attack.[61] The Grand Chamber also commented specifically on the harmful impact of even a mild criminal sanction like a fine:

> The Court reiterates that even when the sanction is the lightest possible, such as a guilty verdict with a discharge in respect of the criminal sentence and an award of only a "token euro" in damages, it nevertheless constitutes a criminal sanction and, in any event, that fact cannot suffice, in itself, to justify the interference with the applicant's freedom of expression. The Court has emphasised on many occasions that interference with freedom of expression may have a chilling effect on the exercise of that freedom – a risk that the relatively moderate nature of a fine would not suffice to negate…The Court would, moreover, reiterate that the dominant position of the State institutions

[60] *Cumpănă and Mazăre v. Romania*, 17 December 2004, Application No. 33348/96, paras. 115-116, https://hudoc.echr.coe.int/eng?i=001-67816 (Grand Chamber).
[61] *Morice v. France*, 23 April 2015, Application No. 29369/10, para. 174, https://hudoc.echr.coe.int/eng?i=001-154265.

requires the authorities to show restraint in resorting to criminal proceedings.[62]

(64) Conversely, the European Court has permitted criminal fines in some cases. For example, in *Lindon, Otchakovsky-Laurens and July v. France*, the Grand Chamber allowed a criminal fine against the author and publisher of a novel and the publisher of a newspaper which circulated passages of the novel.[63] Although fictional, the novel was based on a true story and certain passages made allegedly factual allegations about a French extremist politician's involvement in a murder. The European Court, reviewing the relevant French law and the decisions of the French courts, found that several protective factors were present to ensure that the sentences were an appropriate restriction on freedom of expression. Only specific passages determined to be harmful were sanctioned, the French courts differentiated between statements of fact and opinion as well as statements which the author framed as fictional and a defence of good faith was available.[64] Finally, the European Court accepted that the penalty was proportionate, because the fine and damages were moderate in nature.[65]

(65) Overall, the European jurisprudence indicates that imprisonment is not a proportionate sentence for defamation, particularly in cases related to public interest speech about public figures. It also suggests that other criminal sanctions can be imposed only if certain safeguards are in place to ensure that they are not disproportionate. Appropriate defences, such as good faith publication and opinion, should also be available. The potential chilling effect on the media and the value of public interest speech should be relevant factors.

ii. Authoritative Statements

(66) In addition to the decisions of international and regional human rights courts, other authoritative bodies and experts are influential sources of guidance when interpreting the scope of protections for freedom of expression in international human rights treaties.

(67) The UN Human Rights Committee is the treaty body responsible for monitoring implementation of the ICCPR. Accordingly, its statements represent very influential commentary on the scope of ICCPR obligations. In 2011, the Human Rights Committee adopted General Comment No. 34, which focuses specifically on freedom of expression. It notes that all defamation laws, but "in particular penal

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[62] *Ibid*., para. 176 (internal citations omitted). Note that the "token euro" referenced here is citing to another case; the fine in this case was EUR 4,000 plus costs and damages.

[63] *Lindon, Otchakovksy-Laurens and July v. France*, 22 October 2007, Application Nos. 21279/02 and 36448/02, https://hudoc.echr.coe.int/eng?i=001-82846 (Grand Chamber).

[64] *Ibid*., paras. 53 and 55.

[65] *Ibid*., para. 59.

defamation laws", should include the defence of truth and should not be applied to non-verifiable statements, and a public interest in the subject matter should be recognised as a defence.[66] The Human Rights Committee encourages States to decriminalise defamation, and clearly affirms that "imprisonment is never an appropriate penalty", while criminal defamation should otherwise be applied only in the "most serious of cases".[67]

(68) Important regional bodies The African Commission on Human and Peoples' Rights adopted the *Declaration of Principles on Freedom of Expression and Access to Information in Africa* in 2019. This also calls for an end to criminal defamation laws, specify indicating that States should "amend criminal laws on defamation and libel in favour of civil sanctions" and that "the imposition of custodial sentences for the offences of defamation and libel are a violation of the right to freedom of expression."[68]

(69) In Europe, the Parliamentary Assembly of the Council of Europe adopted a Resolution in 2007 on Towards Decriminalisation of Defamation. The Resolution calls on Council of Europe Member States to "abolish prison sentences for defamation without delay".[69]

(70) The *Inter-American Declaration of Principles on Freedom of Expression*, approved by the Inter-American Commission on Human Rights in 2000, calls for strong limits on the use of criminal defamation:

> The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest. In addition, in these cases, 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.

Subsequently, the Organization of American States (OAS) General Assembly has issued resolutions where it encourages the full decriminalisation of defamation.[70]

[66] Human Rights Committee, General Comment No. 34, note 11, para. 47.
[67] *Ibid*.
[68] African Commission on Human and Peoples' Rights, *Declaration of Principles on Freedom of Expression and Access to Information in Africa*, 10 November 2019, Principles 22(3) and (4), https://www.legal-tools.org/doc/rs94e6/pdf/.
[69] Council of Europe, Parliamentary Assembly, Resolution 1577 (2007), para. 17.1, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17588&lang=en.
[70] OAS General Assembly, Right to Freedom of Thought and Expression and the Importance of the Media, AG/RES. 2287 (XXXVII-O/07), 5 June 2007, para. 12, https://www.oas.org/en/council/ag/resdec/; and OAS General Assembly, Right to Freedom of Thought and Expression and the Importance of the Media, AG/RES. 2523 (XXXIX-O/09), 4 June 2009, para. 12, https://www.oas.org/en/council/ag/resdec/.

(71) The United Nations, Organization for Security and Co-operation in Europe (OSCE), OAS and African Commission on Human and Peoples' Rights have all appointed independent experts focused on freedom of expression. These special mandates release Joint Declarations on important freedom of expression topics each year which have regularly and clearly affirmed that criminal defamation is not consistent with the right to freedom of expression, calling on States to decriminalise defamation. For example, in 2021 they affirmed that States should: "Abolish any criminal defamation laws and replace them, where necessary, with appropriate civil defamation laws."[71] Similarly, in 2002 they stated: "Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws".[72]

(72) In their individual capacities, the various special rapporteurs have also made statements calling for the decriminalisation of defamation. For example, the UN Special Rapporteur explained in a 2012 report:

> In particular, the Special Rapporteur remains concerned that defamation remains classified as a criminal offence rather than a civil tort in many countries around the world. As he has emphasized on many occasions, criminal defamation laws are inherently harsh and have a disproportionate chilling effect on free expression. Individuals face the constant threat of being arrested, held in pretrial detention, subjected to expensive criminal trials, fines and imprisonment, as well as the social stigma associated with having a criminal record.[73]

c. National Legislative and Judicial Developments

(73) Several jurisdictions have repealed their criminal defamation laws altogether while some others have removed the possibility of imprisonment or significantly limited the application of criminal defamation provisions. Moreover, several decisions from common law jurisdictions in recent years have held that criminal defamation rules constitute unjustifiable infringements of constitutional guarantees of freedom of expression. These trends reinforce a growing international tendency to view criminal defamation as inherently illegitimate.

(74) In addition, decisions from other common law jurisdictions analysing analogous criminal defamation provisions suggest that certain aspects of Pakistan's criminal defamation regime, such as the lack of

[71] Special international mandates on freedom of expression, Joint Declaration on Politicians and Public Officials and Freedom of Expression, 20 October 2021, clause 2(b)(ii), https://www.ohchr.org/sites/default/files/2022-04/Joint-Declaration-2021-Politicians_EN.pdf.
[72] Special international mandates on freedom of expression, Joint Declaration, 10 December 2002, https://www.osce.org/files/f/documents/5/5/99558.pdf.
[73] Report of the UN Special Rapporteur on freedom of expression, 4 June 2012, para. 84, undocs.org/A/HRC/20/17.

an absolute defence of truth, further contribute to its disproportionate impacts on freedom of expression.

i. Legislative Repeals of Criminal Defamation Laws

(75) Several States have repealed general criminal defamation laws. These include the following:

- The United States[74]
- New Zealand (1992)[75]
- Ghana (2001)[76]
- Sri Lanka (2002)[77]
- Bosnia and Herzegovina (2002)[78]
- Georgia (2004)[79]
- Ireland (2009)[80]
- The United Kingdom (2009)[81]
- Argentina (2009)[82]
- Armenia (2010)[83]
- Montenegro (2011)[84]

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[74] The United States has never criminalised defamation at the federal level. Although 24 US states and the United States Virgin Islands retain defamation offences, their application is limited in practice due to US Supreme Court jurisprudence mandating that, in respect of criticisms of public officials, they incorporate the same "actual malice" standard applicable to analogous United States civil defamation lawsuits. See *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), https://supreme.justia.com/cases/federal/us/379/64/.

[75] The Defamation Act 1992, Public Act 1992 No 105, Date of Assent: 26 November 1992, https://www.legislation.govt.nz/act/public/1992/0105/latest/DLM280687.html.

[76] See Modern Ghana, "Criminal libel law repealed", 30 July 2001, https://www.modernghana.com/news/15786/1/criminal-libel-law-repealed.html (reporting on the repeal of the criminal libel and sedition provisions in the Criminal Code through the Repeal of the Criminal and Seditious Laws – Amendment Bill 2001).

[77] Penal Code (Amendment) Act, No. 12 of 2002, certified on 17 July 2002, https://www.parliament.lk/uploads/acts/gbills/english/3044.pdf.

[78] Office of the High Representative, Decision Enacting the Law on Protection Against Defamation of the Federation of Bosnia and Herzegovina, 11 January 2002, http://www.ohr.int/decision-enacting-the-law-on-protection-against-defamation-of-the-federation-of-bosnia-and-herzegovina/.

[79] Defamation was decriminalised in Georgia in 2004. See Council of Europe, *Study on the alignment of laws and practices concerning defamation with the relevant case-law of the European Court of Human Rights on freedom of expression, particularly with regard to the principle of proportionality*, CDMSI(2012)Misc11Rev2 (2012), https://rm.coe.int/study-on-the-alignment-of-laws-and-practices-concerning-alignment-of-l/16804915c5, p. 65. Although "Desecration of the State Coat of Arms of the National Flag" remains a criminal offence, it has been interpreted as only referring to physical acts. See Representative on Freedom of the Media Dunja Mijatović, *Defamation and Insult Laws in the OSCE Region: A Comparative Study* (March 2017, Organization for Security and Cooperation in Europe), p. 99, https://www.osce.org/fom/303181.

[80] Defamation Act 2009, Number 31 of 2009, s. 35, https://www.irishstatutebook.ie/eli/2009/act/31/enacted/en/html.

[81] The Coroners and Justice Act 2009, c. 25, section 73, https://www.legislation.gov.uk/ukpga/2009/25/section/73. This repealed libel offences under the common law of Wales, England and Northern Ireland while there is no criminal libel law in Scotland.

[82] Law 26.551, 26 November 2009, available in Spanish at: https://www.argentina.gob.ar/normativa/nacional/ley-26551-160774/texto. The repeal of criminal defamation followed an Inter-American Court of Human Rights decision ordering Argentina to bring its domestic legislation into conformity with the American Convention on Human Rights. See *Kimel v. Argentina (Merits, Reparations and Costs)*, Series C No. 177, 2 May 2008, p. 32, https://corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf.

[83] Armenia's general criminal defamation laws were repealed through Libel, Law Amendment ՀՕ-98-Ն, Art. 136 – Insult, Law Amendment ՀՕ-98-Ն. However, threats or contempt of human rights defenders, slandering certain administration of justice actors and contempt of State symbols remain offences. See Representative on Freedom of the Media Dunja Mijatović, *Defamation and Insult Laws in the OSCE Region: A Comparative Study*, note 79, pp. 42-43, https://www.osce.org/files/f/documents/b/8/303181.pdf.

[84] Montenegro's general insult and defamation provisions, previously in Article 195 and 196 of the Criminal Code, were repealed in 2011, although provisions on harming reputations through offending minorities, offending "honour and reputation through copyright violations", and publicly mocking certain domestic and foreign State symbols

- Macedonia (2012)[85]
- Tajikistan (2012)[86]
- Jamaica (2013)[87]
- Ukraine (2014)[88]
- Norway (2015)[89]
- Sierra Leone (2020)[90]

(76) In addition, several States have amended their criminal defamation laws to remove imprisonment as a possible punishment for defamation. These include the following:

- Bulgaria (2000)[91]
- France (2000)[92]
- Ivory Coast (2004)[93]
- Moldova (2004)[94]
- Croatia (2006)[95]

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remain in effect. See *ibid*., pp. 171-171; and Montenegro Criminal Code, Articles 195-200 and 233(3), https://www.icj.org/wp-content/uploads/2013/05/Montenegro-Criminal-Code-2003-eng.pdf.

[85] General criminal defamation and insult offences were repealed in 2012, although offences for mocking Macedonian or foreign flags, coats of arms or anthems, and foreign States and dignitaries remain in the Criminal Code, although these provide for monetary (not custodial) penalties. See Representative on Freedom of the Media Dunja Mijatović, *Defamation and Insult Laws in the OSCE Region: A Comparative Study*, note 79, pp. 234-235.

[86] Tajikistan's general defamation and insult rules were repealed in 2012, although offences relating to insulting and defaming public officials and the head of State, as well as on the "abuse" of State symbols remain in effect. See *ibid.*, pp. 230-231.

[87] The Defamation Act, 2013, Act No. 31 of 2013, assented to on 29 November 2013, section 7, https://japarliament.gov.jm/attachments/341_The%20Defamation%20Act,%202013.pdf ("Criminal libel is abolished").

[88] Ukraine's new Criminal Code, adopted in 2001, did not include criminal defamation. A criminal defamation provision was reintroduced in 2014 but repealed shortly thereafter. See Pavlo Malyuta, "Criminalization of Defamation in Ukraine: A Step Towards Europe", Jurist, 27 March 2014, http://jurist.org/dateline/2014/03/pavlo-malyuta-ukraine-laws.php.

[89] A new Criminal Code, which was first approved in 2005 but only came into effect on 1 October 2015, eliminated all criminal defamation. See Dunja Mijatović, *Defamation and Insult Laws in the OSCE Region: A Comparative Study*, note 79.

[90] Part V of the Public Order Act, 1965 (on defamatory and seditious libel) was repealed in 2020. See Sierra Leone, Office of the President, "Sierra Leone's President Julius Maada Bio Repeals Criminal Libel Law, Expresses Hope for Media Development and Democratic Spaces", 28 October 2020, https://statehouse.gov.sl/sierra-leones-president-julius-maada-bio-repeals-criminal-libel-law-expresses-hope-for-media-development-and-democratic-spaces/; and Media Foundation for West Africa, "Major Boost for Press Freedom as Sierra Leone Scraps Criminal Libel Law after 55 Years", 24 July 2022, https://www.mfwa.org/major-boost-for-press-freedom-as-sierra-leone-scraps-criminal-libel-law-after-55-years/.

[91] Bulgaria removed the possibility of imprisonment for criminal libel in 2000. However, the separate offence of "defaming" the flag, coat of arms or anthem still provides for a penalty of up to two years' imprisonment. See the Committee to Protect Journalists, "Attacks on the Press 1999: Bulgaria", 22 March 2000, https://cpj.org/2000/03/attacks-on-the-press-1999-bulgaria/; and Representative on Freedom of the Media Dunja Mijatović, *Defamation and Insult Laws in the OSCE Region: A Comparative Study*, note 79, p. 68.

[92] In 2000, prison sentences were removed for defamation and insult. See Council of Europe, *Study on the alignment of laws and practices concerning defamation with the relevant case-law of the European Court of Human Rights on freedom of expression, particularly with regard to the principle of proportionality*, note 79, pp. 61-62.

[93] In 2004, Ivory Coast abolished imprisonment as a punishment for defamation. See Committee to Protect Journalists, "Attacks on the Press in 2004 - Ivory Coast", February 2005, https://www.refworld.org/docid/47c566dec.html.

[94] Moldova eliminated imprisonment for defamation from its Criminal Code in 2004. General criminal provisions for defamation were then removed in 2009. However, the Contravention Code of the Republic of Moldova continues to provide for certain defamation-related offences without the possibility of custodial sentences. In addition, certain offences relating to the "profanation" of State symbols remain in the Criminal Code and provide in certain circumstances for custodial sentences. See Committee to Protect Journalists, "Parliament removes defamation article from Criminal Code", 26 April 2004, https://cpj.org/2004/04/parliament-removes-defamation-article-from-crimina/; and Media Dunja Mijatović, *Defamation and Insult Laws in the OSCE Region: A Comparative Study*, note 79, pp. 159-162.

[95] Imprisonment as a possible punishment for defamation was removed from Croatia's Criminal Code in 2006, although separate Criminal Code provisions on publicly mocking, disparaging or exposing to hatred foreign States

- On a federal level, Mexico (2007)[96]
- El Salvador (2011)[97]

ii. Court Decisions Striking Down Criminal Defamation Laws

(77) National courts in several jurisdictions have held that criminal defamation provisions constitute unjustifiable restrictions on freedom of expression as guaranteed under the constitution. In 2011, the Supreme Court of Bermuda (a trial court) held that the criminalisation of non-intentional defamation was an unconstitutional restriction of freedom of expression.[98] Similar to Pakistan's criminal defamation regime, there was no absolute truth defence under Bermuda's defamation rules, which required, in addition to truth, the statements to be for the "public benefit".[99] The Court read in a requirement for individuals to know that the statement was false as being necessary to render the defamation rules constitutional.[100] In addition, the Court found that the specific prosecution at issue in that case was an unjustified interference with freedom of expression, reasoning that "in most cases where serious injury is caused to personal reputations, civil remedies alone will be a proportionate response" and the decision to prosecute in that instance had not been justified.[101]

(78) More recently, courts in several other common law countries have gone further, holding that criminal defamation provisions more broadly were illegitimate, often finding them to be disproportionate and unnecessary in view of the availability of a less rights-restrictive means of achieving the same goal, namely civil defamation proceedings. In *Madanhire & Another v. The Attorney General*,[102] the Constitutional Court of Zimbabwe unanimously found that the criminal defamation provision in the Criminal Code of Zimbabwe breached the guarantee of freedom of expression under the then constitution. The Court found that the harms of criminal defamation, namely "the chilling possibilities of arrest, detention and two years imprisonment", were "manifestly excessive" and noted the availability of an

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and Croatian and foreign State symbols still provide for the possibility of imprisonment. See Representative on Freedom of the Media Dunja Mijatović, *Defamation and Insult Laws in the OSCE Region: A Comparative Study*, note 79, pp. 75-76.

[96] Committee to Protect Journalists, "Attacks on the Press 2007: Mexico", 5 February 2008, https://cpj.org/2008/02/attacks-on-the-press-2007-mexico/.

[97] Imprisonment for defamation was removed through Decree No. 836, although "*desacato*" (contempt) proscription still provides for imprisonment. See Committee to Protect Journalists, "Criminal Defamation Laws in Central America" 2016, section III, D, https://cpj.org/reports/2016/03/central-america/#3.

[98] *Richardson v. Raynor*, [2011] SC (BDA) 39 CIV, https://www.gov.bm/sites/default/files/SC1108-C-R-Richardson-v-L-Raynor-2011-SC-Bda-39-Civ-12-August-2011.pdf.

[99] *Ibid*., para. 44.

[100] *Ibid*., para. 68. The Court also identified two other unconstitutional aspects of the defamation rules: the possibility of "sufficiently trivial" matters to be pursued as indictable instead of summary offences and the absence of an "adequate mechanism" to ensure that private prosecutions were initiated only when necessary. See *ibid*., para 80.

[101] *Ibid*., paras. 38-39.

[102] [2014] ZWCC 2, 12 June 2014, https://zimlii.org/zw/judgment/constitutional-court-zimbabwe/2014/2.

"appropriate and satisfactory alternative civil remedy" to achieve the same purpose.

(79) Similarly, in 2017, the High Court of Kenya held that country's criminal defamation rules which, like those of Pakistan and Zimbabwe, allowed for custodial sentences of up to two years, unconstitutionally restricted the right to freedom of expression.[103] The Court reasoned that "the chilling possibilities of arrest, detention and two years' imprisonment, are manifestly excessive in their effect and unjustifiable in a modern democratic society…". The Court also relied on the availability of an "appropriate and satisfactory alternative civil remedy" that could accomplish the same goals.

(80) In 2018, in a unanimous decision, the Constitutional Court of Lesotho also found criminal defamation to be an unjustified infringement of the constitutionally guaranteed right to freedom of expression.[104] The Court highlighted, in its proportionality analysis, several overbroad elements of the rules, holding that as a result they did not minimally impair the right to freedom of expression.[105] It then proceeded to analyse the proportionality of the effects of criminalisation of defamation more broadly, noting the risk of self-censorship out of fear of criminal sanction and the resulting impact on the public's access to information, in addition to summarising growing international calls for decriminalising defamation.[106] Ultimately, the significant chilling impact on freedom of expression of the criminal defamation regime and the more suitable nature of civil remedies to address reputational harm led the Court to conclude that it was "not reasonable and demonstrably justified in a free and democratic society".[107]

(81) Although the Court relied in significant part on general problems with the criminalising defamation, it bears mentioning that its more textual findings on the overbreadth of Lesotho's criminal defamation provision are likewise applicable to the legislation impugned in the instant case due to the similarities of the two legislative regimes. Among the specific factors which the Court mentioned and their applicability to the Pakistani criminal defamation regime are as follows:

- Prosecutions could be initiated when no one other than the allegedly defamed individual was aware of the allegedly defamatory statement.[108] Pakistan's criminal defamation regime

[103] *Okuta & Another v. Attorney General and 2 Others*, [2017] eKLR, Petition No. 397 of 2016, http://kenyalaw.org/caselaw/cases/view/130781/.
[104] *Peta v. Minister of Law*, (2018) CC 11/2016, https://lesotholii.org/ls/judgment/high-court-constitutional-division/2018/3/Peta%20v%20Minister%20of%20Law%20%26%20Constitutional%20Affairs.pdf.
[105] *Ibid*., para 18.
[106] *Ibid*., paras. 19(a)(i) and 20-23.
[107] *Ibid*., para 24.
[108] *Ibid*., para. 18(1)(a).

similarly contains no explicit requirement that individuals other than the allegedly defamed individual become aware of the allegedly defamatory statement.

- The defence of truth required that a true statement be for the "public benefit", which was found to be vague and subject to abuse, and, moreover, it would have a "chilling" effect and amounted to a grant of "unfettered" prosecutorial discretion.[109] Likewise, Pakistan's Penal Code's defence of truth incorporates a vague requirement that the content be for the "public good".[110]
- Lesotho's legislation failed to account for the beneficial role of satirical expression through which lies, distortions and exaggerations can serve a useful purpose.[111] Similarly, under Pakistan's Penal Code, there is no exception for satire. To the contrary, Explanation 3 of s. 499 explicitly provides that ironic imputations may constitute defamation without providing any guidance on which ironic statements might be excluded as legitimate satire.

(82) Unlike the above decisions, in which restrictions of freedom of expression under criminal defamation provisions were found to be a disproportionate means of pursuing upholding reputational rights, in *Bai Emil Touray & 2 Others v. The Attorney General*,[112] the Supreme Court of Gambia found Gambia's criminal libel provisions did not pursue a legitimate aim. The Court relied on the historical context of criminal libel laws, which were "used almost exclusively to shield public functionaries from scrutiny and criticism", as well as on the removal of certain defences through 2004 amendments, which the Court believed aimed to "constrain the exercise of the right to free speech and of the press and other media" through disproportionate means and to "protect the government and its public officials".[113]

d. Failure to Respect Criminal Due Process Standards

(83) In order to understand how criminal defamation operates in Pakistan and its impact on freedom of expression, one must look at the offence under Section 499 in its entirety, including its defences, and deconstruct the ingredients of the offence and address the issue of burden of proof that shifts from the prosecution to defence, violating the presumption of innocence and criminal due process guarantees. Section 499 of the Pakistan Penal Code states:

499. Defamation:

[109] *Ibid*., para. 18(1)(b).
[110] Criminal Code of Pakistan, s. 499, First Exception.
[111] Note 104, para. 18(2).
[112] SC Civil Suit No. 001/2017, 9 May 2018, https://www.lawhubgambia.com/sc-1-2017.
[113] *Ibid*., para. 47.

Whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said except in the cases hereinafter excepted, to defame that person.
First Exception - Imputation of truth which public good requires to be made or published: It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question off act.
Second Exception - On Public conduct of public servants: It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.
Third Exception - Conduct of any person touching any public question: It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and. respecting his character, so far as his character appears in that conduct, and no further.
Fourth Exception - Publication of reports of proceedings of Courts: It is not defamation to public a substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.
Fifth Exception - Merits of case decided in Court or conduct of witnesses and other concerned: It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and not further.
Sixth Exception - Merits of public performance: It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.
Seventh Exception - Censure passed in good faith by person having lawful authority over another: It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.
Eight Exception - Accusation preferred in good faith to authorised person: It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject matter of accusation.
Ninth Exception - Imputation made in good faith by person for protection of his or other's interest: It is not defamation to make an imputation on the character of another provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person, or for the public good.
Tenth Exception - Caution intended for good of person to whom conveyed or for public good: It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

(84) Punishment for criminal defamation, in accordance with Section 500 of the Pakistan Penal Code is “simple imprisonment for a term which may extend to two years, or with fine, or with both”.

i. Elements of the Offence

(85) The essential elements/ingredients of this offence are as follows:

1. The making or publishing of an imputation, which should have been made through words, whether spoken or intended to be read, signs or visible representation, which is the action or *actus reus* of the crime.
2. The imputation was made “with the intention of harming, or knowing, or having reason to believe, that it will harm the reputation of the person concerning whom it is made”, which is the intention or *mens rea* part of the crime.

ii. Burden of Proof

(86) The defamation rule in Section 499 and its exceptions place the burden of proof on the accused to prove a number of elements of the offence. Many of the exceptions require the accused to prove that the statement was made in good faith. The First Exception requires the accused to prove that the imputation was both true and made for the public good. The fact that the burden for proof of these elements lies on the accused is clearly established in the case law. Thus, in the case of *Khondkar Abu Taleb v. The State and Muhammad Qamrul Anam Khan* (PLD 1967 Supreme Court 32), the Supreme Court stated that "it should not be forgotten that in a criminal prosecution it is sufficient if the accused can show that the imputation was substantially true." The fact that the burden shifts to the accused to prove these elements good intent and not the prosecution, goes against the presumption of innocence and established criminal due process standards.

e. Special Protection for Officials

(87) As regards the conduct of public servants, according to the Second Exception, it is a defence to show that the statements contained criticism of officials relating to their work but this also requires an additional proof of "good faith". This does not align with international standards, which make it very clear that officials have to tolerate a greater degree of criticism than ordinary citizens. Thus, the European Court of Human Rights has frequently noted:

> The limits of acceptable criticism are … wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance.[114]

(88) Furthermore, international courts have never referred to the idea that criticisms of officials need to be made in good faith. This not only imposes a heavy burden of proof on the accused but it also excludes this defence for a wide range of perfectly normal criticism of officials. The UN Human Rights Committee has made it very clear that there is very little scope for restrictions on political speech of this sort, stating:

> [T]he Committee has observed that in circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high. … Moreover, all public figures, including those exercising the highest political authority such as

[114] *Lingens v. Austria,* note 27, para. 42.

> heads of state and government, are legitimately subject to criticism and political opposition.[115] [references removed]

Requiring those criticising officials to prove good faith clearly fails to respect these standards.

(89) Another problem with these cases is that, in Pakistan, prosecution of criminal defamation is handled by prosecutors when the case is initiated by a government official. This makes it much easier for officials to bring such cases, since they are relieved of the burden of bringing the case themselves, including hiring a lawyer to represent them. It has also resulted in the weaponisation of these rules against political opponents and the silencing of victims of unjust acts. For example, in 2020, a case of criminal defamation under Section 499 (defamation), 500 (punishment for defamation) and 505 (statements conducing to public mischief) of the Pakistan Penal Code along with Sections 11, 20 and 37 of Prevention of Electronic Crimes Act, 2016, was filed against journalist Asad Toor for allegedly defaming the Pakistan Army. The Lahore High Court's Rawalpindi bench held that the First Information Report (FIR) registered against Toor was infructuous due to lack of evidence. However, the case still had important negative implications for Toor while placing a limited burden on the Army.

f. Failure to Provide Appropriate Defences

(90) Under international law, truth is always a full defence to a claim of defamation. This makes sense; the truth can never harm your reputation because what is being said accurately describes who you are. Put differently, you cannot defend a reputation you do not deserve (and hiding the truth is one way of trying to do that). As the UN Human Rights Committee has stated:

> Defamation laws must be crafted with care to ensure that they comply with paragraph 3, and … should include such defences as the defence of truth.[116] [references removed]

In a similar vein, the European Court of Human Rights has indicated:

> [T]he Court considers that the domestic authorities should have provided the applicant with an opportunity to substantiate his statements. It would go against the very spirit of Article 10 to allow a restriction on the expression of substantiated statements solely on the basis of the manner in which they are voiced. In principle, it should be possible to make true declarations in public

[115] General Comment No. 34: Article 19: Freedoms of opinion and expression, 12 September 2011, para. 38, https://undocs.org/CCPR/C/GC/34.
[116] *Ibid.*, para. 47.

> irrespective of their tone or negative consequences for those who are concerned by them.[117]

(91) By requiring not only proof of truth but also that the statements were made for the public good, Section 499 fails to measure up to this very clear international law standard. Indeed, the consequences of this are that an individual might go to jail for articulating an entirely true statement, which is clearly not appropriate.

(92) International law also provides near absolute protection to opinions. This follows from the fact that holding opinions is absolutely protected under Article 19 of the ICCPR and the fact that you cannot prove the truth of value statements. As the UN Human Rights Committee has stated:

> Defamation laws … should not be applied with regard to those forms of expression that are not, of their nature, subject to verification.[118]

Once again, Section 499 fails to live up to these standards, in most cases requiring not only that a statement be an opinion but also that it be made in good faith and, even then, that is a statement about certain types of matters, such as officials (Second Exception) or a public question (Third Exception).

(93) Beyond this, international law provides for a defence of reasonable publication for statements about public figures or on matters of public concern. This applies whenever it was, overall, reasonable in the circumstances for the defendant to have made statements of fact even if they ultimately prove not to be correct. As the UN Human Rights Committee has stated:

> At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, a public interest in the subject matter of the criticism should be recognized as a defence.[119] [references removed]

The European Court of Human Rights has an extensive jurisprudence on this point. For example, in the case of *Aquilina and others v. Malta*, the applicant had wrongly accused a lawyer of having been convicted of contempt of court. In finding a breach of Article 10 following her being held liable in defamation, the European Court noted that the applicant had tried to verify the truth of her allegation, stating:

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[117] *Csánics v. Hungary*, 20 January 2009, Application No. 12188/06, para. 43.
[118] General Comment No. 34: Article 19: Freedoms of opinion and expression, 12 September 2011, para. 47, https://undocs.org/CCPR/C/GC/34.
[119] *Ibid.*

> For the Court, such a course of action would be entirely in line with best journalistic practices. In the circumstances of the present case, the second applicant could not reasonably have been expected to take any further steps ….[120]

(94) There is no suggestion in the exceptions to Section 499 of such a defence.

5. Conclusion

(95) It is not beyond any doubt that a penalty of imprisonment for defamation, as provided for under the Pakistan Penal Code, cannot be justified as a restriction on freedom of expression. This is amply clear from a large number of both international court decisions and authoritative statements about the right to freedom of expression. There is a growing consensus that any form of criminal defamation provision represents a breach of the right to freedom of expression. The potential for abuse of these provisions, as well as the fact that less intrusive civil defamation laws provide ample protection for reputation, shows that criminal defamation laws are simply not necessary, a condition for the legitimacy of any restriction on freedom of expression.

(96) Beyond these broad standards, there are several features of the criminal defamation provisions in the Pakistan Penal Code which render then illegitimate. These include the fact that they place the burden of proof on the accused, contrary to basic criminal due process guarantees, that they do not recognise proof of truth, on its own, as a full and adequate defence, and that they also lack other defences which are recognised as being necessary under international law.

(97) For these reasons, we call on this honourable Court to hold that Sections 499, 500, 501 and 502 of the Pakistan Penal Code, 1860, are null and void as being contrary to the Constitution of the Islamic Republic of Pakistan, 1973. We note that this will not result in any lacuae in Pakistani law, since the prevailing civil defamation law rules will provide adequate protection for reputations in the country.

Mr. Afzal Butt
Preseident
Pakistan Federal Union of Journalists (PFUJ)

[120] *Aquilina and others v. Malta*, 14 June 2011, Application No. 28040/08, para. 50.

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