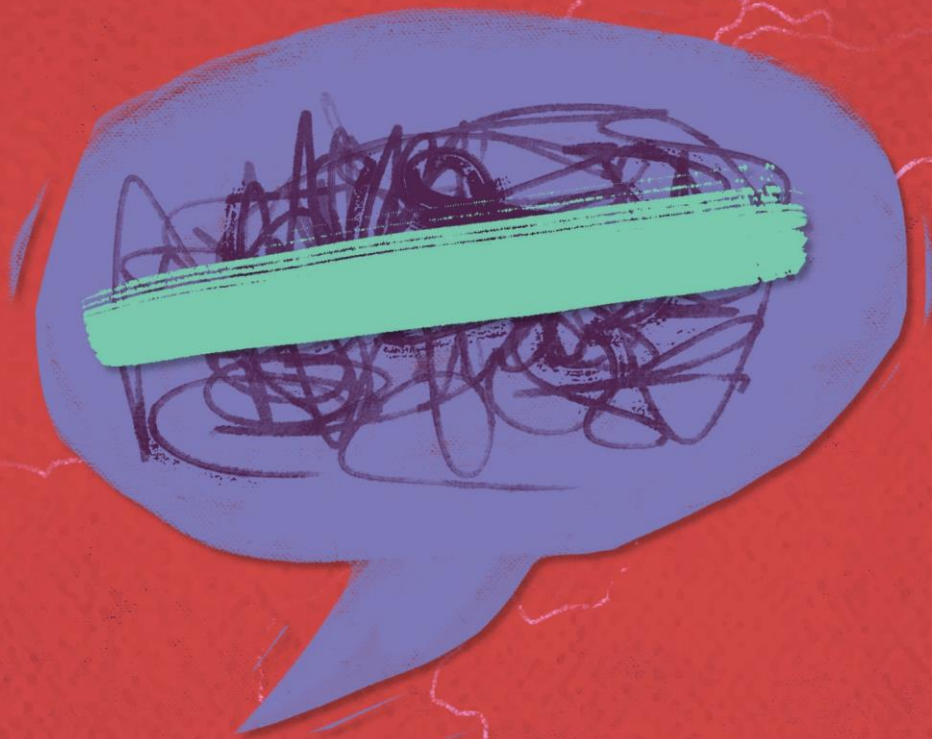


CRIMINALISING SPEECH

A Comparative Analysis of Pakistan's
Criminal Defamation Laws



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Executive Summary

Criminal defamation laws are slowly becoming obsolete around the world and are being replaced with civil remedies, as countries realise the archaic nature of these laws mainly weaponised to silence those whose voices may threaten rulers and their powers. In a society of hyper-digitalisation, where information travels at the speed of light, it has become impossible, and undoubtedly unethical, to silence those with opinions online without encroaching upon their fundamental right to free speech. Considering this, the study documents the international legal frameworks, like the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), that guarantee the right to free speech and press freedom, along with the exceptions they allow and whether criminal defamation adequately falls within these limitations.

The study also takes into account landmark jurisprudence from international bodies such as the United Nations Human Rights Committee (UNHRC) and regional courts such as the European Court of Human Rights (ECtHR) that have issued detailed rulings on how criminal defamation violates the fundamental right to freedom of expression, especially highlighting criminal punishments like incarceration to be an inappropriate remedy against a defamatory statement. European and African regional courts have also stressed that those holding public office should have a higher tolerance to defamatory statements than a regular citizen. In essence, courts have begun to take a rights-based and democratic approach to uphold the importance of public opinion, especially when it involves journalists who work to disseminate information that may be beneficial to the public.

For countries such as Pakistan and India, which have been unable to let go of criminal defamation laws dating back to colonial times, the UK and Sri Lanka are used as examples of states that have managed to repeal such laws. In Pakistan, online criminal defamation was introduced as a separate cyber-offence in 2016 through the Prevention of Electronic Crimes Act (PECA), and with the existence of Sections 499 and 500 of the Pakistan Penal Code (PPC) that already criminalise defamation, it often becomes twice as difficult for those accused of defamatory statements under both laws. The study demonstrates the weaponisation of these laws against critics of the state, journalists covering high-profile cases involving powerful individuals, and victims of gender-based violence choosing to speak up against their abusers. This weaponisation and misuse of the law is not limited to a single country, and is applied anywhere where imbalance of power between powerful parties and regular citizens or media workers can be exploited.

Introduction

The right to freedom of expression is enshrined in Article 19 of the Universal Declaration of Human Rights (UDHR),¹ which says, “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.” Article 19 of the International Covenant on Civil and Political Rights (ICCPR) echoes the essence of the Article 19 of the UDHR by stating:

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.²

This right, however, is not an absolute one, as free speech is considered to be a responsibility as well as a right, and there are a number of limitations that apply to it. ICCPR lays down the restriction to it as follows:

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.³

Countries around the world recognise freedom of expression as the fundamental right that it is, but contain similar restrictions in their domestic laws. Because this right operates within the boundaries of defined limitations, these boundaries can often get blurred.

One of the major threats to free speech is criminal defamation, which derives legitimacy from Article 19(a) of the ICCPR which calls for “respect of the rights and reputation for others”. There is debate surrounding whether criminal defamation is a violation of the basic right to freedom of expression, and whether incarceration is a proportionate response to a reputation being at risk. Many countries have decriminalised their criminal defamation laws and have chosen to apply civil remedies where necessary, claiming damages or injunctions which are argued to be better responses than imprisonment and lengthy criminal trials.

A primary target of criminal defamation laws around the world have been journalists and media workers, especially those at the frontline disseminating politically sensitive information that may not be beneficial to those in power.⁴

The study will document a number of such instances, and the outcomes of the criminal defamation cases filed against many journalists. The study also documents the strong pressure from the international community as multiple nations have moved to decriminalise defamation after numerous national, regional and international superior courts ruled the crime is a “fundamental violation” of freedom of speech with grave implications on press freedom.

1. Nations, U. (2022). Universal Declaration of Human Rights | United Nations. Retrieved from <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

2. International Covenant on Civil and Political Rights. (2022). Retrieved from <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

3. Ibid.

4. Abellan, A. (2022). Privacy Day 2021: A guide to keeping journalists safe online. Retrieved from <https://datajournalism.com/read/longreads/privacy-day-security-guide>

Pakistan's weaponisation of its criminal defamation laws has also made it increasingly difficult for the right to freedom of expression to be practised freely in the country. Sections 499 and 500 of the Pakistan Penal Code (PPC) and Section 20 of the Prevention of Electronic Crimes Act, 2016, also known as PECA, are two laws that criminalise defamation in Pakistan, and have been used to target critics of the state and military. They have also been used to silence victims of gender-based violence from speaking up against their perpetrators for years. There has been significant debate in the country to decriminalise the above-mentioned provision, especially when a civil offence of defamation exists in the Defamation Ordinance of 2000.

Free Speech Landscape in Pakistan

Article 19 of the Constitution of Pakistan talks about the freedom of speech, freedom of expression and freedom of the press, and grants them the status of fundamental rights. This means that every citizen of Pakistan has the right to hold opinions, the right to express them, and the right to speech, along with granting the press the freedom it needs to bring information to the public. These rights can only be abrogated through laws if the speech violates seven exceptions listed in the Constitution, which are as follows,

- Glory of Islam,
- the integrity, security and defence of Pakistan,
- to maintain public order, decency and morality, or
- in relation to contempt of court, and/or
- incitement to an offence.⁵

The exceptions to Article 19 have often become subject of debate as they are used to stifle legitimate free speech as well through domestic laws discussed below.⁶

Along with a civil penalty under the Defamation Ordinance 2000, the act of defamation is also criminalised under Sections 499 and 500 of the Pakistan Penal Code, 1860 (PPC). This is a colonial-era legislation that Pakistan inherited from the pre-independence British India when the British rulers of the Subcontinent implemented the criminal defamation law to protect the reputation of those in power.⁷

Under Section 499, criminal defamation is defined as the intentional making of an imputation which harms the reputation of a person. However, there are 10 exceptions to this crime, listed out in the statute, which provide defence to the accused.

As held by the Sindh High Court in the case of *Syed Mehmood Ali vs. Network Television Marketing*,⁸ where a claim of criminal defamation was brought against the accused for televising a show containing defamatory statements about the plaintiff's food business, the mala fide intention of the accused to hurt reputation also has to be proved.⁹ Sections 499 and 500 of the PPC do not constitute a "reasonable restriction" on speech because even if a person has spoken the truth, they can be prosecuted for defamation. Under the first exception to Section 499, the truth will only be a defence if the statement was made for public good, which is a question of fact to be assessed by the court. This is an arbitrary and overbroad rule that deters people

5. Article 19, The Constitution of Pakistan 1973. (2022). Retrieved from https://na.gov.pk/uploads/documents/1549886415_632.pdf

6. Sultan, J. (2019, December 04). Things you cannot express - according to Pakistani law. Retrieved from <https://courtingthelaw.com/2019/11/18/commentary/things-you-cannot-express-according-to-pakistani-law/>

7. Rolph, D. (2016). Reputation, celebrity and defamation law. London: Routledge Taylor & Francis Group. <https://www.routledge.com/Reputation-Celebrity-and-Defamation-Law/Rolph/p/book/9781138246621>

8. Syed Mehmood Ali vs. Network Television Marketing (PLD 2005 Kar 399)

9. Ejaz Chaudhry, N., & Imran Malik, O. (2022). A Democratic Fundamental - Making the case for freedom of expression.pdf. Retrieved from https://drive.google.com/file/d/1HYA3g8Qvlyg_-Evqi_H7Yp9yRweUd0GV/view

from making statements regarding politicians or political events which they know to be true because they run the risk of a court not finding the statement to be for the public good.¹⁰ Second, a person can be prosecuted under Section 499 even if he or she has not made any verbal or written statement at all. A criminal process can be initiated if a mere allegation arises that the defendant conspired with the person who actually made the allegedly defamatory written statements. This means that an allegation without any proof can also be used to prosecute a person under this section. Whereas, Section 500 of the PPC lays down punishment for defamation if convicted under Section 499, which can extend to up to two years or fine, or both.

In addition to the provisions in the PPC, online criminal defamation has, since 2016, also been laid out in the Prevention of Electronic Crimes Act, 2016 (PECA). Section 20 of the Act is similar to Sections 499 and 500 of the PPC, and carries a maximum jail term of three years. It has been largely weaponised against journalists,¹¹ media workers,¹² political dissidents,¹³ and victims of gender-based violence who chose to speak up against their abusers.¹⁴

The problems with this section are also similar to those with Sections 499 and 500 discussed above, but with an additional involvement of the Federal Investigation Agency (FIA) – the body responsible for investigating cybercrimes – and its inadequacy while prosecuting cases under Section 20 and PECA in general.¹⁵ There have been numerous occasions on which false and frivolous cases were initiated, without credible evidence, against journalists who criticised the government or its departments mainly in order to intimidate the accused persons and silence them.¹⁶ Many of these cases were thrown out at pre-trial stages due to lack of evidence and other technical issues.¹⁷

The higher courts in the country, mainly the Islamabad High Court (IHC), have called out the FIA for its abuse of powers under Section 20 of PECA by issuing notices and arresting journalists and critics of the government and armed forces, and have directed the agency to not violate citizens' fundamental rights.¹⁸ Under Section 20, various citizens and journalists have been issued notices by the FIA to “protect the reputation of public offices”, an act that the IHC has said is not the responsibility of FIA. The IHC remarked, “The abuse of power does not save anyone’s reputation, and public offices’ reputation is dependent on the trust of people of the country on them. This court will not permit the misuse of powers to anyone.”¹⁹ Despite this, the law continues to be used against journalists and citizens.²⁰

In February 2022, the government introduced an amendment to PECA through an ordinance, known as the “PECA Amendment Ordinance”. Through this amendment, online “defamation” of authorities, including the military and judiciary, was made a criminal offence with harsher penalties.²¹ It expanded scope of Section 20 of the Act to include criticism of government bodies and the military by inserting a new definition of “person” that includes “any company, association, or body of persons, ... institution, organisation, authority or any other body established by the Government under any law or otherwise.” The amendment also made defamation a non-bailable offence, and increased the maximum prison term, if convicted, from

10. Ibid.

11. Pakistan: Three journalists face sedition charges under Cybercrime Law / IFJ. (2022). Retrieved from <https://www.ifj.org/media-centre/news/detail/category/press-releases/article/pakistan-three-journalists-face-sedition-charges-under-cybercrime-law.html>

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13. Khan, S. (2022). Year in Review: PECA -. Retrieved from <https://digitalrightsfoundation.pk/year-in-review-peca/>

14. Tahir, Z. (2022). Meesha, eight others booked over vilification of Ali Zafar. Retrieved from <https://www.dawn.com/news/1582156>

15. Rehmat, A. (2022). Criminalising criticism | Special Report | thenews.com.pk. Retrieved from <https://www.thenews.com.pk/tns/detail/938564-criminalising-criticism>

16. Ibid.

17. White Paper on PECA Reforms. (2022). Retrieved from <https://www.cpd-pakistan.org/wp-content/uploads/2021/01/WPPeCaReforms-refined.pdf>

18. (“No hesitation in calling PECA a draconian law, says Islamabad High Court - Digital Rights Monitor”, 2022)

<https://www.digitalrightsmonitor.pk/no-hesitation-in-calling-peca-a-draconian-law-says-islamabad-high-court/>

19. IHC Summons FIA Cyber Crime Wing For Misuse of Powers Under Cybercrime Law - Digital Rights Monitor. (2022). Retrieved from <https://www.digitalrightsmonitor.pk/ihc-summons-fia-cybercrime-wing-for-misuse-of-powers-under-cybercrime-law/>

20. IHC seeks explanation from FIA over press release against journalist Sami Ibrahim. Digital Rights Monitor. Retrieved from <https://www.digitalrightsmonitor.pk/ihc-seeks-explanation-from-fia-over-press-release-against-journalist-sami-ibrahim/>

21. Peca Ordinance 2022 PDF full text. (2022, February 21). Retrieved from <https://thenamal.com/misc/peca-ordinance-2022-pdf-full-text/>

three to five years. The Ordinance received immense backlash from local civil society²² and journalists, and the international community,²³ for violating Article 19 of Pakistan's Constitution, along with international agreements like the ICCPR, and endangering journalists, human rights activists and political opponents who could be targeted for legitimate criticism of the state or its officials and institutions.

Within days of its approval, the PECA Amendment Ordinance was challenged in the IHC by the Pakistan Federal Union of Journalists (PFUJ),²⁴ and other media bodies, who pleaded with the court that the Ordinance was signed only to disregard the democratic law making process which showed malicious intent on part of the government. The petition claimed that the Ordinance was passed to further restrict freedom of expression and press freedom in the country. Two months later, in April 2022, the IHC declared the Ordinance null and void and declared it to be “unconstitutional” as it encroached upon fundamental rights of citizens.²⁵ In addition, the court also declared that the punishments under Section 20 of PECA, which include incarceration and fines, as unconstitutional.²⁶ This was an important development for free speech activists in the country who had been lobbying against the law since its inception in 2016.²⁷ As a result, the FIA, which is the implementation body under PECA, closed around 7000 complaints that were registered with the agency under Section 20. However, Section 20²⁸ is still in effect and will require the attention of lawmakers in the Parliament to determine if it must be repealed in its entirety.

Criminal defamation laws in Pakistan have also been used to silence victims of gender-based violence who chose to speak up against their abusers amid the #MeToo movement. The most famous example of this is the case of singer Meesha Shafi who accused fellow entertainer, Ali Zafar, of sexual harassment on multiple occasions, including while working together in private music studios.²⁹ Shafi filed a case with the provincial ombudsperson, under the Protection Against Harassment of Women at the Workplace Act of 2010, which was rejected on the basis of jurisdiction.³⁰ In 2021, however, the Supreme Court of Pakistan agreed to hear her appeal against the ombudsperson's decision and the matter is still pending with the court.³¹ Alongside Shafi's struggle to seek justice for herself and against her alleged abuser, she was slapped with a criminal defamation charge in 2019 by Zafar which quickly became a widely publicised case.³² At many stages of the trial, Shafi expressed her doubts about the judge being biased,³³ which is not unusual in the patriarchal criminal justice system of the country. In addition to this, around seven other individuals who spoke up online against Ali Zafar with regards to this matter, either sharing their own experiences of alleged harassment by Zafar or by sharing media reports on the case, were also charged with criminal defamation under Section 20 of PECA.³⁴ There has been strong criticism of such cases that act as intimidating tactics in order to silence victims of gender-based violence and anyone who may come forward to support them.³⁵

22. Civil Society, political collectives condemn PECA ordinance. (2022, February 28). Retrieved from <https://thecurrent.pk/civil-society-political-collectives-condemns-peca-ordinance/>
23. Pakistan: Repeal Amendment to Draconian Cyber Law. (2022, February 28). Retrieved from <https://www.hrw.org/news/2022/02/28/pakistan-repeal-amendment-draconian-cyber-law>
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25. Islamabad High Court quashes Peca Amendment Ordinance; part of S.20 of PECA also unconstitutional. (2022, April 14). Retrieved from <https://digitalrightsmonitor.pk/islamabad-high-court-quashes-peca-amendment-ordinance-part-of-s-20-of-peca-also-unconstitutional/>
26. Ibid.
27. Crackdown on journalists POST-PECA. (2020, May 08). Retrieved from <https://bolobhi.org/crackdown-on-journalists-post-peca/>
28. DRM. (2022, April 11). FIA closes 7,000 cases filed under amended PECA ordinance. Digital Rights Monitor. <https://digitalrightsmonitor.pk/fia-closes-7000-cases-filed-under-amended-peca-ordinance/>
29. Meesha Shafi: Pakistan actress says Pop Star Ali Zafar harassed her. (2018, April 20). Retrieved from <https://www.bbc.com/news/world-asia-43836364>
30. Malkani, S. (2020, June 30). Why Meesha Shafi's sexual harassment complaint against Ali Zafar should not have been rejected. Retrieved from <https://www.dawn.com/news/1425530>
31. Desk, W. (2021, January 11). SC approves Meesha Shafi's plea against LHC decision in Ali Zafar Harassment Case. Retrieved from <https://www.thenews.com.pk/latest/772620-sc-approves-meesha-shafis-plea-against-lhc-decision-in-ali-zafar-harassment-case>
32. Bilal, R. (2019, July 01). Meesha's harassment allegations 'surprised' me, Ali Zafar says in statement on defamation case. Retrieved from <https://www.dawn.com/news/1491485/meeshas-harassment-allegations-surprised-me-ali-zafar-says-in-statement-on-defamation-case>
33. Khan, A. (2019, May 04). Defamation suit: Meesha accuses judge of bias, demands case transfer. Retrieved from <https://arynews.tv/meesha-shafi-judge-bias-defamation-suit/>
34. Tahir, Z. (2020, September 29). Meesha, eight others booked over vilification of Ali Zafar. Retrieved from <https://www.dawn.com/news/1582156>
35. Gillani, W. (2020, October 04). PECA and defamation suits: Dialogue. Retrieved from <https://www.thenews.com.pk/tns/detail/723451-peca-and-defamation-suits>

International Landscape of Free Speech

A growing number of international authorities on freedom of expression have called on governments to abolish or consider abolishing criminal defamation. These authorities include the UN Human Rights Committee, which is responsible for interpreting the International Covenant on Civil and Political Rights; and the special representatives on freedom of expression of the UN, the Organisation for Security and Co-operation in Europe (OSCE), and the Organisation of American States (OAS).

While the European Court of Human Rights (ECtHR) has never explicitly ruled out the use of criminal laws in defamation cases, we will see through a number of case-laws ahead that the ECtHR has criticised for their use and suggested that the appropriate space for their use, if any, is narrow. In any case, the ECtHR has joined a very clear international consensus against even the possibility of prison sentences in defamation cases.³⁶ Further abroad, the Inter-American Court of Human Rights and the African Court on Human and People's Rights have also issued decisions criticising the application of criminal defamation laws discussed later in this study. In 2002, the Representative on Freedom of the Media of the OSCE (OSCE RFoM) joined similar figures in the UN and Inter-American systems in stating, "There is widespread agreement among courts, international standard-setting bodies, and CSOs that defamation laws should reflect the concept that public officials must be more, not less, tolerant of criticism than private persons."³⁷

Following are some of the major developments from international authorities, including landmark jurisprudence from regional human rights courts. While these decisions may not be binding on all, they serve as strong persuasive precedent for legal systems that continue with the practice of criminal defamation.

UN Human Rights Committee

The UN Human Rights Committee's General Comment No. 34 deals with the right to freedom of expression under Article 19 of the International Covenant on Civil and Political Rights (ICCPR). The comment, finalised on July 21, 2011, constitutes an authoritative interpretation of the freedoms of opinion and expression guaranteed by the covenant. It is binding on more than 165 countries, including Pakistan. The document was drawn up during two years of debate and consultations with governments, national human rights institutions, and academics. With regards to criminal defamation, it remarked, "States parties should consider the decriminalisation of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty."³⁸

In a more recent development, the UNHRC affirmed that "the same human rights that people have offline must be protected online," in a resolution adopted by consensus on July 5, 2018. The resolution condemns "all undue restrictions on freedom of expression and opinion online," noting that such restrictions have a particularly significant impact on individuals and groups experiencing discrimination, including women and girls.³⁹ On this same concern, it calls for states "to ensure that all domestic laws, policies and practices" are consistent with their international human rights obligations on freedom of expression, also calling for accountability for human rights violations such as arbitrary detention, which often results from the application of laws not in conformity with international human rights law.

36. *Cumpana and Mazare v Romania* (2005) 41 EHRR 200

37. Defamation and insult laws in the OSCE Region: A comparative study. (n.d.). Retrieved May 15, 2022, from <https://www.osce.org/files/t/documents/b/8/303181.pdf>

38. United Nations High Commissioner for Refugees. (n.d.). General comment no. 34, Article 19, freedoms of opinion and expression. Retrieved from <https://www.refworld.org/docid/4ed34b562.html>

39. United Nations. (n.d.). HRC 38th A/HRC/38/L.10 The promotion, protection and enjoyment of human rights on the Internet. Retrieved from <https://www.un.org/en/our-work/documents>

Organisation for Security and Co-operation in Europe (OSCE)

In 2017, the Organisation for Security and Co-operation in Europe (OSCE) released a comparative study, titled “Defamation and Insult Laws in the OSCE Region”, and found that criminal law remained an instrument used by many OSCE states to excessively limit media freedom.⁴⁰ The study documents that only the following 15 out of 57 OSCE participating states, to have repealed all general provisions on criminal defamation and insult, Armenia, Bosnia and Herzegovina, Cyprus, Estonia, Georgia, Ireland, Kyrgyzstan, Moldova, Montenegro, Norway, Romania, Tajikistan, the former Yugoslav Republic of Macedonia, the United Kingdom and Ukraine.

It highlighted the particularly troubling situations in Italy and Greece, as investigations showed both states continuing to sentence journalists to prison for defamation, even if these sentences were in practice converted into criminal fines. The OSCE’s Representative on Freedom of the Media at the time, Dunja Mijatović, called on authorities of the participating States to ensure that criminal laws do not stand in the way of free and pluralistic media, and that pursuing decriminalisation of defamation had been the standing policy of OSCE, as well as other international and regional human rights bodies in Europe.⁴¹

Intergovernmental Rapporteurs on Freedom of Expression

In 2002, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the Organisation of American States (OAS) Special Rapporteur on Freedom of Expression, issued a joint declaration titled “International Mechanisms for Promoting Freedom of Expression”. The document brings attention to criminal defamation in the end by stating, “Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.”⁴²

In 2010, the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organisation for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organisation of American States (OAS) Special Rapporteur on Freedom of Expression, and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information issued a joint declaration reaffirming the right to freedom of expression as laid down in Article 19 of the ICCPR. The declaration made special reference to criminal defamation once again, stating, “Laws making it a crime to defame, insult, slander or libel someone or something, still in place in most countries (some ten countries have fully decriminalised defamation), represent another traditional threat to freedom of expression.”⁴³

European Court of Human Rights (ECtHR)

The right to freedom of expression and information is enshrined in Article 10 of the European Convention on Human Rights (ECHR).⁴⁴ The European Court of Human Rights (ECtHR) has recognised the balancing act between protection of freedom of expression and reputation, and does not completely rule out the possibility of criminal defamation.⁴⁵ In the case of *Lingens v Austria* (1986),⁴⁶ Austrian journalist Lingens faced criminal defamation charges after he published two separate articles, questioning the ex-chancellor, Kreisky, for supporting a former Nazi and president of the Freedom Party, Friedrich Peter. The claim, brought under the Austrian criminal code, failed against the journalist after the ECtHR reasoned that

40. Defamation and insult laws in the OSCE Region: A comparative study. (n.d.). Retrieved from <https://www.osce.org/fom/303181>

41. Schmall, E., & Bhagat, S. (2021, February 17). Indian court clears journalist of defamation claim in #MeToo case. Retrieved from <https://www.nytimes.com/2021/02/17/world/asia/india-mj-akbar-metoo.html>

42. Oas. (2009, August 01). Organization of American States: Democracy for Peace, security, and development. Retrieved from <https://www.oas.org/en/iachr/expression/showarticle.asp?artID=87&IID=1>

43. Oas. (2009, August 01). Organization of American States: Democracy for Peace, security, and development. Retrieved from <https://www.oas.org/en/iachr/expression/showarticle.asp?artID=784&IID=1>

44. European Convention on Human Rights. (n.d.). Retrieved from https://www.echr.coe.int/Documents/Convention_ENG.pdf

45. Freedom of expression, media law and defamation. (n.d.). Retrieved from <https://www.mediadefence.org/wp-content/uploads/2020/06/MLDIP-Defamation-Manual-English-1.pdf>

46. *Lingens v Austria* (1986) 8 EHRR 407

politicians and other public officials should tolerate a “high degree of criticism” due to their public position in democratic societies. Furthermore, the Court also noted that Lingens was covering political issues that were of immense public interest to Austrians, and that censuring the articles would deter other journalists from contributing to public discussion.

A similar case is that of *Bergens Tidende v Norway* (2000),⁴⁷ where a plastic surgeon, Dr R., brought defamation proceedings against a major Norwegian newspaper, *Bergens Tidende*, as well as against the newspaper’s former editor-in-chief and a journalist employed at the paper claiming that the newspaper had published a series of articles recounting complaints of dissatisfied patients that portrayed his care and follow-up treatment as unprofessional, and that he could not publicly refute the statements due to his patient confidentiality obligations. It was ruled by the ECtHR that the doctor’s interest in protecting his personal reputation was not sufficient to outweigh the important public interest in protecting the freedom of the press to impart information on matters of legitimate public concern, which in this case concerned the doctor’s practice and competency as a medical health professional.

With regards to incarceration as a punishment for criminal defamation, the ECtHR maintains that imprisonment is generally incompatible with the right to freedom of expression. In *Cumpana and Mazare v. Romania* (2004),⁴⁸ criminal proceedings were initiated against a Romanian newspaper, *Telegraf*, which published an article implying corruption in the Romanian government. The ECtHR held in this case that incarceration for criminal defamation was appropriate only in exceptional circumstances, mainly where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence.

Supreme Court of the United States of America

The US does not have a criminal defamation law at the federal level, however, 24 out of 50 states do have their own criminal defamation or “libel” related provisions in their respective criminal codes.⁴⁹ Even though the US Supreme Court has never expressly ruled criminal libel unconstitutional, the 1964 case of *Garrison v. Louisiana* gave important rulings as to the status of criminal libel and defamation with regards to freedom of expression and freedom of the press.⁵⁰ In this case, Jim Garrison, the District Attorney for the Parish of New Orleans, held a press conference in 1962 in which he issued a statement disparaging the judicial conduct of the eight judges of the Parish’s Criminal District Court. He attributed the backlog of pending cases to the judges’ inefficiency, laziness, and excessive vacations. Based on these statements, Garrison was tried and convicted of defamation under the Louisiana Criminal Defamation Statute, and the Supreme Court of Louisiana affirmed. Garrison appealed to the US Supreme Court and argued that the statute impermissibly infringed on his First Amendment rights to freedom of expression. The Court held that a criminal libel statute should contain the same restrictions as civil libel laws in order to protect the freedom of expression under the First Amendment. Therefore, the Court held that such statutes may only criminalise statements that are “knowingly false or made with a reckless disregard for their truth or falsity.” Justice Arthur J. Goldberg wrote in his judgement that the Constitution protects the absolute right of citizens and the press to criticise official conduct essentially upholding the right to freedom of the press.

In recent years, there have been fewer or no reports of criminal defamation cases being initiated against individuals, and media workers in particular, even though the 26 states have not yet repealed these laws.⁵¹ It seems that a general understanding exists among the US justice system that civil remedies are more than suitable for cases of libel and defamation, and several other states, including Arkansas, Colorado and

47. *Bergens Tidende v. Norway* 31 EHR (2001).

48. *Cumpana and Mazare v Romania* (2005) 41 EHRR 200

49. As defined by the Legal Information Institute of the Cornell Law School, Libel is a method of defamation expressed by print, writing, pictures, signs, effigies, or any communication embodied in physical form that is injurious to a person's reputation, exposes a person to public hatred, contempt or ridicule, or injures a person in his/her business or profession.

50. *Garrison v. Louisiana* 379 US 64 (1964)

51. Critics are not criminals - trust.org. (n.d.). Retrieved from <https://www.trust.org/contentAsset/raw-data/add1a4ac-a185-439b-aece-abe687933639/file>

Washington, have repealed these statutes.⁵²

African Court of Human and Peoples Rights (ACHPR)

The ACHPR in 2014 delivered a landmark judgement in the case of *Konate v Burkina Faso* by overruling harsh criminal penalties awarded to the journalist Lohé Issa Konaté by the state of Burkina Faso after he was found guilty in a criminal defamation case involving newspaper reports of a state prosecutor's corruption. This was a first of its kind decision for the regional court, and the appellant sought support from numerous international treaties and conventions that strongly discourage criminal sentences in cases with regards to freedom of expression and freedom of the press.

The case posed three main questions before the Court; first, whether Burkina Faso's domestic laws were in line with its international obligations regarding right to freedom of expression, clarity of the law, whether it served a legitimate purpose, and lastly, whether the limitation imposed was necessary to achieve the desired objective. The domestic law was held to be in violation of the international standards set for freedom of the press, and the state was ultimately asked to repeal custodial sentences for acts of defamation. The second question was affirmed as the law was clear and hoped to protect the public interest, a goal which it seemed to achieve.

The third question required the Court to apply the doctrine of necessity and test of proportionality to determine whether the sentence imposed on the journalist was a necessary response on part of the state. It found that the criminal penalties imposed on the journalist were disproportionate, and that a civil remedy would have been a sufficient recourse. The Court also affirmed that the criminal penalties imposed in this case violated Article 9 of the African Charter on Human and Peoples' Rights, Article 19 of the International Covenant on Civil and Political Rights, and Article 66(2)(c) of the Economic Community of West African States.

United Kingdom

The United Kingdom is one of the first countries in Europe, and the first among the Western European participating States in the OSCE, to have officially decriminalised defamation in 2009 through the Coroners and Justice Act. This was a crucial achievement not only for the country's own freedom of speech, but a great encouragement to many other nations which still rely on criminal defamation and look up to the criminal justice system of the UK for inspiration and justification. Following this amendment, the Defamation Act 2013 was passed, introducing a "serious harm" threshold for bringing a defamation claim, which means that the complainant must prove that his reputation was seriously damaged by the statements made by the accused which must be determined by the Court in individual cases.

In the case of *Lachaux v Independent Print Ltd & Anor*, the court held that the question of whether serious harm has been suffered must be determined by reference to actual facts – the impact of the statement – not just the meaning of the words. This is important because since freedom of expression can only be limited when someone's reputation is harmed, it is harmful to take "preventative measures" by penalising the accused of a defamatory statement that may not have even had a harmful impact. This is especially relevant in cases against journalists and media houses because they are forced to self-censor which may result in important information and exclusive reporting being kept hidden from the public out of fear of prosecution. This was a decision that was celebrated and welcomed by the defendant's lawyers and the press

52. Ibid.

53. *Konate v Burkina Faso* (App. No. 004/2013) ACHPR

54. Coroners and Justice Act 2009. Retrieved from <https://www.legislation.gov.uk/ukpga/2009/25/contents> Defamation Act 2013: A summary and overview six years on. (2020, February 18). Retrieved from <https://www.brettwilson.co.uk/blog/defamation-act-2013-a-summary-and-overview-six-years-on/>

55. Defamation Act 2013: A summary and overview six years on. (2020, February 18). Retrieved from <https://www.brettwilson.co.uk/blog/defamation-act-2013-a-summary-and-overview-six-years-on/>

56. *Lachaux v Independent Print Ltd & Anor* 2019 UKSC 27

itself as a victory for press freedom and freedom of expression.⁵⁷

The Coroners and Justice Act 2009 decriminalised defamation, sedition and seditious libel, defamatory libel and obscene libel in England, Wales and Northern Ireland. Criminal defamation has not been used very often in the UK since the 1970s,⁵⁸ but its "chilling effect" remained and states around the world justified their persistent use of criminal defamation according to the example set by the UK, including Pakistan, that continues to implement the law that the British colonial rule left in the region. The existence of these laws on the statute books provides more repressive and authoritative governments around the world with the excuse they need not only to refuse to repeal defamation laws but also to make active use of such laws to prosecute critics, dissidents, activists, journalists, writers and others.

However, with the rise of communications through online channels, the UK government is coming up with new checks and balances on free speech. The Online Safety Bill (currently in draft-form) seeks to address the fact that misinformation and harmful content is now rife online, and contains penalties for those found to be disseminating or spreading false information.⁵⁹ This would undoubtedly create the same problems that currently exist with criminal defamation.

Sri Lanka

Similar to other Commonwealth countries, including Pakistan, Sri Lanka's criminal code was also enacted during the British colonial rule which included the criminal defamation provisions and have not been changed since Sri Lanka's independence in 1948. Since the 1970s, successive governments had used this law to harass newspaper editors and to impose serious constraints on the media. In July 2001, the editor-in-chief of the Ravaya newspaper, Victor Ivan, faced four outstanding criminal defamation charges.⁶⁰ Since 1993, Mr Ivan had been indicted numerous times for criminal defamation by the Attorney General for articles published in his newspaper, and he claimed that these cases were designed to intimidate and harass him. In 1998, he applied to the Sri Lankan Supreme Court to have the indictments against him invalidated, but the Supreme Court turned down his request after which he took his case to the UN Human Rights Commission.⁶¹ In August 2004, the UNHRC found that Mr Ivan had been left in a state of "uncertainty and intimidation" by having indictments for criminal defamation left pending for several years, and that this had a "chilling effect which unduly restricted the author's exercise of his right to freedom of expression," thus violating article 19 of the UN International Covenant on Civil and Political Rights.⁶²

On June 18, 2002, after years of vigorous campaigning by international press freedom organisations and INGOs,⁶³ the Sri Lankan Parliament unanimously passed an act of Parliament repealing criminal defamation laws from the statute books.⁶⁴ The country remains the first and only in South Asia to have done so. The campaign was supported by several international organisations, including the International Press Institute (IPI), PEN International, the World Association of Newspapers, the Commonwealth Press Union (CPU), the Committee to Protect Journalists (CPJ), Free Media Movement (FMM), Article 19, and the Special Rapporteur on Freedom of Expression to the United Nations Commission on Human Rights, who denounced the "chilling effect" that defamation laws have on free expression.

57. Defamation Act 2013: A summary and overview six years on. (2020, February 18). Retrieved from <https://www.brettwilson.co.uk/blog/defamation-act-2013-a-summary-and-overview-six-years-on/>

58. UK: Defamation Decriminalized. Retrieved from <https://humanrightshouse.org/articles/uk-defamation-decriminalized/>

59. Online safety bill: Factsheet. (n.d.). Retrieved from <https://www.gov.uk/government/publications/online-safety-bill-supporting-documents/online-safety-bill-factsheet>

60. Letter: Sri Lanka editor faces numerous defamation charges. (2018, July 31). Retrieved from <https://ipi.media/letter-sri-lanka-editor-faces-numerous-defamation-charges/>

61. Victor Ivan and others v. hon. Sarath N. Silva. (n.d.). Retrieved from <https://www.lawnet.gov.lk/wp-content/uploads/2016/slr/025-SLLR-SLLR%202001%20V%201-VICTOR%20IVAN%20AND%20OTHERS%20v.%20HON.%20SARATH%20N.%20SILVA%20AND%20OTHERS.pdf>

62. Victor Ivan Majuwana Kankanamge v. Sri Lanka, Communication No. 909/2000, (n.d.). Retrieved from <http://hrlibrary.umn.edu/undocs/html/909-2000.html>

63. FMM welcomes repeal of criminal defamation law. (2002, June 20). Retrieved from <https://ifex.org/fmm-welcomes-repeal-of-criminal-defamation-law/>

64. Letter: Sri Lanka Government Repeals Criminal Defamation Laws. (2018, July 24). Retrieved from <https://ipi.media/letter-sri-lanka-government-repeals-criminal-defamation-laws/>

India

India too, like Pakistan and Sri Lanka, has a penal code dating back to British colonial times which is not very different from the Pakistan Penal Code. In the Indian Penal Code (IPC), criminal defamation is also defined under Section 499 and cites certain exceptions. These include important statements which are required for the “public good”, and thus have to be published, especially with regards to the public conduct of government officials and merits of the public performance. Section 500 of the IPC, which outlines punishment for defamation, reads, “Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.”

Just like in Pakistan, defamation is both a civil and criminal offence in India. The remedy for civil defamation in India is covered under the Law of Torts.⁶⁵ In a civil defamation case, a person who is defamed can move either a high court or subordinate courts, and seek damages in the form of monetary compensation from the accused. These cases do not entail jail terms.

In the year 2014, Dr Subramaniam Swamy, member of the Bharatiya Janata Party (BJP) alleged corruption charges on Ms. Jayaram Jayalalitha, a political rival from All India Anna Dravida Munnetra Kazhagamv (AIADMK) party in the state of Tamil Nadu,⁶⁶ after which Ms Jayalalitha framed defamation charges on Dr Subramaniam Swamy. He in return challenged the constitutional validity of Section 499 and Section 500 of the India Penal Code. However, the court, in this case, upheld the constitutional validity of the offence of criminal defamation, and ruled out that the contested provisions impose reasonable restrictions on the right to freedom of speech and expression. This was a major blow to the legal justice system and advocates of free speech in India, as the criminal defamation provisions in the country are also largely used to silence critics of the government and strong politicians.⁶⁷

In 2020, a number of criminal defamation cases were initiated against editors, publishers and journalists by the Jayalalithaa government in the Session Court in Tamil Nadu.⁶⁸ The Supreme Court issued a much welcomed ruling on how the government could “not use criminal defamation to throttle democracy”, further adding that public servants and constitutional functionaries cannot be allowed to misuse the law of criminal defamation by using the State as a tool to initiate defamation proceedings against their critics.⁶⁹ This echoes the decisions of the African Court of Human Rights and the European Court of Human Rights, and their decisions discussed earlier, highlighting that public bodies had to be more tolerant of public criticism since it is their duty to serve the people who elect them in the first place. The cases against the journalists and editors were later withdrawn by the Tamil Nadu state government which serves as an important precedent for other states in the future.⁷⁰

As discussed earlier, criminal defamation in Pakistan has, in the last few years, been used to silence victims of sexual violence amid the #MeToo movement online, who choose to speak up about their abusers and expose them in public forums.⁷¹ India has also seen similar incidents recently. In 2018, MJ Akbar, a former union minister and a journalist, filed a private criminal defamation complaint against a journalist Priya Ramani, who had accused him of sexual misconduct.⁷² In 2021, the defamation charges against Ramani

65. Defamation law in India. (n.d.). Retrieved from <https://www.legalserviceindia.com/legal/article-2224-defamation-law-in-india.html>

66. Dr. Subramanian Swamy vs J. Jayalalitha on 20 August, 1996. (n.d.). Retrieved from <https://indiankanoon.org/doc/1137705/>

67. Perrigo, B. (2021, April 29). India's government is silencing critics amid covid-19 crisis. Retrieved from <https://time.com/6005847/india-government-silencing-critics-covid-19/>

68. Correspondent, L. (2020, September 28). T.N. Challenges verdict against criminal defamation. Retrieved from

<https://www.thehindu.com/news/national/tamil-nadu/tn-challenges-verdict-against-criminal-defamation/article32719678.ece>

69. Sinha, B. (2016, July 29). Defamation law can't be used as a political weapon: SC to jayalalithaa govt. Retrieved from

<https://www.hindustanimes.com/india-news/defamation-law-can-t-be-used-as-a-political-weapon-sc-to-jayalalithaa-govt/story-5P2sgPrkQ565JcRq04MrML.html>

70. Tamil Nadu withdraws 90 defamation cases targeting media outlets: India News - Times of India. (n.d.). Retrieved from

<https://timesofindia.indiatimes.com/india/tamil-nadu-withdraws-90-defamation-cases-targeting-media-outlets/articleshow/84875338.cms>

71. Bilal, R. (2019, July 01). Meesha's harassment allegations 'surprised' me, Ali Zafar says in statement on defamation case. Retrieved from

<https://www.dawn.com/news/1491485/meesha-harassment-allegations-surprised-me-ali-zafar-says-in-statement-on-defamation-case>

72. Me too movement in India: MJ Akbar files defamation case against journalist Priya Ramani: India News - Times of India. (2018, October 15). Retrieved from

<https://timesofindia.indiatimes.com/india/mj-akbar-files-defamation-case-against-journalist-priya-ramani/articleshow/66215351.cms>

were dropped by a New Delhi trial court saying that her disclosure was in the interest of preventing sexual harassment in the workplace, and that, “The woman cannot be punished for raising (her) voice against sex abuse on the pretext of criminal complaint of defamation, as the right of reputation can’t be protected at the cost of right to dignity.”⁷³ This was a landmark judgement for women in India, and serves as an excellent precedent for Pakistani courts too, as the judge highlighted that a woman had the right to raise her complaint even if years had passed since the incident. This is an important point as many men accused of sexual abuse try to discredit the victim’s accusation by challenging her decision to not speak up immediately after the incident has occurred.⁷⁴ The case of Priya Ramani is also important because the accused is a man of a high social and political standing, and many such men in power often get away with sexual abuse, but the court held that they must be held accountable, rather than weaponise existing laws to silence victims.

73. Schmall, E., & Bhagat, S. (2021, February 17). Indian court clears journalist of defamation claim in #MeToo case. Retrieved from <https://www.nytimes.com/2021/02/17/world/asia/india-mj-akbar-metoo.html>

74. Delays in reporting alleged rapes are common - even years later, this isn't a barrier to justice. (2021, July 07). Retrieved from <https://theconversation.com/delays-in-reporting-alleged-rapes-are-common-even-years-later-this-isnt-a-barrier-to-justice-156201>

Conclusion

The world is seeing increasing digitisation as the internet evolves into the primary source of information sharing for people and gives everyone a platform to share their thoughts and opinions. This expanding digital space is not only a challenge for states to guarantee the right to freedom of expression, but it also makes it easier for authoritarian regimes to crack down on dissidents. Criminal defamation finds its origin in the 18th and 19th centuries, where maintaining the reputation of the state was a primary concern for rulers at the time. This is why many countries, including Pakistan and India, that have undergone colonial rule, have criminal codes and defamation laws dating back to the 1800s where colonial rule suppressed any form of uprising against the rulers. Since governance has changed significantly in the past 200 years and democracy has replaced monarchies and colonisations, there is little room left for criminal defamation. This is now becoming a general consensus between human rights advocates, jurists, legal writers and activists, as evident from the jurisprudence documented in this study.

In recent years, Pakistan has faced criticism for its treatment of journalists and failure to protect fundamental human rights in general.⁷⁵ If the state were to rectify this situation, it is imperative that it takes a vigorous stand against the criminal defamation provisions in the PPC and PECA to decriminalise the offences. It is understandable that such measures may take years to materialise, but a good starting point would be to limit the application of criminal defamation laws to exceptional circumstances where “serious harm” must first be proven in order to hold the accused liable. The courts must take the lead in doing this as they are the ones primarily interpreting law and setting precedents. However, for the state, it is necessary that it makes it a point not to prosecute a citizen or journalist in cases where they are critical of the state, its institutions and its policies, or in other similar situations, under the criminal defamation laws. This is important for a democratic system to operate as citizens are required to hold their representatives liable and it is the media’s job to report facts as they are. Any interference in this process would result in a society where democracy is compromised and where public is too scared to speak to or about their governments, or demand protection of their fundamental rights.

75. World Report 2022: Rights trends in Pakistan. (2022, January 13). Retrieved from <https://www.hrw.org/world-report/2022/country-chapters/pakistan>



About MMfD

Media Matters for Democracy (MMfD) works to defend the freedom of expression, media, Internet, and communications in Pakistan. The main premise of our work is to push for a truly independent and inclusive media and cyberspace where citizens in general, and journalists in specific, can exercise their fundamental rights and professional duties safely and without the fear of persecution or physical harm.

We undertake various initiatives, including but not limited to training, policy research, movement building and strategic litigation to further our organisational goals. We also work on acceptance and integration of digital media and journalism technologies, and towards creating sustainable 'media-tech' initiatives in the country.

MMfD recognises diversity and inclusion as a core value of democracy and thus all our programs have a strong focus on fostering values and skills that enable and empower women, minority communities, and other marginalised groups.