

# Defamation Détente Gorbachev Glasnost Perestroika Invasion of Privacy

By Stratos Copteros

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**I**t was the final year of my BA in International Relations. 1988. Studying a Cold War whose freeze was thawing fast. Indeed, everything was changing so rapidly since Gorbachev's arrival that our bibliographies included that week's *Time*, *Newsweek*, *Economist* and every other current publication of a then Google-free world.

I remember how pertinent my studies felt. How excited I was at their immediate applicability. An undergraduate doesn't need much more than a sense of instant relevancy to give a subject the credence it deserves.

Today, as a media law and ethics lecturer, I have the same exquisite luck. So do my students, because much of what I teach relates directly to current events. Just look at the last two years. Between the *News of the World* scandal, the resultant Leveson Commission and the Lord McAlpine fiasco in Great Britain; the call for a media tribunal in our own country, which led to the Press Freedom Commission and its findings; apartheid era keypoint legislation being whipped out to prevent filming of certain locales; the doctoring for publication of an Afghani bomb attack photo by a prominent SA daily; the *Spear* debacle; the Secrecy Bill; speculative coverage of the Oscar Pistorius case; President Jacob Zuma finally dropping all his lawsuits against the media; and now the seizure by police of Bay TV's footage of violent protests in which a Sudanese national was killed; there's not much more I need to say to students to convince them of the merits of my course. Bonus! And despair.

Despair, because at a time when media law has been catapulted to the forefront of media-related discourse, its understanding by the practitioners it applies to, remains poor. Just days before I wrote this, I was interviewed telephonically for a daily SA newspaper about the legal implications of releasing Oscar Pistorius crime scene photographs. I spent 45 minutes on the phone explaining in detail what the potential implications were – more ethical than legal really. And yet the copy that appeared online and in a front-page article the next day was a scant representation and a clear misunderstanding of what I'd actually said. This lack of knowledge has to change; and quickly. Cyberspace is now fully in play; and the speed and scale at which this domain operates, is a quagmire fraught with peril.

Photos: Stephanie Papini



So let's talk cyber fallacy. It's an actual term bandied about mostly by media lawyers. It refers to the completely erroneous assumption that cyberspace is a unique universe where the usual rules do not apply, an enchanted environment exempt from three-dimensional reality's ethical and legal standards. It's not! The entire body of laws and norms that apply to mainstream print and broadcasting are also applicable to online and social media. And as my Introduction to Law lecturer drummed into us, "ignorance of the law is no excuse".

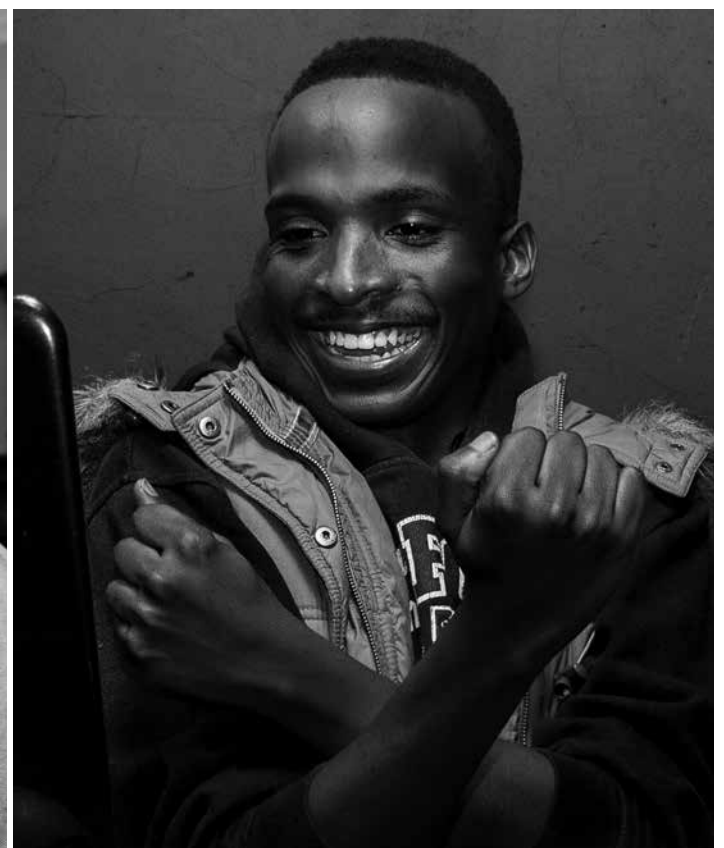
Defamation: there's a great word. A statement is defamatory if it harms the public reputation of the person or entity it refers to. To thus call someone a #\$\$%^& is not defamatory. It might be injurious, rude or insulting, but defamation it isn't. An allegation of serious impropriety though – corruption, theft, sexual misconduct and such behaviour – for very obvious reasons, is.

The potential for genuine damage to reputation is the key to defamation. Defamation is called libel in Britain; and there the same reputational rule of thumb applies. What makes South Africa particularly interesting though, is that we're a constitutional democracy with constitutionally-enshrined rights. A claim of defamation therefore fundamentally involves the balancing of two competing constitutional rights – free speech and human dignity. That's what was at play with The Spear of the Nation case – the right to free speech, including artistic expression, socio-political commentary and freedom of the press; versus our president's right to dignity and reputation. This constitutional connection is also exactly the reason why a case of defamation can make it all the way up to the Constitutional Court, the highest court in our land.

Any natural person, corporation, organisation or political party – except for government or an organ of state – can sue for defamation. In a lawsuit for defamation, the onus of proof swings from plaintiff to defendant. At first, the plaintiff has to prove that the statement was indeed defamatory. Here the law stipulates three key criteria: Clear, overt or insinuated, reference to the plaintiff, publication, and a reasonable expectation of damage to reputation. As long as the reasonable person would associate the statement with the plaintiff, whether they were openly named or their identity alluded to, the first

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requirement is met. Publication however, is often misunderstood. It doesn't mean that a statement has to be published, but that it was simply made public. This can even be a verbal statement spoken to just one other person. Finally, reasonable expectation of damage to reputation is almost self-explanatory. It includes injuring the reputation of a person in his character, trade, business, profession or office.

None of these criteria are particularly difficult to prove, especially if publication involves the statement spread-eagled across multiple media platforms around the world, as so often happens nowadays. Ultimately, once the plaintiff proves that a statement was defamatory, their work is done. The onus of proof then swings to the defendant to prove that they have a valid defence. Here, the most commonly raised defences are that the publication was true and in the public interest, it constituted fair comment, was made on a privileged occasion, or that although false, was reasonable.

Truth and public interest are a combined defence. It can't be one without the other. And courts both in SA and Britain – weary of sensationalism and media intrusion – are starting to draw a clear distinction between what is of genuine public interest, and what is merely interesting to the public. Then, with fair comment and opinion, it is important to remember that our courts recognise that comment or opinion can be scathingly vitriolic and even a tad hyperbolic, as long as it is heartfelt opinion that is projected as such, is fair, made without malice (the pure intention to injure), is substantially based on fact and in the public interest.

Privilege on the other hand, refers to particular types of places and occasions, such as courts of law or parliament. You can't exactly have rigorous parliamentary debates if defamatory statements constantly lead to court actions. Neither can an accused be allowed to sue for defamation when being fingered by a witness in court. Here, the media can draw on what is known as qualified privilege, accurately and fairly reporting what was said in parliament or in court. This covers anything stated in open court by witnesses, legal counsel, presiding officers and court documents, but only once these documents have been brought up in open court.

Reasonableness is the final defence. It's a fabulous progression in common law, brought about by a key decision of our Constitutional Court in *Bogoshi vs National Media*. It makes it possible to escape liability even if a report was untrue, if it can be proven that publication was reasonable. In such a case, the court will take into account what reasonable steps were taken to verify the truth of the statement, the nature and reliability of the information and sources on which it was based, whether right of reply was given to the affected party, the publication of such a response and the overriding need to publish. It's not a get out of jail free card, but it does take into account the manic realities of modern media production. Sometimes false statements simply slip through, even though

everything reasonable was done to verify them.

In invasion of privacy, exactly the same overarching legal precepts and switch in onus of proof apply. Privacy too is a constitutionally-enshrined right; and its invasion can either be the physical, photographic or electronic intrusion into private space, or the disclosure of private facts. In either case, this has to be based on legitimate public interest, and not simply to satisfy the morbid curiosity of celebrity culture. Yes, the courts recognise that public figures have to accept a higher level of public scrutiny than everyman. But let me reiterate that they are beginning to truly grow impatient with unfettered intrusion just because someone is famous. The thing to remember here is incongruity. If the intrusion reveals serious incongruity between public persona and private actions, the courts are more likely to accept that it was in the public interest.

OK. With Media Law 101 in our back pocket, let's hurtle back into cyberspace and the brief and wondrous spotlight on one Lord McAlpine. As former deputy chairman of Britain's Conservative Party and retired member of the House of Lords, Lord McAlpine was happily living out his sunset years until a blogger erroneously identified him as a paedophile. It was just a case of mistaken identity, but it spread like wildfire. Twitter went into overdrive. His name was tweeted and retweeted so often, and bloggers were so prolific in their output, that the mainstream press soon picked up on this. It was exactly what Winston Churchill meant by "a lie travels halfway round the world before the truth has had time to put its pants on". Of course, Lord McAlpine sued for defamation and received huge out of court settlements from the BBC and ITV. But he also had the time, money and wherewithal to track down every single person who had tweeted and retweeted his name – more than 10 000 individuals – and to threaten them with litigation. Those with less than 500 followers could get away with a £25 apology donation to charity. He wasn't as magnanimous with others. Cue in Sally Bercow.

Ms Bercow is wife of the Speaker of the House of Commons. Her sassy and outspoken public image has garnered her over 50 000 followers on Twitter. At the zenith of the McAlpine media furore, she sent out this cheeky tweet: "Why is Lord McAlpine trending? \*Innocent face\*". Funny. Not so hilarious when Lord McAlpine sued and won. In his judgement, the Honourable Justice Tugendhat stated that, "the reasonable reader would understand the words "innocent face" as being insincere and ironical... the tweet meant, in its natural and ordinary defamatory meaning, that the Claimant was a paedophile".

It may be a British judgement, but I can almost guarantee that its thinking is in alignment with our courts. Tweeters and bloggers, beware; and the time cometh when we'll be applying the fair comment and opinion defence to a Facebook remark. More than anything, everyone in media needs to know the law. It's as important now as bringing down the Berlin Wall was in '89.



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