

NOTES / AANTEKENINGE

THE CRIME OF DEFAMATION – STILL DEFENSIBLE IN A MODERN CONSTITUTIONAL DEMOCRACY?

1 Introduction

The crime of defamation, known as criminal libel in some jurisdictions, has (along with associated “insult laws”) been identified in the 2007 Declaration of Table Mountain of the World Association of Newspapers and News Publishers as the “greatest scourge of press freedom on the continent” (<http://www.wan-ifra.org/articles/2011/02/16/the-declaration-of-table-mountain>, accessed 2013-01-31). The Declaration proceeds to call for the abolition of such laws as a matter of urgency. This call has similarly been made in the Caribbean context by the International Press Institute (<http://www.free-media.at/home/singleview/article/ipi-special-report-criminal-defamation-laws-remain-widespread-in-the-caribbean.html>, accessed 2013-02-04) and in the Commonwealth by the Commonwealth Human Rights Initiative (CHRI). Writing on behalf of CHRI, Cowell (“The Human Rights Case for Libel Law Reforms in the Commonwealth – Commonwealth Human Rights Initiative (CHRI)” 2011 *Commonwealth Law Bulletin* 329) notes the “chilling effect” of defamation laws (along with the procedural laws and regulations governing libel actions), defining this phenomenon (Cowell 2011 *Commonwealth Law Bulletin* 330) as

“partially ... self-censorship on the part of individuals but in general...a wider culture of fear and uncertainty within society that limits free speech”.

On this basis, Cowell argues (for CHRI) that criminal defamation represents the “clearest threat to the exercise of freedom of speech with Commonwealth states” and that the “threat of criminal sanction can act as a significant and widespread deterrent against all freedom of speech” (Cowell 2011 *Commonwealth Law Bulletin* 331), and that they should therefore be repealed (Cowell 2011 *Commonwealth Law Bulletin* 334). Similar calls for the abolition of criminal defamation laws have issued from the Organization of American States and the Organization for Security and Co-operation in Europe (<http://www.article19.org/pages/en/criminal-defamation.html>, accessed 2013-01-31), and in response to a complaint relating to a criminal libel conviction emanating from the Philippines, the United Nations Human Rights Council stated that

“States parties should consider the decriminalization of defamation ... application of the criminal law [in the context of defamation] should only be countenanced in the most serious of cases and imprisonment is never an appropriate remedy” (<http://www.cmfr-phil.org/2012/02/17/decriminalizing-libel-un-declares-ph-libel-law-excessive>, accessed 2013-01-31).

Despite these calls for the abolition of the crime, it is noteworthy that the crime is retained in many jurisdictions, including European jurisdictions and Commonwealth countries. For example, every Commonwealth state in the English-speaking Caribbean (except Grenada) has specific criminal libel laws (http://www.freemedia.at/fileadmin/media/Documents/Caribbean_Defamation_Table.pdf, accessed 2013-01-31), Asian Commonwealth countries such as India (s 499, Indian Penal Code), Singapore (s 499, Singapore Penal Code) and Malaysia (s 499, Malaysian Penal Code, discussed by Simon (ed) *Mallal's Penal Law* (2002) 885) have corresponding criminal defamation provisions, and so do African Commonwealth countries such as Botswana (Botswana Penal Code (Cap 08:01), ss 192–199) and South Africa (see below). In addition, Commonwealth members such as Australia (see list of state legislation in Milmo and Rogers *Gatley on Libel and Slander* 11ed (2008) 800 fn 278) and Canada (ss 297–316, Canadian Criminal Code) retain criminal defamation laws. An approach from the Commonwealth Press Union arguing for the abolition of the crime of defamation on the basis that such a crime threatens freedom of expression and is subject to abuse, being used in cases which do not involve the public interest, did not find favour with the Commonwealth Law ministers in their meeting in Accra in 2005 (“Meeting of Commonwealth Law Ministers and Senior Officials” 2006 *Commonwealth Law Bulletin* 73 77).

2 The South African crime of defamation

In the South African context criminal defamation may be defined as “the unlawful and intentional publication of matter that impairs another person’s reputation” (Burchell *Principles of Criminal Law* 3ed (2005) 741). Thus the essential elements of the crime, flowing from the definition are the (i) unlawful (ii) intentional (iii) publication (iv) of matter defamatory of another (Milton *South African Criminal Law and Procedure* 3ed (1996) 525, see also Burchell *Principles of Criminal Law* 743). With regard to the element of unlawfulness, apart from the general justification grounds negating unlawfulness (such as self-defence, necessity and consent – Milton *South African Criminal Law and Procedure* 526), where a published statement was the truth and for the public benefit, or where it amounted to fair comment, or where it was privileged, it would not be regarded as unlawful (Burchell *Principles of Criminal Law* 743; and Milton *South African Criminal Law and Procedure* 526–529). There has been some debate as to whether non-serious defamations are criminally punishable (Milton *South African Criminal Law and Procedure* 529–532; and Snyman *Criminal Law* 5ed (2008) 477) has contended that a defamation has to be serious to fall within the ambit of the crime, this is also the law in Zimbabwe which shares common roots with South African criminal law (*S v Modus Publications* 1998 2 SACR 151 (ZS)), whereas De Wet and Swanepoel (*Strafreg* 2ed (1960) 277–279; Burchell

Principles of Criminal Law 743; Van Oosten "Seriousness, Defamation and Criminal Liability" 1978 SALJ 505; and Van der Berg "Is Gravity Really an Element of *Crimen Iniuria* and Criminal Defamation in our Law?" 1988 THRHR 54, all have argued that this was not a requirement of the crime). The accused will be regarded as acting intentionally where he "knows or at least foresees the possibility that what he is doing is to publish unlawful defamatory matter concerning the complainant" (Burchell *Principles of Criminal Law* 745; and Snyman *Criminal Law* 477). Publication entails that the conduct or words complained of coming to the notice of someone other than the complainant – harm to the good name or reputation (*fama*) of the complainant cannot otherwise ensue (Snyman *Criminal Law* 476). Lastly, matter is defamatory if it "tends to expose any person to hatred, contempt or ridicule" (*R v Shaw and Fennell* (1884) 3 EDC 323 324; and Milton *South African Criminal Law and Procedure* 534). It is also worth noting that the customary-law crimes of defamation are largely equivalent to the common-law offence (Hoctor "Comparing Criminal Law Rules: A Role for Customary Law Concepts?" 2006 *Fundamina* 168 179 fn 103).

Although it seems that writers in the pre-constitutional era either did not question the existence of the crime of defamation (Lansdown, Hoal and Lansdown *Gardiner & Lansdown's South African Criminal Law and Procedure* Vol II 6ed (1957) 1641ff; and Hunt *South African Criminal Law and Procedure* Vol II (1970) 513ff), or actively endorsed its existence (De Wet and Swanepoel *Strafreg* 279; and Van Oosten 1978 SALJ 505ff), more recently it has been contended that this crime should be decriminalized (Burchell *The Law of Defamation in South Africa* (1985) 330; Van der Berg "Should there be a Crime of Defamation?" 1989 SALJ 276 281ff; and Labuschagne "Dekriminalisasie van Laster" 1990 THRHR 391). This view has been more forcefully expressed subsequent to the transition to a constitutional democracy in South Africa (Milton *South African Criminal Law and Procedure* 520; Burchell *Principles of Criminal Law* 741; and Snyman *Criminal Law* 476). As Burchell puts it, "the case for abolition is even stronger in the light of the constitutional imperatives of freedom of expression" (Burchell *Principles of Criminal Law* 741).

3 English, European and American jurisdictions – freedom of expression trumping the right to reputation

These arguments may be seen in the light of the developments in English law, which has had a strong influence on the development on both the civil and criminal aspects of defamation in South African law (Milton *South African Criminal Law and Procedure* 524). Following criticisms of the anomalies of the analogous English common-law offence of defamatory libel (see, *eg*, Spencer "Criminal Libel – A Skeleton in the Cupboard" 1977 *Criminal LR* 383, especially 465ff), the offence (along with the other common-law libel offences) was abolished by section 73 of the Coroners and Justice Act 2009. The erstwhile UK Parliamentary Under-Secretary for State in the Ministry of Justice Minister Claire Ward heralded the demise of the "arcane" offences of defamatory libel and seditious libel, along with

sedition, stating that they dated from “a bygone era” when freedom of expression received insufficient emphasis (<http://www.pressgazette.co.uk/print/44884>, accessed 2013-01-31):

“Freedom of speech is now seen as the touchstone of democracy, and the ability of individuals to criticise the state is crucial to maintaining freedom. The existence of these obsolete offences in this country had been used by other countries as justification for the retention of similar laws which have been actively used to suppress political dissent and restrict press freedom. Abolishing these offences will allow the UK to take a lead in challenging similar laws in other countries, where they are used to suppress free speech.”

Whilst the crime is found, and prosecuted fairly regularly, in a number of European jurisdictions, Emmerson, Ashworth and Macdonald point out that such prosecutions are compatible with Article 10 of the European Convention on Human Rights (which sets out the right to freedom of expression) “only insofar as they relate to untruthful and seriously damaging allegations of fact” (*Human Rights and Criminal Justice* 3ed (2012) 767). In particular the European Court of Human Rights has sought to protect the freedom of the press to impart information, and has held that the limits of acceptable criticism are wider in respect of a politician than a private individual, thus striking down criminal defamation convictions (*Lingens v Austria* (1986) 8 EHRR 407; *Oberschlick v Austria* [1997] EHRLR 676; and for an assessment of the early case law see Tierney “Press Freedom and Public Interest: The Developing Jurisprudence of the European Court of Human Rights” 1998 *European Human Rights LR* 419). Bertoni points out that the freedom of expression jurisprudence of the European Court has in turn impacted on the Inter-American Court of Human Rights, and its application of the right to freedom of expression set out in art. 13 of the American Convention on Human Rights (“The Inter-American Court of Human Rights and the European Court of Human Rights: A Dialogue on Freedom of Expression Standards” 2009 *European Human Rights LR* 332). Once again the right of the press to criticize those who have an influence on matters of public interest, as embodied in the right to freedom of expression, was held to weigh more heavily with the court than the protection of the reputation of the individuals concerned by means of the law of criminal defamation (and thus defamation convictions were struck down by the Inter-American Court of Human Rights in *Case of Herrera Ulloa v Costa Rica*, July 2, 2004 (Series C No 107); and *Case of Ricardo Canese v Paraguay*, August 31, 2004).

4 Should criminal defamation still exist in South African law? The Supreme Court of Appeal decides

In *S v Hoho* (2009 (1) SACR 276 (SCA)) the Supreme Court of Appeal quashed an appeal against conviction on some 22 charges of criminal defamation, arising out of allegations against certain political office-bearers, contained in various published leaflets. The court dealt specifically with the issues whether the common-law crime of defamation was still extant, and whether it was constitutionally sound.

Having examined previous case law, a related South African Law Commission report, the views of academic writers, as well as the statutory extension of the crime in terms of the Electoral Act 73 of 1998, the court had no difficulty in concluding that the crime had not been abrogated by disuse, in that it had been repealed by the silent consent of the community (par [15]). In assessing the constitutionality of the crime, the court first sought to define it, concluding (par [21]) that it was not required that the defamation be serious and in so doing conclusively settling the debate on the matter (referred to earlier). Nevertheless, as the right to a fair trial requires, the State bears the burden of proof to establish each element of the crime beyond reasonable doubt (par [25]).

It was noted by the court (par [31]) that the civil remedy of defamation struck a balance between the right to freedom of expression (s 16 of the Constitution, 1996) and the right to dignity (s 10 of the 1996 Constitution, in the form of the reputation of the complainant), according to the Constitutional Court in *Khumalo v Holomisa* 2002 (8) BCLR 771 (CC). The court then proceeded to hold that the crime of defamation was not unconstitutional, and that it did not agree with the views of some writers that it ought to be decriminalized. Whilst the criminal sanction is a drastic remedy, the court held, this was balanced by the much heavier burden of proof resting on the State, which in turn could explain the lack of criminal prosecutions for defamation (par [33]–[34]). Furthermore, why should it be that bodily injury could be prosecuted in the form of assault, but injury to reputation in the form of defamation could not? In any event, the court held, the need for a criminal sanction, as opposed to a civil remedy, was illustrated by the facts of this case, where the complainants' lack of knowledge of the source of the defamatory leaflets required that they enlisted the help of the police and prosecuting authorities to enable them to ascertain that the appellant was responsible (par [35]). The court cited the decision of the Privy Council in *Worme v Commissioner of Police of Grenada* ([2004] UKPC 8), where the constitutionality of the statutory crime of intentional libel was upheld, despite the protection of the right to freedom of expression in the Grenada Constitution, in that it was held to be justifiable in a democratic society (par [36]).

5 Arguments for and against criminal defamation

Thus, in the light of the *Hoho* case, it seems that criminal defamation will remain a part of the South African criminal law, pending Constitutional Court or legislative intervention. But ought such intervention to take place? The arguments in favour of the abolition of the crime which have been raised in the South African context, and their counter-arguments fall to be briefly examined. Since these arguments resonate with those considered in other jurisdictions in this context, where appropriate comparative sources will be considered.

5.1 Rationale

First, it has been argued that the original rationale for the crime of defamation was no longer applicable. Milton contends (*South African*

Criminal Law and Procedure 520; see also Burchell *Principles of Criminal Law* 741; Van der Berg 1989 *SALJ* 281–283) that the use of the criminal sanction to protect what is ordinarily a delict

“seems to rest not only upon a concern to protect government from scurrilous attacks which might stir up public opinion and insurrection but also a concern to maintain decency in public discourse and prevent disturbances of the public peace”.

This may be so, but it may be contended that the purpose underlying a particular criminal prohibition can change legitimately over a period of time (*R v Levkovic* 2008 *CarswellOnt* 5744, 235 *CCC* (3d) 417 par 111–112). It is clear that the conduct criminalized by the defamation crime certainly protects a significant personality interest, that of the reputation (De Wet and Swanepoel *Strafreg* 279). Impairment of this legal interest “not only diminishes the esteem in which he is held by the community and his self-esteem, but also causes damage” (Van Oosten 1978 *SALJ* 512). Such damage has been characterized as mental suffering (Chandrachud, Manohar and Singh *Ratanlal & Dhirajlal’s The Indian Penal Code* 31ed (2006) 2555), and it may be argued that such harm is no less damaging to the individual and the community than harm to or loss of property (Van Oosten 1978 *SALJ* 512; Gaur *A Textbook on the Indian Penal Code* 2ed (2001) 669; and Simon *Mallal’s Penal Law* 885).

5.2 *Infrequency of incidence of defamation charges*

Secondly, it has been contended that the infrequency with which criminal defamation was prosecuted undermined the utility of such a crime, and indicated that it ought to be decriminalized (Labuschagne 1990 *THRHR* 395; Snyman *Criminal Law* 476; Van der Berg 1989 *SALJ* 283). In response to this argument, it may be noted that in *Hoho* it was determined that, though infrequently prosecuted, the crime was still part of South African law. Moreover, as stated in *Worme v Commissioner of Police of Grenada* (*supra* par [42]):

“The fact that the law of criminal libel has not been invoked in recent years does not show that it is not needed. After all, prosecutions are in one sense a sign not of the success of a criminal law, but of its failure to prevent the conduct in question.”

5.3 *Adequacy of civil remedy*

A third argument against the existence of the crime of defamation is that the civil remedy for defamation is a vigorous and effective means of righting the wrong suffered by one whose reputation has been wrongfully assailed (Van der Berg 1989 *SALJ* 283–284; Rammanhor “Criminal Defamation: Encouraging Silence” June 2009 *Without Prejudice* 21 22; Jordaan “Die Bestaansreg van die Misdaad Strafregtelike Laster in ’n Konstitusionele Bedeling – *Hoho v S* 2009 (1) All SA 103 (HHA)” 2010 *TSAR* 391 398; Snyman *Criminal Law* 476; and Nel “Criminal Law” 2008 4 *Juta’s Quarterly Review* par 2.2)). The court in *Hoho* had regard to this argument,

considering the academic writing to this effect, but concluded that the criminal sanction played a necessary and important role. The Supreme Court of Canada reached the same conclusion in considering the analogous offence of defamatory libel in *R v Lucas* ((1998) 157 DLR (4th) 423), where it was held that, while victims who have been libelled deserve compensation, “perpetrators who willfully and knowingly publish lies deserve to be punished for their grievous misconduct” (par [70]). The fact that a person can claim monetary compensation for damages does not exclude the need for a “corresponding public expression of society’s profound disapproval” (par [72]); in *Hoho* par [35] the same argument is made in the context of assault):

“Although it is important to recognize the right of the person defamed to sue for monetary damages it is equally if not more important that society discourage the intentional publication of lies calculated to expose another individual to hatred and contempt ... Defamatory libel can cause long-lasting or permanent injuries to the victim. The victim may forever be demeaned and diminished in the eyes of her community ... The harm that acts of criminal libel can cause is so grievous and the object of the section to protect the reputation of individuals is so meritorious that the criminal offence is of such importance that the offence should be maintained” (par [73]).

The Privy Council in *Worme v Commissioner of Police of Grenada* (*supra* par [42]) also emphasized that the need for the criminal sanction for libel was in no way undermined by the existence of the civil law remedy:

“Of course the tort of libel provides a civil remedy for damages against those who make such attacks, but this no more shows that a crime of intentional libel is unnecessary than the existence of the tort of conversion shows that the crime of theft is unnecessary.”

Not only does the crime of defamation serve a legitimate and important goal of the criminal law by protecting a person’s reputation from the intentional publication of a lie (Freedman “Constitutional Application” 2009 *SACJ* 474), but it provides protection in cases where the civil remedy would be deficient. Spencer points out that civil defamation actions are “prodigiously expensive” and are hence only available to those with deep pockets (“Criminal Libel: The Law Commission’s Working Paper” 1983 *Criminal LR* 524 527 – the author further poses the question whether even if the civil remedy were to be extended to more potential litigants, through the provision of legal aid, this would not pose a far more dangerous threat to free speech than the criminal offence). Thus the civil remedy does not provide a practical alternative where the victim does not have the financial means to pursue it, or where the offending party does not have the means to satisfy an order of monetary damages to the victim (Freedman 2009 *SACJ* 474). These arguments have, however, been challenged by writers such as Milton (*South African Criminal Law and Procedure* 526) and Labuschagne (1990 *THRHR* 396), who contend that, in respect of the former argument, this would constitute an argument for the criminalization of every type of delict, and in respect of the latter, it would mean that the criminal sanction would be deployed against the poor and not the rich. The validity of these counter-arguments may be questioned, however. In the South African context, all the facets of the human personality are protected against infringement by both criminal law and delict. Thus physical integrity (*corpus*)

is protected by the respective delict and crime of assault, dignity (*dignitas*) is protected by the crime of *crimen iniuria* and the delict of *iniuria*, and reputation (*fama*) by the respective crime and delict of defamation. If the crime of defamation were to disappear, it could be argued that the poor victim would be deprived of all effective remedies. Far from underlying a claim for every delict to be treated as a crime, the argument relates to the need for criminal liability to ensue in a particular situation where the alternative would effectively be no remedy at all. The argument that the criminal sanction would be employed against the poor rather than the rich also misses the point – that whether the offending party is rich or poor is not the crucial consideration, but rather whether deliberate harm is intended by the offending party. Where this is present, criminal liability for defamation draws no distinction based on social status. Moreover, it is up to the complainant to choose to sue for damages or to lay charges, and in respect of the crime, it is up to the prosecuting authority to decide on whether to institute the prosecution.

Furthermore, the civil remedy is deficient when it comes to the deliberate character assassin, who invents a deliberate lie about another – as Spencer states (1977 *Criminal LR* 472):

“[such a person’s acts] can cause intense worry and damage, and it is surely right to deal with him by means of the criminal law. On a loftier plane, truth is a fundamental value in a free society, and such a society ought to take active measures against those who deliberately manufacture untruth”.

As noted above, it was stated in *Hoho* (par [35]; and see also Freedman 2009 *SACJ* 474) that the civil remedy also does not provide an alternative where the victim needs the assistance of the police to track down the perpetrator and publisher of the defamatory statement.

5.4 Constitutionality

Fourthly, a prosecution for defamation has been criticized for its “unacceptable potential to inhibit freedom of expression and media freedom” (Burchell *Principles of Criminal Law* 741; see also Milton *South African Criminal Law and Procedure* 520; Jordaan 2010 *TSAR* 394; Rammanhor June 2009 *Without Prejudice* 22; Van der Berg 1989 *SALJ* 279–281; and see the discussion of the “chilling effect” of the crime above). On this basis, the constitutionality of the crime has been called into question.

It is clear that not all speech deserves protection, and this applies all the more so to defamatory speech, which can cause serious harm. Writing in the context of American law, which (in the judgment of Dworkin *Freedom’s Law* (1996) 195) is “extraordinarily” protective of freedom of expression, Greenawalt (*Speech, Crime and the Uses of Language* (1989) 136) states that given that libels and slanders may “seek to promote the speaker’s advantage, [be] based on malicious hatred of a victim ungrounded in any perceived flaw relating to the defamation, or pander to the salacious interests of readers or listeners”, the idea that all intentional defamations should be protected for their own sakes is “ludicrous”. The law of defamation requires a balance to be struck between the right to reputation (associated

with the right to dignity) and the right to freedom of expression (*National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) 1207; and in the context of Indian law, Chandrachud, Manohar and Singh *Ratanlal & Dhirajlal's The Indian Penal Code 2556–2557*).

It seems that in effecting this balance, the courts have increasingly taken account of the right to dignity of the victim. Thus in *R v Lucas* (*supra*) the Supreme Court of Canada held that the limitation of the right to freedom of expression by the crime of defamatory libel was justifiable, given that preventing damage to reputation as a result of criminal libel is a “legitimate goal of the criminal law” (par [48]), and that the value of defamatory expression was “negligible” (par [57]):

“[D]efamatory libel is so far removed from the core values of freedom of expression that it merits but scant protection. This low degree of protection can also be supported by the meritorious objective of the [sections of the Criminal Code setting out defamatory libel]. They are designed to protect the reputation of the individual. This is the attribute which is most highly sought after, prized and cherished by most individuals. The enjoyment of a good reputation in the community is to be valued beyond riches” (par [94]).

Similarly in India the crime of defamation “does not place any unreasonable restriction on the freedom of speech or expression” (guaranteed in art 19 of the Constitution of India) (Chandrachud, Manohar and Singh *Ratanlal & Dhirajlal's The Indian Penal Code 2557*), and the Privy Council in *Worme* (*supra* [40]–[43]) concluded that the crime of libel did not necessarily fall foul of Article 10 of the European Convention. This statement has been borne out by judgments of the European Court upholding defamation convictions in *Cumpana and Mazare v Romania* (2005) 41 EHRR 200; *Pedersen v Denmark* (2006) 42 EHRR 486; and *Lindon v France* (2008) 46 EHRR 35 (this shift from the earlier jurisprudence of the Court has been bemoaned by Millar “Whither the Spirit of *Lingens*?” 2009 *European Human Rights LR* 277). Moreover, in the *Tristan Donoso* case decided by the Inter-American Court (judgment of January 27, 2009) the Court departs from its previous approach in allowing for the possibility that criminal defamation laws may be used regarding the duties of public officials or pertaining to expressions on matters of public interest (Bertoni 2009 *European Human Rights LR* 345).

The South African Constitutional Court has delivered a number of high-profile judgments on defamation recently. The court, pointing out that there was often an overlap between the values of dignity and reputation (*fama*) (*Khumalo v Holomisa* *supra* par [27]; *Le Roux v Dey*; and *Freedom of Expression Institute as Amici Curiae* 2011 (6) BCLR 577 (CC) par [141]) has discussed the balance between dignity and freedom of expression in defamation cases (*Le Roux v Dey* *supra* par 171; *The Citizen 1978 (Pty) Ltd v McBride (Johnstone as Amici Curiae)* 2011 (8) BCLR 816 (CC) par [146]–[153]), and how the balance is effected by means of the defences to defamation (in the latter case, fair comment – see par [154]–[203]). The remarks addressed by Skweyiya J in *Dikoko v Mokhatla* 2007 (1) BCLR 1 (CC) par [141]–[142] regarding the chilling effect of defamation actions are noteworthy in the present context:

“The chilling effect on freedom of expression envisaged in defamation cases would play out in the following manner. A person who suspects that they may possibly be about to defame someone else is cognizant of the fact that if they do, there may be legal consequences. As a result, they either refrain from making the utterance or doing some background checking first. So the kinds of utterances which are chilled are those which an ordinary person may suspect to be defamatory in nature. The chilling of this kind of expression is by no means an undesirable result and is in line with the framework of intersecting rights ... in which freedom of expression may well have to take a back seat to dignity in certain circumstances. ... Thus rather than being contrary to the constitutional scheme for the protection of expression, ‘chilling’ defamatory statements or those that may be suspected as such, are precisely what the Constitution requires in light of its commitment to dignity as a foundational value.”

5.5 *Selective prosecution*

The final criticism of the defamation crime relates to selective prosecution, that is, that the crime principally protects persons in public office (Labuschagne 1990 *THRHR* 395; and Snyman *Criminal Law* 476). This gives rise to the potential for political abuse of the crime (Feltoe *A Guide to the Criminal Law of Zimbabwe* 3ed (2004) 79). However, the mere possibility of the abuse of a crime by the government is not in itself sufficient reason for the abolition of such crime, provided that it protects a significant legal interest, which is indeed the case in relation to defamation.

6 **Concluding remarks**

It cannot be gainsaid that the right to freedom of expression lies at the heart of a democracy, and the South African Constitution “recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters” (O’Regan J in *South African National Defence Union v Minister of Defence* 1999 (6) BCLR 615 (CC) par [7]). Thus the criminalization of defamation, in the context of the availability of a civil remedy to deal with such offensive conduct, and the apparent reluctance to prosecute defamation, is inevitably controversial.

However, in the brief assessment of the arguments for the decriminalization of defamation set out above, it is clear that strong arguments can be advanced for the retention of the crime: it protects a significant legal interest; the alternative civil remedy does not address all instances of defamation adequately; and even though the crime indubitably limits the right to freedom of expression, such limitation seems reasonable and justifiable in an open and democratic society (that is, consistent with the criteria laid down in s 36 of the Constitution). With regard to this last point, the recent judicial pronouncements stressing the importance of the balancing the right to freedom of expression with the right to dignity are very significant. The remarks of Mogoeng J (as he then was) in *The Citizen 1978 (Pty) Ltd v McBride supra* par [242]–[243] once again stress the centrality of dignity:

“[H]uman dignity must colour the spectacles through which we view defamatory publications ... we ought to be slow to borrow from comparable

jurisdictions [the example proffered is that of the US] which do not necessarily share the same history and experience with us.”

Some of the greatest concerns regarding the existence of the defamation crime relate to the use of this sanction as an instrument to terrorize the media, that is, to infringe upon press freedom. It should be noted that South Africa has never adopted the English crime of *sedition libel* (*R v Endemann* 1915 TPD 142, per De Villiers JP and Curlewis J), which was equated (*R v Endemann supra* 152) with the Roman-Dutch crime of *crimen laesae venerationis*, defined by Voet (*Commentarius ad Pandectas* (1698–1704) 48.4.2) as “the crime of disrespect, when the respect due to the sovereign is violated by some heinous act or saying, though without a hostile intention”. There has never been a successful prosecution for *crimen laesae venerationis* in South African law, and it may be submitted that Milton (*South African Criminal Law and Procedure* 65) is entirely correct when he says that this crime “neither forms nor should form part of modern South African law”. The crime of criminal defamation should not be used to achieve the purposes of these old crimes in protecting members of government from disrespect. This would be entirely contrary to the right to express criticism of government and its officials guaranteed in the right to freedom of expression (s 16 of the Constitution).

The use of the crime to inhibit media freedom is deplorable, and it is entirely appropriate to stress the potentially chilling effect of placing restrictions on speech that may be offensive to individuals or sectors of the community. Nevertheless “genuine debate may also be stifled by over-aggressive and inadequately researched journalism” (Wildhaber “The Right to Offend, Shock or Disturb? – Aspects of Freedom of Expression under the European Convention of Human Rights” 2001 *Irish Jurist* 17 31). A possible procedural safeguard which could be instituted to prevent the misuse of the crime to stifle dissent or legitimate criticism would be to require (similar to the narrowly interpreted – and therefore less useful as a safeguard (see *Gleaves v Insall* [1999] 2 Cr App R) – English Law of Libel Amendment Act 1888, s 8) that the permission of a High Court judge be obtained in order to bring a prosecution against any person responsible for the publication of a newspaper or periodical, including journalists.

It is to be hoped that prosecutions for defamation will continue to be rare, and that the courts will wherever possible use all means – including, where appropriate, the doctrine of *de minimis non curat lex* – to continue to protect and uphold the right to freedom of expression. Nevertheless, where the egregious nature of an instance of defamation militates against the use of the civil remedy, such occurrence should – rightly – be dealt with by means of criminal proceedings.

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