

Module 5: Defamation

Litigating Digital Rights and Freedom of Expression Online

Overview

- Defamation laws can provide a genuine remedy to those whose reputations were unjustly harmed due to falsehoods.
- But despite having a legitimate purpose, defamation is often applied unjustly as a means to stifle expression.
- Rights concerns often raised by defamation proceedings include:
 - Their application for improper purposes (for example, to target humorous or political commentary).
 - The often inadequate provision for appropriate defences (such as the defences of truth or reasonable publication).
 - Disproportionately harsh damage awards, or imprisonment or fines that can have a chilling effect on freedom of expression.
 - The growth of Strategic Lawsuits Against Public Participation (SLAPP) defamation suits by powerful actors to silence or intimidate those who criticise them.

What is Defamation?

- Defamation is defined as a false statement of fact that is harmful to one's reputation; it has been recorded as a legal cause of action since the Roman Empire.
- The legal basis for defamation is enshrined in international law under Article 17 of the ICCPR, which provides for protection against unlawful attacks on a person's honour and reputation, and Article 19(3) of the ICCPR, which includes the reputation of others as a legitimate ground for restricting freedom of expression.

The Right to Protection Against Attacks on Reputation

- Article 12 of the Universal Declaration on Human Rights and Article 17 of the ICCPR outline the international right to protect oneself from attacks on one's reputation, which includes a right to a remedy under the law in the case of such attacks.
- As such, it is necessary for legal regimes to strike a balance between allowing a remedy in cases of defamation, and adequately protecting the right to freedom of expression, free from legal and judicial harassment.

Criminal Defamation

- While historically prevalent and still maintained in many jurisdictions today, under international law criminal penalties for defamation are disproportionate and impermissibly chill freedom of expression.
- “States Parties should consider the decriminalisation of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty”. -- UN Human Rights Committee, General Comment 34
- Where criminal defamation laws are maintained they should include the following safeguards: proof beyond a reasonable doubt, a requirement of *mens rea*, truth as an absolute defence, and prohibitions on imprisonment or revocation of rights as punishments.

Problems of criminal defamation

- Criminal → who decides? Prosecutors.
 - Prosecutors are under budgetary and personnel control of elected officials.
 - Subject to abuse by authoritarian governments
- Criminal → risk of incarceration
 - Reputation vs. bodily freedom
- Criminal → search and seizure
 - Reputation vs. privacy

Civil Defamation

- Although necessary to protect reputation, civil defamation laws can also unjustifiably restrict freedom of expression, for example, by punishing criticism of leaders or imposing unduly harsh sanctions.
- Because punitive damage awards have a chilling effect on expression, remedies should be focussed on repairing the harm done, including through other measures such as the publication of an apology or correction.
- According to the 2000 Joint Declaration from the international mandates on freedom of expression, in addition to truth, it should be a defence to show that it was reasonable to publish the statement.

Truth Defense to Defamation

- Many jurisdictions, in line with international standards, have truth as an absolute defence to defamation, some require that even true statements also be in the public interest.
- In contrast, some jurisdictions protect false statements against defamation liability if they were not published recklessly. (See *Rajagopal & Anor v. State of Tamil*, Supreme Court of India).
- International law recognises that, even for false statements, the reasonable publication of statements on matters of public concern, such as in cases involving criticism of public officials, should be protected.

Online Defamation

- Online communications raise new challenges in the area of defamation law such as who should be liable as a publisher and how to provide an adequate remedy where defamatory content is difficult or impossible to remove.
- Another novel issue is whether providing hyperlinks to defamatory content should attract liability (See *Magyar Jeti Zrt v. Hungary* by the European Court of Human Rights and *Crookes v. Newton* by the Supreme Court of Canada for differing approaches to this issue).
- In addition to defamation cases, online harassment of journalists, particularly female journalists, is a non-legal form of suppressing dissent that has been fueled by the rise of social media.

Types of Defamatory Statements

Under international law certain kinds of content should not be considered defamatory due to the chilling effects that would have on freedom of expression. These forms of expression include:

1. Opinions:

- humour/satire should be considered an opinion for the sake of defamation claims.

2. Journalists reporting (reliable) statements of others

3. Privileged statements:

- Statements from the legislature/judiciary are generally absolutely privileged
- Some other statements, such as reporting crimes to the police, enjoy qualified privilege (i.e. they are protected unless made maliciously).

Problematic Trends in Defamation Claims

- *SLAPP Suits*: Strategic Lawsuits against Public Participation
 - ❖ Cases designed to bury critics under expensive and lengthy litigation, often brought by large corporations or other powerful actors to avoid criticism.
 - ❖ Some courts have countered this by finding against the plaintiff (for example, the Malaysian Federal Court in *Raub Australian Gold Mining Sdn Bhd v. Hue Shieh Lee*), while other jurisdictions (for example some Canadian provinces), have enacted anti-SLAPP legislation that allow for expedited procedures for dismissing SLAPPs in the early stages of litigation.
- *Protection of Officials*
 - ❖ Common in Asia, some defamation laws impose special sanctions for criticism of the government or officials. For example, Thailand's notoriously strict *Lèse-majesté* laws provide for lengthy prison sentences for insulting the royal family.
 - ❖ Special protection for officials is a clear violation of freedom of expression; the UN Human Rights Committee and regional human rights courts have found that public officials should receive *less* protection under defamation laws as a result of the public interest in openly criticising government officials and policies.

Insult law

- General insult law and head-of-state insult law
- Defamation requires a factual allegation. Fact v. Opinion significant.
- Insult law does not even require that.
- General Comment 34: defamation only on “statements subject to verification”
- What does insult law protect? Reputation?
- Cohen (US Supt Ct): Speech conveys feelings. Some feelings are delivered only by certain words. Suppression of those words suppresses those feelings.
- Constitutional challenge ripe

Conclusion

- Civil defamation laws provide important protection for reputation and can be consistent with international law if they strike an appropriate balance between protecting reputation and upholding freedom of expression. Criminal defamation laws are generally considered disproportionate and should at a very minimum not provide for custodial sentences.
- In addition, whether in the civil or criminal context, appropriate defences, such as proof of truth and reasonable publication, should always be available and damage award should be proportionate and designed to remedy the harm rather than punish.
- By bringing defamation laws into line with the principles set out above, governments can prevent those laws from having a chilling effect on freedom of expression.