

# Defamation under Subarticle 3(5) of the Saudi Arabian Anti-Cybercrime Law

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## Abstract

According to subarticle 3(5) of the Saudi Anti-Cyber Crime Law (SACCL), the commission of defamation by means of information technology devices, which causes damage to others, is punishable by either one-year's imprisonment and a fine of up to 500,000 Riyal or both. However, in court practice, the application of this deeming provision has created a significant imbalance between the competing rights, most notably to the detriment of the rights of defence as a whole. The purpose of this article is to provide a critical review of the Saudi lawmaker's intent behind subarticle 3(5), which explicitly places the right to protection of reputation over the rights of defamation defendants, thereby undermining the right to a fair trial. Also reviewed are Sharia's broad definition of defamation, what can be found to have a defamatory meaning and how said definition is being used as a reference to both the defamation and insult offences under subarticle 3(5) of the SACCL. By highlighting issues critical and crucial to the rights of defamation defendants, this article's purpose is to contribute to the debate on the necessity of amending subarticle 3(5) of the SACCL.

## Keywords

Defamation; reputational harm; insult; competing rights; Sharia; Islamic law

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## Introduction

Whereas the traditional face-to-face dispute used to be the only way in which a defamatory statement could be expressed in an open and direct way to the affected person, today there are many ways in which defamatory statements can be spread far and wide due to the emergence of new communication technologies, including the Internet.

It is within this context that the Saudi Anti-Cyber Crime Law (SACCL)<sup>1</sup> was issued in 2009 in order to adapt to the advent of the internet and the proliferation of online communications. Subarticle 3(5), which specifically prohibits defamation, has been interpreted by the Saudi courts as applying to written, visual and verbal forms<sup>2</sup> of online communication which could damage someone's reputation, or are likely to cause such harm.<sup>3</sup> Yet, the SACCL may apply to these forms of defamatory communication regardless of whether the parties involved are natural or legal persons, public or private ones,<sup>4</sup> thereby classifying defamation of private figures as a criminal offence, rather than a civil action or fault.<sup>5</sup> Worse still, not only does this law lack definition of what constitutes defamation, but it also does not provide the accused, neither expressly nor by implication, with the right to a complete defence. It follows, at first glance, that the SACCL appears to be almost meaningless with regard to the rights of defence as referred to in many articles of the Saudi Law of Criminal Procedure.

This article does not purport to discuss defamation of public figures<sup>6</sup> or subject-matter of public interest.<sup>7</sup> The somewhat problematic application of the public interest criterion is left aside. Nor does the article intend

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<sup>1</sup> The Saudi Anti-Cyber Crime Law (SACCL) was issued under the Council of Ministers Decision No. 79, dated 7/3/1428 Hijri, and it was approved by Royal Decree No. M/17, dated 8/3/1428 Hijri. The Act was published in Issue No. 4144 of the Official Gazette (Um Al Qura) on 13/04/1428 Hijri.

<sup>2</sup> This would include spoken words, for example, during an online session, a radio broadcast or television programme, written or printed materials, including emails, social media posts, blogs and websites, online reviews, drawings and cartoons, paintings, poetry and live theatrical performances, etc.

<sup>3</sup> This article assumes that the general contours of defamation which interact with the Saudi Anti-Cyber Crime Law are derived from Islamic Sharia, thereby excluding the common law of defamation.

<sup>4</sup> Subarticle 1(1) of the SACCL. It is also the case in France where corporate entities can be sued for defamation. See, <https://www.lexology.com/library/detail.aspx?g=869ea0f6-29ac-47c0-8f39-be0ac5d958e0>. By contrast, in some of the common law countries, corporations are treated differently for defamation purposes or not allowed standing to sue in defamation at all. For instance, Australia denies corporations standing to sue in defamation where they have more than nine employees. See, D Mark Jackson, "The Corporate Defamation Complainant in the Era of SLAPPs: Revisiting New York Times v. Sullivan" (2001) 9:2 Wm & Mary Bill Rts J 491 [Jackson] ("[c]orporations have increasingly used defamation suits as an offensive weapon" at 491). See also Civil Law (Wrongs) Act 2002 (ACT), s 121; Defamation Act 2006 (NT), s 8; NSW Act, supra note 11, s 9; Defamation Act 2005 (Qld), s 9; Defamation Act 2005 (SA), s 9; Defamation Act 2005 (Tas), s 9; Defamation Act 2005 (Vic), s 9; Defamation Act 2005 (WA), s 9 [Australia Acts].

<sup>5</sup> Various common law jurisdictions have abolished criminal defamation (See, for instance, the *Libel and Slander Act* of Ontario (Canada) and *Defamation Act 2013* (UK) which consider defamation of a private person as a tort (civil wrong). By contrast, civil law jurisdictions (including KSA) approach defamation first and foremost as a criminal offence, although in many countries (including KSA), the claimant's right is also civilly actionable. From a comparative perspective, this distinction supports a generally held view that the national particularisms of defamation laws reflect very different approaches to the protection of reputation.

<sup>6</sup> See, for an illustration, *De Carolis and France Televisions v. France*, ECHR 27 (2016) 21.01.2016, available at: <https://hudoc.echr.coe.int/eng-press#%7B%22itemid%22:%5B%220003-5277562-6561162%22%7D%7D>. This case concerned an accusation of defamation brought by Saudi Prince Turki Al Faisal on account of a documentary on the France 3 television channel concerning complaints lodged by families of the victims of the 11 September 2001 attacks. The first applicant and the journalist who made the documentary were found guilty of public defamation against an individual, Prince Turki Al Faisal, who had joined the proceedings as a "civil party". The TV channel France 3 was declared civilly liable for the damage caused. The applicants complained of a violation of their right to freedom of expression. The Court held that there had been a violation of Article 10 (freedom of expression) of the Convention, finding, after a detailed examination, that the way in which the subject was dealt with did not contravene the standards of responsible journalism. As regards the sanctions, the fine to which the first applicant had been sentenced and the civil liability finding against France 3 were a disproportionate interference with their right to freedom of expression which was not necessary in a democratic society. In this case the Court observed in particular that the facts reported had concerned a subject of general interest. It further noted that Prince Turki Al Faisal held an eminent position in the Kingdom of Saudi Arabia and reiterated that the limits of permissible criticism were wider when it came to civil servants acting in a public capacity in the course of their official duties than in the case of ordinary private persons.

<sup>7</sup> Regarding criminal prosecution on grounds of public interest, go to <https://saudigazette.com.sa/article/600903/SAUDI-ARABIA/Court-reverses-verdict-against-journalist-in-defamation-case>. In contrast to the KSA, the United States has decided - in a wide range of cases involving matters of public interest - that free expression and vigorous public debate are often more important than compensating plaintiffs for harm caused by defamatory falsehood. See, Vincent R. Johnson, *Comparative Defamation Law: England and the United States*, 24 U. Miami Int'l & Comp. L. Rev. 1 (2017), p.44, available at: <https://repository.law.miami.edu/umiclr/vol24/iss1/3>. See also - from a comparative perspective - how the European Court of Human Rights is dealing with access to information of public interest: *Tarsasag A Szabadsagjogokert vs Hungray*, no 37374/05, 14 April 2009

to discuss defamation of religion or whether the defamation of private figures should be decriminalised in the KSA.<sup>8</sup> On the contrary, the present paper is mainly addressed to question, in an abbreviated manner, whether the Saudi regulator<sup>9</sup> has, under subarticle 3(5) of the SACCL, forced the balancing of two competing rights with respect to defamation of private figures, that is, the right to protection from reputational harm and the right to a full defence.

### 1. The lack of definition under subarticle 3(5)

The character of subarticle 3(5) of the SACCL is essentially the product of its inspiring rules of Sharia.<sup>10</sup> Sharia refers to the body of Islamic law. It serves as a guideline for all legal matters, and hence it affords the basis for the enactment of laws and regulations in Saudi Arabia.<sup>11</sup> While subarticle 3(5) and the Sharia it inspires with regard to defamation are applied in an almost identical manner, the former differs from the latter, albeit somewhat slightly, in two ways. First, it exclusively applies to cyber defamation. Second, it clearly fails to define defamation. Indeed, subarticle 3(5) states that:

*[...] Any person who commits defamation and causes damages to others through the use of various information technology devices shall be subject to imprisonment for a period not exceeding one year and a fine not exceeding five hundred thousand riyals or to either punishment.*

Presumably, knowing that courts will step in and fill the gaps left by this deeming provision may have led the Saudi regulator to draft a broad, open-ended provision rather than a detailed one. If this were the case, we may reasonably assume that the regulator preferred an incomplete over a relatively complete subarticle 3(5) as a means of avoiding a difficult definition of defamation and shifting the responsibility to provide specific examples in terms of what defamation covers to the competent courts. In this respect, it is notable that Article 48 of the Saudi Constitution, which had also been incorporated into Article 1 of the Law of Criminal Procedure and Article 1 of the Law of Civil Procedure, states that

*[T]he courts will apply the rules of Islamic Sharia in the cases that are brought before them, in accordance with what is indicated in the Book and the Sunnah, and statutes decreed by the Ruler which do not contradict the Book or the Sunnah.*

(available at <http://hudoc.echr.coe.int/fre?i=001-92171>); Sellami vs France, no. 61470/15, 17 December 2020 (available at <http://hudoc.echr.coe.int/eng?i=001-206518>).

<sup>8</sup> We may only observe that the European Court of Human Rights has emphasised on many occasions that the imposition of a prison sentence in defamation cases will be compatible with freedom of expression, as guaranteed by Article 10 of the Convention, only in exceptional circumstances – notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence (see, mutatis mutandis, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 115, ECHR 2004-XI, and *Mika*, cited above, § 33). However, the Court continually reiterates in its decisions that while the use of criminal law sanctions in defamation cases is not in itself disproportionate (see *Radio France and Others v. France*, no. 53984/00, § 40, ECHR 2004-II; *London, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 47, ECHR 2007-IV; and *Ziembiński v. Poland* (no. 2), no. 1799/07, § 46, 5 July 2016), a criminal conviction is a serious sanction, having regard to the existence of other means of intervention and rebuttal, particularly through civil remedies (see *Frisk and Jensen v. Denmark*, no. 19657/12, § 77, 5 December 2017). For instance, in a recent decision dated March 25, 2021 (*Matlas vs Greece*, no. 1864/18), the Court concluded that the circumstances of the case – a private dispute between the managing director of a company and that company's former legal advisor, which did not reach the public – presented no justification for the imposition of a prison sentence. Such a sanction, by its very nature, will inevitably have a chilling effect on freedom of speech, and the notion that the applicant's sentence was in fact suspended does not alter that conclusion, particularly given the fact that the conviction itself was not expunged (see *Paraskevopoulos v. Greece*, no. 64184/11, § 42, 28 June 2018; *Marchenko v. Ukraine*, no. 4063/04, § 52, 19 February 2009; and *Malisiewicz-Gąsior v. Poland*, no. 43797/98, § 67, 6 April 2006). To read the above-mentioned decision of *Matlas vs Greece*, please go to the European Court of Human Rights website at: <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22%3A%20%20Gr%C3%A8ce%201864%2F18%22%22%22documentcollectionid%22%3A%20JUDGMENTS%22%22DECGRANDCHAMBER%22%22ADMISSIBILITY%22%22ADMISSIBILITYCOM%22%7D>

<sup>9</sup> It is the legislature, law-making branch of the Saudi Government, as denoted in Article 67 of the Saudi Constitution.

<sup>10</sup> The law, as we understand the word in the West, means the rules that regulate relations among people, is an integral part of Sharia. Rules of law are rules of Sharia, but not all the rules of Sharia are rules of law. However, the words “Sharia” and “law” are often used interchangeably.

<sup>11</sup> Islamic Sharia is a framework of Islamic jurisprudence derived primarily from the Holy Qur'an and secondarily from the Sunnah, the practices and sayings (Hadith) of the Prophet Muhammad during his lifetime. The third source is *Ijma'*, the consensus of opinion of Muslim scholars on the principles involved in a specific case occurring after the death of the Prophet. *Qias*, analogy, is the fourth source of law. While judges may base their decisions on any of the four Sunni schools of jurisprudence, the Hanbali school predominates and forms the basis for the country's law and legal interpretations of Sharia. See, *Sharia Incorporated: a comparative overview of the legal systems of twelve Muslim countries in past and present* 157, at 23, (Jan Michiel Otto ed., 2010) [hereinafter *Sharia Incorporated*]; Ann Black et al., *Modern perspectives on Islamic Law* 256 (2013), at 10.

Accordingly, the Supreme Court of KSA has made clear that the judiciary ought to observe the law in the interpretation and application of Sharia, considering that all the Saudi enacted laws and regulations are consistent with the fundamental principles of Sharia, including the Constitution. Yet, since under the four Sunni schools of Islamic doctrine the law is subject to judicial interpretation of holy texts, jurisprudence is usually based on a particular judge's religious beliefs and personal understanding and interpretation of Sharia,<sup>12</sup> which may quite often vary according to that judge and the circumstances of the case. Because judges have considerable discretion in decision making, rulings and sentences diverge widely from case to case. It may therefore be worthwhile to claim, at this early stage, that it is the reasoning of the judges in more difficult defamation cases on which the problem quite often turns. In many difficult cases, it would appear, there is no uniquely correct decision.

While a full discussion of the rules of Sharia is beyond the scope of this article, the purpose of this section is to provide Sharia's broad definition of defamation with the aim of highlighting how it is being used as a reference to defamation offences under subarticle 3(5) of the SACCL. The section will also demonstrate how the application of said provision may extend to include insult and disparagement too.

### 1.1 Using Sharia as a reference to defamation offences under subarticle 3(5)

Before attempting to give some content to the expression defamation under Islamic Sharia, three points are worth noting. First, Islamic Sharia classifies defamation in one major type: "*qazef*". While the prevailing Arabic version of subarticle 3(5) of the SACCL does not contain the word "*qazef*", it does however use the term "*tash-hir*" which means "*qazef*" (defamation) in Arabic. Yet, the classification of defamation offences can be challenging in some instances, as terminology may vary depending on facts and evidence and the lines between defamation and privacy are often blurred to the extent that many aspects of that relationship remain unresolved.<sup>13</sup> Furthermore, in official and unofficial translations of national legislation there is also no standard usage for the Arabic-language terms defamation (*qazef*, *tash-hir*, *zam*) and insult (*sab wa shatem*, *qadeh*, *tah-qir*).

Second, the punishment for *qazef* (defamation) may take forms ranging from flogging to imprisonment and fines. The applicability of these forms of punishment would depend upon whether the cause of defamation action accrues from a false accusation of adultery or other types of harmful statements. While the former fits the category of boundary crimes (*hudud*) in the KSA, and is arguably a very serious offence since it is punishable by 80-lashes flogging, all other types of defamation offences are deemed to be classified as *taazi'r*.<sup>14</sup> That is to say that should the prosecution for defamation be engaged on grounds of adultery or any other type of harmful statement, this may not exclude the application of subarticle 3(5) of the SACCL, so long as the prosecuted offence is committed by means of information technology devices, including the Internet. In this respect, we may also observe that, as per Article 12 of the SACCL, the latter does not prevent any other related law, such as Sharia for instance, from applying to cybercrimes which fall within its own scope, e.g., the online defamatory statement concerning adultery.

<sup>12</sup>Indeed, there is no concept of judicial precedent in Saudi Arabia, which means that the decisions of a court will have no binding authority in respect of another case. It is not always possible to reach a conclusive interpretation of Saudi Arabian law or how a Saudi Arabian court would view a particular case.

<sup>13</sup>This question may actually occur in both Saudi and western jurisdictions. See, Eric Barendt, An overlap of defamation and privacy? (2015) 7(1) JML 85; David Rolph, Vindicating reputation and privacy in Comparative Defamation and Privacy Law edited by Andrew Kenyon (Cambridge University Press, 2016) and Ursula Cheer, Singapore Conference Articles Recognition of business and economic interests of media in defamation and privacy law (2016) 23 TLJ 193. Case law suggests that the precise nature of that relationship is largely untested and therefore merits further analysis. See, John Terry (originally LNS) v Persons Unknown [2010] EWHC 11 (QB), [78] (Tugendhat J) and Lord Sumption in *Khuja v Times Newspapers Limited* [2017] UKSC 49 [21]. See also Nicole Moreham and Mark Warby, *Tugendhat and Christie the Law of Privacy and the Media* (Oxford University Press, 3rd ed, 2016), 351.

<sup>14</sup>In the KSA, crimes are divided into three main categories. Boundary crimes (*hudud*) are those whose punishments and evidentiary and procedural requirements are clearly delimited in the Quran and the collected deeds and sayings of the Prophet Mohammed (al-sunna). Equity crimes (*qisas*) are those crimes causing physical injury or death to another person, and their punishments are also specified in the Quran and the Sunna. Discretionary or reform crimes (*taa'zir*), include crimes whose punishments are not specified in the Quran or Sunna, or which do not meet the evidentiary and procedural requirements of the first two categories. (see, <https://www.ojp.gov/ncjrs/virtual-library/abstracts/sharia-penalties-and-ways-their-implementation-kingdom-saudi-0>). Sharia presumes that a defendant is innocent until proven guilty, and only in serious crimes or in cases of repeat offenders is one likely to witness severe punishments.

Third, from a procedural perspective,<sup>15</sup> individuals, or victims of *qazef*, who claim to have been defamed are required to file a private criminal complaint with either the Public Prosecution or Criminal Police Officers who work under the supervision of the former pursuant to Article 25 of the Saudi Law of Criminal Procedure. Consider, for instance, Article 17 of the latter law, which provides that prosecution for offences that exclusively involve private interests, such as defamation, is generally to be prosecuted upon complaint only.<sup>16</sup> It should, however, be noted that a Public Prosecution under subarticle 3(5) is not concerned with repairing an injury that may have been done to an individual, but with exacting a penalty for the purposes of deterrence.

More importantly, *qazef* is defined under Islamic Sharia as containing words that cause harm to a person, regardless of whether this person is a natural or legal one, a private or public figure,<sup>17</sup> albeit the wording in many cases is extremely broad and may not be susceptible to exhaustive definition. A possible explanation for defining defamation as such, is the effect of Sharia or greater concern with preventing harm generally. Understandably, this definition would receive an interpretation that advances the overarching aims set out in Islamic Sharia, and a key aim is the prevention of harm.<sup>18</sup> But this is a misleading over-simplification. Indeed, as it stands, this broad definition is problematic not only in and of itself, but also in terms of the general standard it sets for defamation offences under subarticle 3(5) of the SACCL. For one thing, we can scarcely doubt that said definition is relatively easy to apply to multiple complex defamation cases and, more important, that it does not extend to include insult and disparagement, for example.

Quite surprisingly, Islamic Sharia is favourable to defamation complainants not only because a defamatory statement is presumed to be harmful, be it false or not,<sup>19</sup> but because defendants are held strictly liable if no affirmative defence is established. It is not necessary for a public prosecutor to prove that the defendant knew that the defamatory statement was false or even acted intentionally with respect to truth or falsity. On the contrary, the procedural requirement that a public prosecutor prove damage “has, as a practical matter”, made it necessary for the Public Prosecution to allege and prove harm, and from a realistic standpoint, has placed the burden of proving defamation on the Public Prosecution. That is to say that defamation does not entail an inquiry either into the defendant’s state of mind about the truth or falsity of the defamatory statement, nor into the defendant’s motives. Thus, the Saudi courts routinely hold that evidence of what is called “defamation” does by itself establish the intention on the part of the accused to cause harm to a person and inflict damage on that person, which Islamic law or the SACCL requires. This is unfortunate. Indeed, the strict liability and presumed harmful principles of Saudi law may threaten to ensnare, with criminal liability, persons whose statements may have been inaccurate, but were in no real sense highly blameworthy.

Undoubtedly, the SACCL is still relatively complainant friendly. In the United States, for example, where defamation of private figures is deemed tort (negligence or civil fault) by law, and where defamation cases are heard by a jury, not by a judge, there is generally no presumption that a defamatory statement is false. Rather, the falsity of the charge must be proved by the plaintiff. This makes it difficult for a libel or slander plaintiff to prevail under American law.<sup>20</sup> In Canada, the Supreme Court had also confirmed - in many defamation cases filed under Article 1457 of the Civil Code of Quebec - that the defendant’s good faith must always be presumed pursuant to Article 2805 of said code, and consequently, it is incumbent upon the plaintiff to prove fault (civil wrong).<sup>21</sup>

Comparatively, although French defamation law is, in practice, more lenient than in the US and Canada, it is predominantly a matter of criminal law and defamation is a criminal offence. Indeed, Art. R.621-1 of the

<sup>15</sup>The Saudi Law of Criminal Procedure sets out the rules and procedures regarding how cases are adjudicated by the criminal courts. The law offers certainty as to who can initiate a complaint and how this is to be done. It also details the evidential requirements, in accordance with Islamic law principles, and provides a clear procedure for processing cases before criminal courts, ensuring the reliability, fairness and integrity of the criminal process.

<sup>16</sup>Zaki Mohammad Shannak, Brief Study of the Saudi Law of Criminal Procedure, ALSHEGREY, 4<sup>th</sup> Ed. 2020, pp. 82-83.

<sup>17</sup>See, for instance, Abdul Kader Awda, *Islamic Criminal Law in comparison to codified laws*, p.353.

<sup>18</sup>Although the vast majority of instances of defamation do not result in litigation — perhaps because the scope of harm does not justify the cost of filing a complaint, however, where defamatory statements are rendered widely accessible on the Internet or social networks, or through text messages, the scope of harm may more often justify filing a complaint.

<sup>19</sup>Case No. 3435426 & 35223096, 25/04/1435 Hijri, in the Saudi Courts Reports, Volume 11, 1084, p.188.

<sup>20</sup>See, Vincent R. Johnson, *Ibid*, p.24.

<sup>21</sup>See, *Prud’homme v. Prud’homme*, 2002 SCC 85, [2002] 4 SCR 663, para.57, available at <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2029/index.do>

French Criminal Code, which prohibits “non-public defamation of private persons”, as well as Article 32 of the French Law of 29 July 1881 on the Freedom of the Press, which prohibits “public defamation of private figures”, impose criminal fines in respect of defamation offences. These provisions apply to professional journalists as well as to non-journalists. Whether defamation is punished by a fine of the first degree<sup>22</sup> according to Article 29 or maximum fine of €12,000 pursuant to Article 32 depends mainly on whether said defamation is deemed public or non-public.<sup>23</sup> But in some cases, defamation can be punished by imprisonment, up to one year, and a maximum fine of €45,000 – notably when the defamatory statement concerns the racial origin, colour or sexual orientation of a person or group of persons.

In any case, what is important to understand is that the above-mentioned French provisions expressly refer to Article 29 of the French Law of 29 July 1881 on the Freedom of the Press for the purposes of defining defamation of private figures. According to this article, defamation is defined as *any allegation or accusation of a fact that causes an attack on the honour or consideration of a person*. Statements that insinuate or imply certain meanings can also be found to have a defamatory meaning. However, a statement which does not contain any insinuation or imputation or accusation of a fact that causes an attack on the honour or consideration of a person, would be considered “disparagement”<sup>24</sup> in French defamation law, though it would be defensible in court.

Compared to the US and Canada, one notable similarity between French defamation provisions and subarticle 3(5) of the SACCL is that there is a presumption in French law that all defamatory statements are made with the “intention to cause harm” to the claimant and that all defamatory statements are made in “bad faith”. It might be thought to mean that defamation involves falsehood. False allegations or accusations of facts may cause harm to individuals. They can so quickly and completely destroy their good reputation.<sup>25</sup> A reputation tarnished by defamation can seldom regain its former lustre. The defendant is, however, entitled to prove under French Law that he or she didn’t act in bad faith. Indeed, since the defamation defendant bears the onus of demonstrating either his good faith or the veracity of his defamatory statement,<sup>26</sup> he can accordingly raise the defence of justification (truth) to prove that the defamatory words carried by the matter of which the plaintiff complains are true. Therefore, the question will be whether there is sufficient evidence to prove that the defamatory statement was in fact true. If the evidence is such that the contested statement might reasonably be true, then there is no realistic prospect of conviction and no charge (fine) should be brought under French Law.<sup>27</sup> And this is probably one of the most distinguishing features of French Defamation Law compared with subarticle 3(5) of the SACCL.

There remains an important practical question over when defamation causes of action may be pleaded alongside other causes of action. Indeed, defamation may also protect a person against humiliation, and from discrimination based on false facts in personal and professional relationships.<sup>28</sup> In this respect, however, it may be said that words which are used to hold the subject up to mockery and ridicule can be found to have a disparaging meaning, not a defamatory one as would be the case under subarticle 3(5) of the SACCL. Moreover, it would surely be wrong in our view to hold that any reputational damage, including personal humiliation, could only be the subject of a defamation action, simply because damage to reputation may

<sup>22</sup> Approximately €1500.

<sup>23</sup> Under French Law, public defamation is an offense when the defamatory words are made to several private persons who are not linked by a community of interest. By contrast, non-public defamation is a simple contravention which may occur when the defamatory words are made to a single private person, or to several private persons linked by a community of interest. Defamation on the Internet is essentially governed by the same principles as defamation by a traditional means of communication. For example, an open-access website is public, whereas an email addressed to a single person is private. *See*, regarding notable differences between public and non-public defamation, Supreme Court of France, Criminal Chamber, Cass.crim. February 7<sup>th</sup>, 2018, available at <https://www.legifrance.gouv.fr>. Also: <https://braun-avocat.com/en/defamation-and-communication-law/>

<sup>24</sup> known in French as *dénigrement*.

<sup>25</sup> *See*, First Degree Court of Marseille, TGI, 11A, Correctional Chamber, November 29<sup>th</sup>, 2016, available at <https://www.legalis.net/jurisprudences/diffamation/?page=3>

<sup>26</sup> known in French as “*l’exception de vérité or la bonne foi*”.

<sup>27</sup> *See*, Court of Appeal of Toulouse, 3<sup>rd</sup> Chamber, January 8<sup>th</sup>, 2020, N°7/2020 N° RG 19/02701 available at <https://www.legalis.net/jurisprudences/diffamation>; Supreme Court of France, Criminal Chamber, Cass.crim., March 15<sup>th</sup>, 2016, n° 14-87.237 available at: <https://www.legifrance.gouv.fr/juri/id/JURITEXT000032263279/>

<sup>28</sup> Nicole Moreham and Mark Warby, Tugendhat and Christie, *the Law of Privacy and the Media* (Oxford University Press, 3rd ed, 2016), p.351.

sometimes involve an infringement of privacy.<sup>29</sup> That is, where complainants do have a genuine privacy case, they are entitled to bring proceedings for violation of private information, rather than for defamation, on grounds of Article 3(4) of the SACCL.<sup>30</sup>

Out of necessity, this article relies solely on reported decisions<sup>31</sup> and does not claim to have captured every defamation decision. Regrettably, the vast majority of defamation cases are underrepresented and the number of reported cases is lower than one would expect based on the present article. There is also no efficient system of court reporting. Not to mention that the official *Saudi Courts Reports* are posted once every ten years on the Ministry of Justice website.<sup>32</sup> Yet, despite the appearance that the number of defamation cases is not significant in the KSA, this is probably not so.<sup>33</sup>

In the apprehension of defamation cases, which particularly arises in the context of communication technologies, the following case<sup>34</sup> is mentioned to illustrate a judge's misinterpretation of the challenged defamatory statement. The defendant was an acting supervisor at the Educational Supervision Centre in the Qatif district. While he was explaining the code of conduct to a group of newly recruited teachers during an online training session, the defendant referred to a disciplinary measure which was eventually taken against a teacher at the complainant's establishment.

Interestingly, the complainant did not claim that the defendant said anything defamatory, nor was it alleged that the defendant made direct reference to the complainant. Nevertheless, the complainant advanced that the defendant referred to his workplace by calling the listeners' attention to the alleged disciplinary measure, which was eventually taken against one teacher there, albeit without mentioning the name of the complainant. The latter did indeed at one point attempt to draw the judge's attention to the fact that all of the listeners knew that he was the only teacher who was working at the establishment at that time, and therefore, the court should exert control over the implied meaning of the challenged statement.<sup>35</sup> In other words, the complainant's argument was that the contested words were artfully arranged to create in the mind of the ordinary listener an association of ideas which would lead to the judgment that he (the complainant) was guilty of disciplinary action and reprehensible conduct, thereby making even the most impromptu words potentially damaging.

Admittedly, the complainant's alleged meaning does not bind the Court according to Article 158 of the Saudi Law of Criminal Procedure. Also, it would be difficult to quickly and cheaply establish whether or not someone has been defamed, as it is an incredibly complex area of law. However, courts should always be cautious when it comes to understanding the context of statements.

As part of his disposition on this case, the judge had to consider whether the challenged statement caused an appreciable harm to the complainant. The judge began by noting that the *status quo* relating to defamation in

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<sup>29</sup>In a case which was reported in a Saudi newspaper in 2021, it was conceded that the husband managed to install a program (application) on his wife's cell phone that allowed him to constantly view her text messages and other information. The judge surprisingly concluded that such conduct falls within the definition of malicious spyware, thereby falling within the scope of Subarticle 3(1) of the SACCL and not Subarticle 3(4) which prohibits violation of privacy. For more information, please go to <https://www.alhurra.com/saudi-arabia/2021/06/17>

<sup>30</sup>While there are ways in which these concepts overlap and some conduct can give rise to actions in both defamation and privacy, this should be much less of a concern than is sometimes suggested. Both actions involve personal interests, but they do not have the same aims. The principle that a complainant is entitled to bring a privacy complaint where reputation rights or interests are at stake was recognized in the following Case No: 34147100 & 35273714, 10/06/1435 Hijri, in the Saudi Courts Reports, Volume 11, 1084, p.206. However, from a German Law perspective, privacy and reputation rights are both aspects of more fundamental rights to human dignity and personal protection. See, EJ Eberle, Dignity and Liberty (Praeger, 2002) 98–109.

<sup>31</sup>The reported decisions effectively represent the Saudi Anti-Cyber Crime Law and Sharia — the body of law that courts primarily rely on when deciding defamation cases.

<sup>32</sup>[https://www.moj.gov.sa/ar/Ministry/Departments/ResearchCenter/Pages/MojPress\\_1435.aspx](https://www.moj.gov.sa/ar/Ministry/Departments/ResearchCenter/Pages/MojPress_1435.aspx)

<sup>33</sup><https://www.loc.gov/item/global-legal-monitor/2015-03-19/saudi-arabia-cyber-crime-conviction/>

<https://www.arabnews.com/saudi-arabia/news/823871>

and

<sup>34</sup>Case No. 34467326 & 35153242, 20/02/1435 Hijri, in the Saudi Courts Reports, Volume 11, 1084, p.166.

<sup>35</sup>Disagreement in the majority of cases generally centres around the test of meaning, because much of the argument between the parties would be focused on meaning. The argument over the meaning to be attributed to words is often a key element of a defamation action, although the determination of meaning is not an empirical exercise. The test deployed by the court is that of how the words would have been understood by the ordinary recipient. These would be matters ultimately to be decided by a judge who would be required to take all the circumstances of the case into account in making their assessment. The exercise of this discretion could be tightly controlled, however, by way of norm-setting, guidance from Islamic Sharia.



the KSA remains intact: the Public Prosecution showing that the defamatory words (1) refer to the complainant; (2) were expressed to a third party;<sup>36</sup> (3) tend to harm the complainant comes with the presumption of damage. Thus, the intention to do so may be inferred either from the verbal defamatory words or from the posting or publication of the defamatory statement should the latter be made in writing. If these three elements are established, Islamic Sharia (including subarticle 3(5) when applicable) presumes the words to be harmful, and that the complainant has suffered actual damages.<sup>37</sup>

Applying these elements to the facts at hand, the judge squarely ruled that *“though such a general statement may bring the teachers’ attention to the existence of a disciplinary measure against a teacher at the complainant’s establishment as a result of statutory violations, without more, it does not form an adequate basis on which to hold the defendant liable for the allegedly defamatory information. Nor would this general statement be susceptible to defamation action under Islamic Sharia.”*

The judge seamlessly supported his ruling by observing that although the second element of defamation was most likely provable, the Public Prosecution’s argument was in any event defeated by the lack of proof of two key elements of the alleged offence, that is, the first and third ones, which were most likely too far from being established. Indeed, criminal defamation is unlike civil fault as it requires a particular mental state, that of knowledge or intention, to be proved against the accused by way of inference (e.g., the intention is inferred from the online, verbal or written defamatory statement). Still, the defendant must have intended to write or to say verbally the words which contain the defamation. The defendant must also have intended to write or to say verbally the words which are alleged to be defamatory with the sole purpose of harming the reputation of the complainant, even without knowledge of whether these defamatory words were true or untrue. Absent the proof of these key elements of defamation, neither the Public Prosecution is capable of meeting its onus under Article 2 of the Implementing Regulation of the Law of Criminal Procedure, nor the defamation complainant can recover damages. In reaching this conclusion, the judge dismissed the case on the grounds that the defendant had used general words which did not directly refer to the defendant, but also because the Public Prosecution could not prove an intention to cause harm to the complainant on the part of the defendant. In short, it was a mystery to the judge why the defendant should be sentenced.

At first glance, the approach of the judge seems to be sound, since there was no direct evidence in the record of this case suggesting that the defendant himself knew of, much less intended, the defamatory meaning. Also, there was not enough of a clear causal link between the challenged statement and the alleged harm. However, the judge escaped answers and that is where the position illogically rests. Of course, the defendant didn’t say explicitly that the complainant had been removed from his establishment as a result of a disciplinary measure. However, that does not detract from the point that anyone hearing the statement would come away with that impression. Indeed, an argument could be made that the disciplinary transfer from one establishment to another in a different local authority is only used where dismissal is unwarranted, that is to say if the teacher deliberately violates statutory rules or commits a criminal offence. We believe that the trial judge should have given far more attention to this question.

Although the offence of defamation recognises natural and ordinary meaning of the words, however, this must not be limited to the literal and obvious meaning and may include any inference which the ordinary, reasonable reader or listener would draw from the statement. Indeed, a mere insinuation is as legally actionable as a positive assertion if it is false, harmful and damaging and the meaning is clear. The test of meaning is an objective test in what an ordinary listener or reader would understand the words to mean.

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<sup>36</sup>Because third-party witnesses may be called to testify in court. However, it is important to bear in mind that the number and gender of witnesses (male/female) may vary depending on the type of defamation (false accusation of adultery or other). For instance, under Islamic Sharia, the Public Prosecution would be faced with the burden of offering 4 witnesses (excluding women and non-Muslims) to the offence of adultery. See, Abdul Kader Awda, *Ibid*, p.318.

<sup>37</sup>The traditional goals of defamation actions under Islamic Sharia are compensating the complainants for the harm they have suffered and signalling to defendants that their behaviour fell below an acceptable standard. Therefore, it is not an unreasonable assumption that any harm caused to a person might be in large part addressed through monetary damages. The amount of actual damages to be awarded for defamation is assessed by the court to compensate the complainant for the harmful statement. It would appear that the Saudi Regulator specifically left the assessment of damages to the judge in defamation actions. Damages are at large and are meant to both compensate complainants and vindicate their reputations. They are meant to reflect the conduct of the defendant and the extent of reputational harm to the complainant. See, Raymond Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States*, 2nd ed. (Toronto: Thomson Reuters Canada, 2017) (loose-leaf updated 2016, release 1), ch. 25 at 36 [Brown, On Defamation].

Dismissing complaints based on defamatory implications penalises the complainant for the defendant's artfulness and undermines state interests in preventing harm caused to individuals. Allowing complaints of defamation by implication will accord proper weight to reputational concerns and calibrate the current imbalance that favours defendants.<sup>38</sup>

### 1.2 Extending defamation offences to include insult under subarticle 3(5)

While Islamic Sharia has general provisions about which there can be no disagreement, in a few cases there is bound to be debate as to whether subarticle 3(5) of the SACCL fits the category of insult or not.

Impinging on the problem is the broad definition of defamation under Islamic Sharia, which provides that *qazef* (defamation) may also contain insulting words (*Sab wa Shatem*) that cause harm to a person, regardless of whether this person is a natural or legal one, a private or public figure. Clearly, this suggests that judges may blur the essential distinction between defamation and insult, so long as the Saudi Regulator does not purport to provide a clearer definition of these two different offences in subarticle 3(5) of the SACCL. In some cases, the broad language used ("cause harm/damage") suggests that liability could conceivably extend to offensive content. In other instances, the objective content focuses primarily on reputational harm, but appears to leave the way clear for other uses. A lack of court practice further complicates categorisation. Consequently, words that are merely vulgar insults are usually found to be defamatory,<sup>39</sup> thus allowing complainants to sue for defamation and claim damages on the grounds of subarticle 3(5) of the SACCL, which is somewhat surprising.<sup>40</sup>

Indeed, there seems no good reason why a complainant or a public prosecutor should not choose between insult and defamation – unless perhaps it is well established that the offence of insult is wholly made-up when the object of the suit is to protect reputation. But that will rarely be the case. Therefore, it can be surmised that defamation and insult are largely separate, even though both connect with harm concerns from an Islamic Sharia perspective.

Under French Law, e.g., both subarticle R.621-2 of the French Criminal Code, which punishes "unprovoked non-public insult of private persons", and Article 32 of the French Law of 29 July 1881 on the Freedom of the Press, which prohibits "public insult of private figures", refer to subarticle 29(2) of the latter law for the purposes of defining insult. According to this subarticle 29(2), insult is defined as "*any offensive expression, scornful word, or invective that does not contain the accusation of a fact*". Although the wording is vague, there is no doubt that the distinction between defamation and insult is commonly one of specific accusations versus offensive expressions that may, in court practice, resemble the facts/value judgments dichotomy.<sup>41</sup> Indeed, insult protects highly subjective concepts such as "honour", "consideration" and "reputation", whereas defamation should only be concerned with false facts. Recognizing this difference leads to the suggestion that there is a certain incongruity in expanding defamation offences to insult under subarticle 3(5) of the SACCL.

The following case<sup>42</sup> is mentioned to illustrate the ease with which defamation and insult can be communicated and spread online. The complainant filed a private criminal complaint with the Qatif police under Article 16 of the Saudi Law of Criminal Procedure, attempting to hold the defendant liable for sending

<sup>38</sup>Nicole Alexandra LaBarbera, *The Art of Insinuation: Defamation by Implication*, 58 Fordham L. Rev., p. 703, 677 (1990). Available at: <https://ir.lawnet.fordham.edu/flr/vol58/iss4/4>

<sup>39</sup>Abdul Kader Awda, *Ibid*, p.353.

<sup>40</sup>See, from a comparative perspective, Hilary Young, "Adding Insult to Injury in Assessing Damages for Corporate Defamation" (2013) 21 Tort L Rev p.127.

<sup>41</sup>Unlike Saudi law, French law distinguishes two different types of libel: defamation proper, the imputation or allegation of a fact that damages the reputation of a person or an institution; and insults, which do not contain the imputation or allegation of a fact. Claimants must choose the legal ground on which they act. If he or she mischaracterises a claim, it will be dismissed (See, Cass.Ass.Plen, n°11-14.637, February 13<sup>th</sup>, 2013, available at <https://www.courdecassation.fr/decision/613ff39831486840f12516da> and Cass. crim., December 7<sup>th</sup>, 2010, n°10-81.984, F-P+B available at <https://www.lexbase.fr/article-juridique/3900701-jurisprudence-distinction-de-la-diffamation-et-de-l-injure-la-diffamation-suppose-l-imputation-d-un>). The reason for this? The possibility of proving truth. A defamatory statement can be proven true; an insulting statement cannot be proven because it doesn't contain the imputation or allegation of a fact. Saying someone is "a dirty pig" is an insult. It can't be proven true. Saying someone "harasses employees in the workplace" is defamation. It can be proven.

<sup>42</sup>Case No. 3521012 & 35239597, 11/05/1435 Hijri, in the Saudi Courts Reports, Volume 11, 1084, p.268.

emails of defamatory content to his mailbox. On being questioned about these criminal charges, the defendant did indeed confess to sending these messages to the complainant. However, the defendant's argument was put in two ways, though it is clear that both were alternative ones. The first was that the complainant made regular visits to the defendant's marital home to meet the latter's wife, without his consent, while he was away from home. The second that the purpose of addressing these words to the complainant was legitimately justified as it was only to deter him from visiting the defendant's wife at their conjugal home, without more.

Clearly, the general manner in which the defendant presented his case was irrelevant. The following paragraph included the defamatory words, which became the centrepiece of this litigation:

*If you were a man, you would not talk to married women, you're such an adulterer...the stupidity is contagious in your family and it obviously arises from a family stupid gene...how quickly you forgot the girls you hanged out with, son of a dog, where did you get the money to buy the truck and the car, obviously from smuggling...you're such a fool, donkey, son of a donkey [...].*

The trial judge built upon the defamatory statement being challenged, noting that not only was this message defamatory on its face,<sup>43</sup> but it was also sent repeatedly and simultaneously to both the complainant and his friends and work colleagues. Admittedly, it is not necessary for the defamatory statement to be known to a large group of people to have sufficient grounds to become a legal case. Nor would it be necessary that the defamatory statement be made in an open and direct way to the affected person.<sup>44</sup>

Oddly, the judge ascertained that the defendant's words were made in language that portrayed the complainant in the worst possible light. This was neither necessary nor appropriate in the circumstances, notably in view of evidence which showed the defendant's wife was also the complainant's aunt. While it was not necessary to characterize the defendant's conduct as amounting to insult and disparagement, it was conceded that the Public Prosecution had successfully met his onus under Article 2(2), of the Implementing Regulation of the Law of Criminal Procedure, by proving an intention on the part of the defendant to cause harm and inflict damage on the complainant. The judge's ruling clearly established that, as a result of this being shown, the defendant was held liable for defamation on the grounds of reputational harm.

While this defamation action arose in the context of communication technologies, the elements of a traditional defamation under Islamic Sharia still applied. However, it was unclear whether this case alleged insult or defamation. Apparently, no question of disparagement or insult was raised and the cause proceeded to judgement on the assumption by all parties and the court itself that the contested words amounted only to defamation. Thus, given the greater potential harm from defamation, all things being equal, and perhaps the better availability of evidence of defamation than insult, it is unsurprising to see that the trial judge focused on defamation. That would also explain why the defendant was finally sentenced to 80 lashes on grounds of false accusation of adultery, and a two-month imprisonment with a fine of up to 5000 SAR pursuant to subarticle 3(5) of the SACCL.

## **2. The significant imbalance in the parties' competing rights**

More problematic is whether the parties' competing rights have been balanced in defamation actions under the SACCL. It cannot be doubted that the defamation cases inevitably force the balancing of the right to protection from harm and the right to a full defence bearing in mind that both should carry equal weight. The value of the latter is explicitly enshrined in the Saudi Law of Criminal Procedure and Law of Civil Procedure.

The impetus behind the Law of Criminal Procedure was a recalibration of the balance between the parties' competing and procedural rights. That is, the rationale behind this balancing exercise is that both the Saudi Law of Criminal Procedure and its Implementing Regulation impose duties on courts with respect to the rights of defence. Therefore, the negation of these rights does not resonate with the Law of Criminal

<sup>43</sup>In common law jurisdictions, such as the USA, when libel (defamation) is clear on its face, without the need for any explanatory matter, it is called libel *per se*.

<sup>44</sup>Abdul Kader Awda, *Ibid*, p.370.

Procedure's stated intention of balancing the parties' rights. Consider, for instance, Article 180 of the latter law and Article 129 of the Implementing Regulation, the former states that "*Any judgment rendered on the subject matter of a criminal action shall decide the claims of private right and the claims of the accused, [...].*"

Reading it solely, this provision appears to suggest that the evidentiary requirements should loom large in pragmatic balancing. In deciding whether to accept a defamation action, the Court is in any case bound by law to balance the interests of all parties by weighing the complainant's right to protection of reputation against the right of the defendant to a complete defence. The idea of balancing competing rights will not be pushed to the point that the right to protection from harm is bound by specific rules, notably Sharia's provisions and subarticle 3(5) of the SACCL, that would negate the rights of defence and defeat the proper and just objectives of the Law of Criminal Procedure. Therefore, the principal question to be answered here is whether the existing subarticle 3(5) is worthy of striking an appropriate balance between two rights vital to a fair trial.

When the question, '*What fundamental rule is the SACCL applying when it permits defamatory statements to be actionable and punishable on grounds of subarticle 3(5) even if proved true?*' is put, the answer lies more in Islamic Sharia fulfilling its role of banning harmful statements and acts. As a consequence, neither subarticle 3(5) nor the Sharia provisions on *qazef* (defamation) require a careful balance to adjudicate the right to protection of reputation and the right to a complete defence in such a way that would fully respect the importance of both sets of rights.

In this fashion, the Saudi courts have only routinely accepted the "vital" value Islamic Sharia places on preventing harm in defamation proceedings. They have stated on many occasions that a hierarchical approach to rights which places some over others must be applied, both when interpreting Sharia and when applying subarticle 3(5) of the SACCL. It may be inferred from these decisions that the protection given to victims of harm (*defamation*) accords with a more sophisticated appreciation of the values of Sharia and is therefore more worthy of legal recognition than the rights of defamation defendants. Summarizing Saudi's defamation jurisprudence is therefore confined to this doctrine, which is unfortunate. Indeed, the importance of weighing competing rights equally requires that the Court conducts a sensitive analysis of all relevant facts, with a view to arriving at a balanced approach evincing respect for all relevant rights.

Regrettably, the reason a defendant is quite often found liable is most likely due, in large part, to the limited toolkit of defences available to defamation defendants under the SACCL and Islamic Sharia. Just as Sharia provisions on *qazef* provide for limitations on the rights of defence, excluding adultery,<sup>45</sup> so too does subarticle 3(5) of the SACCL with its unreasonable negations of these rights which cannot be demonstrably justified from a procedural perspective. That is to say, in order for the defendant to avail herself or himself of a successful defence in a defamation action, she or he must satisfy the onus of demonstrating that the complainant committed a sin within the proper meaning of Islamic Sharia.<sup>46</sup> To do so would mean the

<sup>45</sup>Since adultery is a boundary crime (*hudud*) in the KSA (*see, infra*, 14), a person accused of defamation on grounds of adultery may have four types of defence: a) he may argue that the subject of the defamatory statement has confessed to adultery, by offering two witnesses (two male) or (1 male and two women), provided that these witnesses are Muslims; b) he may also deny defamation by offering an unlimited number of witnesses comprised of Muslim men and women; c) he may confess to defamation and be capable of proving the veracity of her or his defamatory statement, by offering four Muslim witnesses, excluding himself; d) finally, should the defamer be the husband of the defamed (spouse), he may offer four Muslim witnesses for the purpose of proving adultery against his wife. *See*, with regard to the toolkit of defences to adultery under Islamic Sharia, Abdul Kader Awda, *Ibid*, p.379.

<sup>46</sup>For many religions, including Islam, Christianity and Judaism, sin is a very common aspect of faith. A sin is considered any act committed by a person that goes against the Law of God, also known as Divine Law. What counts as a sin depends on the religion one follows. For example, in Islam, it is a sin to drink alcohol, whereas, in Christianity, believers often drink red wine as part of holy communion. Other sins may be the same across different religions. For example, in Christianity, Judaism and Islam, theft is a sin. However, the key major sins of Islam which followers consider to be immoral are: 1) Associating others with God (shirk or polytheism) – in other words, to believe that there is another God other than Allah (Allah is the one and only God. This means that Islam is a monotheistic religion) or to lose hope or faith in Allah and to believe that Allah would not save one on the day of Judgement; 2) Murder; 3) sexual relationships between unmarried man and woman or committing adultery or fornication; 4) Theft; 5) Consuming usury (interest); 6) Stealing from an orphan's estate; 7) Bearing false witness; 8) Engaging in magic or fortune-telling; 9) Abandoning the battlefield during a time of war; 10) Drinking alcohol; 11) Slandering chaste women; 12) Disrespecting one's parents; 13) Homosexuality for both men and women; 14) To withhold Zakat; 15) Gambling money is considered immoral; 16) Neglecting or refusing to pray is a major sin, alongside any other obligatory act for God, known as *wajib*. As for the minor sins in Islam, it is difficult to list them. However, they include anything which violates Allah's guidance, which is not in itself a Major sin. Some of the most

defendant must show that the complainant committed adultery or any other offence that is deemed a sin in Islam. She or he can accordingly not justify the defamatory statement by simply proving that it was true and factually founded, but only by proving that the complainant committed a sin, although it must be noted that it is generally considerably hard, if not impossible, to satisfy this onus and to initiate this type of defence if the complainant did not commit any sin within the religious meaning of Islamic Sharia. Arguing the defendant (defamer) should be criminally liable under subarticle 3(5) in circumstances falling outside the ambit of sinful acts (supposedly committed by the person defamed) is usually not a viable option. Therefore, it is fair to say that there is disagreement not only on whether, but also on how to avail oneself of such a defence in a defamation action.

Likewise, as it seems, the only available type of defence at present - in which the defamation defendant introduces evidence which, if found to be credible, will not negate criminal liability for the reasons mentioned above<sup>47</sup> - can be regarded as setting the breadth of the complainant-friendly defamation jurisprudence in the KSA. A fair inference is that this situation is unsatisfactory as there could be a potential injustice if a complainant is allowed to sue for defamation and claim damages under subarticle 3(5) of the SACCL, whereas the defendant is left without an effective defence. There might, therefore, be good reason for concern. Indeed, the fact that the successful defence is in any case grounded in proof of sin lends support to the view that even if a defamatory statement is true and factually founded, this does not warrant an exemption from punishment for defamation under subarticle 3(5) of the SACCL, as long as the person defamed did not commit a sin according to Islamic Sharia.<sup>48</sup>

In this regard, one may wonder whether the poor quality of a supplier's services or products, if proved true by the defamer, falls within the purview of sinful acts under the Islamic law. Is the veracity of that defamatory statement not reasonably sufficient to provide an absolute defence to the defamation action in such instances? We strongly believe that, in all prosecutions for defamation under subarticle 3(5) of the SACCL, the truth of the defamatory statement should be admitted as evidence. It should be a defence to be pleaded to a charge of criminal defamation if it is found that such a matter was true.<sup>49</sup> Shifting the burden of proof onto the party asserting the truth of the defamatory statement, in cases where a proof of sin is difficult to pin-down, is a matter of procedural rights.<sup>50</sup>

While little case law related to defamation is available at present, the following case<sup>51</sup> highlights just how much is at stake when subarticle 3(5) of the SACCL pits protection from reputational harm against the right to a full defence. The relevant facts of the case can be summarized as follows: A Saudi hospital employee was accused of online defamation by virtue of subarticle 3(5) of the SACCL after posting a defamatory statement about a celebration (wedding) room on an open Facebook page. The post contained photos taken from the celebration room where the defendant was celebrating the wedding of a relative. Alongside the posting were publicly accessible photos showing cockroaches in the guests' meals during the wedding. These photos instantaneously brought comments from many people to which the defendant eventually replied by referring to the location name. Shortly thereafter, the owner of the celebration room in question filed a

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common behaviours include: 1) Breach of a promise that one has made; 2) Being immodest (flirting, watching obscene movies/TV, etc.); 3) Being suspicious or spying on others; 4) Name-calling or bullying another person; 5) Talking excessively about things which are not one's business; 6) Swearing, and so on. See, *what Islam teaches about sin*, Huda, April 29<sup>th</sup>, 2019, available at <https://www.learnreligions.com/sin-in-islam-2004092>.

<sup>47</sup> I.e., the defamatory statement is true and factually founded, but the subject of the statement did not commit a sin.

<sup>48</sup> Abdul Kader Awda, *Ibid*, p.353.

<sup>49</sup> Indeed, a defendant must be able to assert certain privileges as a defence to defamation. One of these is truth, meaning that if a defendant can show that his or her statement is true, by definition it cannot be defamatory. Under Pennsylvania law, for example, truth is an absolute defence to a commercial disparagement claim, unless the plaintiff can establish that the defendant acted with actual malice and knowledge of the falsity. Similarly, under Michigan defamation law, a business defamation claim consists of several elements: 1) the statement is false; 2) defamatory; 3) about the plaintiff's business; 4) made to a third party; 5) negligent; 6) the business suffered damage.

<sup>50</sup> Under French Law, e.g., the veracity of the defamatory statement, made by private figures, can be established pursuant to Subarticle 35 of the French Law of 29 July 1881 on the Freedom of the Press. French courts, however, will accept a defamation defence based on a claim of truth only if the proof submitted by the defendant is considered full, complete and entirely correlated to all the material elements of a defamatory statement. The evidence must, moreover, be contemporaneous to publication/postings. The test of truth is, therefore, rigorous in France. But, although in France truth, like the English common law defence of truth in the *UK Defamation Act of 2013*, is a general defence to an action for defamation, it is not admissible as a defence if the facts concern a person's privacy.

<sup>51</sup> Case No. 34213166 & 35152634, 19/02/1435 Hijri, in the Saudi Courts Reports, Volume 11, 1084, p.273.

complaint under Article 16 of the Saudi Law of Criminal Procedure, alleging that his personal reputation as well as that of his business (celebration room rental) were unfairly traduced and harmed.<sup>52</sup>

It is no surprise that due to its back and forth character, Facebook provides an opportunity for each individual to respond to defamatory comments or postings before the same Facebookers in an immediate or a relatively contemporaneous time frame. Arguably, references to the name of the celebration room would lead all persons reading, liking and sharing the comments to decide not to rent that celebration room in the future. However, presumably this would not be taken as proof of actual damages, nor would it account for the fact that the complainant's business suffered economic loss. The complainant must show that the defamatory posting or statement has caused or is likely to cause serious economic loss.<sup>53</sup> Decline in revenue (if any) might not be actionable as causation is difficult to prove without detailed expert testimony or documentary evidence.

In any event, it may be worth stating directly that while a defamatory statement of a celebration room rental might be thought to harm reputation, it could well be argued that factually false material (photos) or allegations (if any are conveyed by the statement) is what should form the basis of an action for defamation. Moreover, it may be misleading to consider the statement of fact as one of comment. The latter, as distinguished from a statement of fact, is characterized by an element of subjectivity generally incapable of proof, while a statement of fact is capable of being determined to be accurate or not. Comment most commonly includes expressions of opinion but may also extend to inferences of fact which are inherently debatable on the facts of the case.<sup>54</sup> While every case will be extremely fact sensitive, it could be argued that defamation should only be brought when a person deliberately sets out to defame another in a transparent desire to inflict damage on that person, be it a natural or legal person, a public or private figure.

Turning back to the Saudi case at issue, although it was conceded that the photos and defamatory statement complained of were authenticated and proven to be true, and that the accused had confessed to posting them on Facebook, the trial judge specifically found on the evidence before him that all acts of investigation, including interrogation sessions, were carried out by the police<sup>55</sup> contrary to the provisions of Article 15 of the SACCL.<sup>56</sup> Based on these findings, the judge dismissed the case on grounds of trial nullity pursuant to Article 191 of the Saudi Law of Criminal Procedure, which states that “[i]f the court finds an unrectifiable material defect in the action, it shall dismiss the case. Said dismissal shall not preclude refiling the case if legal requirements are satisfied.”

It is not surprising that the judge concluded that even where persuasive evidence was obtained legally, properly and fairly, the defamation case may still be completely discontinued on grounds of trial nullity under Article 191 of the Saudi Law of Criminal Procedure, should the onus resting upon the Public Prosecution to investigate the facts by itself not have been met; nor that the SACCL would require a decision that the judge

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<sup>52</sup>Where a defamatory statement is totally unlawful and harmful, a criminal action will lie. This is even more so in cases of online defamation on Facebook since the comments posted have the potential to remain viewable for a long time and in some cases have the potential to go viral, being viewed and shared repeatedly on various Facebook walls.

<sup>53</sup>See, from a comparative perspective, Section 1 of the UK Defamation Act 2013 (the “serious harm requirement”) which restricts the ability of claimants (including businesses/companies) to sue for defamation. Serious financial loss needs to be shown.

<sup>54</sup>The defence of honest opinion in some of the western jurisdictions, which is similar to the defence of “fair Comment” at common law, requires the defendant to prove that the matter was an expression of opinion, not a statement of fact. The defendant also needs to prove that the opinion is related to a matter of public interest and is based on material that is substantially true. For instance, in 2012, a restaurant owner in Ottawa (Canada) was sentenced to 90 days in jail for libelling (defaming) a woman who posted bad reviews of the restaurant online. The restaurant owner retaliated through various measures including “sending lewd emails” to the woman’s boss and setting up a face account under her name on an “adult dating site”. The court reportedly also ordered the restaurant owner to take an anger management course, undergo counselling and perform 200 hours of community service. See, CBC, 16 November 2012, <http://www.cbc.ca/news/canada/ottawa/cyberbullying-restaurant-owner-gets-90-days-in-jail-1.1297395>.

<sup>55</sup>Or the so-called Criminal Police Officers as denoted in Articles 24 and 26 of the Saudi Law of Criminal Procedure.

<sup>56</sup>Article 15 of the SACCL states that “the Bureau of Investigation and Public Prosecution shall carry out the investigation and prosecution of crimes stipulated in this law”. Therefore, it is notable that the Public Prosecution did not advance a comprehensive and tenable argument as to why all acts of investigation could only have been undertaken and conducted by the police. Instead, the Public Prosecution surprisingly pleaded Article 66 of the Saudi Law of Criminal Procedure which authorizes public investigators to request the police to perform some specific acts of investigation by themselves. In rejecting the submission that the wording of Article 66 of the Saudi Law of Criminal Procedure should be read as authorizing public investigators to request the police to perform some specific acts of investigation by themselves, the Court correctly held that the onus rests on the Public Prosecution to investigate the facts by itself.

regards as grossly unjust and somehow within his official competence to avoid; nor that the resolution of the problem, as espoused by the judge in the case at hand, represents a practical approach. On the contrary, the judge has just deliberated somewhat in applying the law properly. His decision gives full expression to the existing rule of procedure contained in Article 15 of the SACCL upon which he merely rested his position.

What is surprising is that, apart from the contention that the case was unsound and unable to proceed any further in view of the lack of Public Prosecution involvement in the criminal investigations, there was absolutely no way that the trial judge was going to be capable of acquitting the accused on grounds of true facts that were factually founded, simply because neither Islamic Sharia nor subarticle 3(5) of the SACCL entitled him to do so. This is where the great anomaly comes, in our opinion. Notably, the trial judge upheld that the evidence obtained against the defendant would have been admitted in court had it been collected by the designated prosecuting authority under Article 15 of the SACCL, to which the Saudi Regulator had specifically assigned the responsibility with respect to the entire pre-trial stage, including criminal investigations.

Thus, so far as the mandatory requirement set forth in Article 15 of the SACCL is concerned, the question remaining: would the trial outcome – and arguably the outcome on the facts – have been different and more successful in the present case if the Public Prosecution had performed all acts of investigation by itself? This question is borne out by the fact that the defamation action was really standing in here for defamation proceedings which would probably have succeeded if all acts of investigation have been properly undertaken by the Public Prosecution. It would therefore stand to reason that subarticle 3(5) of the SACCL undermines the right to a complete defence. Of course, there is no need to elaborate on this question, however, since it does not arise in the facts of this case. It is sufficient to observe that this anomaly should be a good argument for balancing competing rights in the future. Regrettably, the absence of a fair balance struck between two competing rights - on the one hand the protection of individuals from harmful statements and on the other the right to a full defence - will result in having the trial outcome affected for a great variety of cases that may arise in the future.

### **Conclusion**

The present paper has raised several interesting questions/concerns. First, it reveals that the flip side of the generality of subarticle 3(5) of the SACCL makes it an incomplete text, which could affect the outcome of a variety of cases which may arise in the future. When a legal provision is incomplete, it cannot be applied to cases without clarifying the meaning of its entire terms. This requires that the provision is self-explanatory, i.e., that every addressee agrees to the meaning of its terms and, by implication, that there is no need for interpreting said terms. Otherwise, a provision is incomplete, that is, some of the relevant terms remain ambiguous or overbroad. The basic premise is that subarticle 3(5) is inherently incomplete and that this has important implications for public prosecutors and trial judges.

Second, the paper shows that the chilling effect of subarticle 3(5) of the SACCL is well-attested on the rights of defence. While arguments have been brought that subarticle 3(5) poses no hurdle to the exercise of these rights, this paper offers evidence to the contrary by showing that said provision continues to put the rights of defence at stake. The Saudi Regulator appears to have taken the middle ground in that he had clearly remained conspicuously silent on the rights of defence in subarticle 3(5) of the SACCL. This silence, as has already been noted, signals an implicit refusal to formally accommodate defamation defendants, and it also suggests that the Regulator implicitly negates the right to a full defence, particularly in cases where the subject of the defamatory statements appears not to have committed sinful acts within the proper meaning of Islamic Sharia.

Therefore, and in order to prevent unwieldy and undesirable results, the paper suggests that tools found within the Law of Criminal Procedure itself will play a large role in balancing potential competing rights. The paper also recommends that the Saudi Regulator should seek a “reconciliation” of competing rights, not a hierarchy of rights. Reconciliation of both sets of rights will not shift the burden of proof in future defamation cases, since the defendant will still be faced with the presumption of falsity and the requirement to prove the veracity or justification of his defamatory statement with supporting evidence. In other words, only if a complete defence is exercised by defamation defendants will the presumption of intention be displaced. These criteria also work to ensure a fair and proportionate balancing of rights because they build-in several hurdles that defamation defendants must overcome if they wish to employ their defence.

As things stand, however, aside from the “harm” threshold set out in Islamic Sharia or the “damage” threshold set out in subarticle 3(5) of the SACCL, it might be said that the latter has proved relatively controversial. Our analysis leads to the conclusion that any future alteration or possible amendment to strike an appropriate balance between the right to protection of reputation and the right of defamation defendants to a complete defence will ultimately depend on legislation action. Doing so would amend subarticle 3(5) in a manner that complies with the Saudi Law of Criminal Procedure’s stated intention of balancing the parties’ competing and procedural rights. However, the Saudi Anti-Cyber Crime Law may find it hard to proceed along these lines, because defamation provisions owe their forms to Islamic Sharia.