

## Legal Manual

### **INTRODUCTION**

The story of media freedom in Jordan has been one of give and take. In 1989, the Kingdom of Jordan began a process of democratization: it enabled elections in the largest house of Parliament and established itself as one of the few countries in the Middle East committed to political reform. The Kingdom has since undergone a number of significant political changes including the abrogation of Martial Law, the release of political detainees, and the endorsement of the National Charter and the 1993 Press and Publications Law (PPL). Following the adoption of the Charter and the PPL, dozens of independently owned press outlets emerged, making media a part of daily life in Jordan. These outlets have served as both a reflection of and an instrument for political change and movement towards democracy.

In 1998 and 1999, amendments were made to the 1993 Press and Publications Law that restricted the rights of the media. The amended PPL granted government officials and departments greater power to control and censor the press. Journalists are now barred from writing on topics of sensitivity with neighboring countries, economics, and national security, and are largely censored for writing on topics of religion and sex. Further, the Penal Code's broadly worded and unpredictable slander articles restrict journalists from openly discussing controversial issues that involve public figures. Opinion is often silenced through self-censorship in the face of harsh penalties for journalists, including sentences of 3 months to 2 years imprisonment and large fines.

Most journalists facing charges under these laws will be brought before the regional Court of First Instance. Often, journalists are charged with both civil offenses, brought under the PPL, and criminal offenses, brought under the Penal Code as discussed above. Most of cases involve both civil and criminal charges in one case, in one court. Private individuals offended by what a journalist has written can file a civil case on his own, file a complaint to be brought by the Prosecutor General on behalf of the public interest, or both.

There are seven Courts of First Instance throughout Jordan, and the defendant journalist can expect to have his case heard in the court closest to where the article or statements were published. Because of the large number of newspapers in the capital, most media cases are heard in the Amman Court of First Instance. If the journalist loses in the Court of First Instance, he may appeal to the Court of Appeal for an additional review. If, on the other hand, the journalist wins, the Prosecutor may appeal. Although some cases may be appealed to the highest court in the civil system, called the Court of Cassation, the Cassation Courts normally will not take a media case and the decision of the Court of Appeal is therefore the final decision.

Despite increased pressure to restrict press freedoms from within the government, Jordan's courts have maintained their independence. Jordan's legal system is a civil law system, which means that each judge must interpret and apply the law to the specific facts in the case before him. He is not required to follow what other judges have done, with the exception of decisions by the Court of Cassation. Nevertheless, Jordanian judges have expressed willingness and indeed even a desire to use precedent to guide their decisions, and media lawyers are encouraged to present prior cases to the judge when defending a case. In choosing which case to present, the lawyer should identify cases with facts similar to his client's case. A lawyer should use cases that have a favorable outcome for his client, but can also use those that do not. When using a case with a guilty verdict, the lawyer should demonstrate to the judge why his client's situation is different from the case with the guilty verdict.

He should emphasize that because the facts are different the verdict must be different too—it must be not guilty.

This manual seeks to understand the realities of how the press laws play out in the courts: the kind of language for which journalists are punished, the tools that lawyers have used to combat press offenses, and the interpretive strategies that judges have used in applying the press laws.

The sections of the manual are divided by topic, addressing the most common legal issues that come up in court. Some, like “objectivity, balance and neutrality” are taken directly from legislation while others, like “good will” and “criticism rights,” are legal terms developed by the courts in an attempt to implement the policies set forth by legislation. Understanding the meaning of these terms as used by Jordanian courts, their underlying policies, and the arguments that have succeeded and failed against them is essential to creating a predictable and just legal system. Further, because the PPL and the Penal Code are often written in vague or flexible language, almost all of their provisions could apply to even slightly controversial material, and media professionals must be ready to grapple with a variety of charges in one case. It is our hope that this manual will reveal useful consistencies in media cases and promote open discussion of how these laws are being used and applied.

For each section, the manual will address:

- **Legal Rules.** The manual will outline the rules that apply to the most important and common topics in Jordanian media law. Because the laws approved by Parliament often contain language with several meanings, it is essential to analyze the way these laws are being read, understood and applied in the reality of the court setting. Understanding the rules as the *courts* see them will improve journalistic confidence and mitigate self-censorship. It will allow lawyers to understand what the judges are thinking in order to prepare a competent defense. Finally, an analysis of case law rules will allow judges to see how their colleagues are reading and interpreting the laws. This will give judges the tools to apply vague press laws in a just manner, thus increasing judicial confidence and, most importantly, predictability in the court system.
- **Best Defenses.** After outlining the rules as interpreted by the courts in the prior section, the manual will identify best defenses for lawyers. For each legal topic, the manual will analyze the use of evidence, precedent, burdens of proof, and defense strategies that have worked, as well as those that have consistently failed. The manual will also include ideas for new defenses. This will allow lawyers to anticipate and prepare for the judge’s needs, thus increasing effectiveness in defending journalists.
- **Best Judicial Practices.** Finally, the manual will outline best practices for judges, explaining why certain decisions were just while others were problematic. This section will analyze good and bad judicial reasoning and application of the laws. In addition, while recognizing that Jordanian judges are restrained by the laws of Jordan, the manual will provide a summary of international standards and will explain how a judge can incorporate these principles into their work. For example, where a law’s language is vague, a judge can think about the international standards that Jordan's government has endorsed in order to decide what the vaguely worded law requires.

## **GENERAL PRINCIPLES**

### **Role of the Courts**

The courts play a central role in shaping Jordan's press freedoms and the meaning of its press laws. Although judges are confined to the laws passed by Parliament, they have a large amount of flexibility in deciding how to interpret and apply those laws. We encourage judges to keep the principles of press freedom in mind when deciding how to read a particular legal provision. By doing so, judges help implement the press freedoms that the Kingdom has endorsed under PPL 4, 6, the National Charter, and international treaties.

We also encourage judges to be meticulous in explaining their reasoning and judgment. By providing a step-by-step explanation of the analysis and decision, judges will promote the social values contained in the press laws by making it clear to journalists what is and what isn't permitted. Thorough judicial decision-making will also promote consistency in the law and in judicial proceedings, thus increasing predictability and integrity in the courts—time honored values in legal systems across the globe.

### **Role of the Press**

Several courts have recognized the core role of the press in society, and many judges have begun their opinions describing its importance.

- **Legal Rules**

The role of the press is outlined in PPL Article 4, which states that "the press shall freely exercise its task of presenting news, information, and commentaries and shall contribute to the dissemination of thought, culture and science." Further, PPL Article 6 states that freedom of the press includes making citizens aware of information "in all fields," providing an opportunity for society to express opinions, the right to obtain information that concerns the citizen and "analyze, circulate, publish and comment" on it. Journalists should understand that these rights are written into the laws of Jordan, and should insist on their right to exercise them.

Journalists should also keep in mind, however, that these rights do not guarantee that the journalist can print anything without consequence. Courts and society will expect journalists to conduct investigations with respect for others and to publish with integrity and professionalism. In court, the rights outlined in PPL 4 and 6 will be severely limited by restrictions in other legal articles, such as slander, objectivity, religion and socially sensitive topics, discussed below.

- **Best Defenses**

Lawyers should always remind the judge reviewing his case that the principles outlined in PPL 4 and 6 should guide his interpretation and application of the laws. The lawyer should argue that Parliament put these principles upfront—in the first few articles of the PPL—because they are central to the rest of the law and underlie all its subsequent articles.

- **Best Judicial Practices**

Similarly, judges should respect the ideals that Parliament set forth in the PPL 4 and 6, and use them to guide interpretation of the other PPL provisions. As PPL 4 states, these principles are confined to the provisions of the PPL and Penal Code and there are certainly limits to what a journalist may print. Nevertheless, these principles represent the government's vision in drafting the laws and should always have a strong presence in the courtroom. Where there is a question

of how to interpret a word or phrase, best judicial practice dictates using the government's policy goals to guide the interpretation. Thus, where another provision of the PPL is vague, the judge should adopt the interpretation most closely aligned with PPL 4 and 6.

Internationally, the press has been recognized as playing a key role in a democratic system, serving as a "watch dog" for corruption and inefficiency, as well as a platform for discussion of critical social issues. The Inter-American Court has stated that "freedom of expression constitutes one of the essential pillars of democratic society and a fundamental condition for its progress and the personal development of each individual." This freedom should be guaranteed not only with regard to inoffensive or favourable information and ideas, but also with regard to "those that offend, are unwelcome or shock the State or any sector of the population."<sup>1</sup>

### Criticism rights

- Legal Rules

Several courts have also recognized that the right to criticize is a press freedom fundamental to the role of the media. For example, where an article was written in order to criticize the poor conditions at a regional government passport office, the court declared that "the role of the press is to criticize the performance of government departments through commenting on what is going on there."<sup>2</sup> Courts have viewed this right as limited, however, and will assess the language of the article for accuracy in the criticism. Nevertheless, the court states quite strongly that "hard criticisms are allowed if in the public interest."

Even if criticism is allowed, most courts have required that it be justified by the facts. Courts will still assess the factual statements in an article for truth and accuracy. In the case mentioned above, the court found that the conditions described in the article were accurate before holding that the article was legal. Courts appear to do a similar assessment with regard to criticism by opinion. The same court allows the journalist to criticize the department by likening it to a "sheep yard," but only after the court evaluated this language for accuracy. See the section on "Defenses to PPL and Slander" for more information on the way facts and opinion are treated by courts.

Finally, criticism rights are much more limited when the subject of the criticism is a private individual. Two cases in our study centered on articles about poor conditions at private companies. In those articles, factual reporting and criticism of private companies were not allowed, and the courts refused to acknowledge any right to criticize private entities.

- Best Defenses

Lawyers should focus on the language of PPL 4 and 6 and the cases applying them and argue that it should be extended to their clients. Lawyers should point the judge to the statement "hard criticisms are allowed if in the public interest." The lawyer may then want to argue that all factual reporting is necessarily in the public interest because it is in the public's interest to know the truth about their surroundings. Therefore, once the facts of the article are proved true, the journalist should be allowed to criticize those facts without restriction.

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<sup>1</sup> Cf. Case of Herrera-Ulloa

<sup>2</sup> See **Case No. 2150** about the Zarqa passport department and **Case No. 731/2003**, which allowed an article that harshly criticized the official conduct of a judge.

For opinions, lawyers should argue that opinion criticisms are also in the public interest because they encourage debate and thought on important social issues. Lawyers should also urge the judge to consider international standards for opinion rights. For example, the “fair comment” defense, discussed below, protects opinions on matters of public interest from liability if the opinion could be honestly held and is based on fact, even if the opinion is unreasonable, harsh or prejudiced.

- Best Judicial Practices

Internationally, a journalist's right to criticize public officials, governments, and social policies is considered fundamental to the function of society. In Canada, courts have held that “those accepting or seeking public office can expect attack and criticism.” This is because the public interest “requires that their conduct be open to the most searching critique.” In addition, Canadian government bodies are generally prohibited from suing the citizens for defamation.<sup>3</sup> The Canadian law protects criticism of government because such criticism is essential to the proper functioning of democracy and effective government. Allowing criticism of public officials, particularly criticism of corrupt or inefficient aspects of government, will lead to improvements in the way the country is run.

In the Inter-American system, the press enjoys the right to scrutinize and criticize—even in a harsh manner—officials and issues of public interest. For example, the Argentine Supreme Court<sup>4</sup> recently decided a case about a newspaper article that criticized an official body in charge of forensic activities. The Court established that, on topics of public interest, journalists should never be held liable for stating opinions and criticisms, even when those criticisms are expressed in a very hard manner.

### Sensitive Language and Topics: Focus on the article

When analyzing an article alleged to be offensive, Jordan’s courts recognize the need to focus on the article as a whole to understand the journalist’s meaning, and this is in line with international standards. However, the courts have also demonstrated a tendency to focus on specific language when that language touches on provocative or sensitive subjects.

- Legal Rules

For the most part, Jordan’s judges focus on the entire article or publication as “one unit” in deciding how to apply the press laws.<sup>5</sup> In addition to doing this, judges tend to focus in on specific words or phrases when they include strong or provocative language. Judges will often analyze hyperboles, exaggeration, similes, and metaphors separate from the article itself, applying the press law provisions to these specific statements on their own. Examples from our case study include “sheep yard” and “conspiracy hero.” In these cases, the judge made two analyses, first

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<sup>3</sup> See *Montague (Township) v. Page* and *Halton Hills (Town) v. Kerouac*:  
<http://www.canlii.org/en/on/onsc/doc/2006/2006canlii2192/2006canlii2192.html>  
<http://www.canlii.org/en/on/onsc/doc/2006/2006canlii12970/2006canlii12970.html>

<sup>4</sup> “*Patito José Angel y otro c/ Diario La Nación y otros*”. *Judgement of June 24, 2008*.

<sup>5</sup> See also **Case No. 2059/2006 (#8)**. In analyzing charges of insulting religion under Art 278, the court emphasizes that the article must be read as one unit so that the court will be able to find the true intention of the journalist, asking whether it is insulting, humiliating or making fun of the religion.

applying the law to the article as a whole and second to the phrases “sheep yard” and “conspiracy hero” by themselves.

Journalists should also be aware of the heightened sensitivity that judges have demonstrated when dealing with subjects like religion, the Prophet Mohammad, issues of national security, food security and sex. This is another area where judges tend to focus in on specific language. Sentences or phrases addressing these sensitive topics will likely be analyzed separate from the article as a whole, as mentioned above. The journalist should be aware that these topics may also invoke different elements of the PPL. When confronted with an article that discusses the Prophet, for example, courts have applied PPL 5 and 7, which requires that journalists respect “national responsibility,” “Arab Islamic values” and avoid inciting “differences among the people.”

Furthermore, when the topic is deemed to be socially offensive or threatening to security, courts will apply the laws very strictly and may not allow the normal defenses. For example, a journalist that wrote about the Prophet’s wives and their sexual relations where charged in State Security Court. The Court appeared to be extremely offended by the content of the article, and did not allow the journalist to explain his reasons for writing the article, or whether or not he had “good will” or meant any harm. The journalist argued that the article was meant to assist people in dealing with modern day marital troubles, but the court seemed to ignore this explanation.

The Court in that case also refused to allow the journalist to prove the truth of the statements, even though the court acknowledged that the Prophet had in fact used the phrases quoted in the article. In addition, the Prosecutor was relieved of part of his burden in proving the case, and did not have to prove that the article caused any damage. As our international colleagues have observed, “it seems as though insulting religion is an absolute offence” and that the court values freedom of religion over freedom of expression.

Other language that will get special attention in court is language seen as insulting religious feeling. Under this charge, the Prosecutor only has to prove that the defendant published the material and that he intended to insult religion. The court will analyze the material on its own, looking for irony, joking or humiliation to find that the journalist intended to insult religion. In addition, the court will listen to witness statements about whether the witnesses consider the material insulting.<sup>6</sup>

It is important to note, however, that the journalist must have intended to insult *religion* and not the individual. Further, mere differences of opinion about religion that do not insult another religion are protected under Jordanian law. However, as the case about the Prophet’s wives demonstrates, even where a religious symbol is used to criticize an individual, not a religion, the journalist may still be held liable under Article 7 if it is read to “raise differences among the people.” In a society with religious tensions, almost any creative use of religious symbols could be deemed to raise differences, and the court will accept protests from religious groups as proof.<sup>7</sup> This is another example of several different restrictions applying to one statement, something that is especially common for provocative or sensitive topics.

- Best Defenses

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<sup>6</sup> See **Case No. 2059/2006 (#8)** where the journalist published a picture of the former Minister of Planning with a cross. The journalist was found not guilty under Art 278 because his intent was to criticize the Minister and not the religion.

<sup>7</sup> *Id.* The court found that publishing a picture of the cross, the Christian religious symbol, raises differences among the people in violation of PPL 7.

Lawyers should insist that the judge read the article as a whole, but should also be prepared to defend individual words or phrases that appear to be especially sensitive. If the judge singles out particular words or phrases, lawyers should be prepared with slander and PPL defenses for each of these particular phrases. If it helps the case, however, lawyers should feel free to remind the judge to consider the context of the entire article in analyzing the specific phrases.

In addition, lawyers should remember that they can also single out particular words or phrases that help their client. The lawyer should demonstrate that, in addition to the negative phrases the judge or prosecution singled out, the article also contains other positive words or phrases that show the *good* intent of the journalist. The lawyers should argue that these positive phrases put the negative phrases in their real context, showing the real meaning of the journalist.

The lawyer can also argue that these positive phrases counterbalance or negate entirely the phrases that the judge has focused on. An example of this tactic can be found in a 2006 case about criticism of a government department. There, the court found that the journalist's positive statements about the Director of the department offset the negative statements made elsewhere in the article. The judge agreed that when read with the positive statements about the Director, the journalist's true intent was revealed. Although this practice is problematic because it undermines the journalist's right to criticize without having to add positive statements, it may serve as a useful tool for lawyers in the courtroom.

- Best Judicial Practices

Judges should always read the article as a whole in order to understand what the journalist's true meaning was in writing the article. The element of intent is an important component of Jordan's media laws and is included in both slander and good will. But because "intent" is subjective, and occurs only in the journalist's mind, it can be difficult for the judge to decipher. Thus, in order to properly apply the intent requirements of Jordan's laws, the judge must at minimum carefully analyze the entire article, trying to understand what the journalist was truly thinking.

Internationally, judges are also required to read the article as "one unit." Canadian law requires that an article be viewed as a whole in analyzing both offenses and defenses. The plaintiff is not permitted to single out negative statements from the whole for separate analysis.

The practice of looking for positive statements to counterbalance negative statements is also problematic. As discussed in the "Criticism Rights" section, Jordanian courts have recognized a journalist's right to criticize. A journalist should not be compelled to add statements that he thinks a judge will favor in order to balance his criticisms. Such a practice undermines professional journalism because it encourages journalists to write for the courts instead of for the public interest.

The tendency of courts to focus in on sensitive topics and to treat them differently than other types of language is also out of line with international practice. Judges should not apply the laws more strictly to certain topics just because the judge finds it particularly offensive. Good judicial practice requires a judge to keep his personal feelings out of the courtroom. A judge should be a neutral decision maker, applying the laws evenly and fairly to all topics. Most importantly, the judge should always allow the journalist to present explanation and defenses as provided by law for all topics.

As discussed above, when confronted with articles on sensitive topics, Jordanian judges must also often apply the PPL provisions on "national responsibility," "Arab Islamic values," and

“differences among the people.” A study of the principles guiding the Inter-American system suggests that a principle of “national responsibility” is too vague and therefore has the potential to unduly prevent the free flow of information. The ideal is fundamentally subjective, dependant on who is interpreting it, and could never be a legitimate aim to justify a restriction to freedom of expression. Further, as our international colleagues have suggested, if “national responsibility” refers to issues of great public impact, then these topics should be widely informed and discussed, not restricted and punished.

Finally, our international colleagues have suggested that some courts in our case study seemed to put freedom of religion ahead of the freedom of expression, without balancing the two freedoms. Generally speaking, in many international jurisdictions, no fundamental freedom automatically trumps another freedom. Each case must be evaluated on its particular facts. Not doing so makes it risky for journalists to publish information that may offend people even where the actual meaning of the article is legal and socially acceptable.

## **SPECIFIC PRESS LAWS**

The most common charges brought against journalists in Jordan are those brought under PPL provisions 5, 7, and the slander provisions of the Penal Code. Under both the PPL and the Penal Code, any individual or public official may sue any journalist, cartoonist, or editor involved in publishing information that the individual deems offensive or potentially illegal. The individual has the choice of bringing a civil suit, a criminal suit, or both.

In a civil suit, the individual hires a lawyer and pursues the case against the journalist on his own. In a criminal suit, the individual simply files a complaint with the Prosecutor General, who will then file charges against the appropriate journalist or publication (or both) on the individual's behalf. The individual may also choose to pursue both the civil and criminal suits, in which case the court will hear both in one trial. If the individual chooses to pursue a civil suit, he will use his own resources. But if he files with the Prosecutor, he has almost nothing to lose. There are minimum filing fees and the defense is sometimes the only party that must present evidence. The facility of suing the press has led to thousands of lawsuits, and the courts of Amman, where the press is concentrated, are inundated with media cases.

### **Objectivity, balance, neutrality: PPL 5, 7**

Objectivity, balance and neutrality are the terms used by Jordan's press laws to define professional journalism. These ideals are encoded in the JPA Code of Ethics, the PPL and the Penal Code. In addition, our case study shows that these ideals will guide the way judges interpret and apply the press laws, and may help a judge to decide how to read an imprecise provision of the law. Unfortunately, these terms themselves are vague and are not defined by law. Thus, the words ‘objectivity, balance and neutrality’ are open to interpretation by both the judge and the lawyer. In the courtroom, a violation of this PPL provision is often referred to simply as the “objectivity requirement.”

- Legal Rules



In applying the objectivity requirement, courts require not only truthful reporting, but also accuracy in opinion and criticism statements. The PPL requires the journalist to “search for the truth” and adhere to “balance and objectivity” when publishing material. Under this law, a journalist may be charged with printing incorrect or inaccurate information and will be required to prove the truth of the statements in court. Our section on "Defenses to PPL and Slander" explains how to prove the truth of the statements under a PPL charge.

In applying the objectivity requirement, courts normally view factual reporting as objective, as long as it can be proved true. For example, in a 2006 case that involved a factual description of the poor conditions at a government service department, the court found that the journalist was balanced and objective because he simply reported a factual problem that needed a solution.

In contrast, where a court found that an article inaccurately reported a problem related to food security, the journalist was found guilty of violating the objectivity requirement. Notably, the court placed special emphasis on the fact that the case involved one of the nation’s food suppliers—a sensitive topic for courts—and may have applied the rules more strictly here, as discussed above. Even still, the objectivity requirement seems to be directly linked to the journalist’s ability to prove the truth of his statements. Some courts have begun to acknowledge this, and will agree that the article should automatically meet the objectivity requirement where the journalist can prove truth.

- Best Defenses

The objectivity requirement is one of the most difficult elements for the defense to establish. If the defense lawyer can prove the truth of the statements, he should certainly argue that the objectivity requirement is automatically met.

If the lawyer cannot prove the truth of the journalist’s statements, his job becomes much more difficult, and there is very little case law providing examples of successful defenses in this area. But because the Parliament and the courts have never officially defined “objectivity,” the lawyer should be creative in finding ways to prove that his client meets the requirement.

The defense lawyer may want to focus on the “balance” component provided by the law. In addition to using the defenses to truth described in our “Defense” section, the lawyer can point to the overall balance or neutrality of the article and argue that this type of journalism also meets objectivity requirement. The lawyer should argue that the journalist intended to provide a balanced and objective view of the issue, even if he made mistakes, and should identify statements in the article that tend to give both sides of the issue. In a 2005 case about an article reporting misconduct by certain government ministers, the court found that although the information was inaccurate, the journalist did not intend to publish incorrect information. The court stated that the journalist’s purpose was to identify a problem in the public interest and found that it did not violate objectivity.<sup>8</sup>

- Best Judicial Practices

As discussed above, many Jordanian courts have accepted the rule that objectivity is automatically met when a journalist can prove the truth of his statements. Judges should certainly follow this rule where it applies. Objectivity, by definition, means that the statement is not

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<sup>8</sup> See **Case No. 519/2005** where the journalist reported that ministers who owned business may have been conducting unscrupulous business practices. Notably, the Prosecutor did not submit any evidence other than the article, which may have been key to the not-guilty verdict.

influenced by outside opinion or bias. Thus, if something can be proved true, it has not been unfairly influenced or biased.

That being said, neither the Parliament nor the Court of Cassation has ever defined “objectivity, balance, and neutrality.” Courts should therefore be open to additional interpretations of the requirement. For example, if a journalist has written a balanced article that represents several sides of an issue, this should be considered balanced and objective, even if there are mistakes in the information. For the same reason, judges should also keep in mind international standards with regard to balance and objectivity when deciding how to apply these provisions.

The objectivity requirement is the most problematic when compared to international press freedoms. In Canada, Courts have recognized that even when the law requires responsible journalism, “balance” does not mean the journalist must give equal weight to all information he receives.<sup>9</sup> Moreover, the Declaration of Principles on Freedom of Expression<sup>10</sup> establishes that “Prior conditioning of expressions, such as truthfulness, timeliness or impartiality is incompatible with the right to freedom of expression recognized in international instruments.”

The Inter-American Court of Human Rights has stated that “One cannot legitimately rely on the right of a society to be honestly informed in order to put in place a regime of prior censorship for the alleged purpose of eliminating information deemed to be untrue in the eyes of the censor.”<sup>11</sup> In other words, even if the society believes in its right to be honestly informed, that belief does not justify a system of censorship. Under international standards, in particular Article 13 of the Convention, the right to information means the right to *all* information, including information that is “erroneous” or incorrect. Under U.S. and international law and modern jurisprudence, only information that is shown to be erroneous and produced with “actual malice” should be penalized.<sup>12</sup>

### **Slander and Defamation: Penal Code 188, 189, 190, 191, 192, 194**

Slander and defamation, along with the PPL, are the most common charges brought against journalists. Jordan’s slander provisions are contained within the Penal Code, which means that violations may carry prison sentences of anywhere from 3 months to 2 years. However, to date, no journalist has been sent to jail for violating the Penal Code’s slander laws. More common sentences include small fines, large financial penalties, or closing down a newspaper for a period of months or years.

- Legal Rules

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<sup>9</sup> *Charman v Orion Group Publishing Group Ltd & Ors*, <http://www.bailii.org/ew/cases/EWCA/Civ/2007/972.html>.

<sup>10</sup> The Inter-American Commission on Human Rights approved the Declaration of Principles on Freedom of Expression at its 108th regular sessions in October 2000. This declaration constitutes a basic document for interpreting Article 13 of the American Convention on Human Rights. Its adoption not only serves as an acknowledgment of the importance of safeguarding freedom of expression in the Americas, but also incorporates international standards into the inter-American system to strengthen protection of this right.

<sup>11</sup> Inter-American Court of Human Rights, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 33.

<sup>12</sup> IACHR, Annual Report 1999, Report of the Rapporteur for Freedom of Expression, Chapter II.

Under the Penal Code slander provisions, any private individual or public official may sue any journalist, cartoonist, or editor involved in publishing information that the individual deems offensive. Different rules apply, however, if the person suing is a public official versus a private citizen. Journalists should be aware of the differences in these rules, because they will require different kinds of evidence from the journalist once in court. In addition, journalists should note that courts have recognized a minimum right to criticize public officials, but will strictly apply the slander laws to criticism of private individuals.

It is also important to note that courts tend to categorize certain language as automatically slanderous, without first analyzing whether the language meets the definition of slander provided for by law. Penal Code Article 188 defines slander as “language that attacks a person's dignity or reputation, even in the form of doubting or questioning, without stating specific material.” In other words, slanderous language is language that would tend to damage a person's reputation because it suggests they have been engaging in immoral or socially unacceptable behavior, for example stating that a person is "corrupt." Often, courts will conclude that words or statements are automatically slanderous without allowing debate on whether they are or not. This makes almost all negative language potentially slanderous, and the focus of the case becomes the journalist's ability to defend his statements.

#### 1. Slander against a public official acting in an official capacity

In addition to the definitions and defenses outlined in the Penal Code, courts have developed some special rules for slander of a public official. Once a court has determined that language is slanderous, it will analyze whether or not it is illegal. For a public official, language that the court has identified as slanderous is “illegal unless:”

- It is addressed to a public officer (a government official, parliament member, judge, etc.)
- It relates to the officer's job
- The defendant proves the statements to be true
- The article was written in good will

Note that the journalist has burden of proving the statements true as a defense. In addition, the journalist must have published the statements in good will. This is similar to the US requirement of actual malice, although the rule does not provide the same protection for the defendant. It is unclear who has the burden of proving good will, but both sides normally submit evidence on this point and the court weighs both to come to a decision. The court will look to the journalist's relationship with the plaintiff, whether the article appears to address an issue of public interest, whether the journalist actually believed the statements to be true, or whether the journalist purposefully published incorrect information to harm or insult. Good will is discussed in more detail in our “Defenses” section.

#### 2. Slander against a private individual

The rules for slander against a private individual are substantially different from those used for a public official acting in an official capacity. The Penal Code specifically states that a journalist may use truth as a defense for a public official, but it does not state this for a private individual. In addition, the punishment for slander of a private individual is a fine, not a prison sentence, although the fines can be quite large.

Private slander differs from public slander in two important ways. First, when a private citizen sues a journalist for slander, the prosecution, not the defendant, must prove the elements of the offense. Second, private slander requires a showing of actual damage resulting from the journalist's article, often called the "criminal outcome" by the courts. Criminal outcome has been defined as damage to the individual's reputation, lost employment, or financial damage, and it must be proved with hard evidence. Damage to reputation, while a main focus of private slander, does not get much attention from the courts under public slander—damage seems to be presumed for public officials. For private slander, the Prosecutor must prove:<sup>13</sup>

Tangible Elements:

- The act (the writing of the article)
- The criminal outcome (damage to the individual or his reputation, referred to as “touching honor or dignity”)
- Causation (the article caused the damage or harm)

Intangible Elements:

- Intent (the journalist intended to create the criminal outcome)

- Best Defenses

Lawyers defending against charges of slander for a public officer will have to prove two elements: the truth of the statements and the good will of the journalist. Our section on "Defenses to PPL and Slander" describes in detail the best defenses for truth and good will, and this section will therefore focus on defenses to private slander.

While the lawyer should always try to establish the truth of his client's statements, for slander against a private individual, truth may not be a central focus of the defense.<sup>14</sup> Because defense lawyers often lack the kind of evidence necessary to prove truth, this rule may be beneficial to the defense in some cases.

The defense lawyer should take advantage of the fact that the Prosecutor has the burden of proof for private slander. The defense should insist that the Prosecutor submit enough evidence to meet this burden. If, for example, the Prosecutor submits the article as his only evidence, the defense should insist that the case be dismissed because the Prosecutor has not proved the tangible or the intangible elements. The judge should not accept the article as evidence of anything but the “act” element.

The defense should also attack the quality of evidence submitted by the prosecution. If, for example, the Prosecutor uses witnesses who have a relationship with the individual, or some other motive for supporting him, the defense should argue that the witness is not reliable and

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<sup>13</sup> See **Case No. 2059/2006**, series of opinionated policy questions posed to PM as an individual, not in official capacity.

<sup>14</sup> See **Case No. 2059/2006**. The journalist published a series of questions criticizing the Prime Minister as an individual, according to the court. The court did not list truth as an element, and implied that the journalist could be found guilty even if the statements were true. The court dismissed the case because the Prosecutor only submitted the article.

thus quality of that evidence is too low to meet the burden. Again, the defense should then insist that the case must be dismissed.<sup>15</sup>

The defense lawyer can use the causation element to his advantage as well. He can argue that the article did not harm the plaintiff's reputation because the information in the article was already publicly available. His reputation would have been damaged anyway.

Lawyers should also focus specifically on the elements of "criminal outcome" and journalist intent. These are very difficult elements for the Prosecutor to prove, because they often have to do with subjective states of mind— what people are thinking. For the criminal outcome, the Prosecutor must show actual damage to the individual's reputation. Unless the Prosecutor can show that the individual has lost his job or suffered some other quantifiable injury, the Prosecutor will have to find witnesses that say their opinion of the individual has changed.

Both the defense and the judge should always analyze witness statements carefully because witnesses are human and are often biased or easily influenced. The defense should look for relationships between the witness and the private individual or other motives that may influence the witness' statements. Did the witness work in the same company or department as the individual? Does the witness have anything to gain from a guilty verdict? Similarly, for the journalist's intent, the Prosecutor will have to show that the journalist wanted to harm the individual when he published the article—he will have to prove what the journalist was thinking at the time of writing the article. This is a very high burden, and the defense must hold him to it.

- Best Judicial Practices

Good judicial practice requires starting the analysis from the beginning. Thus, for both public and private slander, the first question judges should ask is whether or not the words used by the journalist fit the Penal Code's definition of slander. Is the word or phrase meant to attack or damage the individual's reputation, as the Penal Code requires? Or do the words simply describe an event or factual characteristic? Words that have a negative meaning should not automatically be considered slanderous.

The fact that a journalist cannot rely upon truth as a defense to a charge of slander against a private individual has drawn sharp criticism from the international community, and our colleagues have suggested that criminalizing the publication of true statements is an extraordinary limit on freedom of expression.<sup>16</sup>

In order to mitigate the harsh consequences of this rule, a judge can focus on the causation element and the good will element to try and understand the journalist's intent. This will help the judge make decisions that protect journalists while still following the rule of law. The causation element, for example, states that the journalist's article must cause the damage to the individual's reputation. If, however, the information was already in the public sphere when the journalist wrote the article, then the judge should conclude that the article did not harm the plaintiff's reputation—the information was already publicly available and his reputation would have been damaged anyway.

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<sup>15</sup> In addition to **Case No. 2059/2006**, see also **Case No. 519/2005** where the court dismissed the case because the Prosecutor did not submit enough evidence to prove the criminal outcome.

<sup>16</sup> Heller, Schabas & Hoult on Prime Minister case.

Secondly, the judge should look closely at the journalist's intent in publishing the statements. The judge must ask whether the journalist published the article specifically in order to damage the individual's reputation. If the judge answers this question 'no', finding that the journalist instead intended to publish for other purposes, the judge must dismiss the case. If the judge finds that the journalist intended to publish true statements, or that he intended to identify a problem or social issue, the judge may conclude that the journalist was acting within the role of the press under PPL 4 and 6, and thus necessarily in the public interest and good will.<sup>17</sup>

Internationally, journalists enjoy much greater freedom of expression and criticism under slander laws. Canadian government bodies, for example, are largely prohibited from suing citizens for defamation.<sup>18</sup> The law protects criticism of government from liability on the principle that such criticism is essential to the proper functioning of an open society and that allowing such criticism—particularly of corrupt or inefficient government—will lead to improvement in leadership.

The Inter-American Court has affirmed this view, stating that “in the case of public officials, individuals who exercise functions of a public nature, and politicians, a different threshold of protection should be applied, which is not based on the nature of the subject, but on the characteristic of public interest inherent in the activities or acts of a specific individual. Those individuals who have an influence on matters of public interest have laid themselves open voluntarily to a more intense public scrutiny and, consequently, in this domain, they are subject to a higher risk of being criticized, because their activities go beyond the private sphere and belong to the realm of public debate.”<sup>19</sup>

Another protection against slander in international jurisdictions is the “fair comment” defense. The defense recognizes that criticism of government and public officials is at the core of protected speech. The Supreme Court of Canada has said that “a free and general discussion of public matters is fundamental to a democratic society.”<sup>20</sup> As our international colleagues have observed, “the right of persons to make public their opinions on the conduct of public officials, in terms usually critical and often caustic, goes back to the earliest times in Greece and Rome.”

Jordan's slander laws are also inconsistent with international standards in that they provide criminal penalties for slander against a public official. Article 10 of the Declaration of Principles on Freedom of Expression states that where the individual offended by the journalist's statements is a “public official, a public person or a private person who has voluntarily become involved in matters of public interest,” that individual's reputation should only be protected by civil, not criminal, penalties. In addition, in these cases, the Declaration requires that the Prosecution prove that the journalist had specific intent to inflict harm on the individual. For example, if the journalist was “fully aware that false news was disseminated,” or acted with “gross negligence” in determining whether the news was true or not. This is similar to the “actual malice” standard in the United States, and the burden of proof always falls on the prosecution or the plaintiff.

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<sup>17</sup> See PPL 4 which states that the role of the press is to disseminate information and thought

<sup>18</sup> See *Montague (Township) v. Page* and *Halton Hills (Town) v. Kerouac*:

<http://www.canlii.org/en/on/onsc/doc/2006/2006canlii2192/2006canlii2192.html>

<http://www.canlii.org/en/on/onsc/doc/2006/2006canlii12970/2006canlii12970.html>

<sup>19</sup> Case of Herrera-Ulloa, para. 129.

<sup>20</sup> *Cherneskey v. Armadale Publishers Ltd.*,

<http://www.canlii.org/en/ca/scc/doc/1978/1978canlii20/1978canlii20.html>

Recently, the Inter-American Court has suggested that criminal remedies in libel cases may be appropriate in "exceptional" circumstances. The Court recognized that slander and defamation should normally not be classified as criminal offenses because the punishments are the most severe and are not appropriate for journalistic mistakes or violations. Thus, the Court has stated that criminal proceedings should only be used when "absolutely necessary" to prevent the offense from happening again, and the prosecution should always carry the burden of proof.<sup>21</sup> Jordan's press laws provide criminal punishment for a wide variety of press offenses that are adjudicated as civil cases internationally. Judges should keep this in mind when allocating sentences, and should apply criminal sentences only when "absolutely necessary."

### **Reporting on the Courts: Courts Dignity Laws**

If a journalist is charged with a press offense for reporting on a judicial proceeding, special rules may apply. If the journalist is charged with slander of the judge or the court, he or she will face the charges for slander of a public official as discussed above. However, in addition to the slander charge, the journalist may also face charges under the Courts Dignity Laws.

- **Legal Rules**

Article 11 of the Courts Dignity Law is concerned with maintaining the integrity of judicial proceedings and prohibits journalists from publishing material that interferes with an ongoing case. The purpose of the law is to prevent publication of information that might negatively affect a person's right to a fair trial by biasing witnesses, evidence, or even the judge. Thus, if a journalist wishes to report on a case currently being determined, he or she should concentrate only on sources that are publicly available. Publishing confidential information about witnesses, defenses, or other information that may affect the court's ability to provide a neutral hearing should be postponed until after the case is decided.

Article 15 of the Courts Dignity Law is not as clearly defined and may cause problems for a journalist that wishes to criticize a judicial decision or proceeding, even after the case is decided. The Article prohibits slander or any information published for the purpose of "doubting or insulting the course of justice." Thus, like the slander and PPL charges discussed above, the journalist will have to demonstrate elements of truth and good will in order to succeed in court.

- **Best Defenses**

Courts will dismiss charges under Article 11 if the information was published after the hearings are over. Thus, timing becomes important, and the lawyer should look at the date the case reported on was decided and compare it to the date his client published the information. If the information was published after the hearings were over, the lawyer can point the judge to the language and purpose of the law as well as the legal precedent. The lawyer should then argue that the charge must be dismissed because the information could not have had any affect on the judicial proceedings reported on in the article.<sup>22</sup>

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<sup>21</sup> I/A Court H.R., Case of Kimel v. Argentina. Merits, Reparations and Costs. Judgment of May 3, 2008 (Only in Spanish). Series C No. 177

<sup>22</sup> See Case No. 731/2003

Although Article 15 is more flexible than Article 11, it still specifically states that the journalist must have published with the "purpose" of insulting the court. The lawyer should take advantage of this language by insisting that the Prosecutor submit evidence, in addition to the article itself, proving that the journalist had bad intentions in publishing the material. As discussed above, proving the intent of a third party is extremely difficult and sets a high burden of proof for the Prosecutor, increasing the likelihood of a not-guilty verdict.

Courts have demonstrated their willingness to analyze the specific intent of the journalist, and have found journalists not guilty where no additional evidence was submitted of a malicious purpose. For example, even where an article called the judge a "conspiracy hero" because of a questionable judicial proceeding, the Prosecutor failed to submit evidence other than the article showing harmful intent, and the journalist was found not guilty under Article 15. It should be noted, however, that the "conspiracy hero" statement was also singled out and analyzed separately for violations of slander and PPL.

- Best Judicial Practices

The judicial readings of Article 11 found in our case study were fair and accurate readings of the law. Further, in comparison with other Articles, Article 11 is refreshingly clear. We also generally agree with the underlying policies of Article 11: impartial hearings are essential to a just legal system, and this requires that certain information not be made public. Judges should continue to compare the timing of the article with that of the judicial proceeding and apply the law accordingly.

Article 15 is more problematic. As discussed under Criticism Rights and other sections, criticism of government bodies is essential to the function of society. If a judge or a court is participating in bad or unprofessional behavior, society has a right to know. Allowing criticism of courts will discourage such behavior and promote transparency, thus increasing the integrity and reputation of the courts and the judges functioning within it. To promote these goals within the constraints of Article 15, we encourage judges to require a strong showing that the journalist published in order to insult or harm before awarding a guilty verdict.

Internationally, the "fair report privilege" protects reporters who have published fair and accurate accounts of information contained in official documents or statements made during official proceedings. The defense protects the journalist even if those official statements turn out to be wrong. Publications about judicial proceedings, where the journalist relied upon court transcripts and documents to source the article, are also protected by the fair and accurate report doctrine. The privilege recognizes that the public has the right to be informed of judicial proceedings by giving the journalist freedom to report on what the government is publishing.

Because the Courts Dignity Laws do not specifically require that the published information be in fact true, the courts of Jordan should feel free to adopt this defense. Then, the court can look to see whether the journalist relied on official documents in reporting and not require that the journalist prove that the information is in fact true. Adopting this approach recognizes the role of the press and the government and acknowledges that the journalist should not be held accountable if the government has published incorrect information. As our international colleagues have urged, "recognizing a fair report of judicial proceedings defense would likely provide greater protection for journalists than just a defense of truth."



## **DEFENSES TO PPL & SLANDER: Proving Truth and Good Will**

As discussed above, objectivity and journalistic intent are important factors in Jordanian press law: they are encoded in society and its laws, and thus weigh heavily in judicial decision-making. Therefore, the defendant-journalist's ability to prove the truth of the published statements is an essential defense to the most common press charges, and the journalist must understand what he or she will be required to show if charged in a court of law. Additionally, the journalist's reasons for publishing—whether the statements were published to benefit the public or simply to insult or harm—is an important factor to the judge in deciding whether the journalist is guilty or not. The journalist will only receive a not guilty verdict if it is shown that he or she published in "good will" and not for malicious purposes.

Often, journalists are charged with violating the Press and Publication Law's truth and dignity requirements together with slander under the Penal Code. In such cases, truth and good will must be established, and the manual will therefore address the defenses together in one section. Once a journalist and his or her lawyer establish both elements, however, they will likely meet the requirements for both the PPL and Penal Code charges.

### **Proving the Truth of a Statement: PPL 5, 7 and the Penal Code**

- Legal Rules

As discussed above, truth and the objectivity requirement play a huge role in Jordan's press law system. Not only do they appear in the JPA Code of Ethics, the PPL and the Penal Code, but also in the way judges choose to apply the laws to the case before them. Courts will look for truthful reporting and accuracy in opinion and criticism statements. A journalist may be charged with printing incorrect or inaccurate information and will be required to prove the truth of the statements in court. For example, the Cassation Court has stated that under PPL 5, 7, "the courts of merit must convict the defendant unless he proves the trueness of what he stated in the article."<sup>23</sup>

Similarly, a journalist charged with slander or defamation of a public official under the Penal Code will also be required to prove the truth of the statements. Penal Code 188 specifically provides that a journalist charged with slandering a public official acting in official capacity can use the truth of the statements as a defense, as long as the article was published with "good will." If the journalist is accused of slander against a private individual, however, the journalist may not enjoy the defense of proving the truth of the statements.

Being able to successfully prove the truth of a statement in court is essential to the journalist and his lawyer. For proving truth under both PPL and the Penal Code, the journalist should keep the following information in mind.

#### **When must the truth of the statements be proved?**

As discussed above, the truth of a statement must be proved when the journalist is charged under either PPL 5, 7 or the Penal Code's prohibition on slander against a public official, and journalists will often be charged with both. PPL 5 states that the "journalist must search for the truth" while PPL 7 provides an obligation to be objective. Courts have interpreted these provisions as requiring that the journalist engage in balanced reporting of correct information.

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<sup>23</sup> See Case No. 746/2005 citing Cassation Court Case No. 256/1990.

Neutral statements and statements of fact must be proved true in court using hard evidence. The court may require that evidence be submitted to support every factual statement, not just the general idea of the article as a whole.

Opinion statements often must also be proved true. Courts ask whether the journalist's statements “fit the acts done” by the individual described in the article, and whether the statements “justify the description” that the article uses.<sup>24</sup> Thus, the court will evaluate the journalist's statements for accuracy and ask whether the commentary is justified.

### **Who has the burden of proving the statements?**

Under the PPL, the defendant has the burden of proving the statements true. The journalist also has the burden of proving the statements true under the Penal Code slander provision. It is extremely important, therefore, that the journalist keeps records of the sources he or she is using to write an article.

### **What kind of evidence is acceptable in court for proving truth and objectivity?**

Not all sources are treated the same by the court. Even where a journalist has submitted evidence supporting their statements to the court, in some cases the court has still convicted.<sup>25</sup> The journalist must remember also that the Prosecutor will likely submit his own contradicting evidence. In those cases, the court will weigh the evidence submitted by both sides in order to come to a conclusion about the truth of the statements, and the journalist wants his evidence to weigh heavier.

The journalist should be sure to obtain and keep copies of any documents, government records, or statements from witnesses that he used in his article. If the journalist has made statements about statistics or financials, he should be able to provide reliable documents verifying those numbers as well. Under the truth and objectivity requirement, the courts will often ask whether or not the statement is *actually* true, not whether the journalist *believed* it to be true, which can be difficult for the journalist to prove. This rule is unfortunate from a press freedoms perspective and is inconsistent with international standards. Nevertheless, the higher the quality of the journalist's evidence, the more likely is his success in court.

### **What about opinion, value judgments, exaggeration or other figurative language?**

Courts will often focus on statements of opinion, value judgments, exaggeration or other figurative language separately and on their own. Journalists charged under PPL 5, 7 or slander will be required to prove the truth of opinion statements in addition to proving the truth of factual statements.

Because this kind of statement cannot generally be proved true or false in the traditional sense, courts will address whether the statements in the article “fit the acts done” in reality. In other words, courts will ask whether the plaintiff's behavior “justifies the description” that the journalist has used. The judge will ask the journalist to prove that what he has stated fits what

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<sup>24</sup> See **Case No. 731/2003** describing a judge as a “conspiracy hero” and **Case No. 2150/2006** describing a government department as a “sheep yard.”

<sup>25</sup> See **Case No. 746/2005** where the defense submitted documents supporting the allegations of corruption and misconduct, but the court still convicted, finding that the documents were not a good indication of the actual conditions in light of the prosecutor's witnesses.

actually happened.<sup>26</sup> For example, where an article described a judge as a "conspiracy hero" who helped to cheat and deceive, the court analyzed these statements on their own and agreed that the statements accurately described the judge's misconduct. The court concluded that the journalist's statements were therefore "true" and found him not guilty. If, on the other hand, the court found the wording to be too strong or negative when compared to the judge's actual conduct, the court may have found that the journalist violated his responsibility to report the truth.

- Best Defenses

### **Who has the burden of proof?**

The burden of proving the truth of the statements under both the PPL and the Penal Code rests with the defense.<sup>27</sup>

### **How can I prove statements of fact?**

Statements of fact should be proved using the appropriate evidence, and the more reliable and clear the evidence is the better. Witnesses are often used in the courts as well, but are generally not as reliable as official documents and reports.

In addition, lawyers should examine carefully the documents submitted by the prosecution. If the prosecution only submits the article as evidence, the defense should argue that the journalist's statements should be accepted as true or, at minimum, that the defense's evidence should be accepted as true. The defense should attack the prosecution's evidence as well, scrutinizing carefully the quality and reliability of his witnesses and documents.

### **How can I prove statements of opinion?**

To prove statements of opinion, a court may ask the defense to show that the statements "fit the act done" or "justify" the description. Because the court is looking to see whether the opinion is justified, the lawyer may want to argue that the opinion is justified because a "reasonable person" could hold that opinion. By definition, opinions vary from person to person. Therefore, whether the opinion is "justified" depends on the person evaluating the opinion. As a neutral mediator, a judge should not ask himself whether he thinks the opinion is justified. The fairest way to assess this question is to ask whether a person of normal intellect and reasonable nature could hold that opinion. By doing this, the lawyer is asking the court to broaden the scope of acceptable opinion statements beyond just what the judge's opinion might be, thus increasing the likelihood of success.

### **How do I prove information contained in government reports or public documents?**

When a journalist has relied on government reports as his source, lawyers should always argue for the "fair report" privilege. This privilege protects journalists who have published fair and accurate accounts of information contained in official documents, whether or not that information turns out to be correct. Conversely, under a 2003 decision in Amman Court of Appeals, a journalist relying on official sources was still required to prove the truth of the

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<sup>26</sup> See **Case No. 731/2003** describing a judge as a "conspiracy hero" and **Case No. 2150/2006** describing a government department as a "sheep yard."

<sup>27</sup> See **Case No. 746/2005**, citing the Court of Cassation (No. 256/1990): "The courts of merit must convict the defendant unless he proves the trueness of what he stated in the article."

information contained therein. Although this is the only decision we found like this, lawyers should still be prepared to prove that the statements are actually true, not just that the journalist believed them to be true. Lawyers may want to point out to the judge that this is an unreasonable burden on journalists, arguing that the purpose of government reports is that the public and the press rely on them.

One of the cases in our study, in which the journalist accused Ministers of inappropriate business dealings, the court suggests that because the information was already in the public debate, the journalist's truth requirement might be relaxed. The court implied that the journalist only need to prove that he did not *intend* to publish untrue information—he was not required to prove that the information was in fact true. Following the logic of this case, lawyers should always look to see if the information was already in the public sphere. If it is in any way, the lawyer should argue that his client was merely commenting on what was already public information.

- Best Judicial Practices

A judge faced with the truth requirements under the PPL and Penal Code has several options for interpretation, and should consider the particular circumstances of the case before him before applying a rule. The PPL, for example, only requires that the journalist “search for the truth,” not necessarily that he prove each and every statement to be actually true. In addition, neither the PPL nor the Penal Code discusses opinion statements in any detail, and we encourage judges to be especially lenient with such statements for the reasons listed above. We believe that judges can adopt the “reasonable person,” “fair comment” and “fair report” rules for opinion statements and still be within Jordan's press laws. At minimum, we urge judges to study the principles that underlie these defenses and use them to guide decision-making.

Truth also plays a role in international jurisdictions, but it is not applied as strictly as in Jordan. In those jurisdictions, the truth requirement takes many forms, depending on the circumstances. In the United States, for example, a defendant charged with libel of a public official can successfully defend against a charge by proving the truth of the statements made. However, even if the defendant cannot prove the truth of the statements, he or she will not necessarily be held liable. The Supreme Court has held that the First Amendment requires that the journalist only be held liable if the plaintiff proves “actual malice”—that the defendant knew or should have known that the statements were false at the time of publication. If the journalist published the statements in good faith, believing them to be true, then he or she cannot be held liable for libel.<sup>28</sup>

Another application of truth has to do with how much evidence the court requires from the defendant. Most countries do not require the defense to prove the truth of each and every statement, but rather the general meaning of the article as a whole.

The defense of truth is often not enough to protect press freedoms because it can be difficult to prove the truth of an article in court, even when the article is in fact true. This poses the danger of punishing journalists for printing true information simply because they didn't have the resources to provide the appropriate evidence in court. A 2005 case<sup>29</sup> illustrates the difficulty the media may experience when required to prove truth. In that case, the Court reviewed the journalist's documents but concluded that they were not enough to prove the truth of the article. In Canada, the defense of justification is similar to Jordan's truth defense, but is one of

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<sup>28</sup> See **New York Times Co. v. Sullivan, 376 U.S. 254 (1964)**.

<sup>29</sup> See also **Case No. 205/2005** about corruption at the Civil Consumption Corp, where defendants were found guilty under PPL 5,7 because they could not prove the truth of the article.

“substantial justification” only. This means that the journalist only needs to prove that the general idea of the article is true and not necessarily every individual allegation.

The “responsible journalism” defense also protects journalists from liability in Canada. The defense states that journalists are protected from liability even if portions of the story are incorrect, as long as the journalist can demonstrate that it acted responsibly in publishing.<sup>30</sup> Courts will consider, among other things, what steps the journalist took to verify the information published and whether a comment was sought from the person who is the subject of the article. If no steps were taken or the source was unreliable, a conviction may be justified. If, however, the source was reliable or reasonable steps were taken to verify the information, the journalist may be protected by responsible journalism.

In some circumstances, issues of public interest should be published even before proof of the statement is available, even if proof may never be available. These defenses recognize that sometimes the role of press is to raise questions or call for investigation, not just to report facts. This principle is confirmed in PPL 4 and 6, and judges should make exceptions to the truth requirement in such circumstances.

Another significant obstacle for journalists defending the truth of their statements is the lack of a dependable “fair report” privilege. In many countries, this privilege protects journalists who have published fair and accurate accounts of information contained in official documents, whether or not that information turns out to be correct. Conversely, under the 2003 decision in Amman Court of Appeals, mentioned above, a journalist relying on official sources may still be required to prove the truth of the information contained therein. Such a holding confuses the role of the press with that of the government by requiring the journalist to gather and evaluate information in a manner already delegated to specialized governmental bodies. The injustice is compounded if the court chooses to hold the journalist accountable for inaccurate government reporting. In addition to concerns of fundamental fairness to the journalist, the holding also threatens access to government findings and reports that are traditionally presented to the public via the press. Judges are strongly encouraged to distinguish themselves from this holding, and allow the fair report privilege into the courtroom.

International standards also often hold that information already available in the public arena does not have to be proved true by the journalist. As mentioned above, one of our cases suggests that in such circumstances the journalist needs only to prove that he did not intend to publish untrue information. Freedom of expression would be better protected if the public debate requirement were not necessary to the defense. While newspapers will often reflect on issues that have already entered the public arena, they should also be permitted to raise issues of which the public is not yet aware.

A journalist’s ability to put forth opinion and value judgments is also a key feature of a free and open press. Jordanian courts have been creative in fashioning tests to evaluate the truth of opinion statements, but we urge judges to recognize the restrictive nature of even these approaches. Opinion statements deserve the most latitude in terms of freedom of expression because they cannot be proved true or false and it is unfair to require the journalist to do so. Moreover, society is capable of recognizing opinion as the writer’s personal belief and evaluating it for what it is. There is less danger that the public would rely on the opinion as it would rely on statements of fact.

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<sup>30</sup> See *Cusson v. Quan*, <http://www.canlii.org/en/on/onca/doc/2007/2007onca771/2007onca771.html>.

In Canada, the defense of “fair comment” protects opinions on matters of public interest from liability if the opinion could be honestly held and is based on fact, even if the opinion is unreasonable, harsh or prejudiced. Similar versions of the defense exist in other commonwealth countries. A defense of fair comment is essential to a meaningful right of freedom of expression, as opinions are most often incapable of proof and thus cannot be protected by the truth defense.

Canadian law usually views cartoons or editorial drawings as expressions of opinion or value judgments. Courts in Canada have held that such pictures often use caricature and symbolism and should not be taken literally.<sup>31</sup>

Where there is no defense available to protect statements of opinion, freedom of expression is incredibly restricted. Judges should support defenses that protect statements of opinion from liability. Jordan has signed and ratified the *UN International Covenant on Civil and Political Rights*,<sup>32</sup> which protects freedom of expression. International law is incorporated into Jordan’s legal system, and judges are urged to learn and apply these principles.

## **Good will**

- **Legal Rules**

Although not provided for specifically in the laws, good will is a rule commonly invoked by Jordan’s courts. It is applicable to almost every press offense. Under the rule, journalists must explain their intentions in writing the article in order to establish that they published in good will. Good will must be proved in addition to proving the truth, and it is a way for the court to ask the journalist what his purpose was in writing the article. Did the journalist publish the information believing it was true? Did he publish the information in the public interest, to further debate? Or did he publish in order to harm another individual? Courts take these questions very seriously, and although intent can be hard to prove, journalists should marshal all their resources to demonstrate that they had good intentions. Once good will is established, courts tend to be more lenient with the journalist, and he may then have an easier time proving the remaining elements.

Both sides will submit evidence of the journalist’s intentions, and the court will weigh the evidence and any witness statements. Additionally, the court will analyze the article carefully for clues about what the journalist meant to do. Strong, provocative language may be taken as an intention to harm. The journalist should be ready to explain such language and why it fits the subject of the article.

- **Best Defenses**

It is important to produce evidence that disproves allegations of improper or bad intent, even where the journalist cannot prove the truth of the article. One tactic that has been successful in Jordanian courts is to prove a lack of motive to harm the individual. For example, if there is no relationship between the journalist and the plaintiff, if they do not know each other personally, or if they do but are on good terms, the lawyer should argue that the journalist had no reason for wanting to harm the plaintiff. The article must therefore have been written to spread information

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<sup>31</sup> *Ross v. Beutel*, <http://www.canlii.org/en/nb/nbca/doc/2001/2001nbca62/2001nbca62.html>.

<sup>32</sup> See: <http://www.hrweb.org/legal/cpr.html> and <http://www.hrweb.org/legal/cprsig.html>

or debate. As indicated in PPL 4 and 6, spreading information and thought are in the public interest, and it follows that the court may then assume good will.<sup>33</sup>

The elements of good will are not clearly defined, and lawyers can be creative in proving their client's good intentions. For example, the lawyer can argue that, because his client genuinely believed the statements to be true, the intention of the publication is automatically good and in the public interest. This is based on the premise, stated in PPL 4, that it is the role of the press to "freely exercise its task of presenting news, information and commentary."

Courts have also established that certain topics are always in the public interest and that publications on these topics are generally accepted to be in good will, including information about public services provided by government departments.<sup>34</sup> Lawyers should argue that their case should also fall into this category, and may want to demonstrate the similarities between the two.

- Best Judicial Practices

The writers of this manual recognize the difficulty that a judge faces in determining good will. As with all analyses of someone's subjective state of mind, including of opinion and purpose, strong evidence is often lacking. Or, if evidence exists, it weighs equally on both sides. The judge is often left to decipher the journalist's intent from the article itself. We encourage judges to be meticulous in determining intent, evaluating all the evidence as a whole. Finally, where there is no clear answer, judges should remember the guiding principles of the PPL, the National Charter, and the international standards outlined in this manual.

A 2006 case demonstrates that certain topics should automatically be considered in the public interest and articles about them considered in good will. The case identified the purpose of the article as attempting to bring change in the conditions at the passport department. This is consistent with other decisions that have supported journalists who point out a social problem that needs resolution. We encourage judges to continue this trend, adding to the topics that constitute good will and public interest.

Following the reasoning in the 2003 case mentioned above, judges can assume that the journalist wrote the article in the public interest if there is no connection between the journalist and the plaintiff, or if it can be otherwise proven that the journalist did not write the article for the sole purpose of damaging a reputation. This is based on the principle, stated in PPL Article 4, that it is the role of the press to present news, information and commentary, and that the dissemination of information is in the public interest.<sup>35</sup>

The principles underlying good will are common in international jurisdictions. For example, good will is similar to the "actual malice" requirement for punitive damages in the U.S., which looks at the intent of the journalist in publishing. However, U.S. slander rules require that the plaintiff, not the defense, prove that the journalist published with malice or bad intentions. Similarly, while it is not necessary to prove intent to harm in defamation claims in Canada, punitive awards for defamation are restricted to circumstances where the defendants acted maliciously.

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<sup>33</sup> See Case No. 731/2003

<sup>34</sup> See Case No. 2150/2006 about the Zarqa passport department.

<sup>35</sup> See also Case No. 2150/2006

In the U.S., even if the defendant cannot prove the truth of the statements, he or she will not be found liable unless he purposefully printed false information. Under the First Amendment, a journalist may only be found guilty if the plaintiff proves that the defendant knew or should have known that the statements were false at the time of publication. If the journalist published the statements in good faith, believing them to be true, then he or she cannot be held liable for libel.<sup>36</sup>

## **CONCLUSION**

Freedom of expression and access to information is the cornerstone of any free society. Jordan has repeatedly endorsed these principles: the country has signed and ratified the UN International Covenant on Civil and Political Rights, has passed the National Charter, and has incorporated strong language that supports press freedom into the PPL. Still, most of the decisions about what these laws mean and how they are applied are made in the courts. Judges, lawyers, and journalists become daily players in shaping the state of press freedom in Jordan. We encourage debate in the courtroom about the merits of defenses such as “fair comment” and “fair report” and hope that these principles will serve as a source of new ideas and a guide for interpretation.

Jordan’s press laws are not set in stone. In fact, the flexible language that the law employs can and should serve as a platform for debate and exploration. With a professional press core, an agile and creative defense bar, and an educated and value-driven judiciary, Jordan’s legal system can move these laws in an intelligent and socially responsible direction, one that is consistent with domestic and international standards of press freedoms.

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<sup>36</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).