Defamation Law: Positive Jurisprudence

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I. INTRODUCTION

In September 1999, lawyers, journalists, human rights advocates, and U.N. representatives gathered in Sri Lanka to develop international standards for defamation law.[1] Identifying repressive laws and government abuse as serious threats to freedom of expression, ARTICLE 19, the International Centre Against Censorship, had organized the symposium as part of its program to promote "good defamation laws."[2] Local journalists provided an unplanned reminder of the need for and power of freedom of expression when they staged an anti-government rally outside the conference hall. A Sri Lankan minister and invited speaker had to "run the gauntlet" of protestors before entering the building.[3] After three days of discussion, participants produced a declaration that called for the abolition of criminal defamation laws and set guidelines for procedure, defenses, and sanctions in civil cases. ARTICLE 19 plans to publish and distribute these standards over the next few years.

The Sri Lanka symposium represents the most recent step in an international movement to reform defamation law. Designed to protect reputation, defamation law prohibits statements that would make a reasonable person think less of their subject. While most people agree it is intended to serve a legitimate purpose, political bodies and public figures often abuse it to silence their critics. In some countries, the government shuts down opposition by jailing journalists on groundless charges of libel or slander. In others, the

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1. This Article developed from my work last summer as an intern at ARTICLE 19, the International Centre Against Censorship. I wrote sections of Parts III–V for a background paper for the Sri Lanka conference described here. A version co-authored with Toby Mendel was distributed to conference participants and is scheduled to appear in the next issue of the Sri Lankan journal *Moot Point*. *See* Toby Mendel & Bonnie Docherty, *International Colloquium of Defamation Laws*, 3 MOOT POINT (forthcoming 2000). I wish to thank ARTICLE 19, then Deputy Director Malcolm Smart, and Head of Law Programme Toby Mendel for their guidance and comments on this project.

2. Memorandum on the ARTICLE 19 Programme of Action to Promote Good Defamation Laws (1999) (on file with author).

3. E-mail from Malcolm Smart, Deputy Director of ARTICLE 19, to Bonnie Docherty, former intern at ARTICLE 19 (Sept. 23, 1999) (on file with author).

technicalities of litigation serve to chill free discussion of matters of public interest.

Over the past fifteen years, national and international courts have developed a body of case law that seeks to reduce defamation's infringement on freedom of expression, a right guaranteed in treaties and constitutions around the world. Courts in democratic countries have played an especially significant role in reform because free speech is vital to their political system. The decisions exhibit noteworthy trends in legal change and frequently refer to each other as persuasive precedent. This Article presents an overview of such positive jurisprudence and focuses on decisions from international, Commonwealth, and United States courts.

Part II will explain the elements and origins of defamation law, as well as its conflict with freedom of expression. Parts III, IV, and V will analyze the recent jurisprudence in depth and highlight new means of protecting political speech from the government and its agents. These sections will focus on the initiation of an action, defenses to defamation, and sanctions, respectively. Part VI will discuss the different legal bases—common law, constitutions, and conventions—used by the courts and how they influence the new developments. Part VII will conclude by arguing that the courts' reliance on democracy as a justification for limiting defamation law may impede the development and global application of their reforms.

The positive jurisprudence of the past fifteen years has protected freedom of expression by denying certain bodies the right to bring suit, allowing heightened criticism of the government and public figures, establishing defenses that help reduce the chilling effect on the media, and requiring sanctions proportionate to the offense. Courts could go a step further, however, if they acknowledged the different legal bases for their decisions and the limits they impose on a common standard. In addition to grounding their decisions on the value of free speech to democracy, courts should consider freedom of expression as a universal right when ruling on defamation cases. Such a broad justification for protecting expression would allow courts to extend the recent jurisprudence to non-political speech and non-democratic countries.

II. DEFAMATION DEFINED

Defamation is a public communication that tends to injure the reputation of another. It includes both libel (written defamatory statements) and slander (oral ones). The definition of defamation varies from jurisdiction to jurisdiction, but "there is common agreement that a communication that is merely unflattering, annoying, irksome, or embarrassing, or that hurts only the plaintiff's feelings, is not actionable."[4] People should be tough enough

4. 1 ROBERT D. SACK, SACK ON DEFAMATION: LIBEL, SLANDER AND RELATED PROBLEMS 2–9 (1999).

not to be injured by such statements, which would flood the courts if actionable.[5] The U.S. Restatement (Second) of Torts defines defamation as a communication that "'tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'"[6] England, birthplace of the common law, has a similar definition. One court framed the question as whether "'what has been published . . . would tend in the minds of people of ordinary sense to bring the plaintiff into contempt, hatred, or ridicule or to injure his character.'"[7] Other common tests include: "'lowering the plaintiff in the estimation of right-thinking people generally,' 'injuring the plaintiff's reputation by exposing him to hatred, contempt or ridicule,' and 'tending to make the plaintiff be shunned and avoided.'"[8] Elements shared by most jurisdictions include a statement, publication to a third party or parties, and a potential to injure the plaintiff's reputation.

The law of defamation dates back to ancient times, and although it has evolved dramatically, modern themes are apparent in its origins. The civil law version developed from the Roman *acto injuriarum*, which focused on the "intentional and unjustified hurting of another's feelings" more than damage to public reputation.[9] Publication of the insult increased the injury, but was not a required element of the offense. The common law action grew out of the English ecclesiastical courts' failure to deal satisfactorily with defamation. While the church courts could order offenders to apologize, victims often found such remedies inadequate and turned to duels for satisfaction.[10] The *Scandalum Magnatum*, passed in 1275 to stop this violence, introduced two justifications for defamation law that remain relevant.[11] First, Parliament wanted to prevent insults to the nation's "best men" because it feared threats to the feudal order.[12] This idea evolved into a concern that uncontrolled criticism would drive qualified individuals out of public service.[13]

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5. *See id.* at 2–10.

6. *Id.* at 2–11 (quoting RESTATEMENT (SECOND) OF TORTS § 559 (1977)).

7. Derbyshire County Council v. Times Newspapers Ltd, 1 All E.R. 1011, 1015 (H.L. 1993) (U.K.) (quoting South Hetton Coal Co Ltd v. North-Eastern News Association Ltd, 1 Q.B. 133, 138 (Q.B. 1894) (U.K.)).

8. GEOFFREY ROBERTSON & ANDREW G.L. NICOL, MEDIA LAW 46 (1992).

9. Die Spoorbond v. South African Railways, 1946 (2) SALR 999, 1010 (CC) (S. Afr.) (Schreiner, J.A., concurring).

10. *See* KENNETH CAMPBELL, THE ORIGINS AND DEVELOPMENT OF A PHILOSOPHY FOR THE PROTECTION OF OPINION IN DEFAMATION LAW 39 (1990).

11. *See id.* at 40. The statute stated in part: "'It is commanded, That from henceforth none be so hardy to tell or publish any false News or Tales, whereby discord, or occasion of discord or slander may grow between the King and his People, or the Great Men of the Realm.'" *Id.* (quoting 3 Edw., Westminster ch. 34 (1275), 1 Dawson's 35 (Eng.)).

12. *See* NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 4 (1986).

13. *See id.* at 11 ("The good names of the 'best men' could not be left totally unguarded .... [O]therwise . . . the process of political communication would become corrupted and the general population might be denied the public services of the 'best men'—the most virtuous, wise, and talented members of the community.").

Second, the government, then the Crown, wanted to stifle critics who threatened its legitimacy. In that era, the challenge came from those who rejected the idea that the king was ordained by God.[14] By 1676, the common law had incorporated the *Scandalum Magnatum* and its successors.[15] Today, almost every state in the world has a civil or criminal law to protect individual and institutional reputation.

By making some public statements unlawful, however, defamation law runs counter to another widely accepted legal tenet—the right to freedom of expression. Constitutions drafted from the eighteenth century to the present contain provisions that guarantee free speech within states. On the international level, treaties, such as the International Covenant on Civil and Political Rights and the European Convention on Human Rights, protect the right to free expression.[16] Article 19 of the Universal Declaration of Human Rights states, "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[17] This Article supports the view that freedom of expression is a fundamental human right.

Unlike defamation law, which seeks to limit harmful statements, freedom of expression encourages public discourse. The United States, a leader in the field because of its expansive First Amendment, has developed three common justifications for free speech. First, open discussion creates a "marketplace of ideas," in which ideas compete in the public sphere until truth emerges.[18] Second, "intelligent self-government" requires free speech because citizens need to understand and debate matters of public concern.[19] Third, people can only experience true autonomy and self-fulfillment if they are allowed to express themselves; thus free expression represents an end in itself.[20] Freedom of speech can also be considered a fundamental right, which in turn helps protect other rights. If people can speak freely, they can assert their rights openly and protest any infringements. ARTICLE 19 Executive Director Andrew Puddephatt compares freedom of expression to the canary in a coal mine. Like the collapse of the canary, which warned miners of poison gas, suppression of expression indicates that other violations will soon occur.[21]

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14. *See* CAMPBELL, *supra* note 10, at 39–40.

15. *See id.* at 46.

16. *See* International Covenant on Civil and Political Rights, *opened for signature* December 16, 1966, art. 19, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 51, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171; European Convention on Human Rights, Nov. 4, 1950, art. 10, Europ. T.S. No. 5.

17. Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, art. 19, G.A. Res. 217A, U.N. DOC. A/810 (1948).

18. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 785–86 (2d ed. 1988).

19. *See id.* at 786–87.

20. *See id.* at 787–88.

21. Andrew Puddephatt has used the analogy repeatedly in private conversation and at ARTICLE 19

The pendulum between reputation and expression has swung back and forth throughout history, but the past fifteen years have produced an international trend toward liberalizing defamation law. A body of "positive" jurisprudence has developed in courts from five continents, the first and third worlds, and old and new governments. Despite the international scope of this case law, most of these decisions come from democratic countries and deal with political speech. The cases highlight the vital role freedom of expression plays in democracy, while serving as a reminder that free speech faces threats even in relatively open societies. Although freedom of expression continues to be seriously abused in many countries, this jurisprudence demonstrates an effort to increase protection of political criticism and sets a model for future international reform. The next three parts of this Article will analyze the recent developments in defamation law from the filing of an action to its resolution.

III. THE INITIATION OF AN ACTION

When initiating an action for defamation, a party in most countries can choose between civil and criminal law. Both options have the potential to interfere with freedom of expression, but their structural differences require different responses. In civil cases, courts, especially from the Commonwealth, have taken advantage of procedural mechanisms to limit who has standing to sue. Courts have used a more substantive law approach in criminal cases; the European Court of Human Rights (ECHR), for example, has developed a hierarchy of how much scrutiny different groups must tolerate. In both instances, the recent trend has been to protect criticism of a wider spectrum of bodies or individuals. While most courts agree one cannot defame the government, the question of how far to carry protection remains.

A. Standing to Sue: Civil Actions

Because most of the recent jurisprudence deals with political speech, the statements at issue generally target the government or an affiliated individual or body. Instead of looking at the contents of the criticism, several courts in the Commonwealth have responded by restricting who has the right to bring a defamation action. Governments are frequently denied standing because of the importance of allowing criticism of the state. Courts have also blocked suits by other public bodies, including state-owned corporations and political parties.

Many countries have recognized the danger of giving the government the right to sue its critics for defamation. In *Derbyshire County Council v. Times Newspapers Ltd.* (1993),[22] the English House of Lords ruled that the common law does not allow a local authority to maintain an action for libel. The

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22. 1 All E.R. 1011 (H.L. 1993) (U.K.).

County Council had tried to sue the Sunday *Times* and its staff for two articles questioning council investments and management of a superannuation fund. Because the council is elected, Lord Keith of Kinkel wrote, it "should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech."[23] The Indian Supreme Court followed *Derbyshire's* lead one year later in *R. Rajagopal v. State of T.N.* (1994).[24] It found that "the Government, local authority and other organs and institutions exercising power" cannot bring a defamation suit for damages.[25] Going a step farther, this court also ruled that because public officials do not have a right to privacy, they cannot seek damages for statements that discuss their official conduct.[26]

The courts present a threefold rationale for restricting the government's ability to sue. First, criticism of the government is vital to the success of a democracy, and defamation suits only serve to chill free debate. *Derbyshire* emphasized this point when distinguishing the county council, a governmental and democratically elected body, from other types of corporations, which can sue if defamation damages their business.[27] Second, defamation laws are designed to protect reputation, which some courts argue a government body cannot have. Because elected bodies regularly change membership, Lord Keith explained, "it is difficult to say the local authority as such has any reputation of its own. Reputation in the eyes of the public is more likely to attach itself to the controlling political party, and with a change in that party the reputation itself will change."[28] Finally, political action offers a better means for the government to defend itself from harsh criticism. Allowing the state to sue some critics opens the door to unlimited suits against others. Such suits also represent an inappropriate use of a state's wealth; the government should not use taxpayers' money to stifle their right to freedom of expression.[29]

Using this reasoning, courts have extended the limits on who can sue to government organizations that are not elected bodies. State-owned corporations, for example, have failed to win standing in at least two important cases. In *Die Spoorbond v. South African Railways* (1946), the South African court set a now frequently cited precedent when it ruled that the national railway could not sue a newspaper for defamation. The railway administration had objected to an article that accused it of endangering the public by

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23. *Id.* at 1017.

24. (1994) 6 S.C.C. 632 (India).

25. *Id.* at 650.

26. *See id.* Many years earlier, the Supreme Court of Illinois ruled a city could not sue a newspaper for defamation. It said, "No court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence." City of Chicago v. Tribune Co., 307 Ill. 595, 601 (1923).

27. *See Derbyshire*, 1 All E.R. at 1017.

28. *Id.* at 1020.

29. *See* Die Spoorbond v. South African Railways, 1946 (2) SALR 999, 1012–13 (S. Afr.) (Schreiner, J.A., concurring).

permitting trains to be dangerously overloaded and driven at high speeds. While acknowledging that corporations can sue for defamation, the court could find no cases where the Crown sued for injury to its reputation. "Had such a right existed," Chief Justice Watermeyer wrote, "one would have expected to find reports of cases in which it had been claimed."[30] Unlike *Derbyshire*, *Die Spoorbond* assumed that a government has a reputation, but argued that it is a "far more robust and universal thing" not vulnerable to attacks. Because the Crown itself did not run the national railway, defamatory statements about the corporation would not change people's opinions of the Crown.[31] The Supreme Court of Zimbabwe recently reiterated this principle when it denied the state-run Post and Telecommunications Corporation standing for defamation actions.[32] Relying heavily on *Die Spoorbond*, *Post and Telecommunications Corp. v. Modus Publications* (1997) found that while some "artificial persons" may sue for defamation, organs of the state may not. It denied the right to sue to "those artificial persons which are part of the governance of the country;"[33] the criteria to determine this status include the body's organizational and financial autonomy, whether it provides essential public services, and the effect of stifling criticism of it.[34]

Three years ago, in a decision that represents a high-water mark for freedom of expression, an English court denied a political party the right to bring a defamation action. In *Goldsmith v. Bhoyrul* (1997), the Referendum Party and its founder Sir James Goldsmith sued a newspaper and two journalists for running an article that suggested the party had lied to its supporters because it was planning to withdraw its election candidates.[35] The court analogized the party to the elected body discussed in *Derbyshire* and found that it was in the public interest to have unfettered debate about political parties seeking election to public office. "Defamation actions or threat of them would constitute a fetter on free speech at a time and on a topic when it is clearly in the public interest that there should be none," wrote Buckley of the Queen's Bench Division.[36] Under this approach, individual party members maintain the right to sue, but political parties, like the government, must defend their reputations in other forums.

The limits on the right of a government, state-owned corporation, or political party to sue for defamation stop an action at the beginning. In such cases, it does not matter what the statement was or whether it was true or false. The speaker or writer will not have to defend the comment because the case will never go to trial. While this approach to defamation law provides

30. *Id.* at 1008.
31. *Id.* at 1009.
32. *See* Posts and Telecommunications Corporation v. Modus Publications (Private) Ltd., (2) ZLR 492 (S), Judgement No. S-199-97 (1997) (Zimb.).
33. *Id.* at 497.
34. *See id.* at 500.
35. 4 All E.R. 268, 270 (Q.B. 1997) (U.K.).
36. *Id.* at 270–71.

the maximum amount of protection to a defendant, courts apply it only in the governmental sphere.

B. Hierarchy of Permissible Criticism: Criminal Actions

While limiting standing can help protect political expression in civil cases, criminal defamation requires a different approach. Because governments generally prosecute criminal cases, courts must allow them to initiate actions where criminal defamation is on the books. Private prosecutions, permitted in some countries, give similar power to individuals, including politicians and government officials. In a recent attempt to curb official abuse of criminal defamation law, the ECHR has narrowed the circumstances where scrutiny of public bodies and figures is defamatory. Over the past fifteen years, the court has decided a string of cases that creates a hierarchy of "acceptable criticism."[37] Because it has refused to abolish all criminal defamation, the ECHR cannot strip entities that civil law deprives of standing of their legal recourse. It has tried instead to limit the prosecutorial powers of governments and their agents by ruling that public bodies and officials must tolerate higher levels of criticism.

The ECHR acts like a court of appeals for the European legal systems. Established in 1953, it makes sure that state parties uphold their obligations under the European Convention on Human Rights. After a domestic court rules on a case, individuals may appeal to the European Commission on Human Rights if they believe the state has violated their rights under the convention. The Commission forwards worthy cases to the Court, which then produces a binding decision.[38] When determining if a restriction on freedom of expression is valid, the ECHR follows a three-step process. An "interference," in these cases a defamation action, violates the Convention's guarantee of free expression (Article 10) unless it is "prescribed by law," has a legitimate aim, and is "necessary in a democratic society."[39] In the cases discussed below, the interference failed to meet the third criterion.

The *Lingens Case* (1986), the first in the ECHR's string of recent defamation jurisprudence, found that politicians must accept more criticism than private individuals.[40] Bruno Kreisky, retiring chancellor and president of the Austrian Socialist Party, had won a private prosecution against journalist P.M. Lingens concerning articles about his political links with a former Nazi. Lingens argued Austria's criminal defamation law and his conviction violated his right to free expression. The ECHR agreed and ruled that "the

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37. This phrase comes from Lingens Case, 103 Eur. Ct. H.R. (ser. A) at 26 (1986). For more information on recent ECHR decisions, see Sandra Coliver, *Defamation Jurisprudence of the European Court of Human Rights*, 13 MEDIA L. & PRAC. 250 (1992).

38. *See* PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 217–19 (1997).

39. Castells v. Spain, 236 Eur. Ct. H.R. (ser. A) at 20 (1992).

40. *See Lingens*, 103 Eur. Ct. H.R. (ser. A) at 26.

limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual."[41] When choosing his career, a politician "knowingly lays himself open to close scrutiny" and therefore must tolerate more.[42] Using a rationale common to most decisions in this Article, the court also noted that political debate rests "at the very core of the concept of a democratic society."[43] While not completely sacrificing the right to protection of reputation even for public life, politicians must accept that courts will seriously consider the value of political debate when ruling in a defamation suit.[44]

In *Castells v. Spain* (1992), the ECHR went a step further, establishing an even wider definition of permissible criticism of the government itself.[45] The state had charged Castells, then a senator, with insulting the government in a magazine article about violence in the Basque Country. According to the Spanish criminal code, insulting, falsely accusing, or threatening the government is punishable by imprisonment from six months to twelve years.[46] Finding for Castells, the ECHR said a democratic government must accept more criticism than private individuals and politicians.[47] Echoing the common law idea that governments cannot have reputations, the court argued governments must not bring actions to protect their honor.[48] It distinguished these cases from potentially legitimate prosecutions to protect public order. Although the ECHR did not prohibit government prosecutions, it urged states to show restraint when instituting criminal defamation suits because of their "dominant position" and the need for political criticism.[49]

The same year, *Thorgeirson v. Iceland* (1992) extended heightened scrutiny to non-political issues of public interest.[50] The state had charged writer Thorgeir Thorgeirson with defamation of unspecified police officers after he published two articles about police brutality. Its penal code called for punishing anyone who "'vituperates or otherwise insults a civil servant'" with fines or up to three years imprisonment.[51] The government argued such defamatory expression should not be protected because it did not relate to the democratic political process. The ECHR, however, said, "there is no warrant in its case-law for distinguishing . . . between political discussion and discussion of other matters of public concern."[52] Raising another common

41. *Id.*
42. *Id.*
43. *Id.*
44. *See id.*
45. 236 Eur. Ct. H.R. (ser. A) (1992).
46. *See id.* at 17.
47. *See id.* at 23.
48. *Id.* at 21.
49. *See id.* at 23–24.
50. 239 Eur. Ct. H.R. (ser. A) (1992).
51. *Id.* at 19.
52. *Id.* at 27.

theme, the court also discussed the value of the press as a provider of information and a "public watchdog."[53]

In this string of cases, the ECHR relied heavily on the value of public discourse to democracy. Its rulings do not, however, provide an absolute safeguard for free expression. Unlike the civil law approach discussed above, the ECHR's hierarchy of permissible criticism does not stop actions at the beginning. Instead, it discourages prosecutions by defining what kind of scrutiny is legally acceptable and establishing guidelines for future cases.

C. Criminal Prosecutions: An Appropriate Form of Action?

Recent jurisprudence has not developed a clear stand on criminal defamation. Some courts consider the type of prosecution and overturn inappropriate prosecutions. Others argue that criminal defamation laws inherently violate freedom of expression and should be abolished completely. Despite this mix of opinions, cases and commentary indicate a trend toward discouraging criminal prosecutions for defamation.

While international courts have deferred to national sovereignty, domestic ones have often argued that criminal defamation poses less of a threat to free expression than civil actions. In each of the cases discussed above, the ECHR found the prosecution unnecessary in a democratic society, but it was unwilling to go so far as to reject all criminal defamation. "It remains open to competent State authorities to adopt, in their capacity as guarantors of public order, measures, *even of a criminal law nature*, intended to react appropriately and without excess to defamatory accusations."[54] Several national courts have noted that criminal law offers extra safeguards for the defendant. Governments are supposed to reserve prosecutions for only the most serious injuries to reputation, and criminal convictions generally require a higher standard of proof. Furthermore, juries can award damages hundreds of times greater than the maximum criminal fines.[55] Quoting an earlier U.S. case, the court in *Derbyshire* said, "'A despotic or corrupt government can more easily stifle opposition by a series of civil actions than by criminal prosecutions.'"[56] Although these domestic courts did not actively argue in favor of criminal law, they saw greater threats to freedom of expression from other forms of action.

Intergovernmental and nongovernmental organizations, by contrast, have called for the abolition of criminal defamation as an unjust interference with freedom of speech. A criminal conviction, which is usually reserved for more serious offenses, carries a greater stigma, and people should not face imprisonment for criticizing the government or its agents. Last summer, the U.N.

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53. *Id.*

54. Castells v. Spain, 236 Eur. Ct. H.R. (ser. A) at 24 (1992).

55. New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964).

56. Derbyshire County Council v. Times Newspapers Ltd, 1 All E.R. 1011, 1018 (H.L. 1993) (U.K.) (quoting City of Chicago v. Tribune Co., 307 Ill. 595 (1923)).

Human Rights Committee condemned the criminalization of defamation of the government. In its observations on Mexico's periodic report, the Committee said, "The criminal offense of 'defamation of the State' should be abolished."[57] The recent ARTICLE 19-sponsored conference discussed supra called for an end to all criminal defamation laws. According to the standards produced at the symposium, "Criminal defamation laws are frequently abused, being used in cases which do not involve the public interest and as a first, rather than last, resort."[58] While ordinary people cannot afford to bring prosecutions, politicians and public officials often take advantage of them.[59] As a result, criminal laws primarily benefit the very institutions and individuals to which recent jurisprudence tries to deny actions.

Despite the unresolved debate over criminal law, an analysis of recent cases shows a general move toward protecting a broader spectrum of political criticism. National courts have denied governments, state-owned corporations, and most recently, political parties the standing to sue for defamation. International courts, reviewing primarily criminal cases, have established a hierarchy of permissible criticism that requires governments and politicians to tolerate potentially defamatory scrutiny for matters of public concern. Although probably not a realistic option in the near future, the abolition of criminal defamation laws would make the jurisprudence more consistent, because it would leave no form of defamation action available to governments and their agents.

IV. DEFENSES TO DEFAMATION

Recent jurisprudence offers further protection for free expression at the trial stage. In defamation cases, the two parties often agree on the contents of the controversial statement. The questions for the court include: is the statement true, does it matter if it is true, how will readers interpret it, and what was the *mens rea* of the person who made it. Recognizing that imposing too high a burden on the defendant can discourage that party or future ones from speaking freely, courts have tried to shift some of the weight to the plaintiff. This part will begin by describing the traditional common law defenses to defamation, which are still used and continue to be refined. Then it will analyze and compare several new defenses available for statements of fact and statements of opinion.

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57. *Concluding Observations of the Human Rights Committee: Mexico*, U.N. GAOR Hum. Rts. Comm., 66th Sess. at 4, U.N. Doc. CCPR/C/79/Add. 109 (1999).

58. ARTICLE 19, Declaration Regarding Principles of Freedom of Expression and Defamation 1 (Sept. 1999) (on file with author).

59. *See id.*

A. Traditional Defenses

Once an action reaches trial, the common law has traditionally offered three defenses to defamation: truth, fair comment, and privilege.[60] Truth, or justification, is a complete defense for statements of fact. If defendants can prove the truth of a defamatory statement, they cannot be held liable for damages. Perfection is not required, however. In Britain, for example, the defendant only needs to show that the statement is "substantially correct."[61]

The defense of fair comment offers protection for the expression of opinions. The court does not need to agree with the opinion; instead, it must determine "whether the views could honestly have been held by a fair-minded person on facts known at the time."[62] While it may be easier to argue fair comment than to justify facts, the defense does not cover all opinions. Defendants must prove their opinions were based on facts[63] and made for the public interest; the latter requirement is not too difficult to meet unless the defamation deals with the private life of someone who is not a public figure.[64] Defendants do not need to prove they honestly held the opinion, only that a reasonable person could hold such an opinion.[65] Unlike justification, fair comment can be defeated if the plaintiff proves the defamer acted maliciously.[66]

Privilege—absolute or qualified—is designed to protect expression made for the public good. Absolute privilege offers a complete defense for people "with a public duty to speak out." For example, elected officials may speak freely in Parliament; judges, lawyers, and witnesses cannot be sued for what they say in court; certain government officials are not liable for reports about matters of state.[67] Without such a defense, the threat of defamation suits would deter these people from speaking freely and the public interest would suffer.

Qualified privilege provides protection to expression made in the public interest unless statements are made with malice. It requires "reciprocity of interest" between the person who makes a comment and the person who receives it.[68] The defense applies to people with a social or moral duty to report information, such as the occurrence of a crime, and to authorities who have a duty "to receive and act upon" communications or complaints.[69]

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60. For a more detailed discussion of these defenses, see ROBERTSON & NICOL, *supra* note 8, at 70–95; *See also* Reynolds v. Times Newspapers Ltd., 3 W.L.R. 1010, 1015–17 (H.L. 1999) (U.K.).
61. *See* ROBERTSON & NICOL, *supra* note 8, at 73–76.
62. *Id.* at 79.
63. *See id.* at 81.
64. *See id.* at 85.
65. *See id.* at 84.
66. *See id.* at 83–84.
67. *Id.* at 86.
68. *See* Theophanous v. H & W Times (1994) 124 A.L.R. 1, 20 (Austl.).
69. ROBERTSON & NICOL, *supra* note 8, at 87.

B. Recent Developments

While the common law defenses to defamation offer some protection to freedom of expression, courts in recent years have recognized that they are often inadequate. A true statement should never be defamatory, but requiring a defendant to prove truth presents an obstacle to free expression. Evidence rules are strict, and journalists fear being compelled to reveal their sources. "Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public."[70]

Fair comment and privilege are problematic because they apply only in limited situations. Qualified privilege, for example, rarely helps the media because it disseminates information to the public at large and therefore lacks the required reciprocity. Fair comment only protects opinions, and the dividing line between facts and opinions is often unclear. Courts try to determine how an "ordinary reader" would classify a statement by looking at it in context.[71] Commenting on the traditional defenses, one court wrote, "the balance is tilted too far against free communication and the need to protect the efficacious working of representative democracy and government in favour of the protection of individual reputation."[72] As a result, courts have had to develop new ways to protect expression in an attempt to shift the balance the other way. In recent cases, they have introduced new defenses or fine-tuned old ones. The next two parts will examine modern protections for statements of fact and statements of opinion. Although different jurisdictions have adopted different approaches, these developments represent another move toward liberalizing defamation law.

1. Defenses of Facts

Several decades before the recent string of defamation cases, the U.S. Supreme Court developed a groundbreaking test to protect freedom of expression. Recognizing the limits of the traditional truth defense, *New York Times Co. v. Sullivan* (1964) focused on the defendant's intent and established a malice requirement for defamation. The test applies specifically to public officials and shifts the burden of proof to the plaintiff, in contrast to the traditional common law defenses.[73] The case involved an advertisement run in the *New York Times* and signed by, among others, four African American

70. Derbyshire County Council v. Times Newspapers Ltd, 1 All E.R. 1011, 1018 (H.L 1993) (U.K.). *See also* New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964) ("Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.").

71. ROBERTSON & NICOL, *supra* note 8, at 80.

72. *Theophanous*, 124 A.L.R. at 20.

73. *See Sullivan*, 376 U.S. at 279–80.

clergymen also named as defendants. Sullivan, an elected police commissioner from Montgomery, Alabama, alleged that the advertisement's accusations of police violence against civil rights protestors damaged his reputation.[74] Although the advertisement contained some factual errors, Justice Brennan rejected the requirement that the defendant prove truth and argued that an "erroneous statement is inevitable in free debate."[75] The court ruled that a public official could only recover damages if he or she could prove "the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard for whether it was false or not."[76] Addressing the balance between reputation and free expression, Justice Brennan said the fact that the plaintiff may have suffered "injury to official reputation" did not justify "repressing speech that would otherwise be free."[77] By shifting the burden and changing the *mens rea* for defamation, this case excused innocent mistakes and protected political criticism made in good faith.

Considered a trailblazer for protecting free expression, *Sullivan* has sparked debate in jurisprudence around the world, and during the past decade, several foreign courts adopted its rule. The Indian Supreme Court discusses *Sullivan* at great length in *Rajagopal*, which involved the publication of a convicted murderer's autobiography alleging criminal links with prison officials. While acknowledging that the Indian Constitution may not protect as much expression as the First Amendment of the United States, the court shared the belief that the media plays a valuable role as a government watchdog. Avoiding the term "malice," it held public officials have no action for damages with regard to official duties unless they can prove defendant published information with "reckless disregard for the truth."[78] Pakistan's High Court in Lahore also followed *Sullivan* in *Nazami v. Muhammad Rashid* (1996).[79] Two local dailies had printed the statements of a third party, who described a well-known politician as senile, frustrated, and corrupt.[80] The court found the publisher did not print the statements with malice and had even sought comment from the plaintiff before publication.[81]

Other domestic courts have seen a need for new defenses but rejected *Sullivan* as going too far. The High Court of Australia, in *Theophanous v. H & W Times* (1994), established a "reasonableness" standard that has been copied around the world.[82] Theophanous, a member of the House of Representa-

74. *See id.* at 256–58.
75. *Id.* at 271.
76. *Id.* at 279–80.
77. *Id.* at 272.
78. Rajagopal v. State of T.N., (1994) 6 S.C.C. 632, 650 (India).
79. P.L.D. 1996 Lahore 410, 425 (Pak.).
80. *See id.* at 415–16.
81. *See id.* at 425.
82. (1994) 124 A.L.R. 1 (Austl.).

tives, sued the newspaper for publishing a letter to the editor claiming he was an "idiot" and biased toward Greek immigrants.[83] The court set up a three-part "reasonableness" test for the defendant to escape liability. The defendant must prove it did not know the information was false, it did not publish recklessly, and its decision to publish was justifiable. It thus gave the publisher protection "whether or not the material is accurate."[84] In contrast to *Sullivan*, however, the Australian court ruled the defendant should bear the burden of proof because it has better information about the publication history and forcing a plaintiff to prove unreasonableness would "give inadequate protection to reputation."[85] The court also decided to protect statements about certain subjects rather than certain people. The "reasonableness" test applies not to scrutiny of public figures, but to "political discussion," defined as "discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office."[86] Although it did not go as far as *Sullivan*, *Theophanous* represented a sizable step forward for freedom of expression because it abolished the requirement to prove factual statements to be true.

The *Theophanous* court envisioned the reasonableness defense as a substitute for traditional qualified privilege. After its ruling, the common law defense "will have little, if any, practical significance where publication occurs in the course of the discussion of political matters."[87] Because the public has an interest in political discussion, anyone contributing to it, including the media, can meet qualified privilege's requirement of reciprocity of interest. Rather than requiring defendants to prove privilege, however, the Australian court found that allowing the defendant to prove reasonableness better protected its implied constitutional right to freedom of expression.[88]

Last fall, the English House of Lords demonstrated the problems of requiring media defendants to prove privilege. In *Reynolds v. Times Newspapers Ltd.* (1999),[89] the court refused to establish a general privilege for the publication of "political information." Reynolds, who had just resigned as the Prime Minister of Ireland, claimed the *Sunday Times* had falsely accused him of withholding information and "deliberately and dishonestly" misleading the Irish House of Representatives and his coalition cabinet.[90] The newspaper argued that it was in the public interest to print the story. The court discussed many of the cases analyzed in this section,[91] but limited its deci-

83. *See id.* at 8–9.
84. *Id.* at 23.
85. *Id.* at 22. Unlike the United States, Australia has only an implied constitutional right to free expression based on the guarantee of representative government. The significance of this distinction will be discussed in Part VI of this Article.
86. *Id.* at 13.
87. *Id.* at 25.
88. *See id.* at 26.
89. 3 W.L.R. 1010 (H.L. 1999) (U.K.).
90. *Id.* at 1014.
91. *See id.* at 1021–22, 1026-27.

sion to qualified privilege and ruled against the *Times*. Recognizing the value of free expression, however, the court somewhat modified the common law and emphasized the need to view the situation "with today's eyes."[92] *Reynolds* replaced the traditional requirement of reciprocity with a "circumstances test," which a judge may use to decide if privilege is appropriate in a particular case.[93] To determine if "the public was entitled to know the particular information,"[94] the judge will consider many factors, including the seriousness of the allegation, the nature and source of the information, efforts made to verify the information, and the urgency and tone of the article.[95] Such a test offers the possibility, but no guarantee, of privilege for the press; the court found the *Times'* story too one-sided.[96] While showing the value of reforming old rules, this case also highlights the greater power of developing new ones.

After Australia's breakthrough in *Theophanous*, several other countries have adopted a version of the reasonableness test. In *National Media Ltd. v. Bogoshi* (1998), the South African Supreme Court of Appeal rejected strict liability for defamation.[97] It said the courts should instead look to "the nature, extent and tone of the allegations" to determine if a publication was reasonable. The "publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in the particular way and at the particular time."[98] Political discussion, for example, warrants greater freedom of expression. Other factors include the reliability of the source of the information and the steps journalists took to verify it.[99] Like Australia, South Africa placed the burden of proof on the defendant because "the facts upon which defendants rely are peculiarly within their knowledge."[100] This part of *Bogoshi* was actually a setback for freedom of expression because it overturned *Holomisa v. Argus Newspapers Ltd.* (1996), which gave primacy to free expression and put the burden of proof on the plaintiff.[101] Nevertheless, the Supreme Court of Appeal's willingness to protect political speech represents a valuable precedent in a burgeoning democracy like South Africa.

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92. *Id.* at 1017. ("The circumstances in which the public interest requires a communication to be protected in the absence of malice depend upon current social conditions. The requirements at the close of the twentieth century may not be the same as those of earlier centuries or earlier decades of this century.").

93. *See id.* at 1027. The reciprocity requirement is also referred to as the "duty interest test" because the publisher must have a duty to print the information and the public must have an interest in learning about it. *See id.* at 1017.

94. *Id.* at 1020.

95. *See id.* at 1027.

96. *See id.* at 1028.

97. 1998 (4) SA 1196, 1210 (CC) (S. Afr.).

98. *Id.* at 1212.

99. *See id.*

100. *Id.* at 1215.

101. *See id.* at 1217.

The previous cases all relieve the defendant of the burden of proving the truth of factual statements by establishing alternative defenses more favorable to freedom of expression. While truth should not be required, it should remain available as a defense. Defendants should have the right to prove truth if it is easier for them. The ECHR recognized the importance of the truth defense in *Castells*.[102] In his magazine article about violence in the Basque Country, Castells claimed that the government had not investigated or prosecuted murderers because it was protecting local officials involved in the crimes. Castells's lawyers argued the material was true and reflected the views of the general public, but the Spanish court refused to let the defendant submit evidence supporting this defense. The ECHR found that Castells's assertions "were susceptible to an attempt to establish truth," and if proved true, could have changed the outcome of the case.[103] The court ruled that the refusal to admit the defendant's evidence represented a violation of his right to free expression unnecessary in a democratic society.[104] While modern defenses strive to protect freedom of expression, this case serves as a reminder that courts must allow defendants to use traditional defenses where they offer more protection.

2. Defenses of Opinions

While the malice and reasonableness tests protect statements of fact, other recent cases have focussed on protecting the right to express opinions. In *Lingens*, the ECHR distinguished facts, which can be proved, and "value-judgments," which cannot.[105] Lingens argued that his description of retiring Chancellor Kreisky's "base opportunism" and "immoral" behavior were value-judgments. Under Austria's Criminal Code, however, he had to prove that his statements, even opinions, were true. "As regards value-judgments this requirement is impossible of fulfillment," the ECHR wrote, "and it infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 of the Convention."[106] The ECHR found that requiring a defendant to prove the truth of an opinion was not only impossible, but also an unnecessary and disproportionate way to protect reputation.[107]

Although they discuss the significance of the distinction, courts have not clearly defined how to determine if a statement is fact or opinion. In *Castells*, the majority treated the defendant's statements as provable facts. Two concurrences, by contrast, argued his comments were opinions and, therefore, the truth of his statements was irrelevant. For Judge De Meyer, it made "no

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102. *See* Castells v. Spain, 236 Eur. Ct. H.R. (ser. A) (1992).
103. *Id.* at 24.
104. *See id.*
105. Lingens Case, 103 Eur. Ct. H.R. (ser. A) at 28 (1986).
106. *Id.*
107. *See id.*

difference whether Mr. Castells was right or wrong."[108] Judge Pekkanen recognized the difficulty for a defendant if forced to prove the unprovable. "I consider that it was not possible for Mr. Castells to prove the truthfulness of his opinion . . . ," he wrote. "For finding a violation of Article 10 of the Convention it is sufficient that Mr. Castells was punished for criticizing the Government when he had done so in a way which should be allowed in a democratic society."[109] Unfortunately, these judges did not establish a test for determining if a statement is fact or opinion, or even explain why they interpreted Castells's statements as they did.

If courts err toward opinion, they will provide better protection for freedom of expression. In *Thorgeirson*, for example, the ECHR treated a journalist's summary of public opinion similar to an individual's opinion. Thorgeirson based his descriptions of police brutality at least in part on stories and rumors familiar to most people. "In so far as the applicant was required to establish the truth of these statements," the ECHR wrote, "he was . . . faced with an unreasonable if not impossible task."[110] Recognizing it is as hard to prove other people's opinions as it is one's own, it relieved him of the burden of proving the truth of that opinion.

Courts have also protected opinion by expanding traditional defenses. Two years ago, the Supreme Court of Zimbabwe modified its fair comment doctrine to provide greater protection for freedom of expression. *Moyse v. Mujuru* (1998) involved a *Horizon Magazine* article that referred to General Mujuru, former Commander of the National Army and a Member of Parliament.[111] The article suggested that Mujuru was involved in "dishonourable, disreputable or dishonest activities" in his district.[112] While the court found the statements defamatory, it excused them under fair comment. In an earlier case, the Supreme Court had laid out a five-part test for proving the defense of fair comment. The allegation must be: (1) a comment or opinion, (2) fair, i.e., based on some foundation, (3) based on true facts, (4) a matter of public interest, and (5) based on facts stated clearly in the publication.[113] In *Moyse*, the Supreme Court found the fifth requirement too limiting. It expanded it to include facts known generally to readers, even if not present in the allegedly defamatory document.[114]

In an effort to give freedom of expression greater protection from defamation suits, courts have both refined and replaced the traditional defenses to fact and opinion. The option to prove truth remains, as does a less stringent fair comment rule. Qualified privilege lives on in the *Theophanous* defense for political discussion. Progressive courts have developed new defenses, such as

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108. *Castells*, 236 Eur. Ct. H.R. (ser. A) at 28 (1992).
109. *Id.* at 29.
110. Thorgeir Thorgeirson v. Iceland, 239 Eur. Ct. H.R. (ser. A) at 28 (1992).
111. Reportable ZLR (80), Judgment No S.C. 153/98, 1-2 (1998) (Zimb.).
112. *Id.* at 4.
113. *See id.* at 11–13.
114. *See id.* at 15.

the malice and reasonableness tests. These cases not only restrict the abuse of defamation law, but also exemplify the value of comparative law. International, commonwealth and U.S. courts consistently cite each other, creating a dialogue that helps spread and advance positive jurisprudence.

V. SANCTIONS

Once a statement is found defamatory, the sanctions imposed may present a threat to freedom of expression. They not only discourage the defendant from publishing in the future, but also deter other authors from expressing themselves freely. In recent years, courts have worked to place limits on the most common kinds of sanctions including prior restraint, interlocutory injunctions, damage awards, and custodial sentences.

National and international authorities have condemned prior restraint, which stifles expression before the public can evaluate it. In *Rajagopal*, the Supreme Court of India ruled that the government could not stop the publication of a prisoner's autobiography that accused prison authorities of corruption. "The remedy of public officials/public figures, if any, will arise only after the publication and will be governed by the principles indicated herein."[115] The court cited *New York Times v. United States* (1971), better known as the *Pentagon Papers*, which placed a "heavy burden" on the government to justify any pre-publication restraint.[116] International law has also condemned prior censorship. In a 1995 report on the Republic of Korea, the UN Special Rapporteur for Freedom of Expression wrote, "any system of prior restraint on freedom of expression carries with it a heavy presumption of invalidity under international human rights law. Any institutionalization of such restraint adds further weight to this presumption."[117] Because defamation requires publication, the law offers no remedy before statements are presented to the public even if they are later found to be defamatory.

During a trial, temporary sanctions pose the most serious threat to freedom of expression. In *Francis P. Lotodo v. Star Publishers* (1998),[118] the High Court of Kenya denied an interlocutory injunction prohibiting distribution of allegedly defamatory materials. Lotodo, a Member of Parliament and Minister for Natural Resources, had sought to block the distribution and reissuing of articles published in the *Star* newspaper that he considered defamatory. The defendants argued the articles were not defamatory, and alternatively, that they were published under qualified privilege.[119] Judge Khamoni cited a three-part test for granting interlocutory injunctions: (1) the applicant must show a probability of success in the case, (2) the ap-

115. Rajagopal v. State of T.N., (1994) 6 S.C.C. 632, 649 (India).
116. *Id.* at 648–49.
117. *Report on the mission to the Republic of Korea of the Special Rapporteur*, U.N. ESCOR, 52d Sess. Agenda Item 8, at 8, U.N. Doc. E/CN.4/1996/39/Add. 1 (1995).
118. High Court of Kenya, Civil Case No. 883 (1998) (Kenya).
119. *See id.* at 1.

plicant must show he would suffer "irreparable injury, which would not adequately be compensated by an award of damages," and (3) if in doubt, the court should look at the "balance of convenience."[120] Choosing to rule on convenience, Khamoni argued that the public interest in free speech outweighed Lotodo's private interest. The right to freedom of expression "should be enjoyed . . . free from the drastic interference that may be caused by an interlocutory injunction . . . , unless there is a substantial risk of grave injustice and the private interest in preventing the discussion outweighs the public interest."[121] This case did not abolish interlocutory injunctions in all Kenyan defamation actions, but it set an important precedent by recognizing the dangers of blocking expression before it is proved defamatory.

Even when courts have found the defendant guilty of defamation, they have recognized that the imposition of sanctions can have a dangerous chilling effect on freedom of expression. In *Tolstoy Miloslavsky v. the United Kingdom* (1995),[122] the ECHR ruled that excessive damages for defamation violated Article 10 of the Convention. "[U]nder the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered," the court wrote.[123] Historian Count Nikolai Tolstoy Miloslavsky had published and distributed pamphlets that accused a school warden of war crimes for transferring Yugoslavian prisoners of war to Soviet and Titoist forces after World War II; the POWs were ultimately massacred or sent to hard labor camps. Finding the count guilty of defamation, an English jury had awarded the plaintiff £1.5 million in compensatory damages, three times the previously largest libel award in England.[124] Tolstoy Miloslavsky accepted liability but claimed that the United Kingdom violated the European Convention by not overturning such a large award. While recognizing the seriousness of the libel, the ECHR found that there are limits on how much money a jury can award.[125] Because £1.5 million was neither in line with other defamation awards nor subject to adequate safeguards, the court ruled that it did not meet the proportionality test and unnecessarily interfered with freedom of expression.[126]

Given that courts have recently rejected excessive damages as violations of freedom of expression, custodial sanctions for defamation clearly represent a disproportionate and serious threat. In many European and Commonwealth countries, custodial sanctions remain on the books, but courts rarely impose penalties for criminal defamation other than fines. As a result, there is little case law challenging imprisonment in these countries. International organizations, however, have condemned the threat of custodial sanctions because

120. *Id.* at 11.
121. *Id.* at 16.
122. 316 Eur. Ct. H.R. (ser. A) 51 (1995).
123. *Id.* at 75.
124. *See id.* at 76.
125. *See id.* at 75.
126. *See id.* at 76.

even the possibility of prison will deter free speech. The U.N. Human Rights Committee regularly criticizes states for maintaining penal sanctions. Since 1994, it has expressed concern about the possibility of custodial sanctions in Iceland, Norway, Jordan, Tunisia, Morocco, Mauritius and Iraq.[127] Endorsing the *Declaration of Sana'a*, the General Conference of UNESCO demanded the release of all imprisoned journalists, calling "the arrest and detention of journalists because of their professional activities . . . a grave violation of human rights."[128] More recently, as part of its argument for the abolition of criminal defamation, the new ARTICLE 19 standards argue that even a suspended sentence exerts an unjustified and unnecessary chilling effect on free expression.[129]

These developments in defamation law offer protection for defendants from before trial to after judgment. Although they do not restrict liability, they ensure that sanctions that interfere with freedom of expression are not imposed until after a fair trial. The decisions also confine sanctions to the needs of specific cases—the injunction of a particular defamatory document or compensation for an injured plaintiff. By focusing on repairing injuries rather than punishing defendants, the new rules reduce the danger of unwanted deterrence, which can infringe on the right to free expression.

VI. DIFFERENT BASES FOR FREEDOM OF EXPRESSION

Over the past fifteen years, Commonwealth, United States, and international courts have developed new ways to protect freedom of expression in defamation cases. They have restricted who can claim a legal recourse for defamatory statements, created defenses more favorable to the defendant, and regulated sanctions imposed on those found guilty. These courts share similar goals, and a close reading of their decisions reveals common arguments, such as the significance of free speech to democracy, the press's value as a watchdog, and the need to provide a check on the government's power. The consensus breaks down, however, when one examines the legal bases for their decisions. This Part will describe how courts rely on the common law, national constitutions, and international conventions to protect freedom of expression. It will then analyze how the basis courts choose affects their decisions and suggest that they consider a more universal rationale for reforming defamation law in the future.

For Commonwealth courts, the common law of defamation often provides sufficient protection for freedom of expression. The common law is particularly important in England, which has no constitution. In *Derbyshire*, for

127. *See* memorandum from ARTICLE 19/INTERIGHTS to the Centre for Human Rights and Legal Aid 10–11 (Feb. 9, 1999) (on file with the author). This memorandum concerns the legitimacy of custodial sanctions for defamation under international human rights norms.

128. UNESCO, DECLARATIONS ON PROMOTING INDEPENDENT AND PLURALISTIC MEDIA 43 (1997).

129. *See* ARTICLE 19, Declaration Regarding Principles of Freedom of Expression and Defamation, *supra* note 58, at 1.

example, the House of Lords relied on "public interest considerations" when ruling a local authority cannot sue for defamation. It discussed the First Amendment provisions used in *Sullivan* and found that "the public interest considerations which underlaid them are no less valid in this country."[130] The court also saw no need to rely on the European Convention of Human Rights. "I have reached my conclusion upon the common law of England . . . ," Lord Keith of Kinkel wrote. "I find it satisfactory to be able to conclude that the common law of England is consistent with the obligations assumed by the Crown under the treaty in this particular field."[131] *Derbyshire* represents the ideal, but rare, situation where common law, constitution, and convention coincide. Lord Keith's insistence that he needed only the common law, however, highlights the reluctance to adopt a more universal basis for defamation law reform around the world.

In states that have constitutions, judges frequently cite their provisions when trying to protect expression. The United States' First Amendment, which states, "Congress shall make no law . . . abridging the freedom of speech, or the press . . . ," offers the strongest guarantee of free speech.[132] In *Sullivan*, Justice Brennan ruled that awarding damages for defamation constitutes a state action and therefore must comply with the First Amendment.[133] Australia's constitution, by contrast, provides an implied right to free communication based on "the concept of representative government."[134] While this right trumps the common law, it limits protection to political speech. Constitutions fail as an international check on defamation law because they do not provide a standard guarantee of freedom of expression.

International courts rely on treaties, such as the European Convention of Human Rights, that bind its parties to uphold enumerated rights. In *Lingens*, Austria argued that national courts should be allowed discretion to balance the conflicting rights of freedom of expression (Article 10) and respect for private life (Article 8) and "to ensure that political debate did not degenerate into personal insult."[135] While acknowledging that state courts have a "margin of appreciation," the ECHR ruled that it had the final say. "The Court is therefore empowered to give the final ruling on whether a 'restriction' or 'penalty' is reconcilable with freedom of expression as protected by Article 10."[136] While treaties govern a broader jurisdiction than domestic law, they often defer to national practice. As discussed above, the ECHR has condemned several specific prosecutions, but failed to strike down criminal defamation in general. Furthermore, the international courts that interpret

130. Derbyshire County Council v. Times Newspapers Ltd, 1 All E.R. 1011, 1018 (H.L. 1993) (U.K.).
131. *Id.* at 1021.
132. *See* U.S. CONST. amend. I.
133. New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964).
134. Theophanous v. H & W Times, (1994) 124 A.L.R. 1, 11 (Austl.).
135. Lingens Case, 103 Eur. Ct. H.R. (ser. A) at 25 (1986).
136. *Id.*

treaty obligations do not always have the power to enforce the decisions they make.

The courts' use of different legal bases to liberalize defamation law suggests that the recent jurisprudence is compatible with several systems. In some cases, judges in jurisdictions with different guarantors of free expression developed virtually identical rules. *Derbyshire*, for example, justified denying the government a right to sue because it would conflict with the public interest. *Rajagopal* adopted the same rule, but relied on India's constitutional right to free speech. *Rajagopal* also followed *Sullivan*'s lead and established a malice test even after it acknowledged its constitution did not provide as much protection as the First Amendment. Other jurisdictions could thus easily adapt many of the rules developed over the past fifteen years.

In other cases, however, a jurisdiction's basis for freedom of expression limits, or at least is used to limit, reforms to defamation law. While the U.S. Constitution includes no rights contrary to the First Amendment, the ECHR must balance treaty rights to free expression and respect for private life. Different constitutions also produce different results. Relying on its implied constitutional right, *Theophanous* rejected the rules of *Sullivan* and *Derbyshire* and refused to give the press an absolute freedom to criticize public officials.[137] "[A]s the freedom under the Australian Constitution is not absolute, an absolute immunity from action cannot easily be supported," the court wrote. "It does not seem to us that the efficacious working of representative democracy and government demands or needs protection in the form of an absolute immunity."[138] Because common law, constitutions, and conventions often guarantee different levels of freedom of expression, the bases of courts' decisions can have a dramatic effect on their outcome.

As defamation law continues to develop in the next century, courts may want to consider a broader justification for freedom of expression. In *Lotodo*, Judge Khamoni of the Kenyan High Court wrote, "[T]he rights I have been discussing in this application are rights, not only enshrined in section 79(I) of the Constitution of this country, but also of Universal application . . . ."[139] While acknowledging the value of freedom of expression to democracy, most other courts have failed to consider its role as a fundamental human right.[140] The human rights argument would probably not have made a significant

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137. *See Theophanous*, 124 A.L.R. at 20–21.

138. *Id.* at 21.

139. Lotodo v. Star Publishers, High Court of Kenya, Civil Case No. 883, 16 (1998).

140. *Reynolds v. Times Newspapers Ltd.* places a heavier emphasis on human rights than most other domestic cases discussed in this Article. The court, however, does not base its decision on the argument that freedom of expression is a human right. Furthermore, most of its interest in human rights stems from England's new Human Rights Act, scheduled to come into force in October 2000, which requires courts to "have particular regard to the importance of freedom of expression" and to ensure the common law is consistent with Article 10 of the European Convention of Human Rights. Rather than serving as a universal abstract justification, human rights becomes a national statutory requirement. *See* Reynolds v. Times Newspapers Ltd., 3 W.L.R. 1010, 1023 (H.L. 1999) (U.K.).

difference in the recent body of cases because freedom of expression has, in general, been adequately protected. In addition, it would force courts to consider other rights, like the rights to reputation and privacy, and thus threaten to decrease protections in countries with strong freedom of expression laws. The human rights approach, however, has some advantages that should be seriously considered. It would provide a more universal basis for freedom of expression that would help standardize the jurisprudence. It would help protect criticism of the government by imposing an international obligation on states to uphold the right. Finally, it would offer courts in non-democratic countries a valuable tool for reconceptualizing their defamation laws.

VII. CONCLUSION

Together, the cases discussed above (and similar ones that may not be included) create a body of "positive" jurisprudence for defamation law. While not denying the right to protect one's reputation, they demonstrate an increased willingness to protect freedom of expression from the filing of a suit to the final judgment. They also show the development of an international body of law that has expanded dramatically in the past fifteen years. Domestic courts decided most of the defamation cases, but judges frequently referred to the rulings of foreign jurisdictions and international courts when explaining their rulings.

A belief in the value of democracy links these international, Commonwealth, and U.S. decisions. When deciding to limit the scope of defamation laws, they invariably justify the infringement on individual reputation by looking at the requirements of democratic government. Applying its three-part test to decide if an "interference" with Article 10 is justified, the ECHR always rejected the interference as "unnecessary in a democratic society." The *Lingens* court defended the publication of offensive and shocking statements by explaining, "Freedom of expression . . . constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress."[141] Echoing the sentiments of many Commonwealth courts, *Theophanous* described freedom of political discussion as "an indispensable element in ensuring the efficacious working of representative democracy and government."[142] Whatever rule they established and whatever bases they used, these courts consistently adopted the self-government defense for freedom of expression.

The focus on democracy may contribute to the short-term spread of this jurisprudence, yet hinder it in the long run. Freed of the restrictions of the Cold War, many countries are creating democratic systems and looking to the laws of existing states for ideas. South Africa, for example, recently es-

141. *Lingens*, 103 Eur. Ct. H.R. (ser. A) at 26 (1986).
142. *Theophanous*, 124 A.L.R. at 14.

tablished a truly representative government and chose to adopt an Australian defense for political defamation. The trends described in this Article offer not abstract ideals, but tested models, which have garnered international support. Their previous success combined with the courts' emphasis on their value to self-government make them attractive options for burgeoning democracies.

Neither the right to free expression nor the need to protect reputation are limited to democracies, however. If courts want to expand this positive jurisprudence, they should consider a less narrow justification. The traditional U.S. "marketplace of ideas" and "autonomy" arguments offer two options that are not tied to a specific political system. The interpretation of freedom of expression as a fundamental right already has the support of international law. This justification would provide a universal legal basis, which courts in any jurisdiction could use.

If international, Commonwealth, and U.S. courts continue to favor free expression over reputation, the recent defamation jurisprudence could develop in two directions. First, it could evolve to protect non-political speech, such as the statements of public interest described in *Thorgeirson.* Second, it could spread to non-democratic countries. ARTICLE 19's Sri Lanka standards leave both these possibilities open by treating freedom of expression as a human right and avoiding any mention of democracy or self-government. The standards closely parallel the recent trends in defamation law and have thus been proven achievable. The cases discussed in this Article differ primarily in the legal bases used to protect free expression. If courts reconsidered their rationales and sought to resolve this difference by considering freedom of expression as a human right, they might develop a universal justification for freedom of expression. Such an approach would help expand existing jurisprudence and facilitate future reforms of defamation law around the world.