AN EVALUATION OF THE CONSTITUTIONALITY OF THE COMMON LAW
CRIME OF CRIMINAL DEFAMATION

by

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SUMMARY

The challenge in the law of defamation lies in finding the appropriate balance between the two competing rights of freedom of expression and an unimpaired reputation. From Roman and Roman-Dutch law into the modern era, criminal and civil defamation have been very closely linked. The elements and defences are substantially alike.

There were several calls prior to 1994 for the abrogation of criminal defamation. Now that the right to an unimpaired reputation, as part of the right to human dignity, and the right to freedom of expression is constitutionally guaranteed, quo vadis the crime of criminal defamation? The Supreme Court of Appeal has recently granted a petition for leave to appeal against convictions for criminal defamation on this very point: is the offence constitutional?

Due to the paucity of criminal defamation precedent, the copious civil law precedent concerning civil defamation must be analysed to determine what view the Supreme Court of Appeal will adopt.

Prior to 1994 the right to an unimpaired reputation has trumped freedom of expression. Since then, the two leading decisions by the Supreme Court of Appeal and the Constitutional Court have ameliorated this situation slightly, according freedom of expression more weight. Claiming the previous common law position was incorrect, they claim the present common law
position is constitutionally sound. Thus the Constitution has in essence had no effect to date upon the balancing of competing rights in the law of defamation.

Both courts have erred in according the right to freedom of expression too little weight. This may be due to three judicial errors.

Firstly, they have under-appreciated that the values of dignity, equality and freedom fortify and are fortified by the right to freedom of expression. Aspects of dignity such as self-actualisation, self-governance and an acceptance that humans have intrinsic worth are heavily reliant on freedom of expression, particularly political expression.

Secondly, while political expression lies at the core of freedom of expression, reputation lies nearer the periphery of the right to dignity. Rights at the core ought to trump competing but peripheral rights.

Thirdly, erroneous statements are inevitable in free debate. Unless they too are protected, unacceptable self-censorship occurs.

The correct approach is as a matter of policy, particularly regarding political expression, to balance the competing rights with one’s thumb on the free expression side of the scales. This seems the trend of the European Court of Human Rights in recent cases.
In Canada, an offence punishing libel made intentionally but without knowledge of its falsity was recently ruled unconstitutional. On the other hand, another offence punishing libel made with knowledge it was false, *videlicet* punishing the intentional publication of defamatory lies, was ruled constitutional.

Criminal defamation clearly infringes upon the right to freedom of expression. For this infringement to pass constitutional muster it must be reasonable and justifiable in an open and democratic society. It fails the limitation test due to the lack of proportionality between its objective in protecting the right to an unimpaired reputation and the harm it does to the right to expression.

There are three reasons: firstly the “chilling effect” of imprisonment, over and above pecuniary damages, unacceptably stifles free debate. Secondly, it may punish even the truth, yet protect a falsehood, since the truth *per se* is not a defence. An undeserved reputation is thus more highly valued than the publication of that truth. Finally there is a well-developed civil remedy that adequately protects the right to reputation of aggrieved persons.

In the appeal concerning the constitutionality of the common law offence of criminal defamation, the Supreme Court of Appeal ought to find it unconstitutional.
Chapter 1

Introduction

The challenge in the law of defamation lies in finding the fulcrum that would most appropriately balance two opposing rights: the right to freedom of expression on the one hand and the right to an unimpaired reputation on the other.

Publication of defamatory material, whether true or not, causes direct and often highly visible harm to the victim to whom it is directed. This harm was probably most elegantly set out in Iago’s lament that

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'[g]ood name in man and woman, dear my lord,
Is the immediate jewel of their souls:
Who steals my purse steals trash; 'tis something, nothing;
'Twas mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name
Robs me of that which not enriches him
And makes me poor indeed.'
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For this reason the law has recognised a person’s right to an unimpaired reputation and has accordingly afforded protection of this right by both civil and criminal remedies. There are two civil remedies. The aggrieved party can apply for an interdict to prohibit publication of the defamatory material or he may institute action to recover damages he has suffered through the wrongful impairment of his reputation. At criminal law a prosecution for the

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1 Alexander William Shakespeare: The Complete Works (1973) 1133 (Othello Act 3 Scene 3).
common law crime of criminal defamation may be utilised.\textsuperscript{2}

Prior to 1994 the balance in South African law between the right to a good name and the right to freedom of expression was firmly weighted in favour of the former. Thus the theoretical necessity for a remedy for statements that could cause harm to others was viewed as so unassailable that traditional arguments in favour of freedom of speech did not view defamation as a free speech issue; rather defamation was held to be an exception to the principles of free expression.\textsuperscript{3} As a consequence, until recently, the South African common law of defamation severely circumscribed freedom of expression and freedom of the press, such that at civil law the press was held strictly liable for the publication of defamatory material.\textsuperscript{4} In proving defences of justification to negate unlawfulness, defendants were saddled with a full onus, not merely an evidentiary burden. Furthermore, the concept of 'public interest' was narrowly defined.\textsuperscript{5}

This contest between the rights to reputation and to freedom of expression had occurred without thought or consideration of the effect that it would have on the open and democratic nature of our society. Nor was the contest between the competing rights viewed within the context of an over-arching constitution providing for the protection of rights unassailable by any other law.

\textsuperscript{2} Burchell \textit{The Law of Defamation in South Africa} (1985) 325, hereinafter referred to as \textit{Burchell Defamation}.
\textsuperscript{3} Schauer \textit{Free Speech: A Philosophical Enquiry} (1982) 167, hereinafter referred to as \textit{Schauer Free Speech}.
\textsuperscript{4} \textit{Pakendorf en Andere v De Flamingh} 1982 3 SA 146 (A).
Section 10 of the Bill of Rights contained in The Constitution of the Republic of South Africa Act\(^6\) entrenches the right to human dignity, while section 16 guarantees the right to freedom of expression. The balance between these two opposing rights has accordingly been elevated to a constitutional level. This would inevitably lead to a fundamental re-examination of the point of equilibrium between the right to freedom of expression on the one hand and the protection of a person’s reputation on the other. At civil law the delict of defamation has received comprehensive judicial overview that has seen a marked concomitant shift in favour of the right to freedom of expression.

The first opportunity for a proper re-examination of the position at criminal law has now arisen following the conviction of the accused in *The State versus Kerr Luzuko Hoho*\(^7\). A petition by the appellant to the Supreme Court of Appeal has succeeded solely on the ground of whether the offence of criminal defamation is constitutionally sound. The appeal has not as yet been set down.

### 1.1 Problem Statement

*Quo vadis* then the common law crime of criminal defamation in South Africa? The offence clearly intrudes upon the right to freedom of expression, a right that is now constitutionally guaranteed. The question to be determined is whether the criminalisation of that expression is justifiable in an open and

\(^6\) Act 108 of 1996, hereinafter referred to as ‘the Constitution.’
\(^7\) CHD CC123/02.
democratic society. The *raison d’etre* for the offence is that it is required to uphold the right to an unimpaired reputation. This right forms part of the right to human dignity. Therefore, in determining whether the offence of criminal defamation is a justifiable limitation of the right to expression in an open and democratic society, an appropriate fulcrum for the balance between the competing right of expression and the right to human dignity must be found. Historically our courts have allowed the right to an unimpaired reputation to predominate. If this trend continues then the limitation of the right to freedom of expression imposed by the offence of criminal defamation will be considered justifiable in an open and democratic society.

There are, however, cogent reasons for the Supreme Court of Appeal in determining the appeal in *The State v Hoho*\(^8\) to allow the right to freedom of expression to trump the right to an unimpaired reputation. There are well-developed civil remedies available to aggrieved parties who allege that their right to an unimpaired reputation has been breeched. The aggrieved party seeking constitutional protection of his reputation may not be worthy of that reputation insofar as the alleged defamatory statements may be true. The aggrieved party may furthermore be a high-ranking political or public official whose conduct in an open and democratic society should be open to searching and thorough scrutiny.

This treatise will examine where the fulcrum that most equitably balances the

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\(^8\) *Supra.*
right to free expression and the right to an unimpaired reputation ought to be positioned. It will further examine whether it is constitutional to utilise the resources of the State in a prosecution for criminal defamation so as to punish defamatory expression in an open and democratic society.

1.2 Methodology

There is very little case law concerning the offence of criminal defamation in South Africa. There is by contrast significant development and substantial precedent apropos the common law in respect of civil defamation. The criminal and civil aspects of defamation have been closely aligned in Roman and Roman-Dutch law such that even today there is considerable congruence between them.

An analysis of the judicial jurisprudence concerning civil defamation may then be an indication of the view the Supreme Court of Appeal will take on the pertinent issue in the case The State v Hoho,\(^9\) \textit{videlicet} whether the common law crime of criminal defamation passes constitutional muster or not. The issue of defamation focuses on the balance between the competing rights to freedom of expression and to unimpaired reputation. To note where the courts place the balance in civil matters provides an indication of how the courts may view the respective strengths of these rights in a criminal analysis.

To determine the balance correctly, and as a critique of the current common

\(^9\) \textit{Supra}. 
law position, policy-based arguments as well as European jurisprudence will be utilised. A decision on the constitutionality of a similar provision in the Canadian Criminal Code will also be analysed.

Finally it will be argued that the common law offence of criminal defamation does not pass the proportionality test insofar as the harm it causes to the right to expression disproportionately outweighs its benefit in protecting the right to an unimpaired reputation.

1.3 Chapter Division

Following this introductory chapter, Chapter Two will provide the background to the case *The State versus Hoho*.\(^{10}\) The third chapter will focus on the definition and development of the crime of criminal defamation through Roman and Roman-Dutch law up until the present. Thereafter the historical pre-constitutional arguments for the abrogation of criminal defamation will be analysed, as well as arguments raised by apologists for the offence.

The fourth chapter will deal with a brief outline of the respective rights to human dignity and to freedom of expression as set out in the Bill of Rights to the Constitution. Chapter Five will consider the judicial analyses of these competing rights in the civil forum in the constitutional era. The issue of whether the right to reputation falls within the purview of the right to human dignity will be analysed. As to the right to freedom of expression, emphasis

\(^{10}\) *Supra.*
will be placed on two important judgments by the Supreme Court of Appeal and the Constitutional Court that have developed the common law in the area of civil defamation without any constitutional influence having been deemed necessary.

The sixth chapter will be in the form of a critique of the position taken by the above-mentioned two courts. It will be argued that in their development of the common law in the constitutional era, the courts have placed insufficient weight upon the right to freedom of expression. Three such arguments will be raised; these are the intrinsic value of freedom of expression to human dignity, secondly the importance of distinguishing between the core and the periphery of the competing rights to human dignity and freedom of expression and lastly the value of permitting false statements in an open and democratic society. Thereafter an argument for a bias in favour of freedom of expression shall be made. The rationale for this bias will be supported by both policy-based arguments as well as the general trend evident from relevant European case law.

The seventh chapter will consider a recent decision of the Canadian Supreme Court concerning two statutory offences for criminal defamation. The argument will be presented that the approach adopted in this case ought to be followed by the Supreme Court of Appeal in considering the constitutionality of the crime of criminal defamation.

In the concluding chapter international trends will be considered. It will be
argued that the offence of criminal defamation fails the constitutional limitation test on three counts: firstly, due to the unacceptable ‘chilling effect’ it exerts through self-censorship, secondly because it may punish the truth and protect falsehoods, and thirdly because of the well-developed civil remedy that exists to protect the right to an unimpaired reputation. The submission is then made that the crime of criminal defamation is unconstitutional because it fails the proportionality test; the harm it does to the right to freedom of expression is out of proportion to the benefit it affords the right to an unsullied reputation.
Chapter 2

The Facts of S v Hoho, High Court (Bhisho) Case No: CC 123/2002

This case stems from the publication of a number of articles by an author who sought anonymity behind the pseudonym ‘Father Punch’. During the period 2000 to 2002 Father Punch compiled and distributed documents that contained, to quote from the summary of substantial facts appended to the indictment,

‘harsh criticisms and also slanderous, false allegations against several people’.

These several people, named as complainants in the indictment, included both the Speaker and the ANC Chief Whip of the Eastern Cape Provincial Legislature, the Premier of the Eastern Cape, two senior National Cabinet Ministers and a National Deputy Minister. The Father Punch saga was chronicled extensively in the regional media. A high-level police investigation into the true identity of the author of the alleged defamatory publications continued for several months. The reason for the high profile of the case is apparent from the said summary of substantial facts:

‘Some of this information was of a confidential nature, causing widespread mistrust, suspicions and accusations within the Eastern Cape Legislature as well as within the local ruling party, the African National Congress. At some stage it adversely effected (sic) the effective governing of the Eastern Cape Province.’
The resultant political paranoia within the Bhisho Legislature led to several people at various times over a period of some months being incorrectly suspected and even accused of being Father Punch. This led to several police raids in that time upon the offices of a number of employees at the Bhisho Legislature. Eventually the finger of suspicion pointed to Hoho.

He was duly arrested and indicted in the High Court on 23 counts of criminal defamation and on a further 23 counts of crimen injuria. The case was heard by White J and ended with the conviction of the accused on 22 counts of criminal defamation and on 1 count of crimen injuria. The court a quo refused leave to appeal but a petition to the Supreme Court of Appeal succeeded partially; the Supreme Court of Appeal dismissed the petition on all the grounds save one. The only aspect upon which the Court will hear the appellant concerns whether the offence of criminal defamation is constitutionally sound. If the offence passes constitutional muster, the convictions will stand; if not, then the conviction of the appellant on the 22 counts of criminal defamation will be set aside. The conviction on the offence of crimen injuria stands and no appeal has been allowed in respect thereof. Heads of argument have already been filed by both parties but the matter has as yet not been set down for a hearing.

In the next chapter the historical roots and current content of the crime of criminal defamation will be examined. The arguments raised in South Africa prior to the passing of the Constitution of the Republic of South Africa Act

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11 Act 200 of 1993 (hereinafter referred to as ‘the interim Constitution’).
will be discussed. Relevant arguments stemming from other jurisdictions will also be considered.
Chapter 3

Historical Overview

3.1 Introduction

The delict of defamation and the crime of criminal defamation are historically intertwined, to the point where there has at times been confusion as to whether the action was civil or criminal in nature. In modern society, however, the civil remedy is well-developed and commonly utilised, whereas prosecutions for the criminal offence are rare. This has led in the past to arguments, both in South Africa and in foreign jurisdictions, for the abrogation of the offence. These arguments were made prior to the constitutional era introduced in 1994. Both the historical development of the offence, as well as the arguments raised for and against its abrogation will now be considered.

3.2 Development and Content of the Crime of Criminal Defamation

Criminal defamation consists in the unlawful and intentional publication of matter concerning another which tends to injure his reputation.\(^{12}\) Snyman includes the element of gravity in the above definition, requiring that the *actus reus* seriously tend to injure the complainant’s reputation.\(^{13}\)

The Romans originally viewed verbal defamations in a criminal light. At issue

\(^{13}\) Snyman *Criminal Law* 4 ed 459.
was personal insult for which a measure of atonement was required through a criminal sanction. In terms of the law of the Twelve Tables, vulgar songs and crass affronts in the public domain were punishable by death. Although Roman law took some time to develop a general action for *iniuria*, it finally recognised the principle that damage to a person’s feelings was protected in the *actio iniuriae*. This protection remained closely linked to the criminal law with the result that there was no clear separation between the civil and criminal elements of the delict. Indeed the act had to be capable of characterization as being criminal as pre-condition to being included in the concept of *iniuria*.

The content for the *factum* of this delict is given by Ulpian as *omnemque iniuriam aut in corpus inferri aut ad dignitatem aut ad infamiam pertinere*.

The common law offences arising from these wrongs to *corpus*, *dignitas*, and *fama* are, respectively, assault, *crimen iniuriae* and criminal defamation.

The close association between the civil and criminal nature of the delict continued in Roman-Dutch law where the private action was penal in nature. If the plaintiff succeeded in his claim, the pursuant pecuniary award was viewed more as a fine than as reimbursing the plaintiff for the damages he had suffered. The award ostensibly for damages was not necessarily even in

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16. ‘All delicts are made up of either injuries to one’s body, or to one’s dignity or to one’s reputation.’
favour of the plaintiff in as much as the judge had the discretion to require the penalty be paid to a charitable institution.\textsuperscript{18}

During the 17\textsuperscript{th} and 18\textsuperscript{th} Century cases of defamation, often involving public officials and members of government were widespread in Holland. As a preventative measure a Placaat of the States of Holland and West Friesland dated 7 March 1754 was passed. It imposed a severe penalty for the existing crime of defamation in the interests of deterrence.\textsuperscript{19}

This Placaat was held as never having been operative at the Cape. The offence of defamation, was, however, held to be part of our common law, having been recognised as such by the Roman-Dutch authorities and by the South African courts.\textsuperscript{20}

The Cape legislature promulgated the Act of the Cape of Good Hope Relating to Defamatory Libels 46 of 1882, whereby the publication of a defamatory libel was criminalized. The same defences available to a civil defendant were open to the criminal accused, although an accused was obliged to file a special plea of truth for the public benefit if such were to be his defence. Section 107 of the Criminal Procedure Act 51 of 1977 still requires this special plea. This Act therefore codified the common law of defamatory libel in the Cape area of jurisdiction. The distinctions between libel and slander peculiar to English law were hereby introduced into the law of the Cape.\textsuperscript{21}

\textsuperscript{18} \textit{R v Fuleza} 1951 1 SA 519 (A).
\textsuperscript{19} \textit{R v Harrison and Dryburgh} 1922 AD 320 327,332; Burchell \textit{Defamation} 323.
\textsuperscript{20} \textit{R v Harrison and Dryburgh} at 327; Burchell \textit{Defamation} 323.
\textsuperscript{21} Burchell \textit{Defamation} 323-324.
In the Transvaal, a Volksraad Besluit of 1871 had prescribed certain penalties for the crime of defamation, whether the defamation be oral or written.22

Neither of these legislative interventions into the law of defamation of South Africa had any lasting effect on the common law offence of criminal defamation.23

The elements making out criminal defamation are substantially akin to those of civil defamation. Apart from the greater burden of proof that lies upon the State, the requirements of publication, defamatory matter and reference to the complainant are identical. The general defences excluding unlawfulness (truth for public benefit, fair comment and privilege) and intention in the form of *animus injurandi* are open to both the civil defendant and to the criminal accused.24

Section 107 of the Criminal Procedure Act places a procedural duty upon an accused to disclose his defence by means of a special plea if his defence is that the defamatory matter is true and that it was for the public benefit that it be published.

A number of areas are as yet, however, not settled in the law of criminal defamation. There is judicial uncertainty, and academic dispute, over

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22 Burchell *Defamation* 324-325.
23 *R v Fuleza* at 528F-H; *Rv Japel* 1906 TS 108 110-111.
24 Burchell *Defamation* 325.
whether the gravity of the defamation is also an element of the offence.\textsuperscript{25} It is in addition uncertain if liability requires the likelihood that the defamatory material be likely to lead to a breach of the peace.\textsuperscript{26}

3.3 Pre-constitutional Arguments For and Against the Abrogation of Criminal Defamation as an Offence in South Africa

Long before the enactment of the interim Constitution, several authors questioned the continued existence of criminal defamation as a criminal offence.\textsuperscript{27}

Historically and internationally there has been a policy concern as to whether, in the face of well-developed civil remedies, the introduction of a criminal sanction is too harsh a regulation of free speech. It is argued that the requirement for such an offence is reduced as the civil law provides effective and efficient compensation to those whose reputations have been wrongly impugned.

A further serious criticism of the continued existence of the offence of criminal defamation, both internationally and locally, as is immediately apparent in the \textit{Hoho} case, is that it has traditionally been utilised to protect public officials from criticism. Van der Linden specifically identified public officials as a

\textsuperscript{25} Compare Snyman \textit{Criminal Law} 461, who considers gravity an element of the offence, with Van Der Berg ‘Is gravity really an element of \textit{crimen iniuria} and criminal defamation in our law?’ \textit{THRHR} 1988 (51) 54, who does not; \textit{R v Fuleza} at 327.

\textsuperscript{26} Burchell \textit{Defamation} 325.

\textsuperscript{27} Gardner ‘Is slander a crime in South Africa’ 1909 \textit{SALJ} 534; Burchell \textit{Defamation} 332-334; Labuschagne ‘Dekriminalisasie van Laster’ 1990 \textit{THRHR} 395, hereinafter referred to as Labuschagne Dekriminalisasie van Laster.
group in respect of whom criminal defamation could be committed. The Star Chamber in England held that libels against a magistrate or other public person should be subject to penalties harsher than the norm because

'It concerns not only the breach of the peace, but also the scandal of the Government.'

There was furthermore apparently a rule of practice in the Cape Province prior to Union that the Attorney-General would decline to prosecute in matters where the complainants were private citizens.

This distinction received judicial imprimatur when Russel J held that

'I do not think that I am in a position to say that the law which regards verbal defamation as a crime has been abrogated by disuse. Especially that is the case in proceedings like these in which the person attacked is an official high in the service of the Government. There are signs that defamation of a person in authority is regarded as more obviously of a criminal nature than defamation of a private individual.'

This is precisely the danger, so runs this argument, of such criminal defamation prosecutions, to wit that those who hold political power can use it to silence their critics and even punish defeated opponents for campaign statements. Robert Leflar, Arkansas law professor and former state Supreme Court judge, conducted a study of United States criminal defamation convictions. He concluded that 44 of the 110 cases between

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28 Labuschagne Dekriminalisasie van Laster 395.
30 Labuschagne Dekriminalisasie van Laster 396; Le Seuer v Geary 1877 7 SC 115.
31 R v Masoja and Mtelo 1930 SR 167 177; Labuschagne Dekriminalisasie van Laster 396.
1920 and 1956 grew out of or were part of political controversies.\textsuperscript{32} The problem is not confined to the Nineteenth and Twentieth Centuries; politically inspired prosecutions in Alabama, Kansas and Wisconsin that commenced in late 2001 as well as Bills introduced in Oklahoma and Iowa criminalizing false statements made in the course of a political campaign reveal the problem to be very relevant today.\textsuperscript{33} The dictum of Edgerton J in the unanimous judgment in \textit{Sweeney v Patterson}\textsuperscript{34} resonates with as much relevance today as when delivered in 1942:

'\[c\]ases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors… Whatever is added to the field of libel is taken from the field of free debate.'\textsuperscript{35}

A further argument concerns the fact that there are very few prosecutions for criminal defamation in South Africa.\textsuperscript{36} Prosecutions for defamatory libel in England are similarly rare and in fact not encouraged by the English courts.\textsuperscript{37} Kennedy LJ held that it behoves the prosecuting authorities to resort to prosecutions for this offence only in comparatively exceptional circumstances.\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{32} Bischof ‘Criminal Libel as Political Tactic’ \textit{The News Media & The Law} Spring 2001 17.
\item \textsuperscript{33} Bischof ‘A Renaissance in Speech Crime Prosecutions’ 14-17.
\item \textsuperscript{34} \textit{Sweeney v Patterson} 76 US App DC 23.
\item \textsuperscript{35} At 24.
\item \textsuperscript{36} Burchell \textit{Defamation} 332.
\item \textsuperscript{37} Smith and Hogan \textit{Criminal Law} (2005) 940.
\item \textsuperscript{38} Gleaves v Insall 1999 2 Cr App R 466; Smith and Hogan \textit{Criminal Law} 940.
\end{itemize}
It should be noted that in England, unlike South Africa, only libel is criminalized; slander, or *iniuria verbis*, does not make out a criminal offence.

The scant number of prosecutions can scarcely be ascribed to the fact that defamations, even serious defamations, are rare. Thus, went the argument, the offence ought to be abrogated even in respect of the most serious instances of defamation due to desuetude, that is, disuse, following the progress in the appropriate civil remedies. The Supreme Court of Canada, however, dismissed this argument. It was held that provisions in the Criminal Code such as theft from oyster beds or high treason are also rarely invoked yet this renders them neither ineffective nor unwarranted.

This paucity of prosecutions led to a further argument as set out in the following editorial comment that appeared in *The Times* in London pursuant to the report on defamation by the Faulks Committee:

> ‘[w]hat has to be asked is whether the public interest in protecting reputation is really so great that criminal sanctions are justified. If so, it is hard to understand why the old offence of criminal libel was so rarely used. The fact is that there are only limited sums available for the control of crime, and they are better directed to dealing with serious crimes against the person and property, and to the maintenance of law and order.’

Apologists for the offence have raised as *raison d’être* the following arguments.

39 *R v Fuleza* at 528F-H.
40 Burchell *Defamation* 332.
41 *R v Lucas* 1998 1 S C R 439 par 57.
42 Labuschagne Dekriminalisasie van Laster 395.
The rationale for criminalizing what would ordinarily be no more than a delict or tort has been not only the need to protect government from outrageous broadsides that might inflame public opinion or insurrection, but also a requirement to maintain decency in public discourse and to prevent disturbances of public order.  

Further arguments in favour of retaining the offence have raised the position of the impoverished publisher of defamatory material as well as that of the impecunious victim of such slurs to his reputation. The civil remedies in respect of the former, being a man of straw, would be of little value. Thus, in the absence of a criminal sanction, he could commit acts of libel with impunity. The force of this argument is partly diminished by the possible alternative to an aggrieved party of obtaining an interdict stopping publication by the penniless publisher. The argument also offends against the fundamental demand that all be treated equally before the law, insofar as such an argument leads to one legal regime for the rich and altogether another one for the poor.

The argument in respect of the impecunious victim, on the other hand, is that the expense of civil litigation is such as to preclude him from having any protection at all were there to be no criminal sanction.

The force of this argument is minimised in two respects: the possibility open

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43 Milton and Hunt South African Criminal Law and Procedure 520.
44 R v Lucas at par 74.
45 Labuschagne Dekriminalisasie van Laster 396.
46 Burchell Defamation 333; R v Lucas at par 74.
to an indigent complainant of obtaining legal aid, and the simple observation that the offence seems seldom if ever to have been prosecuted at the instance of an impecunious complainant. Certainly this argument received short thrift in the said editorial in *The Times*:

‘[a]nother argument relied on by the Law Commission is that civil libel proceedings are expensive and difficult to mount (and legal aid is not available). The same is also true, however, of other types of civil proceedings. This is no reason for creating a criminal sanction on top of an existing liability. The civil remedy for libel, when invoked, is in fact effective: in addition to damages, an injunction is available to prevent repetition of the untrue statement, and the breach of this is a contempt punishable by imprisonment.’47

While the continued existence of the offence of criminal defamation was questioned from time to time in primarily academic circles, the offence remained a part of the common law of South Africa. It is submitted that the new constitutional dispensation of 1994 and 1996 now requires a different approach to assessing the value of this offence in our common law. The arguments in favour of the abrogation of the offence must now be weighed in the balance between the two competing rights to freedom of expression and to an unimpaired reputation. They will furthermore be considered in determining whether the inroad that the offence of criminal defamation makes upon the right to free expression is justifiable in an open and democratic society.

In the next chapter the provisions of the Constitution that deal with the right to human dignity and the right to freedom of expression will be analysed.

47 Labuschagne Dekriminalisasie van Laster 396.
Particular attention will be paid to the difference in formulation of the right to freedom of expression between the final and interim constitutions. The relevance of this difference will also be discussed.
4.1 Introduction

The arguments for and against the abrogation of the common law crime of criminal defamation prior to the interim Constitution have now been considered. The introduction of the interim Constitution and later of the Constitution has inevitably led to a reappraisal of our law in many areas. To understand its effect in the area of defamation and its likely effect in the area of criminal defamation, an analysis of these rights is required.

4.2 The Right to Human Dignity

The right to human dignity is entrenched in section 10 of the Constitution. This section reads that everyone is imbued with inherent dignity by virtue of their humanity; accordingly everyone has the right to have their dignity both respected and protected.

Section 1 of the Constitution holds that one of the founding values of the Republic of South Africa is human dignity. Section 7(1) of the Bill of Rights holds that the said Bill of Rights affirms the democratic values of human dignity, equality and freedom. Section 36(1) of the Bill of Rights holds that rights may only be limited to the extent that the limitation is reasonable and
justifiable in an open and democratic society based on human dignity, equality and freedom. Section 37(5) (c) of the Bill of Rights holds that even in a state of emergency the right to human dignity is non-derogable. Section 39(1)(a) of the Bill of Rights requires that an interpretation of the Bill of Rights must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. Human dignity is therefore not only a constitutional right requiring protection and justiciable and enforceable at law, it is also a value foundational to the interpretation of all the other fundamental rights and is of principal import in the limitations enquiry.\textsuperscript{48}

The concept of human dignity is not defined in the Constitution. A dictionary definition of the word ‘dignity’ has been given as the state of being worthy of honour or respect.\textsuperscript{49} The notion of dignity at the most rudimentary level would include in its purview subjective feelings of self-worth and freedom from contempt, malice or derision.\textsuperscript{50} The common law furthermore provides protection for human dignity in the actio iniuriarum. There is no express indication that the right to reputation is protected by section 10 of the Constitution. This is a matter that has subsequently been examined by the courts and that will be dealt with infra.

4.3 The Right to Freedom of Expression

Section 16 of the Constitution guarantees the right to freedom of expression.

\textsuperscript{49} The Concise Oxford Dictionary of Current English (1992) 326.
\textsuperscript{50} Chaskalson \textit{Constitutional Law} (1996) 17-10.
It reads as follows:

'Freedom of Expression

16. (1) Everyone has the right to freedom of expression, which includes –
(a) freedom of the press and other media;
(b) freedom to receive or impart information or ideas;
(c) freedom of artistic creativity; and
(d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to-
(a) propaganda for war;
(b) incitement of imminent violence; or
(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.'

Freedom of expression is recognized in most free nations as a fundamental prerequisite for a democratic and open society. The following dictum from Cameron J indicates this to be recognised in South Africa as well:

'In a free society all freedoms are important, but they are not all equally important. Political philosophers are agreed about the primacy of the freedom of speech. It is the freedom upon which all others depend; it is the freedom without which the others would not long endure.'

Section 16 of the Constitution differs from its forerunner, section 15 of the interim Constitution, in a number of interesting ways. Of note is that section 15(1) read with the limitation clause, section 33(1) of the interim Constitution provided expression that related to ‘free and fair political activity’ a higher degree of constitutional protection than other non-political forms of

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52 Mandela v Falati 1995 1 SA 251 (W) 259F.
expression. This was done through requiring in section 33(1) that limitation of political expression be not merely ‘reasonable’ (the test in respect of most other rights), but ‘reasonable and necessary’. Section 16(1) read with the limitation clause, section 36, of the final Constitution, on the other hand, sets a uniform standard of justification to all forms of protected expression.53

Where the interim Constitution sacrificed the ability to weigh the interests in a particular case to the advantages of predictability, the final Constitution requires fairness and accuracy in individual cases at the expense of predictability. This approach is in accord with the Canadian Charter, which also does not differentiate between different forms of expression and the protection to be provided them.54 The advantage of this approach was enunciated as follows:

‘While the Canadian approach does not apply special tests to restrictions on commercial expression [as opposed for example to political expression], our method of analysis does permit a sensitive, case-orientated approach to the determination of their constitutionality. Placing the conflicting values in their factual and social context when performing the s 1 [limitation clause] analysis permits the courts to have regard to the special features of the expression in question.’55

Section 16 of the Constitution, in another significant contradistinction to section 15 of the interim Constitution, contains a number of enumerated exclusions. The earlier enactment left it to the courts to determine whether to adopt a definitional approach, which would exclude certain categories of

54 Ibid 20-10.
expression from constitutional protection altogether, or a wholly content-neutral approach. Section 16(2) of the Constitution removes from the courts this decision, certainly in respect of expressive action in respect of propaganda for war, incitement of imminent violence and the advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. The rules of hermeneutics suggest strongly that these three areas are exhaustive of those in which expressive activity is constitutionally unprotected.\(^{56}\) By logical imperative therefore, all activity that falls within the definition of expression as used in section 16 enjoys the constitutional protection afforded by section 16(1), unless it falls within one or more of the section 16(2) categories.

The formulation of the right to freedom of expression as enunciated in section 16 of the Constitution reflects the influence of articles 19 and 20 of the International Covenant on Civil and Political Rights\(^ {57}\). The right to freedom of expression, subject to permissible limitations to protect the rights or reputations of others or for the protection of national security, is protected by article 19. Article 20 sets out obligatory restrictions to freedom of expression in as much as states are required to outlaw hate speech and propaganda for war.\(^ {58}\)

Thus section 16 shares with the ICCPR a qualified formulation of the right to freedom of expression. The Bill of Rights furthermore contains further qualifications as set out in the general limitation of rights in section 36. This


\(^{57}\) Hereinafter referred to as ‘the ICCPR’.

\(^{58}\) Currie and De Waal The Bill of Rights Handbook 359.
The approach of qualified formulation therefore sets section 16 and the ICCPR apart from Western constitutions influenced by liberal theory that exalts free speech to the point where it approaches the absolute.\textsuperscript{59}

The inclusion of the specific forms of expression as enumerated in section 16(1) may imply at a superficial level that freedoms concerning press and the media, the impartation of information and ideas, artistic creativity and academic activity and scientific research are afforded a higher degree of protection than other forms of expression that do not fall within the ambit of these categories. These categories do not form the core of the right to freedom of expression; political comment and opinion is traditionally and internationally the first amongst equals apropos the core values of the right to freedom of expression.

In the next chapter the judicial view of whether the right to dignity encompasses the right to an unimpaired reputation will be examined. Thereafter a number of judicial decisions concerning defamation actions brought against primarily media defendants will be analysed. These decisions have led to a reappraisal of the balance between the right to an unimpaired reputation and the right to freedom of expression.

\textsuperscript{59} Currie and De Waal \textit{The Bill of Rights Handbook} 359.
Chapter 5

Case Law Review

5.1 Introduction

There are no reported cases concerning criminal defamation subsequent to the enactment of the interim Constitution. The best manner in which to gauge the view of the judiciary as to their view of the correct balance between the right to an unimpaired reputation and the right to freedom of expression is to examine their judgments concerning civil defamation suits. An analysis of the evolution of their judgments will provide an indication of how the Supreme Court of Appeal will view the constitutionality of the crime of criminal defamation.

5.2 The Right to Human Dignity

In interpreting and applying section 10 of the interim Constitution, the Constitutional Court has described the right to dignity, together with the right to life as the foremost of the human rights.\(^{60}\)

The issue of whether or not the protection of the public reputation of an individual falls within the ambit of the right to human dignity fell to be decided by the courts. The determination of this issue would clearly impact heavily

\(^{60}\) S v Makwanyane 1995 3 SA 391 (CC) 451C-E.
on the balance between the right to reputation and the right to freedom of expression.

Roman and Roman-Dutch law distinguished between *dignitas* and *fama*; the former came to be protected by the law of delict whilst the latter was governed by the law of defamation. This distinction led to a finding in the case *Potgieter v Kilian*\(^{61}\) that whilst *dignitas* fell within the protection afforded by section 10 of the interim Constitution, one’s public reputation did not.\(^{62}\) The court held that insofar as the Legislature was well aware of the distinction between *dignitas* and *fama*, it had clearly decided not to protect the reputation of individuals constitutionally. This was because organs of State did not ordinarily defame citizens; as the interim Constitution had only vertical application and not horizontal application too, there was no necessity to include the right to an unsullied reputation within the ambit of the right to human dignity\(^{63}\)

Again dealing with the interim Constitution, the court in *Gardiner v Whitaker*\(^ {64}\) had earlier adopted a contrary position. This court recognised that the right to a good name was not expressly protected by the Bill of Rights in the interim Constitution. It nevertheless held that the right to human dignity expressed in section 10 encompassed a concept broader than *dignitas* that had come through the Roman-Dutch law. Bolstered by the view adopted by the Constitutional Court in Germany that the right to dignity included a person’s

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\(^{61}\) 1996 2 SA 276 (N).

\(^{62}\) *Potgieter v Kilian* at 313I-314A.

\(^{63}\) *Ibid* at 316B-E.

\(^{64}\) 1995 2 SA 672 (E).
reputation, the court held that a similar approach be adopted in South Africa. This would then place the right to reputation, constitutionally speaking, on an equal footing with the right to expression. This view that the right to dignity encompasses the right to an unimpaired reputation subsequently received the imprimatur of the Supreme Court of Appeal in National Media Limited and Others v Bogoshi and of the Constitutional Court in Khumalo v Holomisa.

5.3 The Right to Freedom of Expression Reappraised

Prior to the promulgation of the interim Constitution, the law of defamation distinguished between media and non-media defendants. The interim Constitution provided hope for defendants, particularly in the media, that the common law approach was unconstitutional insofar as it provided insufficient protection to the right of freedom of expression. The subsequent case law, as is apparent from cases such as Potgieter v Kilian and Gardiner v Whitaker was complicated by the issue of whether the Bill of Rights operated solely in the vertical sphere vis-à-vis the state and individuals, or whether it had a further horizontal application between persons with no state involvement. Since the state at common law could not be a plaintiff in an action for defamation, such cases are invariably classic instances of so-called horizontal litigation where private persons bring suit to enforce their rights at common law. The Constitutional Court resolved the matter by

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65 Gardener v Whitaker at 689D-691A.
66 1998 4 SA 1196 (SCA) 1207D-I.
67 2002 5 SA 401 (CC) 418F-419A.
68 Supra.
69 Supra.
70 Die Spoorbond v South African Railways 1946 AD 999.
holding that the Bill of Rights had only indirect application to suits for defamation through the operation of the interpretation clause in section 35(3) of the interim Constitution. This section enjoined courts during the process of interpretation of any law and application and development of the common law to have the requisite regard to the spirit, purport and objects of the Bill of Rights. Accordingly the High Court was the appropriate forum to advance the common law in the light of the Bill of Rights.71

The opportunity to redress the imbalance between the rights of reputation and expression apropos the media finally arose in National Media Ltd v Bogoshi.72 Here the court recognized its finding 16 years earlier in Pakendorf v De Flamingh73 concerning strict liability for the press was incorrect. It took cognisance that the necessary weighing of competing interests, between the right to reputation and to free expression, had not occurred. In particular, it found no attention had been given to the right to freedom of expression.74

This judgment has seminally changed the manner in which the law regards defamation by the press, overturning considerable precedent, not least of which was the Supreme Court of Appeal’s own decision in the case of Neethling v Du Preez; Neethling v The Weekly Mail75 only five years earlier. Liability for the press in the field of defamation was moved from strict liability to creating a further justification ground whereby unlawfulness may be

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71 Currie and De Waal The Bill of Rights Handbook 385; Du Plessis v De Klerk 1996 3 SA 850 (CC).
72 Supra.
73 1982 3 SA 146 (A).
74 National Media Ltd v Bogoshi at 1207 D-E.
75 1994 1 SA 708 (A).
rebutted, namely where publication of a defamatory statement, although false, is reasonable in all the circumstances of the case. 76

The court expressly denied that the change in balance between the competing rights had been done to revise the common law to conform to the values of the interim Constitution. Rather it had erred in the case of Pakendorf v De Flamingh; 77 it would now correct the mistaken formulation of the common law made in this case. 78 Thus the media defendant continued to bear the onus to prove all the facts upon which he relied to show that the publication was reasonable in the circumstances of the case and that he was concomitantly not negligent.79

While this case had been determined in terms of the interim Constitution, the essence of this decision was confirmed by the Constitutional Court in terms of the present Constitution in the case of Khumalo v Holomisa 80.

In this case, the Constitutional Court resolved the issue of whether the provisions of section 16 have horizontal application. The court held that

'[t]here can be no doubt that the law of defamation does affect the right to freedom of expression. Given the intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the State or organs of State, it is clear that the right to

76 National Media Ltd v Bogoshi at 1212 G-H.
77 Supra.
78 National Media Ltd v Bogoshi at 1216 E.
79 Ibid 1215 I.
80 2002 5 SA 401 (CC)
freedom of expression is of direct horizontal application in this case as contemplated by s 8 (2) of the Constitution.\footnote{Khumalo v Holomisa at 420 G-H.}

The court recognised the importance of the right to freedom of expression, holding it to be integral to a democratic society. It further recognised the key roll played by the mass media, stating that the press should act with vigour and courage, for were they to vacillate in their duties they could well put the attainment of the nation’s constitutional aspirations in danger.

While expressing the fundamental importance of freedom of expression to our democracy, the court nevertheless held that it is not the first amongst equals in the pantheon of rights enshrined in the Bill of Rights. A consideration of the constitutionality of the law of defamation must determine whether it strikes the appropriate balance between the freedom of expression and the value of human dignity. In making this determination the court followed and approved the approach adopted by the Supreme Court of Appeal in National Media Ltd v Bogoshi\footnote{Supra.}.

The Supreme Court of Appeal was faced with the alleged defamation of a cabinet minister acting in her official capacity in Mthambi-Mahanyele v Mail & Guardian Ltd and Another.\footnote{2004 6 SA 329 (SCA).} Here the court stated that it had in National Media Ltd v Bogoshi\footnote{Supra.} suggested that political expression that amounts to defamatory statements ought, as a matter of public policy, to be handled separately from other forms of defamatory material. This would amount to a
special defence available to protect political speech. Thus the media would have greater latitude in publishing information about politicians concerning their official functions and work performance. The proper balance between the right to dignity and the right to freedom of expression in the context of political speech is

'to recognise that, in particular circumstances, the publication of defamatory statements about a Cabinet Minister (or any member of Government) may be justifiable (reasonable) in the particular circumstances and therefore not unlawful.'

Thus political speech that is false may nevertheless, depending upon the context in which it is made and the surrounding circumstances, be lawful provided its publication was reasonable. The issue of negligence therefore does not even arise in as much as the justification ground means there is no actus reus.

This latitude permitted political expression was essential so as to allow robust and frank discussion with which to hold members of Government accountable to society. Drawing on section 1(d) of the Constitution, the court went on to state that accountability lies at the heart of the democratic State and is accordingly one of the founding values in our Constitution.

Both the Supreme Court of Appeal and the Constitutional Court have now provided important judgments apropos the balance between the right to an

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85 Mthembu-Mahanyele v Mail & Guardian Ltd and Another at 345 A-C.
86 Ibid at 349 A.
87 Ibid at 350 C-D.
88 Ibid at 356 E-G.
unimpaired reputation and the right to freedom of expression. Historically, at common law, the right to an unimpaired reputation has trumped the right to freedom of expression. The judicial decisions analysed in this chapter have changed the common law position in respect of civil defamation to some degree. No longer does the media defendant face strict liability for unlawful publication. If the publication is reasonable, the defendant may rebut the element of negligence. If the publication concerned political expression, the reasonableness of the publication may justify the act, negating its unlawfulness.

Despite these changes, however, it will be argued in the next chapter that the judicial emphasis remains on protecting the reputation of persons, thereby giving insufficient content to freedom of expression. In so doing, the argument will be, the courts have not yet found the proper fulcrum that will balance the competing rights to dignity through an unimpaired reputation and to freedom of expression.
Chapter 6

Critique of the Current Balance between the Competing Rights of Dignity and Freedom of Expression

6.1 Introduction

The Supreme Court of Appeal considered *National Media Ltd v Bogoshi* subsequent to the passing of the interim Constitution. The court’s judgment changed the balance between the right to an unimpaired reputation and the right to freedom of expression, doing away with the strict liability that faced the media defendant and introducing the concept of reasonableness by which a defendant could rebut negligence.

The court expressly denied, however, that this change in balance between the competing rights had been done to revise the common law to conform to the values of the interim Constitution. Rather, the court held that the formulation of the common law that it had made in the case of *Pakendorf v De Flamingh* was incorrect; it had done no more than to correct this mistake. Thus the court expressly stated that the interim Constitution had played no role in its determination of the proper balance between the two competing rights.

In as much as section 35(3) of the interim Constitution required the court

89 Supra.
90 Supra.
91 *National Media Ltd v Bogoshi* at 1216 E.
during the process of interpretation of any law and application and development of the common law to have the requisite regard to the spirit, purport and objects of the Bill of Rights, the court proceeded to do so. The court then went on to state that:

‘the right to protect one’s reputation weighed no less than the freedom of expression in pre-transitional times; and the quotation from the judgment in Makwanyane confirms my own impression that the interim Constitution rated personal dignity much higher than before. The ultimate question is whether what I hold to be the common law achieves a proper balance between the right to protect one’s reputation and the freedom of the press, viewing these interests as constitutional values. I believe it does.’92

By way of summation then, the court’s view was effectively that the provisions of the interim Constitution had had no effect on its ruling. The matter was determined purely on a proper determination of the common law. The court had corrected an error it had made in Pakendorf v De Flamingh93 16 years earlier. Since the common law position enunciated by the court fell full-square within the spirit, purport and objects of the Bill of Rights, it was unnecessary to take any steps to conform the common law in any way.

The Constitutional Court considered the case of Khumalo v Holomisa94 under the Constitution. It followed the approach and findings of the Supreme Court of Appeal in National Media Ltd v Bogoshi.95 It implicitly agreed that the common law accurately reflected the balance between the competing rights and that therefore no constitutional consideration of the matter was required.

92 National Media Ltd v Bogoshi at 1217 F-G.
93 Supra.
94 Supra.
95 Supra.
These two cases are the leading authorities concerning defamation as it relates to the media and yet both have held that the common law balance between the competing rights is correct. They have accordingly held, the Supreme Court of Appeal expressly under the interim Constitution and the Constitutional Court implicitly under the final Constitution, that the Constitution has as yet had no effect on that law whatsoever.

Prior to 1994, the plaintiff alleging an infringement of his right to an unsullied reputation had been in a far stronger position procedurally than any other plaintiff who brought suit for a violation of any other right. This was particularly so where the defendant was part of the media and faced strict liability.

Although the common law position has since been moderated, in essence the right to an unimpaired reputation continues to triumph over freedom of expression. Thus, by way of example, the media defendant continues to bear the onus to prove all the facts upon which he relies to show that the publication was reasonable in the circumstances of the case and that he was concomitantly not negligent. He is also still saddled with an onus to rebut intent. The plaintiff does not even have to prove the falsity of the defamatory material; rather the defendant bears the burden of proving it to be true. The truth is also not an absolute defence; the defendant must furthermore show that the publication of the truth was for the public benefit. This is despite the Constitutional Court finding that the Constitution has no interest in protecting

96 National Media Ltd v Bogoshi at 1215 I.
the right to reputation unless that reputation properly reflects the true character of the claimant.\textsuperscript{97}

This has resulted in a situation where plaintiffs alleging an infringement of their right to an unsullied reputation continue to be advantaged procedurally over other plaintiffs.

To take the argument further, it is submitted that there are several other rights that lie nearer the core of the right to dignity than the right to an unsullied reputation. It may be recalled that there has been some debate as to whether the right to reputation fell within the ambit of the right to human dignity at all.\textsuperscript{98} Although the matter is now settled,\textsuperscript{99} our \textit{apartheid} history is replete with examples of affronts to human dignity that are significantly more serious than an affront to one’s reputation. Yet even plaintiffs bringing action for damages flowing from breaches of these core rights are in a worse position than the defamation plaintiff, although his right to a good name lies at the periphery of the right to human dignity.

This situation has arisen because both the Supreme Court of Appeal and the Constitutional Court have essentially paid mere lip service to the right to freedom of expression. In stating that they are merely applying a correct formulation of the common law, they have in fact denied the content of the

\textsuperscript{97} \textit{Khumalo and Others v Holomisa} at 421 E; Currie and De Waal \textit{The Bill of Rights Handbook} 389.
\textsuperscript{98} \textit{Potgieter v Kilian} at 313I-314A.
\textsuperscript{99} \textit{National Media Ltd v Bogoshi} at 1207D-I; \textit{Khumalo v Holomisa} at 418F-419A.
right to freedom of expression. In so doing they have allowed the right to dignity to trump the right to freedom of expression at every turn.\textsuperscript{100}

It is argued that this may be so due to three errors these courts have made in evaluating the right to freedom of expression and when weighing it up against the right to reputation. These errors will now be enunciated.

\textbf{6.2 Freedom of Expression as it Pertains to the Value and Right of Human Dignity}

Both the Supreme Court of Appeal and the Constitutional Court have erred in these cases in so far as they have failed to appreciate the extent to which the value of human dignity as set out in section 1, the founding provision of the Constitution, is dependant upon the right to freedom of expression. In similar vein, they have misunderstood how that human dignity, equality and freedom as prescribed in section 7 (the founding section to the Bill of Rights), in section 36 (the limitation section), and in section 39 (the interpretation section) of the Constitution are reinforced and buttressed by the right to freedom of expression. Similarly, they have failed to understand that human dignity as a value and as a right is itself diminished when the right to freedom of expression is erroneously diminished.

This error is subtlety manifest in the following \textit{dictum}:

\textsuperscript{100} Chaskalson, Kentridge, Klaaren, Marcus, Spitz Woolman \textit{Constitutional Law of South Africa} 2 ed 2003 36-52 36-56, hereinafter referred to as Chaskalson \textit{Constitutional Law (2003).}
'The balance which our common law strikes between protection of an individual reputation and the right to freedom of expression differs fundamentally from the balance struck in the United States. The difference is even more marked under the two respective constitutional regimes. The United States constitution … is simple, terse and direct, the injunctions unqualified and the style peremptory. Our Constitution is … infinitely more explicit, more detailed, more balanced, more carefully phrased and counterpoised.'

The court here was referring to the three intertwined values of human dignity, equality and freedom that formed the foundation stones of the Constitution.

Viewed in isolation, this notion is unremarkable. It is made, however in the context of the balance between reputation and free expression. Since the right to freedom of expression is extraordinarily highly prized in the United States, the dictum that our common law ‘differs fundamentally’ and our constitutional regime ‘even more markedly’ from that position in essence sends a message that the right to dignity will overcome, as indeed it has. In so doing the court has overlooked the foundational role that the right to freedom of expression plays in underscoring the said intertwined values of human dignity, equality and freedom.

This is all the more peculiar when one considers that both National Media Ltd v Bogoshi and Khumalo v Holomisa dealt with political speech, the form of expression at the very heart of freedom of expression, whilst the right to a good name lies if not quite at the periphery of the right to human dignity then certainly not at its core either.

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101 S v Mamabolo 2001 3 SA 409 (CC) par 40.
103 Supra.
104 Supra
In his analysis of the Constitutional Court’s jurisprudence, Woolman has identified five definitions of the concept of human dignity that reveal different facets of this said notion of dignity. A scrutiny of these aspects reveals that several underscore the right to freedom of expression. Several of these aspects would themselves be mere husks if the right to freedom of expression did not provide for their kernel.

The first definition of dignity he describes as the ‘individual as an end-in-herself’. This involves identifying people as ends in themselves with intrinsic virtue based on their humanity and not merely as instruments to be used for the furtherance of the goals of others. Restrictions such as censorship, a determination of what one may or may not hear, was typical of the manner in which apartheid excoriated this feature of dignity. The application and bearing upon freedom of expression is evident:

‘Government insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to hear opinions that might persuade them to dangerous or offensive convictions. We retain our dignity, as individuals, only by insisting that no one – no official and no majority – has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it.’

The second definition he describes as ‘equal concern and equal respect’. The consideration of the intrinsic worth of all persons leads to the view that each person is required to be treated with equal concern and respect,

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106 Ibid 36-7.
irrespective of their race, income, education, societal status and the like. This aspect would tend to fortify the right to reputation.

The third definition is that of ‘self-actualization’. While all humans have equal intrinsic worth that requires they be treated equally, this facet emphasises that every human being is unique. As such, everyone needs the freedom to develop him or herself optimally. It is freedom that gives dignity its value. To deny a person freedom is to deny his dignity. As stated by perhaps the greatest author and protagonist of the Nineteenth Century on the subject of freedom, John Stuart Mill, there is great importance, both to the individual and to society in allowing full freedom to men and women to expand themselves and to grow in innumerable and conflicting directions.

This aspect of the value of human dignity requires a strong emphasis on the right to freedom of expression to enable and empower every individual to mature himself and his humanity to the greatest possible extent.

The fourth definition enunciated by Woolman is ‘self-governance’. Humans are primarily motivated by neither instinct nor blind passion; rather it is the ability of humans to reason that gives their lives meaning. It has the effect that persons are able to plot their own course in life. The necessary political corollary is that every person is also able to take part in the process of government. The importance of the franchise lies in its declaration that everyone has a voice, that everyone counts.

109  Ibid 36-11.
This characteristic of dignity is heavily reliant on the right to freedom of expression. Freedom of expression is recognized in most free nations as a fundamental prerequisite for a democratic and open society.\textsuperscript{112} It has also been recognised to be so in our courts:

\begin{quote}
‘In a free society all freedoms are important, but they are not all equally important. Political philosophers are agreed about the primacy of the freedom of speech. It is the freedom upon which all others depend; it is the freedom without which the others would not long endure.’\textsuperscript{113}
\end{quote}

The fifth and final definition is that of ‘collective responsibility for the material conditions for agency’.\textsuperscript{114} Whereas the previous aspects have related to the dignity of the individual, this aspect relates to the dignity of the collective. A condition leading to a loss of dignity for any one of us demeans all of us.

The error that the Supreme Court of Appeal and the Constitutional Court have made is not to have taken sufficient cognizance of the underlying value of an unrestricted right to freedom of expression as a pre-requisite for the value of human dignity that underscores our Constitution and hopefully our society. Furthermore, such freedom is necessary for persons to exercise fully their right to human dignity. To put it more succinctly, an infringement of the right

\textsuperscript{112} Retail, Wholesale and Department Store Union, Local 580 v Dolphin Deliver Ltd at 174; New York Times v Sullivan at 269-271.

\textsuperscript{113} Mandela v Falati at 259F.

to freedom of expression is concomitantly an infringement of the right to human dignity.

Whilst the Supreme Court of Appeal and the Constitutional Court have erred in this way, the Provincial Divisions have not. These courts have had a better understanding of the right of free expression and the value thereof to dignity, equality and freedom. This has particularly been so in the realm of political expression. One such court has held that the Constitution recognised the particular importance of the media in providing robust criticism so as to nurture and strengthen our nascent democracy. This court then went on to hold that in cases where the defamatory statement related to free and fair political activity, the plaintiff ought to bear the burden of proof that the publication, in all the circumstances in which it was made, was made unreasonably.115

Further too, in the court a quo to the subsequent Khumalo v Holomisa116 Constitutional Court case, the Provincial Division recognised the value of dignity in assessing both the right to reputation and the right to freedom of expression.117 Another court decried the rejection of the dictum in Holomisa v Argus Newspapers Ltd,118 stating obiter that freedom of expression was of fundamental significance to democracy. Accordingly, it stated, there were grounds for finding that political speech ought to enjoy a higher level of

115 Holomisa v Argus Newspapers Ltd 1996 2 SA 588 (W) 608J – 609D.
116 Supra.
117 Holomisa v Khumalo 2002 3 SA 38 (T).
118 Supra.
protection than is currently the case.\textsuperscript{119} Another court stated that freedom of expression went to the very heart of democracy; accordingly the court held that the right of freedom of expression as regards the possible dereliction of duty by public officials weighed more heavily than those officials’ right to privacy.\textsuperscript{120}

The weight of opinion arising from the Provincial Divisions appears to have been noted. In \textit{Mthembi-Mahanyele v Mail & Guardian Ltd}\textsuperscript{121} the Supreme Court of Appeal posed the question of whether political expression ought not to weigh heavier than a government politician’s right to a good name in circumstances where the public’s right to be informed and free debate is imperative.\textsuperscript{122} The court went on to state that the question of whether political speech ought to be treated differently from other forms of expression had not come before it for adjudication since \textit{National Media Ltd and Others v Bogoshi}.\textsuperscript{123} That case, it stated, had suggested the possibility of a justification ground, based on considerations of public policy, whereby the making of defamatory statements about government ministers could be lawful, depending upon the circumstances. This would then allow greater latitude in the publication of information concerning the work performance of members of government than would be the case with private individuals.\textsuperscript{124}

\textsuperscript{119} Sayed \textit{v} Editor, Cape Times 2004 1 SA 58 (C).
\textsuperscript{121} Supra.
\textsuperscript{122} \textit{Mthembi-Mahanyele v Mail & Guardian Ltd and Another} at 338B.
\textsuperscript{123} Supra.
\textsuperscript{124} \textit{Mthembi-Mahanyele v Mail & Guardian Ltd and Another} at 345 A-B.
circumstances, the publication of defamatory statements about senior government officials may in fact be justifiable in the particular circumstances of that case.\textsuperscript{125}

This so-called special case for the protection of political speech amounts to little more than an application of the \textit{dictum} in \textit{National Media Ltd v Bogoshi}\textsuperscript{126} where the Supreme Court of Appeal had stated, not limiting its scope to political speech only, that the publication by the media of false defamatory allegations of fact would be justified and lawful if the said publication was found to have been reasonable, having regard to the time, manner and factual content of the publication and to all the other circumstances of the case.\textsuperscript{127}

Although this case created a special defence for political expression\textsuperscript{128}, the Supreme Court of Appeal did no more than partially apply its own \textit{obiter dictum} by stating there are compelling reasons for holding that the defamation of senior politicians and functionaries might in certain circumstances be justifiable and therefore lawful;\textsuperscript{129} in doing so it merely restated and applied principles of common law stemming from its earlier decision in \textit{National Media Ltd v Bogoshi}\textsuperscript{130}. At its essence, despite the prose, it continued to pay lip service to the right of freedom of expression, not being prepared to grasp the nettle to give the said right the substance our democracy requires.

\textsuperscript{125} Ibid at 349A.
\textsuperscript{126} Supra.
\textsuperscript{127} \textit{National Media Ltd v Bogoshi} at 1212G.
\textsuperscript{128} Currie and De Waal \textit{The Bill of Rights Handbook} 391-392.
\textsuperscript{129} Mthembu-Mahanyele \textit{v Mail & Guardian Ltd and Another} at 356D-E.
\textsuperscript{130} Supra.
6.3 The Core and Periphery of a Right

The second error made by the Supreme Court of Appeal and the Constitutional Court relates to what lies at the core of the respective competing rights. Infringements of certain categories of expression are more serious than others. Political comment is more important than a theatre review, and philosophical discourse requires more protection than a ‘bodice-ripper’ beloved of pulp fiction readers. Accepting that not all expression is equally worthy of constitutional protection, it is convenient to distinguish between the ‘strength’ and the ‘scope’ of a right. The term ‘scope’ refers to the range of the right, that is, the extent of conduct it encompasses, whilst the ‘strength’ of the right is a measure of its ability to prevail over competing values or rights within the scope of that right. Although there is no strict correlation between the two terms, they tend to be inversely proportional to each other. Thus at the very core of a right, where the scope is narrowest, the full glare of constitutional protection is brightest. The broader the scope of the right, however, the more likely it is to conflict with other rights; thus it becomes weaker as the radiance of constitutional protection diffuses into the shadows. At the penumbra an area is encountered where the ability of the right to prevail is considerably weaker than at the centre of the right, where its strength may be nigh absolute.\textsuperscript{131}

Thus it is for our courts to determine precisely what lies at the centre of the right to expression, and quite how far the shadow lands lie from it. In this

\textsuperscript{131} Schauer \textit{Free Speech} 135.
regard there is some Canadian jurisprudential assistance. It was held that the essence of the right to freedom of expression will include the search for political, scientific and artistic truth as well as the protection of every being’s independence and personal growth and the encouragement of participation of the individual and the public in the democratic process.  

Of these values, democratic societies often regard political expression as the first amongst equals and it is often regarded as the primary justification for the protection of free speech. In the United States it is has been held by the courts and often argued in constitutional jurisprudence that political expression ought to be exalted above other forms of expression and concomitantly receive greater protection. Judgments by the West German Constitutional Court and the European Court have held that political expression is entitled to a greater degree of protection than other forms of expression.

Democratic philosophy regards freedom of expression as a foundational component of a social order founded on the principle that the population at large is sovereign. Therefore expression is the most deserving of protection when it relates to public affairs and especially so when it amounts to criticism of governmental officials and policies. The necessity of freedom for this political expression rests on two legs: firstly, a sovereign electorate requires

135 Ibid at 145, 150-151.
as much information from as diverse sources possible to best exercise its sovereignty. Secondly, freedom to criticize prevents public servants from becoming tyrants, by holding them accountable, as public servants, to their public masters.  

For these reasons, Alexander Meiklejohn, the American political philosopher, drawing on roots as diverse as Kant, Hume and Spinoza, defined freedom of speech as freedom of political speech by those without profit motives, and went on to hold this right to be absolute.  

While that would be a bridge too far in view of the structure of our Constitution, there are sound policy arguments for the view that infringements that strike at the heart of the right to freedom of expression should have to endure rigorous and searching scrutiny to pass constitutional muster.  

The Constitutional Court has recognised the difference between forms of expression that lie at the core of the right and those that are of little value at the periphery of the said right. 

While political expression lies at the core of the right to freedom of expression, it is submitted that the right to reputation lies nearer the periphery of the right to dignity.

\[136\] Schauer Free Speech 35-36.  
\[137\] Ibid 36, 135.  
\[138\] De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others 2004 1 SA 406 (CC) 433E.
There was originally some doubt as to whether the right to reputation fell within the purview of the right to dignity at all. In *Potgieter en ‘n Ander v Kilian*,\(^{139}\) the court held that it did not. This decision was made in terms of the interim Constitution that was held to have only vertical application. This consideration played some part in the court’s reasoning. The final Constitution clearly has horizontal application and it is now accepted that the right to reputation does indeed form part of the right to human dignity.

In *Holomisa v Argus Newspapers Ltd*,\(^{140}\) the court was of the view that this right to reputation, though a central aspect of the innate dignity of everyone, did not lie at the core of that right to human dignity; it could not, by way of example, be weighed equally with physical integrity as regards the right to dignity.

In *Buthelezi v South African Broadcasting Corporation*,\(^{141}\) the court adopted a contrary position: physical injury, the court held, depended on the recuperative strength of the body whilst injury to reputation was in the hands of an inconsistent public all to ready to believe the worst of one.\(^{142}\)

The Supreme Court of Appeal expressly preferred the latter view, finding nothing in the text or spirit of the interim Constitution that would support the view that the right to reputation does not lie at the core of the right to

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\(^{139}\) *Supra* at 313I- 314A.

\(^{140}\) *Supra* at 611G-H..

\(^{141}\) 1998 1 B All SA 147 (D).

\(^{142}\) *Buthelezi v South African Broadcasting Corporation* at 156e-g.
dignity. This is an odd rationale; there is nothing in the final Constitution to indicate that political expression is particularly valued in the context of the right to freedom of expression, yet no-one would seriously doubt that it lies anywhere else other than at the core.

The case of *Mthembi-Mahanyele v Mail & Guardian Ltd and Another* may be indicative of a change of heart by the Supreme Court of Appeal. Here the court indicated that political speech should receive greater protection than other forms of expression and that concomitantly members of Government can expect to be more vulnerable to robust criticism.

It is argued that, having regard to the gross infringements of human dignity that are part of South Africa’s history, the impairment of one’s reputation is a relatively lesser violation of one’s right to dignity. Political expression, on the other hand, lies at the core of the right to freedom of expression. Therefore the right to freedom of expression, particularly in the political arena that is the focus of the prosecution in *S v Hoho*, ought to be accorded greater weight than the right to unsullied reputation that is nearer the periphery of the right to dignity.

### 6.4 The Value of Permitting False Statements

Prior to 1994 the common law held a media defendant strictly liable for the publication of defamatory material. The Supreme Court of Appeal held

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143  *National Media Ltd v Bogoshi* at 1217 I-J.  
144  *Mthembi-Mahanyele v Mail & Guardian Ltd and Another* at 352D- 356E.
this to have been an incorrect interpretation of the common law and introduced a defence of the reasonableness of the publication to negate the liability.\textsuperscript{146} Yet in doing away with the said strict liability, the same court made mention of the great attraction held by a regime of strict liability as a means of inhibiting the publication of injurious falsehoods. It expressed a natural aversion to opening the door to the publication of defamatory lies that can serve no other purpose other than to vilify the victim. Such an aversion, it stated, was not only natural but right.\textsuperscript{147}

The mindset that informed this view was also apparent in the Constitutional Court where it was stated that the constitutional right attaching to an aggrieved party faced with the publication of damaging but true statements is weak. In like manner, it held, the constitutional interest concerning the publication of false material is similarly feeble.\textsuperscript{148}

This is the view that has dominated the development of the common law. It argues that falsehoods normally detract from public debate rather than contribute to them. By punishing such falsehoods, they are suppressed and the standard of public discussion is raised.

This traditional argument as to the presumed lack of worth in misstatements of fact claims as allies two praiseworthy goals. First is the goal of actively encouraging the dissemination of accurate information. This recognizes that

\textsuperscript{145} Pakendorf en Andere v De Flamingh at 146.
\textsuperscript{146} National Media Ltd v Bogoshi at 1212G.
\textsuperscript{147} Ibid at 1209F.
\textsuperscript{148} Khumalo and Others v Holomisa at 423E-F.
although specious statements are harmful, their suppression must also accommodate the affirmative advantages of fostering truth. The second goal relates to the democratic argument as to the great value of the free flow of social and political commentary. Opinion and comment are less susceptible than fact to characterizations of true or false but the democratic process is enhanced by their publication. Therefore, runs the argument, the suppression of false factual statements should not cause society to forfeit valuable opinion, comment, criticism and evaluation.\(^{149}\)

Accordingly, the traditional common law has created rules to accommodate these seemingly compatible goals. Thus there is the defence of ‘fair comment’; a publication, provided the reasonable man would regard it as comment and not as a statement of fact, on a matter of public interest, is not actionable, however critical or harmful, provided it is fair and is founded on true and on accurately stated facts.\(^{150}\) In this way the theoretical basis is laid whereby truth in public dialogue is promoted, freedom of expression that enhances public discussion is enhanced while still giving recognition to the negative impact of spurious and disingenuous publications of fact.\(^{151}\)

This view, with its cosy assumption of a congruence between theory and its practical manifestation, provided ample scope for criticism by the American Realists. Indeed, the law of defamation provides perhaps the clearest application of the theory of that school of jurisprudence. The critique is as

\(^{149}\) Schauer, *Free Speech* 169.


\(^{151}\) Schauer, *Free Speech* 169.
follows. To err is human, and courts are not exempt from that condition. Judicial officers can be wrong, and in the law of defamation, they may find that which is true to be false. Galileo’s tribunal is just one of many such examples. Thus a rule penalizing factual falsity may in fact be penalizing truth. The effect on a putative publisher of important defamatory material that he knows to be accurate and lawful to disseminate, is that in deciding to publish he must also consider whether a subsequent finder of fact will come to that same conclusion.

Furthermore, the publisher may himself be mistaken in his belief as to the veracity of his material. He must then either publish and risk being damned, or exercise self-censorship to avoid the possibility of liability. Self-censorship is a salutary exercise but not when a publisher with true, accurate and important information crucial to the public interest and of grave national import, exercises such censorship because of the risk of subsequent prosecution for criminal defamation and consequent incarceration. The expense of criminal and civil litigation aggravates this deterrent effect, insofar as the publisher is out of pocket whether he prevails or not.

Thus any rule suppressing the publication of falsehoods suppresses the truth too. The analogy to the philosophy of a society to the issue of due process is inescapable. A society that wishes to optimally advance the conviction of the guilty will devise procedural and evidentiary rules that will snare some innocents too; so too a sanction designed to deter falsity will deter truth, the more so when the sanction is criminal and not merely civil and pecuniary.
Therefore a society must determine the appropriate balance whereby
cognisance of the value of free debate unfettered by liability is properly
weighed against the harm to reputation of false defamatory publications.

Again, in determining this balance, two errors are possible. These are of
either over-including or of under-including expression, most of which is false
but some of which may be true and of great social utility. The two extremes
are the erroneous prohibition of valuable speech on the one hand, and
wrongfully failing to sanction the circulation of false and harmful speech on
the other hand. Whilst harm to reputation ought not to be minimised, the
centrality of freedom of expression requires acknowledgement that the
erroneous prohibition of speech is a harm of singular enormity.152

It has long been acknowledged in various dicta from the United States that
false statements are inevitable in free discourse and debate. Accordingly
even such falsehoods must receive protection to provide the freedom of
expression the necessary breathing space it requires to survive and thrive.153

The utilitarian value of this approach has been recognized in the United
States in, by way of example, the destruction of the powerful Ponder
electioneering machinery in North Carolina, as exhibited by the decision of
Ponder v Cobb.154 Cobb, chair of the Republican Committee in North
Carolina, accused three election officials of committing acts of fraud and

152 Schauer Free Speech 169-171.
154 257 NC 281.
ballot stuffing. One of them, Zeno Ponder, a powerful Democratic Party figure, successfully sued for $40 000. The North Carolina Supreme Court on appeal ordered a new trial based on the logic above. No new trial was ever held, but the powerful Ponder election machine was smashed in the 1964 elections when a solid slate of Republicans was elected.155

It is argued that the present position, whereby a defamatory statement can result in criminal and civil liability, results in an unacceptable degree of self-censorship. This is often referred to under the rubric the ‘chilling effect’. Both the Supreme Court of Appeal and the Constitutional Court have been aware of the danger of self-censorship posed by the current position in the law of defamation and have referred to this chilling effect in their judgments.156 It is their view, however, that the deleterious effect of this self-censorship is reduced to an acceptable level by permitting the defence of reasonable publication.

It is submitted that the effect of the offence of criminal defamation is to create an unacceptable degree of self-censorship and does not recognise the value of permitting even false forms of expression.

6.5 Finding the Balance

The current stance, that is, the common law position, undervalues the right to freedom of expression. Of course, in no country can freedom of expression

156 National Media v Bogoshi at 1210 H; Khumalo v Holomisa at 422 D-F.
be absolute. The reason is clear: as Mill himself acknowledged in Chapter 2 of his *On Liberty*, speech falls within the category of other-regarding acts as opposed to self-regarding acts.¹⁵⁷ Mill went on to advance the view that the free and open exchange of ideas is the defined ultimate good in freedom-loving societies, such that any harm flowing from such discussion must be less than the harm consequent upon suppression of such speech.¹⁵⁸ This view has not found favour, because the exercise of the right to free expression may impinge on the rights of others to equality, privacy, dignity, fair trial, workplace democracy, political campaigning, property and economic activity. A balance must accordingly be found.

In balancing competing rights, a distinction, if only of degree, can readily be made between balancing freedom of expression against the general public interest, on the one hand, and against specific individual rights on the other. In the present discussion, this would be the distinction between criminal and civil defamation. Speech against the public interest *per se*, perhaps by calling for Afrikaner secession to an independent homeland carved out of the Republic when geographic union of the country is in the public interest, creates a clear tension.

In such cases, where the speech does not fall within one of the section 16(2) exclusions, it is submitted that it is insufficient to refer merely to a balancing process. A clear presumption must be against any restriction of the right to expression. According to Schauer, where the freedom of expression of an

¹⁵⁷ *Mill On Liberty and Utilitarianism* 17-53.
¹⁵⁸ *Ibid* at 17-53; *Schauer Free Speech* 11.
individual creates a tension with the general public interest, and where no particular individual rights are at stake apart from the right to freedom of expression, the courts should balance the opposing interests, but with their 'thumbs on the free speech side of the scales'.

Balancing the rights is analogous to Blackstone’s maxim that it is better that ten guilty be acquitted than that one innocent be convicted. This view presupposes that justice is prone to error; otherwise the guilty would always be convicted and the innocent ever acquitted. The errors can be either under-inclusion, as where the guilty are set free, or over-inclusion, where the innocent are punished. Both errors do harm: acquitting the guilty harms the public interest in numerous ways, while incarceration of the innocent infringes individual rights to personal liberty.

There is also an obvious tension between society’s interest in punishing the guilty, and the right of the innocent to liberty. Neither can be considered absolute. The fulcrum where the competing rights are balanced is nearer to the individual right to liberty, and accordingly various procedural devices are employed to make it hard to convict the blameless; the price paid for this choice is to make it hard to convict the guilty too. This price is not deemed too high because society would rather err on the side of under-inclusion. By building this bias in favour of the accused into the system, we acknowledge the relative weight, or strength, of one right over another.

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159 Schauer Free Speech 133.
160 Ibid at 137-138.
Optimal accuracy in the fact-finding process would be achieved by requiring proof on a balance of probabilities; to reduce this to a percentage, the said optimal accuracy would be proof of 51%. By raising the bar to 95%, proof beyond reasonable doubt, all accused persons the proof of whose guilt fell within the 51% - 94% range, and who are probably guilty, are nevertheless acquitted. The logical concomitant of the in-built bias is that more mistakes in the adjudication of facts are made. According to Schauer, we pay a price in terms of precision for our preferences. As we regard the conviction of the innocent to be more heinous than the acquittal of the accused, we determine beforehand to make more mistakes in all, but are prepared to do so to ensure that we minimise the type of mistake we find most deleterious to society.\footnote{Ibid at 138.}

The analogy in balancing the right to expression with other interests is clear. In striking the correct balance, a decision-making body is prone to the errors of over-inclusion and under-inclusion. If any content is to be given to the right of free expression, indeed if anything more than lip service is to be paid to averments of its place of primacy in democratic societies,\footnote{Mandela v Falati at 259F; Retail, Wholesale and Department Store Union, Local 580 v Dolphin Deliver Ltd at 174; New York Times v Sullivan at 269-271.} then it must be to its competing rights what the right to personal liberty is in the criminal justice system. The bar need not be raised as high, but what is required is a skewing process that over-protects rather than under-protects. If this minimizes errors in protecting free expression at the cost of increasing other errors, this is no more than the price that society knows beforehand it has to pay.\footnote{Schauer Free Speech 139.}
This skewing of the balance in favour of the freedom of expression seems to be a trend in modern jurisprudence. Viewed formally, the rights and freedoms guaranteed in the European Convention on Human Rights are equally important. Civil law countries tend to deal with defamation in criminal rather than civil courts. The Strasbourg authorities have, however, given particular emphasis to the freedom of expression\textsuperscript{164}, and within determinations of that right, have provided very substantial protection for political expression, linked as it so often is with issues of press freedom.\textsuperscript{165}

In \textit{Lingens v Austria},\textsuperscript{166} the applicant, a journalist, published two articles alleging the Austrian Chancellor Kreisky, in a speech condemning noted Nazi-hunter Simon Wiesenthal, was protecting former members of the Nazi SS; he also criticised the lack of tact Kreisky displayed in dealing with Nazi victims. The article used terms such as ‘baset opportunism’, ‘immoral’ and ‘undignified’ apropos the Federal Chancellor, who then instituted two private prosecutions against him, in consequence whereof he was convicted of criminal defamation. The applicant then applied to the European Commission, claiming a breach of his article 10 right guaranteeing his right to expression. Finding there had been such a breach, the matter was referred to the European Court of Human Rights.

The argument by the applicant was that his convictions for criminal defamation infringed his right to freedom of expression to a degree incompatible with the underlying values that informed a democratic society.

\textsuperscript{165} Ibid at 85-86.
\textsuperscript{166} 1986 8 EHRR 407.
The replying submission by the Government was that the disputed sanctions were necessary to protect the good name of Mr Kreisky.\textsuperscript{167}

After the Government conceded there had been an infringement of the applicant’s article 10 right, and the applicant conceded the interference was prescribed by law and concerned a legitimate aim, to wit the protection of reputation, the issue before the court was whether the interference was ‘necessary in a democratic society’ for achieving the aim of protecting reputation.

The court found freedom of political debate to be at the very core of the concept of a democratic society envisaged by the Convention. As such it held the limits of acceptable criticism of politicians to be wider than criticism of a private individual. It also found that the concepts of pluralism, tolerance and broadmindedness inherent to a democratic society require the right to express not merely statements that are inoffensive, but also those that offend, shock and disturb. The court accordingly held for the applicant, finding his article 10 right had been breached.\textsuperscript{168}

The European Court came to a similar conclusion in \textit{Oberschlik v Austria},\textsuperscript{169} where the applicant, again a journalist, had been convicted following a successful private prosecution for libel pursuant to him calling the leader of the Austrian Freedom Party an ‘idiot’ in an article. The leader, Mr Haider,

\begin{footnotesize}
\begin{enumerate}
\item[167] Davis, Cheadle Haysom \textit{Fundamental Rights in the Constitution: Commentary and Cases} (1997) 598-599.
\item[168] \textit{Ibid} at 598-601; Shorts and De Than \textit{Human Rights Law in the UK} 468-469.
\item[169] 1998 25 EHRR 357.
\end{enumerate}
\end{footnotesize}
had made a speech glorifying the achievements of the Nazi army during the Second World War. The court found that although the word ‘idiot’ was controversial, it was an opinion utilised in conjunction with a political matter, and his conviction accordingly violated his article 10 right.

Furthermore, in *De Haes and Gijsels v Belgium*\(^{170}\) the applicants had published several detailed commentaries vehemently criticising, making personal attacks and alleging bias, in respect of certain Court of Appeal judges in a matter concerning custody. Their conviction on a defamation action instituted by three judges was overturned by the European Court of Human Rights, which found that freedom of expression includes robust criticism that some may find objectionable.

These judgments should be noted against the background of article 10(2) of the European Convention of Human Rights, which restricts the operation of the right to expression specifically in respect of reputation. It provides the right to expression may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and which are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.\(^{171}\)

\(^{170}\) 1998 25 EHRR 1.
\(^{171}\) Shorts and De Than *Human Rights Law in the UK* 65.
The European trend, therefore, is to apportion more weight in the balance to freedom of expression as opposed to the reputation of politicians.

Whilst the courts in Europe have skewed the balancing process in favour of the right to freedom of expression, it is argued that Parliament has done so in England by means of the Human Rights Act of 1998. Section 1 of this Act incorporates the relevant articles of the said European Convention of Human Rights into English law; section 12 then effectively enhances the right to freedom of expression in certain circumstances at the expense of the right to privacy. Section 12(1) states that the section applies ‘if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.’ Section 12(2) requires notice to the respondent while section 12(3) stipulates that no relief will be granted an applicant to prevent publication unless ‘the court is satisfied that the applicant is likely to establish that publication should not be allowed’.

Thus freedom of expression is elevated above respect for privacy; if the publication is untrue, represents a breach of confidentiality or for some other reason unlawfully harms the applicant, he has a subsequent civil claim for damages. Whilst these three sub-sections introduce a procedural bias in favour of free expression, section 12(4) introduces a substantive ‘skewing’ that, it is submitted, is required in our law, by stipulating that the court must have particular regard in its determinations of the importance of the European Convention right to freedom of expression.  

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172 Shorts and De Than *Human Rights Law in the UK* 43-46.
Criminal libel prosecutions are rare and judicially discouraged in England.\(^\text{173}\)

The significance of freedom of expression as one of the most important freedoms has been emphasised in several judgments.\(^\text{174}\)

The House of Lords had occasion recently to consider a libel suit brought by the former Prime Minister of Ireland.\(^\text{175}\) The plaintiff sued following an article that intimated he had misled political colleagues by suppressing information. The Law Lords held that since section 12 of the Human Rights Act would soon be in force, the common law had to be developed in accordance with article 10 of the Convention. The court held that the freedom to disseminate and receive information concerning political matters was a precondition for parliamentary democracy. It noted that the European Court had distinguished between statements of fact as opposed to opinion, and had required speech about political matters to receive a high degree of protection. Nevertheless, the court held that information of political interest not be treated \textit{per se} any differently from any other material. Rather, common factors were enumerated by which all types of expression were to be evaluated. The court held for Reynolds (Lords Steyn and Hope dissenting). Lord Steyn’s dissenting judgment held freedom of expression to be the rule and the regulation of speech the exception requiring justification by means of a pressing social need. The majority view has received academic censure for giving too much protection to the reputations of those in the public eye.\(^\text{176}\)

\(^{173}\) Smith and Hogan \textit{Criminal Law} 735.


\(^{175}\) \textit{Reynolds v Times Newspaper Ltd, Ruddock and Witherow} 1999 3 WLR 1072.

\(^{176}\) Shorts and De Than \textit{Human Rights Law in the UK} 546-547.
From the analysis in this chapter it seems fair to say that the trend in modern European jurisprudence has been to skew the balance in favour of the right to freedom of expression. Although the Supreme Court of Appeal and the Constitutional Court have been considerably more cautious, they have established a trend in favour of the right to freedom of expression. The approach the Supreme Court of Appeal will take in determining the appeal S v Hoho\textsuperscript{177} will provide an indication of how quite how much value they afford the right to freedom of expression. A recent Canadian decision will be examined in the next chapter as it may be of assistance in determining the constitutionality of the crime of criminal defamation.

\textsuperscript{177} Supra.
The case of *R v Lucas*\textsuperscript{178} concerned the prosecution of two accused, a husband and his wife, for criminal libel in terms of the Canadian Criminal Code. The judgment of the court *a quo* as well as that of the Supreme Court of Canada in the final appeal strikes, it is submitted, a reasonable balance between the competing rights to an unimpaired reputation and of freedom of expression.

The two accused had picketed in front of the Provincial Court as well as in front of the local police headquarters with placards alleging the investigation officer in a certain case had colluded or assisted in the rape and sodomy of a young girl by her brother. They were both charged under section 300 and section 301 of the Canadian Criminal Code with criminal libel.

At their trial, the two accused attacked the constitutionality of the offences. The court *a quo* was therefore called upon to determine whether the provisions in the Canadian Criminal Code setting out the offence of criminal libel infringed the constitutionally guaranteed right to freedom of expression of the accused. If the right was indeed infringed, the court had then to determine whether this violation was within reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

\textsuperscript{178} 1998 1 S C R 439
The trial court drew a distinction between the two crimes. Section 300 required the Crown to prove that the accused knew that the published criminal libel was false, whereas section 301 did not require that the defamatory material be false; one could be convicted even if the statement were true. The trial court went on to balance the right to freedom of expression with the right to reputation.

Hrabinsky J found section 300 to be constitutional, since the intentional publishing of lies was far removed from the core values of freedom of expression. Furthermore, the objective of section 300, the protection of reputation, impaired freedom of expression as little as possible. Section 301, on the other hand, criminalised the truth. This offence the trial court found to be an unconstitutional invasion of the right to freedom of expression. This was due to two grounds: the significant impairment of the right to freedom of expression by criminalising true statements, and the lack of proportionality between the effect of the legislation (criminalising the truth) and its objective (the protection of reputation). No appeal on the part of the Crown was made in respect of this finding as to the unconstitutionality of section 301. The Supreme Court of Canada implicitly agreed with this view.

On appeal, the Supreme Court upheld the constitutionality and therefore the conviction of the accused of criminal libel in terms of section 300. This offence requires the publication of false material by an accused with the intent to defame in circumstances where the accused subjectively knows the
material is false. The court held that perpetrators who wilfully and knowingly publish lies deserve to be punished for their grievous misconduct.\textsuperscript{179}

In Canadian law, accordingly, the truth of a statement is an absolute defence both at criminal and civil law.

This Canadian approach takes into account the value of a deserved reputation but recognises the value of freedom of expression where such reputation is undeserved. It also refuses to criminalise the truth.

The common law offence of criminal defamation as developed in South Africa currently does no such thing. The truth alone is an insufficient defence insofar as the truth must furthermore be for the public benefit. As such it exalts a reputation based on falsehood above the freedom to tell the truth. The accused is furthermore in a uniquely invidious position if he chooses this as his defence insofar as he must disclose this at the time of plea in terms of section 107 of the Criminal Procedure Act; this then is an exception to the general rule that an accused need disclose his defence for the first time in cross-examination of the State witnesses.\textsuperscript{180}

It will be argued in the final chapter that the Supreme Court of Appeal, in deciding the case of \textit{S v Hoho},\textsuperscript{181} would do well to follow this Canadian approach.

\begin{footnotes}
\item[179] \textit{R v Lucas} at par 70.
\item[181] \textit{Supra}.
\end{footnotes}
Chapter 8

Conclusion and Recommendations

The issue of criminalising expression is currently most pertinent in Africa. A recent survey presented at a workshop in Lusaka on World Press Freedom Day, 3 May 2005, listed at least 125 journalists and members of the media that had been charged under criminal defamation and insult laws in 35 of the 53 African countries. Many were convicted and some imprisoned. Observers at the workshop noted an increase in judicial harassment of journalists. In all, such laws exist in 48 African countries; in a reversal of the trend, Kenya, Ghana and Egypt have recently scrapped these laws.182

Nor is the problem confined to the developing nations. The issue of the criminalisation of expression defamatory of high-ranking political figures that is to be determined in The State v Hoho is particularly apposite in the United States at the moment. Here

‘[a] relatively unused type of criminal statute is enjoying new life in a handful of states as prosecutors try to put people in jail for speaking.’183

Testifying before the Kansas Senate Judiciary Committee, Edward Seaton, former president of the Inter American Press Association, stated that criminal defamation laws are

'the hallmark of closed societies around the world… Those of us who believe in democracy and campaign for free expression are frequently in the position of urging other countries to repeal their criminal defamation laws. The principal argument made to these governments is that enlightened societies simply do not imprison people for what they write. In societies governed by the rule of law rather than the whims of political strongmen, attacks on public officials are not met by arresting journalists.'\(^{184}\)

The state of criminal defamation worldwide is in somewhat of a state of flux. In an interesting irony, at a time when the European Court of Human Rights is applying principles similar to those developed in American First Amendment jurisprudence, there are indications that the United States Supreme Court is restricting those rights. On a five to four majority in the case of *Dun & Bradstreet v Greenmoss Builders*,\(^{185}\) it awarded damages despite the absence of malice on the part of the publisher of the defamatory material. In so doing it created a distinction between cases that were of purely private concern as opposed to cases of public concern. This distinction has been criticised as unduly complex and tendentious.\(^{186}\) Nevertheless, two members of the court went further in suggesting that the rule in *New York Times v Sullivan*\(^{187}\) be revisited.

Internationally, there have been numerous commissions appointed to investigate whether or not to retain criminal defamation as an offence. Following the Faulks Report, Scotland did away with the offence. In Australia the Australian Capital Territory Community Law Reform Committee recommended in its Defamation Report of 1995 that the offence be retained


\(^{185}\) *Dun & Bradstreet v Greenmoss Builders* 105 S Ct 3429 (1985).

\(^{186}\) Barendt *Freedom of Speech* 314-315.

\(^{187}\) Supra.
in part because it is the only real sanction against someone who has made themselves an uneconomic civil target or who defames a person or body that would not be expected to institute civil action. The English Commission also recommended providing for a new offence with the proviso that it did not inhibit genuine freedom of speech. The Canadian Law Reform Commissions, on the other hand, were of the view that the civil law amply protected individuals from attacks on their reputation and that there was accordingly limited utility in retaining any such offence.\textsuperscript{188}

In the midst of these opposing views, the Supreme Court of Appeal will soon have to determine whether criminal defamation is constitutionally acceptable in South Africa.

The Canadian position has been presented; as regards South Africa, there have been no reported cases of criminal defamation since the introduction of the Constitution. As has been shown, certain indicators of the judicial attitude have been provided in the civil arena. Thus where at common law the right to reputation has traditionally held the upper hand in its contest with the right to expression, the very highest courts in the land have now re-stated the common law to correct their earlier error, thereby giving more weight to the right to freedom of expression. Supposedly the two rights now stand on an equal footing. It has been submitted that by such judgments the Supreme Court of Appeal and the Constitutional Court have consistently refused to recognise the proper content of the right of freedom of expression.

\textsuperscript{188} \textit{R v Lucas} at par 75-76.
The common law offence of criminal defamation clearly infringes upon the right to freedom of expression. For this offence to pass constitutional muster, it must then be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The limitation test requires that criminal defamation serve a constitutionally acceptable purpose; insofar as it protects the wrongful impairment of reputation, it passes this leg of the test. The second leg relates to whether there is sufficient proportionality between the harm it does to the right to freedom of expression and the benefits it achieves in protecting the individual’s right to dignity through protecting his right to an unsullied reputation.

The harm that criminal defamation with its threat of imprisonment causes, together with the less restrictive means whereby its legitimate purpose may be achieved, means that it fails the proportionality test. There are three legs to this argument.

Firstly, criminal defamation creates an impermissible ‘chilling effect’ through the threat of criminal sanctions, over and above civil pecuniary damages; this in turn results in unacceptably damaging self-censorship. This was a major consideration Lingens v Austria, where the court adopted the view that criminal censure was likely to discourage criticism as well as to hamper the press in performing its task as purveyor of information and public watchdog. ¹⁸⁹

¹⁸⁹ Lingens v Austria at par 44.
The second argument is that in criminal defamation the truth is not enough. An accused must not only create a reasonable doubt through proving the truth of the statement. He must, in addition, create a reasonable doubt concerning whether it was made for the public benefit. Thus an undeserved reputation, insofar as it is based on something less than the truth, is more highly valued than the publication of that self-same truth. For this reason Lord Diplock stated that criminal libel unjustifiably restricted article 10 of the European Convention of Human Rights. It turned Article 10 ‘on its head’, he found, because in English criminal law a person’s freedom of expression, wherever it manifested itself in exposing seriously discreditable conduct of others, may result in criminal sanctions. The only way to avoid this fate is if the accused can convince a jury ex post facto that the particular exercise of the freedom was for the public benefit. Article 10 of the European Convention, on the other hand, required that freedom of expression should shall be untrammelled by public authority, save for where its interference to repress a particular exercise of the freedom was necessary for the protection of the public interest.190

The last argument showing the lack of proportionality relates to the availability of a well developed and efficacious civil remedy for the aggrieved party. This is considerably less restrictive and yet fully adequate in addressing harm to an aggrieved party’s reputation.

A further consideration in this regard relates to the interest served by a

190 Gleaves v Deakin 1980 AC 477 483.
criminal prosecution. When the *lis* is between two civil parties, the right to expression of one individual contends with the right to dignity of another. When the *lis* is between the State and an individual, however, it is unclear what public interest contends with the right to expression. When the complainant in that matter is a public official or politician, the public interest becomes ever murkier. To compound matters the perception of the abuse of the judicial process by those in authority is an understandable suspicion that remains inexorably at the back of the minds of most reasonable persons. Indeed, the argument that the offence is required to assist the impecunious plaintiff who would otherwise have no opportunity to redress the wrong done to him, loses sight of the reality that in practice impecunious persons are never criminal complainants; that privilege worldwide seems to be the preserve of the politicians and public officials.

It is submitted that the Supreme Court of Appeal in deciding the appeal in *The State v Hoho* would do well to therefore to follow the Canadian approach and grant constitutional protection to the truth.

There is an indication in *Khumalo v Holomisa*\(^{191}\) that the Constitutional Court may yet ameliorate the position as regards truthful statements; O'Regan J agreed that the constitutional interest in upholding a reputation against truthful but injurious statements is weak.\(^{192}\) It was precisely this reasoning that led to the Canadian court *a quo* in *R v Lucas*\(^{193}\) finding section 301 of the Canadian Criminal Code to be unconstitutional. This *obiter dictum* by O'Regan J could

\(^{191}\) Supra.
\(^{192}\) *Khumalo v Holomisa* at 423E.
\(^{193}\) Supra.
therefore be an indication that when faced with an offence that may punish someone for telling the truth, the right to freedom of expression may trump the right to a reputation that is unwarranted.

The Law of the Twelve Tables of the Romans was prepared to punish attacks on reputation insults with death. Today a person seeking reparations can make do with pecuniary recompense through the civil courts. It is submitted that the time is nigh for the long linkage between criminal and civil defamation to be severed. The Supreme Court of Appeal ought to find the common law crime of criminal defamation to be unconstitutional. This is because it fails the proportionality test on the basis of the three arguments set out in this chapter. The harm it does to the right to freedom of expression is out of proportion to the benefit it affords the right to an unsullied reputation.

It would then be open to the Legislature to criminalise the intentional publication of lies as in section 300 of the Canadian Criminal Code if it deems such to be necessary for the protection of the right to reputation.
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