



# The “misuse” of the judicial system to attack freedom of expression

Trends, Challenges and  
Responses

In the series:

World Trends in Freedom  
of Expression and Media  
Development

## Key trends:

- The gradual trend toward the decriminalization of defamation is slowing down, with 160 states still not having decriminalized defamation.
- The use of criminal defamation offences to restrict online expression has increased worldwide.
- Several States have harshened or reintroduced provisions on libel, defamation and insult by stating new laws intending to address cybersecurity, “fake news” and hate speech.
- Expanded use of civil defamation often leads to disproportionate damages that have a chilling effect on freedom of expression and journalists’ work.
- There has been a rise in abusive practices such as “forum shopping” and SLAPPs by powerful actors that want to silence critical voices and undermine scrutiny.
- There have been emerging challenges linked to online communications, including increased vulnerability of journalists, artists, human rights defenders and bloggers.
- Jurisprudence of international courts has reaffirmed that the speech about public officials is specially protected and must receive a proportional treatment under civil law.

# I. Introduction

According to international law, criminal sanctions to expression should only be applied very exceptionally and as a last resort, in the most severe cases, such as those involving incitement to hatred. However, despite important advocacy efforts for the decriminalization of speech offences, journalists worldwide continue to face criminal charges in instances that do not reach that threshold of severity, often in relation to criticism of public officials or institutions.

The alarming rise in the number of imprisoned journalists – which stood at the unprecedented level of 294 by the end of 2021, according to the [Committee to Protect Journalists](#)<sup>1</sup> – prompted [UN Secretary-General António Guterres in 2020 to urge governments](#) “to immediately release journalists who have been detained solely for exercising their profession”.<sup>2</sup> Criminal offences that journalists are often charged for include defamation, insulting public officials, sedition, attempts against national security/public order, vague definitions of hate speech, the publication of “fake news”, blasphemy and terrorism, among others. Journalists are also targeted by claims related to tax laws, trade secrets and copyright infringement. Since the start of the COVID-19 pandemic, they have also faced charges related to spreading disinformation or rumours, endangering public health, inciting public violence, and not complying with emergency restrictions imposed by governments, among others. In some cases, defamation was among the claims made against journalists, although it was not the most frequently cited accusation, and was often brought in combination with others.

Defamation can be “broadly understood as the communication of a false statement that unjustly causes harm to a legal or natural person’s reputation”.<sup>3</sup> The term “libel” is also used when referring to defamation in written or another permanent form, such as via radio, TV or other forms of communication including online, while “slander” alludes to its oral and unrecorded form. In some legal systems, the terms *injuria* and *calumnia* are also utilized to refer to defamation. Some countries’ statutes still include the figure of insult or *desacato* (defamation of public officials, institutions and symbols, such as the country’s flag or insignia), and charges of *lèse-majesté* (defamation of members of the royalty), despite growing international consensus that these are not aligned with international law.

Defamation can be governed through specific legislation, or through provisions included in more general laws, this varying across countries. It can be classified as a criminal offence or as a civil wrong, and in many countries it remains as both. When defamation is categorized under criminal law it can give way to sentences including fines and/or imprisonment; while the cases handled by civil courts are settled by a financial compensation or other forms of remedy, such as a correction, reply, or an apology. Defamation can also be handled through alternative dispute-solving mechanisms, such as press councils or other media self-regulation bodies.

International human rights courts and monitoring bodies, UN agencies, Special Mandates for Freedom of Expression and CSOs have repeatedly called for the decriminalization of defamation, given criminal charges’ significant chilling effect on freedom of expression and their disproportionality for the protection of reputations. The campaign for the decriminalization of defamation, among other speech offences, has unfolded at international, regional and national level. It has resulted in the repeal of criminal sanctions in a number of countries, but has also faced setbacks. Criminal defamation provisions continue to be used to intimidate and suppress expression across regions, along with disproportionate civil damages and vexatious litigation, among other challenges.

<sup>1</sup> [https://cpj.org/data/imprisoned/2021/?status=Imprisoned&start\\_year=2021&end\\_year=2021&group\\_by=location](https://cpj.org/data/imprisoned/2021/?status=Imprisoned&start_year=2021&end_year=2021&group_by=location).

<sup>2</sup> <https://www.un.org/sg/en/content/sg/note-correspondents/2020-12-15/note-correspondents-the-annual-report-the-committee-protect-journalists>.

<sup>3</sup> Media Defence. [Fact sheet: Defending the Media in Defamation Cases](#), p.1: <https://www.mediadefence.org/wp-content/uploads/2020/09/Media-Defence-Defamation-Fact-Sheet-for-Web.pdf>.

## II. Applicable international standards and stepping-stones in the campaign for the decriminalization of defamation and other press offences

### Standards in international and regional human rights instruments

Defamation laws can serve the legitimate purpose of safeguarding reputations from being damaged by false statements of fact, but they require for an adequate balance to be struck between this aim and upholding freedom of expression. It has been increasingly recognized that tackling defamation under criminal law does not respect such balance, as it results in disproportionate measures to address the harm caused, which is also the case when civil actions result in excessively burdensome compensation.

Article 19 of the Universal Declaration of Human Rights (UDHR) states that “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”. Freedom of expression is also protected under Article 19 of the International Covenant on Civil and Political Rights (ICCPR) – a binding treaty that has been ratified by most countries – as follows:

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

Freedom of expression can only be restricted in very exceptional circumstances, in compliance with a three-part, cumulative test. Limitations to this right must: i) Be provided by law, which should be clear and accessible to everyone; ii) Have a legitimate aim: to protect the rights or reputations of others; or to protect national security or public order, public health or morals – as per Art. 19(3) above; iii) Be necessary and proportionate, representing the least restrictive means to achieve the sought for aim.<sup>4</sup>

At regional level, Article 13 of the American Convention on Human Rights protects freedom of expression in similar terms, stating that its exercise shall not be subject to prior censorship, and that any subsequent limitation “shall be expressly established by law to the extent necessary to ensure: a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals.” The African Charter on Human and Peoples’ Rights also enshrines freedom of expression in its Article 9, which recognizes every individual’s right to receive information as well as to express and disseminate his or her opinions within the law. In turn, Article 10 of the European Convention on Human Rights states that “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”

Also relevant to the right to reputation are Article 12 of the UDHR and Article 17 of the ICCPR, which protect individuals against attacks against their honour and reputation (the former referring

<sup>4</sup> For a structure view of the three-part test, please see: <https://www.youtube.com/watch?v=Wg8fVtHPDag>.

to “arbitrary attacks” and the latter to “unlawful attacks”). The American Convention on Human Rights also protects honour and reputation against unlawful attacks (Article 11) and establishes the related right to reply or correction (Article 14).

## Soft law, jurisprudence and advocacy milestones

### Global level

In 2011, the **Human Rights Committee**, provided guidance related to defamation in its **Comment 34 on Article 19 of the ICCPR**.<sup>5</sup> This interpretative document calls attention to the Covenant’s particularly strong protection of expression in the context of public debate regarding public political figures and institutions, expressing concern about laws such as “lese majesty, desecration, disrespect for authority, disrespect for flags and symbols, defamation of the head of state and the protection of the honour of public officials”. Defamation laws should be designed in a way that does not serve to curtail free expression, the Comment highlights. It notes that States should consider the decriminalization of defamation, clarifying that criminal law should only be applied to the most severe cases and that imprisonment is never an appropriate sanction, and it recommends placing reasonable limits on damages to be paid by the losing party. It explains that defamation laws should provide for truth as a defence, and should not apply to expression that cannot be subject to verification (i.e. opinion). The Comment also reflects the importance of the standard of actual malice<sup>6</sup> and of public interest as defences. The Comment also notes that prohibiting displays of lack of respect to religions and belief systems is incompatible with the Covenant, except in the case of expressions amounting to advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence within the provisions of Article 20 of the ICCPR. This is in line with the **Human Rights Council Resolution 16/18** that had been adopted earlier in 2011,<sup>7</sup> and is a position that would also be reflected in the **Rabat Plan of Action on the Prohibition of Incitement to Hatred**.<sup>8</sup>

More recently, through **Resolution 39/6** (2018)<sup>9</sup> and **Resolution 45/18** (2020),<sup>10</sup> the **Human Rights Council** expressed concern for the misuse of defamation and libel laws (among other types of legislation) to restrict legitimate expression and interfere with journalists’ work – especially through excessive criminal penalties – and urged States to revise and repeal them as needed to conform to international standards. The resolutions also called attention to the use of strategic lawsuits against public participation (SLAPP) to pressure journalists, an issue that will be further analyzed in Section 4.3 of this Brief.

The **UN Special Rapporteur on Freedom of Opinion and Expression**, the **OAS Special Rapporteur for Freedom of Expression**, the **Special Rapporteur on Freedom of Expression and Access to Information in Africa** and the **OSCE Representative on Freedom of the Media** have repeatedly called for criminal defamation laws to be abolished and civil ones to be favored, both through statements they issued individually, as well as through joint declarations. **Ten of their joint declarations** contain recommendations concerning defamation and related offences. These call attention, among other aspects, to the problematic nature of criminal defamation legislation, blasphemy laws and those protecting the reputation of public figures, institutions and state symbols, the importance of ensuring the proportionality of civil sanctions, and the defence of opinion, proof of truth, fair comment and reasonable publication.

<sup>5</sup> <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

<sup>6</sup> The standard of actual malice originated in the 1964 US Supreme Court landmark ruling in *New York Times Co. v. Sullivan*: <https://globalfreedomofexpression.columbia.edu/cases/new-york-times-co-v-sullivan/>, which set the doctrine that, to win a defamation suit, a public official must prove that a defamatory statement is false and that the person who published it knew it was false or did so in reckless disregard of its truth or falseness.

<sup>7</sup> [https://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.RES.16.18\\_en.pdf](https://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.RES.16.18_en.pdf).

<sup>8</sup> [https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/SeminarRabat/Rabat\\_draft\\_outcome.pdf](https://www.ohchr.org/sites/default/files/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf). For a structured view of the Rabat six-part threshold, please see: <https://www.youtube.com/watch?v=ADrB32OSe3A>.

<sup>9</sup> <https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2FRES%2F39%2F6&Language=E&DeviceType=Desktop&LangRequested=False>.

<sup>10</sup> <https://digitallibrary.un.org/record/3888335?ln=fr>.

The **UN General Assembly's Resolution 74/157<sup>11</sup> on the Safety of Journalists and the Issue of Impunity**, adopted in December 2019 with record levels of support, also urges States to ensure that defamation laws are not misused to censor and interfere with journalists' work and, "where necessary, to revise and repeal such laws, in compliance with States' obligations under international human rights law".

The **Sana'a Declaration<sup>12</sup>** emerging from the **UNESCO**-sponsored seminar on Promoting Independent and Pluralistic Arab Media in 1996 and the **Sofia Declaration<sup>13</sup>** adopted in a similar event focused on Central and Eastern Europe in 1997 state that disputes involving the media or media professionals in exercise of their work should be tried under civil codes or procedures, not criminal ones. Both Declarations were endorsed by UNESCO's General Conference in 1997. **Six UNESCO World Press Freedom Day commemorations** also called for the decriminalization of defamation. **UNESCO's Media Development Indicators<sup>14</sup>**, endorsed by the International Programme for the Development of Communication in 2008, include a specific indicator reflecting that defamation legislation should impose the narrowest restrictions necessary to protect individuals' reputations, which outlines some key conditions that should be in place for this to be the case. In turn, the **UN Plan of Action on the Safety of Journalists<sup>15</sup>**, spearheaded by UNESCO in 2011 and approved by the UN Chief Executives Board in 2012, proposes cooperation with Member States to ensure that defamation becomes a civil, not a criminal action.

Another key contribution to advocacy at global level was the development of **Principles on Freedom of Expression and Protection of Reputation<sup>16</sup>** led by the CSO ARTICLE 19, first released in 2000 and updated in 2017.

## Regional level

### European Human Rights System

In 1986, the **European Court of Human Rights (ECtHR)** issued a landmark decision in the **Lingens v. Austria (1986)**.<sup>17</sup> Considering that freedom of political debate is at the core of a democratic society, the Court noted the higher limits of acceptable criticism regarding a politician, as compared to a private citizen, since "... the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance".

The ECtHR has consistently asserted that penalties imposed for defamation should be proportional and that governments should prioritize other forms of remedy. Despite not having completely ruled out the criminalization of defamation, it has never upheld a prison sentence for this offence. In **Castells v. Spain (1995)**<sup>18</sup> it argued that, given the Government's dominant position, it needs to show restraint in terms of turning to criminal proceedings, especially if other options are available. In **Cumpana and Mazare v. Romania (2004)**,<sup>19</sup> it noted that imprisonment was appropriate only exceptionally, "notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence." The Court has also acknowledged the chilling effect of suspended prison sentences, for instance in **Belpietro v. Italy (2013)**,<sup>20</sup> and has repeatedly highlighted that damages in civil defamation cases must be proportional to the harm caused.

<sup>11</sup> <https://undocs.org/Home/Mobile?FinalSymbol=A%2FRES%2F74%2F157&Language=E&DeviceType=Desktop&LangRequested=False>.

<sup>12</sup> <https://al-bab.com/documents-reference-section/sanaa-declaration-arab-media>.

<sup>13</sup> <https://accountablejournalism.org/ethics-codes/International-Sofia>.

<sup>14</sup> <https://unesdoc.unesco.org/ark:/48223/pf0000163102>.

<sup>15</sup> [https://en.unesco.org/sites/default/files/un-plan-on-safety-journalists\\_en.pdf](https://en.unesco.org/sites/default/files/un-plan-on-safety-journalists_en.pdf).

<sup>16</sup> [https://www.article19.org/data/files/medialibrary/38641/Defamation-Principles-\(online\)-.pdf](https://www.article19.org/data/files/medialibrary/38641/Defamation-Principles-(online)-.pdf).

<sup>17</sup> <https://globalfreedomofexpression.columbia.edu/cases/lingens-v-austria/>.

<sup>18</sup> <https://globalfreedomofexpression.columbia.edu/cases/castells-v-spain/>.

<sup>19</sup> <https://globalfreedomofexpression.columbia.edu/cases/case-cumpana-mazare-v-romania/>.

<sup>20</sup> <https://globalfreedomofexpression.columbia.edu/cases/belpietro-v-italy/>.

## Inter-American Human Rights System

The **Inter-American Court of Human Rights** has played a key role in the progressive decriminalization of laws that penalize expression offending public officials' honour (*desacato* or contempt of authority laws) in Latin America.

The **Court** has repeatedly asserted that criminal sanctions imposed for defamation are disproportionate, overturning these in [Herrera-Ulloa v. Costa Rica](#) (2004),<sup>21</sup> [Ricardo Canese v. Paraguay](#) (2004),<sup>22</sup> [Palamara Iribarne v. Chile](#) (2005),<sup>23</sup> [Tristán Donoso v. Panama](#) (2009)<sup>24</sup> and [Uson Ramírez v. Venezuela](#) (2009).<sup>25</sup> In [Tristán Donoso v. Panama](#), the Court also recognized the intimidating and inhibiting impact of disproportionate civil penalties.

In [Kimel v. Argentina](#) (2008),<sup>26</sup> the Inter-American Court found that the criminal sentence that had been imposed on a journalist/historian was unnecessary and disproportionate, ruling that the Argentine State had abused its punitive power and violated the author's freedom of expression. It ordered Argentina to compensate the author and to reform its criminal legislation on the protection of honour and reputation, as it violated the principle of strict legality. The ruling led to the country's abolishment of criminal defamation for expressions on matters of public interest or of a non-assertive nature; as well as to the elimination of prison sentences for any other case of defamation, which were replaced by fines.<sup>27</sup>

More recently, in [Álvarez v. Venezuela](#) (2019),<sup>28</sup> the Court found that criminal prosecution is not appropriate to protect the honour of a public official in connection to speech concerning the exercise of his/her functions, as it would limit freedom of expression, weaken public scrutiny over State institutions and damage democratic pluralism.

In the very recent case of [Moya Chacón v. Costa Rica](#) (2022),<sup>29</sup> analyzing a defamation civil sanction in accordance with the convention, the Inter-American Court warned that it was not proven at the domestic level that the journalists had any intention to inflict specific harm against the person or persons affected by the news. In this context, and also considering the fact that the published information was provided by an official source, the Court considers that the civil measures imposed by national judges had an intimidatory effect on journalists.

## African Human Rights System

In 2014, the **African Court on Human and People's Rights** issued a landmark judgment, [Lohé Issa Konaté v. Burkina Faso](#) (2014).<sup>30</sup> It overruled the criminal sanctions that had been imposed on a newspaper editor that had been convicted for defamation, public insult and contempt of officials following the publication of two articles denouncing corruption involving a state prosecutor, who had initiated the proceedings. The Court argued that the sanctions (one year-imprisonment, a fine and a six-month publication suspension) amounted to a disproportionate interference on Mr Konaté's and other journalists' freedom of expression, also stating that public figures should tolerate a higher level of criticism than private citizens. It ordered the country to amend its defamation legislation, repealing custodial penalties and bringing other sanctions in line with the

<sup>21</sup> <https://globalfreedomofexpression.columbia.edu/cases/herrera-ulloa-v-costa-rica/>.

<sup>22</sup> <https://globalfreedomofexpression.columbia.edu/cases/ricardo-canese-v-paraguay/>.

<sup>23</sup> <https://globalfreedomofexpression.columbia.edu/cases/palamara-iribarne-v-chile/>.

<sup>24</sup> <https://globalfreedomofexpression.columbia.edu/cases/tristan-donoso-v-panama/>.

<sup>25</sup> <https://globalfreedomofexpression.columbia.edu/cases/uson-ramirez-v-venezuela/>.

<sup>26</sup> <https://globalfreedomofexpression.columbia.edu/cases/kimel-v-argentina/>.

<sup>27</sup> In the case [Mémoli v. Argentina](#) (2013): [https://iachr.ils.edu/sites/default/files/iachr/Court\\_and\\_Commission\\_Documents/2016-2017R2/memoli\\_001\\_preliminary\\_objections\\_merits\\_reparations\\_and\\_costs\\_aug\\_2013.pdf](https://iachr.ils.edu/sites/default/files/iachr/Court_and_Commission_Documents/2016-2017R2/memoli_001_preliminary_objections_merits_reparations_and_costs_aug_2013.pdf), however, IACHR's rule was divergent with the previous jurisprudence, causing concern among free expression advocates and experts. See Catalina Botero (2014) [Derecho penal y libertad de expresión: deliberación pública, democracia y derecho penal](#): <https://drive.google.com/file/d/0B5QHpZDYvKSNQIVRWGFIYkwxREE/view>, intervention in the framework of the Seminar "Freedom of expression and the judiciary", April 2014, Rio de Janeiro, Brazil; Eduardo Bertoni (2013) [Setbacks and Tension in the Inter-American Court of Human Rights](#): <https://www.mediadefence.org/news/setbacks-and-tension-in-the-inter-american-court-of-human-rights/>, published in Media Defence.

<sup>28</sup> [https://www.corteidh.or.cr/docs/comunicados/cp\\_48\\_19\\_eng.pdf](https://www.corteidh.or.cr/docs/comunicados/cp_48_19_eng.pdf).

<sup>29</sup> [https://www.corteidh.or.cr/docs/comunicados/cp\\_60\\_2022\\_eng.pdf](https://www.corteidh.or.cr/docs/comunicados/cp_60_2022_eng.pdf).

<sup>30</sup> <https://globalfreedomofexpression.columbia.edu/cases/lohe-issa-konate-v-the-republic-of-burkina-faso/>.

tests of necessity and proportionality, besides expunging the editor’s criminal record and paying him a compensation. This decision gave momentum to the decriminalization of defamation in the region, and was followed by key rulings and developments at national level, starting by the declaration of criminal defamation as unconstitutional by courts in Zimbabwe (2016) and Kenya (2017).

In 2018, the **Community Court of Justice of the Economic Community of West African States (ECOWAS Court)** also issued a key judgment, [Federation of African Journalists \(FAJ\) and others v. The Gambia](#) (2018).<sup>31</sup> The Court ruled that the criminal defamation, sedition and false laws offences in the country’s Criminal Code infringed upon freedom of expression, given their chilling effect. The Gambia was ordered to repeal or decriminalize its laws on sedition, false news, criminal libel and defamation, and the journalists concerned were awarded compensation. **As a result, the Gambian Supreme Cour declared criminal defamation as unconstitutional.**

### III. The impact of criminal defamation laws

Criminal defamation laws have an inhibitory and silencing effect, even before a conviction takes place. They have a negative impact in terms of:	
<b>Time</b>	When faced with a criminal lawsuit, a journalist will have to invest time in meeting with lawyers, testifying, preparing appeals, etc.
<b>Financial resources</b>	The concerned journalist will have to cover the costs of legal defence, and to pay the fine that is sometimes part of the criminal sanctions, which can sometimes be significant. A criminal process can also involve the freezing of assets. An aspect to be noted is that, in most legal systems, if there is a conviction involving a fine, the money goes to the State, rather than to financially compensate the person defamed.
<b>Professional career and image</b>	Some cases involve the suspension of journalistic work while proceedings are ongoing, or as part of the sanctions ruled by the court. The stigma associated with being criminally prosecuted can also result in job loss and negatively impact future work opportunities, which could be further undermined if the case results in a criminal conviction that would remain in a journalist’s record. Work continuity can also be impaired by the seizing of data, computers, phones and other equipment during the legal proceedings. Criminal cases can also lead to the closing of media outlets.
<b>Psychological effects</b>	A criminal prosecution may include arrest and detention, interrogation, going through a trial and facing possible imprisonment, which are emotionally draining. An international travel ban and restrictions to move beyond certain areas within the defendant’s country may also apply. Powerful plaintiffs may also portray the journalist as a liar, an enemy of the State, etc., which can lead to public vilification and harassment both online and offline.
<b>Deprivation of liberty and other related consequences</b>	If convicted, along with being deprived of her/his liberty, a journalist must face other consequences related to the poor conditions prevailing in prisons in many countries, which can sometimes be deadly. For example, <b><u>at least one of the imprisoned journalists who died due to COVID-related causes in 2020 had been serving a 10-year prison sentence for defamation</u></b> the previous year.
<b>Self-censorship, undermining freedom of expression and access to information</b>	A journalist who has faced a criminal prosecution, and peers who are aware about it, may be hesitant about covering the same topic or other controversial ones, or may be discouraged from doing so by editors or media outlet owners. Suspended prison sentences, common in many countries, mean that although not imprisoned, the journalist is likely to feel under constant threat, also leading to self-censorship. The mere existence of criminal defamation legislation implies that journalists work under the continued risk of facing prosecution, even in countries where it is rarely or never used. All the above greatly impacts on freedom of expression and the public’s right to know.

<sup>31</sup> <https://globalfreedomofexpression.columbia.edu/cases/federation-african-journalists-faj-others-v-gambia/>.

## IV. Trends and Challenges

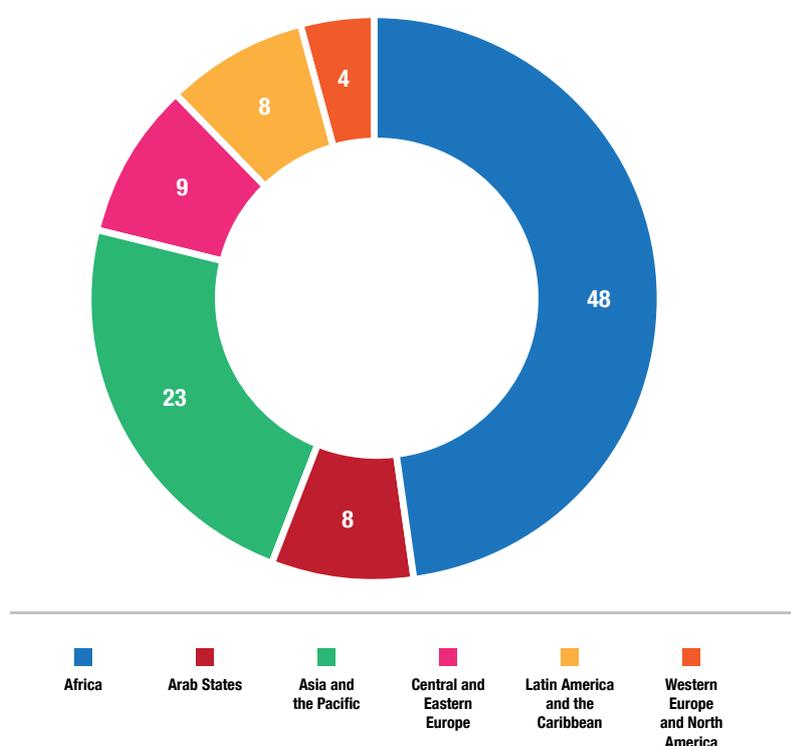
### Slowing down and backsliding, following some previously achieved progress towards the decriminalization of defamation

UNESCO's [World Trends Global Report on Freedom of Expression and Media Development \(2021-2022\)](#)<sup>32</sup> recorded that, in 2021, at least 160 UNESCO Member States still have criminal defamation laws. At the same time, a raft of new laws have been passed in the last five years that purport to take aim at mis- and disinformation, cybercrime, or hate speech, but with potentially grave implications for media freedom. At least 57 laws and regulations across 44 countries have been adopted or amended since 2016 that contain overly vague language or disproportionate punishments that threaten online freedom of expression and media freedom.

Advances in jurisprudence and soft law, as well as the strong push from advocate groups have resulted in some advances towards the decriminalization of defamation in a number of countries in diverse regions in the past two decades. However, this process has slowed down at least for the past 5 years.

The use of criminal defamation continues to be one of the strongest challenges to press freedom in all regions. Criminal defamation laws, including insult provisions that increase protection for public officials or that grant similar safeguards to State institutions are often used by powerful actors to silence criticism, limit public discussion and protect interests, rather than to legitimately ensure respect for the right of reputation.

**Percentage of journalists imprisoned for defamation by region between 1992 and 2020**



Source: Committee to Protect Journalists

#### According to the Committee to Protect Journalists:

- **294** journalists were imprisoned in 2021 (record level)
- **1,866** journalists were imprisoned between 1992 and 2020:
  - **142** of them (8% of journalists imprisoned) were charged with defamation. In 47 of these cases, defamation was combined with ethnic/religious insult, retaliatory, false news and/or anti-state charges) – see regional breakdown to the right
  - **24** additional journalists were imprisoned for ethnic/religious insult (6 of them under combined charges, including anti-state charges) – 50% in Asia and the Pacific, 25% in Arab States, 17% in Latin America & the Caribbean, and 8% in Africa

<sup>32</sup> <https://unesdoc.unesco.org/ark:/48223/pf0000227025>.

## Criminal defamation across regions

**Africa** has witnessed a gradual, sustained trend toward decriminalization of defamation following the 2014 **Lohé Issa Konaté v. Burkina Faso** landmark ruling by the African Court on Human and Peoples' Rights, going, in six years, from **1 to 8** countries that had fully decriminalized defamation,<sup>33</sup> with 4 additional countries having implemented partial reforms. Yet defamation is still a criminal offence in **39 out of the 47 countries** in Africa. There is still momentum toward decriminalization of defamation offences in the region, but there has also been backsliding, for example, through the upholding, harshening, reintroduction or new adoption of criminal defamation and insult offences in several countries. Even in some countries where the crime of defamation has been repealed, journalists continue to be prosecuted under cybercrime, anti-terror, hate speech, "fake news", national security or data protection laws, increasingly facing charges in connection to social media posts.

Among the **Arab States**, no country has decriminalized defamation. Journalists and others publicly expressing themselves do not count with adequate defences when threatened with or charged with defamation, libel and other similar offences, which are widely used in the region to silence and control the media. Journalists, bloggers, activists and other critical voices often face prosecution for online expression, under a wide variety of defamation-type offences, often combined into claims aggregating different charges.

**In Asia and the Pacific, 38 out of 44 UNESCO Member States** retain criminal defamation, **6** having repealed it and an additional one having advanced a partial repeal.<sup>34</sup> There has been instances of back-and-forth in a number of countries. In most States in South, South East and East Asia, defamation can be handled via the civil and/or criminal route and criteria to determine when a case can be considered a criminal offence is often unclear, which is conducive to abuse. The introduction of defamation legislation in this sub-region is sometimes motivated by political retaliation.<sup>35</sup> The rise in the application of defamation and related provisions to online speech, including through the adoption of new laws, has also caused international alarm. A group of UN Special Procedures have recently expressed concern about the increase of *lèse-majesté* prosecutions and the harshening of related prison sentences in a country, the enforcement of which has become stricter as activists shifted to online advocacy since the start of the COVID-19 pandemic.

In **Central and Eastern Europe** there has been an increased use of criminal defamation laws, which are in force in **15 out of the 25 UNESCO Member States** that make up the region, most of them including the possibility of custodial sanctions. Ten countries have abolished all general provisions on defamation and insult,<sup>36</sup> and another 4 have implemented a partial decriminalization.<sup>37</sup> At least 4 countries have introduced or reintroduced, expanded or harshened defamation or related offences in the past decade, one of them extending criminal defamation and insult to online speech. There were at least two others that considered proposals to strengthen criminal defamation, yet they did not prosper, partly thanks to international pressure against them.<sup>38</sup>

<sup>33</sup> Ghana (2001), Burkina Faso (2014), Zimbabwe (2016), Kenya (2017), Gambia (2018), Lesotho (2018), Liberia (2019) and Sierra Leone (2020) have fully decriminalized defamation. Central African Republic, Côte d'Ivoire, Rwanda and Uganda have implemented partial reforms.

<sup>34</sup> New Zealand (1992), Sri Lanka (2002), Niue (2007), Timor-Leste (2009), Kyrgyzstan (2015) and Maldives (2018) have abolished criminal defamation. Kazakhstan decriminalized defamation but not insult (2020).

<sup>35</sup> Ibidem.

<sup>36</sup> Bosnia and Herzegovina (1999), Ukraine (2001), Estonia (2002), Georgia (2004), Armenia (2010), The Republic of Moldova (2009), Montenegro (2001), North Macedonia (2012), Tajikistan (2012) and Romania (2014).

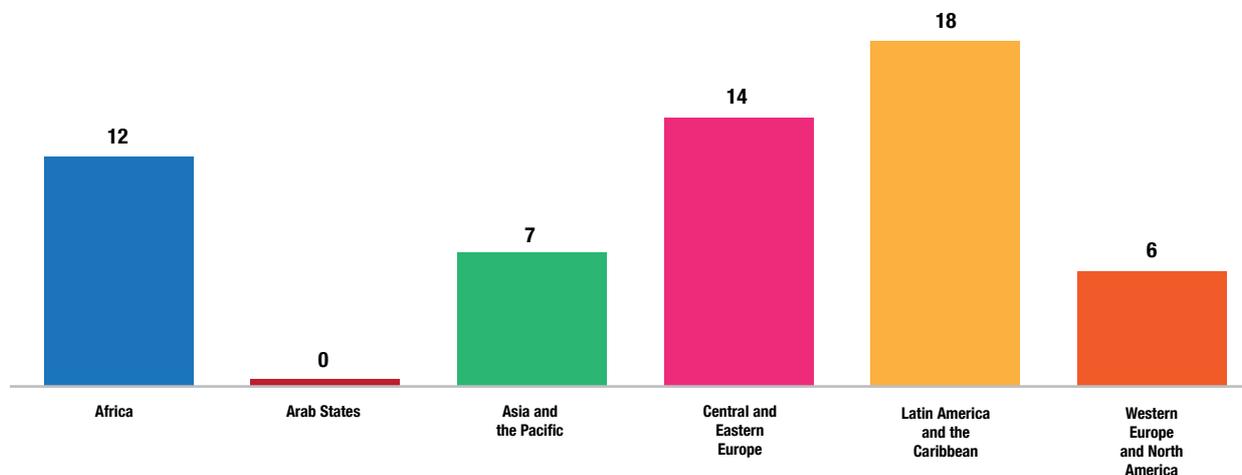
<sup>37</sup> Bulgaria, Croatia, Lithuania and Serbia.

<sup>38</sup> Information for this region draws from OSCE (2017) "[Defamation and Insult Laws in the OSCE Region: A Comparative Study](https://www.osce.org/fom/303181)": <https://www.osce.org/fom/303181>, cit. and UNESCO and University of Oxford (2018) [World trends in freedom of expression and media development: regional overview of Central and Eastern Europe, 2017/2018](https://unesdoc.unesco.org/ark:/48223/pf0000265969): <https://unesdoc.unesco.org/ark:/48223/pf0000265969>.

In **Latin America and the Caribbean**, significant advances were made between 1993 and 2012 in terms of recognizing the particularly strong protection that expression should enjoy when it concerns public officials or matters of public interest. At least **12 countries** have either repealed *desacato* laws and similar ones or abolished criminal defamation in relation to issues of public interest,<sup>39</sup> and at least two additional ones have implemented partial repeals.<sup>40</sup> Some countries have abolished prison sanctions, replacing them by fines. The abolishment of general criminal defamation provisions took place only in **4 countries** – with the caveat that in one of these, the repeal took place at federal level, and in another one “seditious libel” still remains in the books.<sup>41</sup> Criminal defamation offences persist in **29 of the 33 UNESCO Member States** that constitute the region, and continues to be weaponized against journalists and bloggers. Even in countries where *desacato* has been eliminated, public officials file claims, in their personal capacity and under other figures protecting “honour”, against speech that criticizes them in regard to the exercise of their duties. In recent years, slander has been integrated as a criminal offence in a country’s electoral code; while in another one “defamation” has been eliminated from its Penal Code yet the crimes of *injuria* (insult) and *calumnia* (slander) remain there. There has also been growing concern about the increased number of claims – including initiated by political figures – against content posted online, as well as regarding attempts to introduce new legislation that integrates online defamation as a specific offence and about the criminalization of speech through other laws, for instance focused on hate speech.

In **Western Europe and North America**, criminal defamation remains in the statutes of **20 out of the 25 UNESCO Member States** that compose the region, the great majority of them retaining custodial sanctions. Between 2003 and 2018, **5 countries** abolished criminal defamation and insult laws, and there was a partial repeal in an additional one.<sup>42</sup> Some States have also reinforced criminal defamation laws to combat online hate speech or cyber-bullying. For the most part, criminal defamation laws have fallen in disuse in common law countries, while the offence is retained in the majority of civil law countries, and still utilised frequently in a number of them. In several of these countries, defamation against a public official is more strongly penalized, and in some cases the heads of state enjoy a higher degree of protection, with sanctions for libel against them being harsher. Advances have been made in terms of abolishing imprisonment as a sanction and the repeal of blasphemy laws in a number of countries. International opposition has delayed or obstructed some attempts to introduce new problematic defamation laws in the region.

### Members States that have fully or partial decriminalized defamation



Source: ARTICLE 19 (2012) Defamation Maps; OSCE (2017) “Defamation and Insult Laws in the OSCE Region: A Comparative Study”; María Dolores Miño Buitrón, Agustina del Campo, Eduardo Bertoni (2012) “La ley y la palabra: Criminalización de la expresión en América Latina”, Catalina Botero (2014), “Derecho penal y libertad de expresión: deliberación pública, democracia y derecho penal” alerts and reports by ARTICLE 19, Freedom House, IFEX, Human Rights Watch, IPI, CPJ, RSF, official websites.

<sup>39</sup> Argentina (1993), Paraguay (1998), Costa Rica (2002), Peru (2003), Chile (2001 and 2005), Honduras (2005), Guatemala (2006), Panama (2007), Nicaragua (2007), Uruguay (2009) and Bolivia (2012) eliminated *desacato* or similar figures criminalizing speech concerning public officials. Argentina (2009), Uruguay (2009) and El Salvador (2011) abolished criminalization of defamation on issues of public interest.

<sup>40</sup> Trinidad & Tobago abolished the offence of malicious defamatory libel (2014) and in the Dominican Republic the Constitutional Court derogated some provisions in the press law that criminalized defamation and insult against governmental bodies and public officials in 2016: <https://unesdoc.unesco.org/ark:/48223/pf0000265969>.

<sup>41</sup> Jamaica (2013) and Antigua and Barbuda (2015) repealed criminal defamation. Grenada did so as well (2012), yet retained “seditious libel” as a crime. Mexico also abolished criminal defamation offences from the Federal Penal Code (2007), and the reform moved several Mexican States to implement similar changes, although it still remains in a number of them.

<sup>42</sup> Cyprus (2003), Ireland (2009), the United Kingdom (2009), Norway (2015) and Malta (2018) have repealed criminal defamation. Italy has repealed the offence of insult in 2016, yet defamation remains a criminal offence, which is heavily used in the country.

In all regions, there has been an **increase in the use of criminal defamation offences to restrict online expression**, within a broader growing trend to criminalize speech on the Internet. **Libel, defamation and insult provisions and their application have been strengthened, including through their integration in new legislation on cybersecurity, anti-terrorism or aimed at countering disinformation or hate speech**, characterized by vague definitions that facilitate their abusive use. This situation has allowed for the suppression of speech against public officials even in some countries where criminal defamation laws had been repealed. Defamation is often grouped within a wider set of charges, as part of a mix of trumped-up accusations aimed at limiting criticism by bloggers, activists, artists and others posting information online.

Since the start of the COVID-19 pandemic, there have been rising concerns about different steps taken by governments to the detriment of freedom of expression,<sup>43</sup> **as recently voiced by the UN Secretary-General**.<sup>44</sup> In this context, there have been **instances in which COVID-19-related intimidation, arrests, criminal investigations, prosecutions and sanctions (including imprisonment) and legal reforms integrated references to slander, defamation, damaging the image of administration, insulting public officials, State symbols or a religion, and similar ones, either as stand-alone offences or, most often, combined with others**. This research has come across such cases in **close to 30 countries**, spanning all regions, Asia and the Pacific standing out as the one where these appeared to be most common.<sup>45</sup> It should be noted, however, that the frequency in which defamation was among the justifications to limit critical speech related to COVID-19 was lower than the case of some other offences, such as the dissemination of health-related disinformation.

In some countries, **criminal defamation laws continue to be in force but are not generally utilized**. They are not abolished due to inertia or the impression that there is no need to do so, given that they have fallen into disuse. Yet the fact that they continue to exist can deter media's work and serve as an excuse for other countries to continue misusing them and resist their repeal. **Blasphemy, religious insult and apostasy laws** also remain in the statutes of countries in all regions, and have been updated or newly-approved in some States. The related punishment goes from fines, to imprisonment, to the death penalty. The highest levels of restrictions imposed on freedom of expression in relation to religion appear to be imposed in Arab States and Asia and the Pacific.

## Increased use of civil defamation

Another concerning trend has been the rise in the use of civil defamation across regions, and particularly in countries that have decriminalized it, which often leads to excessive damages,<sup>46</sup> and is misused to target journalists who publish content that makes public officials or powerful economic actors uncomfortable. In many cases, this practice attempts to bankrupt journalists and media outlets through disproportionate financial sanctions, which in turn encourages self-censorship or the automatic publication of an apology in the face of a possible lawsuit. Although having a lower psychological toll than criminal defamation, the civil route can thus still have a significant inhibitory effect, when it allows for excessive awards and involves long and expensive legal procedures. Another challenge related to civil defamation is that it may require a lower standard of severity in terms of a claim being accepted by a court and a lower standard of proof. Moreover, in some jurisdictions the defendant will not benefit from legal aid regarding this type of charges, which implies facing very high costs for securing the very specialized technical defence needed.

<sup>43</sup> See [Issue Brief published by UNESCO: https://unesdoc.unesco.org/ark:/48223/pf0000373573?posInSet=1&queryId=0216815c-9a38-457c-8e20-b224c31b03e5](https://unesdoc.unesco.org/ark:/48223/pf0000373573?posInSet=1&queryId=0216815c-9a38-457c-8e20-b224c31b03e5), [Guidance by OHCHR: https://www.ohchr.org/EN/NewsEvents/Pages/COVID19Guidance.aspx](https://www.ohchr.org/EN/NewsEvents/Pages/COVID19Guidance.aspx) and [Policy Brief by the UN-Secretary General: https://www.un.org/en/un-coronavirus-communications-team/we-are-all-together-human-rights-and-covid-19-response-and](https://www.un.org/en/un-coronavirus-communications-team/we-are-all-together-human-rights-and-covid-19-response-and).

<sup>44</sup> <https://www.theguardian.com/global-development/2021/feb/22/world-faces-pandemic-human-rights-abuses-covid-19-antonio-guterres>.

<sup>45</sup> Based on [IPI COVID-19 Press Freedom Tracker: https://ipi.media/covid19/?alert\\_type=0&language=0&years=0&country=0](https://ipi.media/covid19/?alert_type=0&language=0&years=0&country=0), focused monitoring by [Human Rights Watch](#) and [ARTICLE 19](#) and [CPJ](#) and alerts by other specialized press freedom organizations such as IFEF and RSF.

<sup>46</sup> See for example IPI (2017) [IPI Report: Trends in Civil Compensation for Defamation in Europe: http://legaldb.freemedia.at/2017/06/09/trends-in-civil-compensation-for-defamation-in-europe/](http://legaldb.freemedia.at/2017/06/09/trends-in-civil-compensation-for-defamation-in-europe/) and Article 19 (2009) [Civil Defamation: Undermining Free Expression: https://www.article19.org/data/files/pdfs/publications/civil-defamation.pdf](https://www.article19.org/data/files/pdfs/publications/civil-defamation.pdf).

- According to a **2020 survey undertaken by the Foreign Policy Centre** among 63 investigative journalists working in 41 countries, **73%** of them had received communications threatening legal action, **91%** of these consisting in civil defamation and **33%** in criminal defamation claims.
- Perhaps indicative of the increasing volume of civil defamation actions that are being initiated worldwide is that, between 2018 and 2021, the specialized CSO **Media Defence** supported journalists/media in **45 civil defamation/libel cases and 40 criminal ones**, spanning across regions.

## SLAPPs and “forum shopping” are on the rise

**Strategic Lawsuits Against Public Participation (SLAPPs)** are legal claims that are typically initiated by a powerful actor (a state body/official, high-profile individual or firm) to intimidate and silence weaker parties who criticise or disseminate public interest messages unfavourable to them. The real objective is not to win the case, but to overwhelm the defendant through protracted legal proceedings, excessive costs – even at the risk of bankruptcy – and the related psychological burden. SLAPPs focused on defamation charges are very commonly used to deter journalists from advancing their work, preventing the publication of certain content or causing its removal, and discouraging others from covering the same issues.<sup>47</sup> The threat of initiating legal action is often sufficient to stop journalistic research and reporting. SLAPPs can take the form of civil or criminal defamation claims, which can be domestic or also have a transnational dimension – involving for instance multiple claims in courts across a same country, or in one/several foreign jurisdictions. They can be very complex, as well as financially and psychologically draining for a defendant.

SLAPPs usually entail the tactic of “**forum shopping**” or “**libel tourism**”; which, as defined in a **2019 CoE study**,<sup>48</sup> “describes the practice of choosing the court in which to bring an action based on the prospect of the most favourable outcome, even when there is no or only a tenuous connection between the legal issues and the jurisdiction”. The advantages for the claimant could be related to more favourable procedural rules, applicable law or practice (e.g. tendency to award higher damages), or higher legal costs for the defendants, for example. Plaintiffs can also choose foreign jurisdictions to make it difficult for the defendant to physically appear before a tribunal, and because of the financial and logistical implications of ensuring his/her defence in another country. Given the cross-border nature of digital communications, a same allegedly defamatory statement can give way to multiple cases in diverse jurisdictions across countries, which naturally has a chilling effect. The litigation process may also affect a journalist’s or outlet’s reputation. Thus, SLAPPs often result in journalists or media houses submitting to the demands made by those legally threatening, or in out-of-court settlements.<sup>49</sup> They have sometimes served for “the privatization of State-driven suppression of journalism where members of government share interests with private sector actors”.

SLAPPs have been on the rise in different regions, and have garnered significant attention from advocates and international bodies, particularly in Europe, given the severity of the trend there.<sup>50</sup> In 2018, a cross-party group of **European Parliament Members urged the European Commission to initiate anti-SLAPP legislation to protect journalists**,<sup>51</sup> and in 2019 a coalition

<sup>47</sup> Besides journalists, SLAPPs also often target activists, human rights defenders, academics and other actors seeking to reveal issues pertaining to corruption, environmental damages, crime, consumer protection issues, etc.

<sup>48</sup> <https://rm.coe.int/liability-and-jurisdictional-issues-in-online-defamation-cases-en/168097d9c3>.

<sup>49</sup> Justin Borg-Barthet (2020) *Advice concerning the introduction of anti-SLAPP legislation to protect freedom of expression in the European Union*: <https://www.ecpmf.eu/wp-content/uploads/2020/05/EC-Advice-concerning-the-introduction-of-anti-SLAPP-legislation-to-protect-freedom-of-expression-in-the-European-Union.pdf>, Centre for Private International Law at the University of Aberdeen, p. 5 and 14.

<sup>50</sup> See for instance the SLAPP cases documented in the **2022 Annual report**: <https://rm.coe.int/platform-protection-of-journalists-annual-report-2022/1680a64fe1> of the CoE’s Platform to promote the protection of journalism and the safety of journalists, p. 48 and 49.

<sup>51</sup> <https://www.europarl.europa.eu/news/en/press-room/20180426IPR02615/tackle-online-and-offline-threats-to-media-pluralism-and-freedom-urge-meeps>.

of CSOs addressed an [Open Letter](#)<sup>52</sup> to the Commission that focused on the threats posed by SLAPPs against journalists. In 2020, besides the already referred to mention of SLAPPs in **Human Rights Council Resolution 45/18**, a [Human Rights Comment](#) on the topic was issued by the CoE Commissioner for Human Rights.<sup>53</sup> In addition, on 1 December 2020, a coalition of 60 civil society groups across Europe published a proposal that called on EU policymakers to urgently put forward an EU anti-SLAPP Directive to protect public watchdogs that help hold the power to account and keep the democratic debate alive.<sup>54</sup> In 2022, [the European Commission proposed its new anti-SLAPP Directive](#), which includes a mechanism for early dismissals of manifestly unfounded cases, a burden of cost that falls upon the claimant if the case is dismissed as abusive, the right for the defendant to claim and obtain full compensation for any damage incurred, dissuasive penalties on claimants bringing abusive cases to court, and protection against third country judgements.<sup>55</sup> The European Commission simultaneously adopted a **Recommendation for Member States** to align their rules with the proposed EU Law for all domestic cases.<sup>56</sup>

Notable cases on SLAPPS	
<p><b>Europe</b></p>	<p><b><u>Steel Morris v. United Kingdom Case, ECtHR</u></b> (2005). The Court found a violation of Art. 10 of the Convention as the applicants, namely two members of London Greenpeace, were asked a 40.000 euros reimbursement for damaging McDonald’s company reputation through a pamphlet titled “<i>What’s wrong with McDonald’s</i>”. According to the Court, the violation stemmed from the incapacity of the state to guarantee legal aid to the activists who were very low-income individuals against one of the richest companies in the world- and the amount of the award against them.<sup>57</sup></p>
<p><b>United States</b></p> <p>In the United States, SLAPPs are recognized as a violation of citizens’ rights under the First Amendment, namely free speech and right to petition the government for the redress of grievances.</p>	<p><b><u>Protect Our Mountain Environment Inc v District Court Case, Colorado Supreme Court</u></b><sup>58</sup> (1984): In the POME case, the Court ruled that these types of lawsuits are “baseless” and may result in damages to wider society by way of having a chilling effect on constitutionally protected activities. The Court articulated a three-prong test to avoid early dismissal of a case. This required the plaintiff in the main proceedings to prove that the defendant’s actions are void of legal or factual basis, that the defendant’s main purpose was to harass the plaintiff, and that the actions affect the legal interests of the plaintiff.<sup>59</sup></p>
<p><b>Australia</b></p> <p>As regulation, the <b><u>Protection of Public Participation Act</u></b> was adopted in 2008 in the Australian Capital Territory (ACT).</p>	<p><b><u>Gunns v. Marr &amp; Ors, Supreme Court of Victoria</u></b><sup>60</sup> (2005): in Australia, the issue of SLAPP rose to prominence as a consequence of this notorious case, where the plaintiff, Australia’s largest timber and woodchip company, Gunns Ltd, sued 20 people including high profile individuals, environmental NGOs and activists over their work concerning the protection of forests in Tasmania.<sup>61</sup></p>

<sup>52</sup> <https://www.ecpmf.eu/letter-to-the-european-commission-concerning-the-threat-of-vexatious-litigation-against-journalists-activists-and-others/>.

<sup>53</sup> <https://www.coe.int/en/web/commissioner/-/time-to-take-action-against-slapps>.

<sup>54</sup> <https://europeanjournalists.org/blog/2020/12/02/coalition-published-a-proposal-for-an-eu-anti-slapp-law/>.

<sup>55</sup> European Commission. 2022. 2022/0117(COD). <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0177>.

<sup>56</sup> European Commission. 2022. C/2022/2428. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32022H0758>.

<sup>57</sup> <https://globalfreedomofexpression.columbia.edu/publications/slapps-5-ws-background-strategic-lawsuits-public-participation/>.

<sup>58</sup> <https://law.justia.com/cases/colorado/supreme-court/1984/83sa387-0.html>.

<sup>59</sup> Mapping of anti-SLAPPs law in the US: <https://anti-slapp.org/your-states-free-speech-protection/>.

<sup>60</sup> <https://www.austlii.edu.au/au/journals/NatEnvLawRw/2006/30.pdf>.

<sup>61</sup> Mapping of anti-SLAPPs law in Australia: [https://www.sourcewatch.org/index.php/SLAPP's\\_in\\_Australia](https://www.sourcewatch.org/index.php/SLAPP's_in_Australia).

## Canada

Following these developments, anti-SLAPP legislation has been passed in Quebec and **Ontario (2015)** and **British Columbia (2019)**, generally providing expedited mechanisms for defendants to have SLAPP suits dismissed.

In the **Daishowa Inc v Friends of the Lubicon, Ontario Supreme Court (1998)**<sup>62</sup> and **Fraser v Corp of District of Saanich, British Columbia Supreme Court (1993)**<sup>63</sup> cases, the courts first identified lawsuits targeting freedom of expression on a public issue employing frivolous and exaggerated claims. The latter provided the first acknowledgement of SLAPP from a Canadian court, which defined it as a meritless suit to “*silence or intimidate citizens who have participated in proceedings regarding public policy or public decision making*”.

**Scory v. Krannitz, British Columbia Supreme Court (2011)**: the Court relying on the Fraser case also awarded special costs on the basis that the allegations in the claim could not be proven and the claim could be characterized as a SLAPP.<sup>64</sup>

## Defamation in digital times

Besides facilitating “forum shopping”, making SLAPPs more complex and giving rise to new, vague laws that problematically criminalize legitimate speech, the globalized nature of digital communications poses other challenges to protecting reputations while also ensuring respect for freedom of expression. Online platforms can amplify content that is defamatory, which is produced by an increasing number of actors that are unaware of its legal implications. Journalists, activists and private citizens face defamation charges for online posts – even if written as satire or jokingly – or for sharing hyperlinks or information originally published by others. Other questions have emerged, for instance, in relation to online archives that include articles ruled defamatory by a tribunal, about whether adding an update or clarification would be a less restrictive measure than ordering for them to be removed.<sup>65</sup>

Also relevant to online defamation are discussions on the liability of Internet Service Providers, such as social media platforms, for defamatory material that is not created nor modified by them, but rather posted by third-parties, including anonymous ones. There have also been cases in which online news portals have been held liable for comments posted by readers, and of plaintiffs seeking liability for suggestions/results shown by search engines, claiming that these were defamatory.<sup>66</sup>

## V. Gender and diversity-related considerations

Further research on the gender-related implications of criminal and civil defamation offences is needed, looking for example into the frequency with which defamation charges are brought against women journalists as compared to their male peers, including in retaliation for having denounced harassment and abuse, and their impact. Another relevant aspect, when considering defamation and gender, are the smear campaigns aimed at undermining women journalists’ reputations, instigated by those whose interests were affected by their reporting and

<sup>62</sup> <https://www.canlii.org/en/on/onsc/doc/1998/1998canlii14828/1998canlii14828.html>.

<sup>63</sup> [https://casetext.com/case/fraser-v-security-and-inv-corp/?PHONE\\_NUMBER\\_GROUP=P](https://casetext.com/case/fraser-v-security-and-inv-corp/?PHONE_NUMBER_GROUP=P).

<sup>64</sup> <https://www.canlii.org/en/bc/bcsc/doc/2011/2011bcsc1344/2011bcsc1344.html>.

<sup>65</sup> Read more about these issues in ARTICLE 19’s [Revised Principles on Freedom of Expression and Protection of Reputation](https://www.article19.org/data/files/medialibrary/38641/Defamation-Principles-(online)-.pdf): [https://www.article19.org/data/files/medialibrary/38641/Defamation-Principles-\(online\)-.pdf](https://www.article19.org/data/files/medialibrary/38641/Defamation-Principles-(online)-.pdf), and related background paper: <https://www.article19.org/data/files/medialibrary/38641/170228-Final-Background-paper-Revised-Defamation-Principles.pdf>.

<sup>66</sup> See for instance the cases emanated by the ECtHR, where the conclusion in terms of liability has not always been the same: [Delfi AS v. Estonia](https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22002-8960%22%7D) (2009): <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22002-8960%22%7D>; [Krone Verlag GmbH & Co. KG v. Austria](https://hudoc.echr.coe.int/eng#%7B%22appno%22%3A%2272331/01%22%7D%22itemid%22%3A%22001-77930%22%7D) (2006): <https://hudoc.echr.coe.int/eng#%7B%22appno%22%3A%2272331/01%22%7D%22itemid%22%3A%22001-77930%22%7D>; [Karhuvaara and Iltalehti v. Finland](https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-67457%22%7D) (2004): <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-67457%22%7D>.

often involving an overwhelming amount of online trolling.<sup>67</sup> In some cases, women journalists have fought back by filing defamation charges themselves. In view of women journalists' insufficient access to support systems and mechanisms to deal with online attacks, and the low awareness about measures, policies and guidelines to tackle the problem, it is easy to understand how they would resort to defamation proceedings. This calls for the development of adequate frameworks to tackle these instances of gender-based online threats, harassment and violence – which may be best addressed, on a case-by-case basis and upon thorough analysis, by actions other than a defamation claim.

## VI. Recommendations

### States

- States should repeal criminal defamation laws, even if they are never or rarely enforced, and replace them by appropriate civil defamation legislation.
- They should also abolish, or review in accordance with international standards, other laws that criminalize expression through vague and overbroad definitions pertaining to “fake news”, cybersecurity, terrorism, hate speech, public health and national security, among others, which lend themselves to abusive restrictions of freedom of speech.
- Civil defamation laws should be revised, where needed, to be brought in line with international standards. Among other key aspects:
  - Public officials should not benefit from special protection and public bodies should not be allowed to file claims under defamation laws, which should not protect the State, national or religious symbols either.
  - Proper defences should be in place, including the protection of statements of opinion, the proof of substantial truth, and the standards of reasonable publication, innocent publication and fair and accurate reporting on the words of others. The claimant should bear the burden of proof regarding the falsity of an impugned statement, at a minimum in cases that are of public interest. Certain types of statements must never give way to liability, such as those made in the context of the proceedings of legislatures, local authorities and courts; those included in documents issued by legislative bodies and in official reports; or made under the penalty of perjury, under oath, before a body investigating human rights abuse, or when performing a legal, moral or social duty, except if made with malice.
  - Remedies should be proportional, aiming to repair the damage caused by certain expressions rather than to punish those who made them. Courts should prioritize non-pecuniary remedies, imposing financial awards only when these are needed to completely repair the harm done. A ceiling should be established for maximum compensation, but a minimum level should not be set. Pecuniary remedies should take into account the defendant's financial capacity (e.g. not resulting in his/her bankruptcy) and whether voluntary or self-regulatory mechanisms (e.g. apology, correction, reply) have also been used. Laws should ensure that these alternative dispute resolution mechanisms are the preferred option for settling conflicts, being faster and less costly than court proceedings.
  - Journalists' right to not disclose their sources should be respected in the context of defamation lawsuits.
  - Safeguards should be put in place against SLAPPs and “forum shopping”.

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<sup>67</sup> For example, a [UNESCO/ICFJ survey](https://en.unesco.org/news/unescos-global-survey-online-violence-against-women-journalists) (<https://en.unesco.org/news/unescos-global-survey-online-violence-against-women-journalists>) revealed that that 73% of women journalists responding to it had been the targets of online violence while performing their job, and that 41% of the cases of online attacks were linked to orchestrated disinformation campaigns. In turn, 25% of respondents stated that, although they had reported online attacks to their employers, the most common response was no action being taken (10%), closely followed by the suggestion “to grow a thicker skin” or “toughen up” (9%).

- Internet Service Providers (ISPs) should benefit from immunity from liability under defamation laws for content that they host. They should not be required to proactively monitor content. Orders for the removal of content found to be defamatory should be issued by an independent tribunal or adjudicatory instance. Any liability imposed on an ISP should remain proportionate and bear a direct correlation to its failure to comply with an order to restrict content.<sup>68</sup>
- Judicial actors, including prosecutors and judges, should apply international standards on freedom of expression when prosecuting and judging cases related to criminal and civil defamation.

## Advocacy and awareness-raising

- Coalitions of civil society organizations, media actors, public figures, international organizations and other relevant stakeholders should give new impetus to the campaign to decriminalize defamation offences.
- Campaigning is also crucial to ensure that judgments by international and regional courts are fully implemented at country level.
- Mobilizing the public, as well as producing journalistic reporting on criminal defamation cases and their consequences, can have a significant impact in pushing for the abolition of criminal defamation and to counter backsliding.
- Advancing research is also relevant to underpin advocacy, including on successful campaigns, the status of defamation laws around the world, landmark jurisprudence, and the challenges posed by digital technologies.<sup>69</sup>

## Strategic litigation and legal support for journalists

- Strategic litigation related to criminal and civil defamation cases handled by domestic and international courts can have a critical impact, by leading to decisions and interpretations aligned with international standards that can result in concrete legal and policy change, as well as set positive precedents for future cases
- The presentation of *amicus curiae* can also have a significant impact by contributing to inform court decisions, in favour of freedom of expression.<sup>70</sup>
- The provision of legal advice and support for journalists is also critical, and media outlet owners should facilitate it for the journalists they employ, along with financial aid.
- Making journalists aware of the support they can access at different levels, as well as of their rights, can encourage them to continue their work and to fight the cases brought against them to the end, rather than self-censor.

<sup>68</sup> These recommendations, reflected in ARTICLE 19's revised principles on defamation, were developed on the basis of the [Manila Principles on Intermediary Liability](https://www.eff.org/files/2015/10/31/manila_principles_1.0.pdf): [https://www.eff.org/files/2015/10/31/manila\\_principles\\_1.0.pdf](https://www.eff.org/files/2015/10/31/manila_principles_1.0.pdf).

<sup>69</sup> E.g., examining the way in which defamation plays out online as compared to off-line, the implications for communicators who produce online content of public interest, and establishing a clear distinction between defamation and phenomena such as disinformation, misinformation and mal-information – as there is often confusion between them, including in claims filed and new laws that are being developed.

<sup>70</sup> <https://unesdoc.unesco.org/ark:/48223/pf0000379020>.

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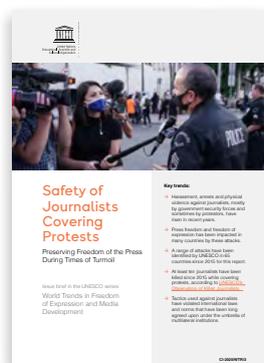
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## About this brief

This brief comes as part of the [UNESCO series World Trends in Freedom of Expression and Media Development](#). The brief addresses current trends, challenges and responses worldwide on defamation and related laws, with a special focus on abusive practices such as 'forum shopping' and Strategic Lawsuits Against Public Participation (SLAPPs). Being addressed to the judiciary, including judges, prosecutors and lawyers, the issue brief also provides definitions, international standards and landmark jurisprudence from the main regional human rights courts related to defamation, and presents good practices and recommendations toward the decriminalization of defamation.

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This document and the other issue briefs in the World Trends Report series can be downloaded at <https://www.unesco.org/en/world-media-trends/issue-briefs>.

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