

Defamation Law

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Key words: defamation law, freedom of expression, the right to reputation, defamatory statement, Internet defamation, satire, defamation of public figures.

ABSTRACT:

Everyone living in a society has the right to honor, dignity and reputation in the society and wants to exercise this without any interference from others. The right to reputation, honor and dignity are moral, ethical and social values that are closely linked to each other, and these values are protected by the state. Both, the right to reputation and freedom of expression are fundamental human rights. They also interact with each other. But in some cases the right to reputation can clash with the right to freedom of expression at multiple levels and at different aspects of daily life. The law of defamation aims to ensure balance between these two rights. The article is namely dedicated to analyse essential aspects of defamation law.

Açar sözlər: diffamasiya, ifadə azadlığı, nüfuz hüququ, təhqiramiz ifadələr, internetdə böhtan, satira, ictimai xadimlərin diffamasiyası.

XÜLASƏ:

Cəmiyyətdə yaşayan hər bir kəsin şərəfi, ləyaqət və nüfuzun qorunması hüququ vardır və hər kəs bu hüquqları başqalarının müdaxiləsi olmadan həyata keçirmək istəyir. İnsan şərəfi, ləyaqəti və nüfuz bir-biri ilə sıx surətdə bağlı olan mənəvi, əxlaqi və sosial dəyərlər olduğuna görə bu dəyərlər dövlət tərəfindən

müdafiə olunur. Həm nüfuz hüququ, həm də ifadə azadlığı fundamental insan hüquqlarıdır. Onlar həmçinin bir-biri ilə qarşılıqlı əlaqədədir. Lakin bəzi hallarda nüfuz hüququ gündəlik həyatın müxtəlif aspektlərində və müxtəlif səviyyələrdə ifadə azadlığı ilə toqquşa bilər. Diffamasiya hüququnun əsas məqsədi də bu iki hüquq arasında balans təmin etməkdir. Məqalə də məhz diffamasiya hüququnun əsas aspektlərini analiz etməyə həsr olunmuşdur.

Ключевые слова: право на диффамацию, свобода выражения, право на репутацию, оскорбительные фразы, клевета, сатира, диффамация публичных деятелей.

РЕЗЮМЕ:

У каждого представителя общества есть право на защиту чести, достоинства и репутации и каждый хочет пользоваться этим правом без вмешательства других. Так как честь, достоинство и репутация каждого человека являются тесно связанными между собой моральными, нравственными и социальными ценностями, они защищаются государством. Право на репутацию и свобода выражения являются фундаментальными правами человека. Эти права так же во взаимоотношении друг с другом. Однако, в некоторых случаях право на репутацию в определенных аспектах и уровнях, встречающихся в ежедневной жизни, сталкиваются со свободой выражения. Следовательно, целью диффамации является сохранение баланса между этими двумя правами. Эта статья и посвящается анализу основных аспектов права на диффамацию.

Introduction

Defamation laws are by definition a limitation on one human right protected by international law – the right to freedom of expression – in favour of another important interest, the protection of reputation under the right to private life, which are equally recognised in the Universal Declaration of Human Rights, other international conventions such as the European Convention on Human Rights (hereinafter “the Convention” or the ECHR), and in many national constitutions. There is no automatic hierarchy between these two but the balancing must take place in accordance with a clearly-defined set of rules.

The law of defamation protects people against untrue statements that could damage their reputation, and is probably the single most important area of law for any journalist to know about. One of the reasons for this is that defamation can affect journalists in any field of work. The second reason why defamation is such an important part of the law for journalists is that being successfully sued for it can be very expensive. Damages in defamation cases are usually decided by juries; as a result, they are very unpredictable, and can be extremely high.

The article is namely dedicated to analyse essential aspects of defamation law. This article is structured in three primary parts. First, this article reviews the definition of defamation law, focusing on the basic legal concepts of defamation, types of defamation, elements of a defamation lawsuit, possible defenses to a charge of defamation and defamation of public figures. Second, it reviews legal liability for defamation, the risks of criminal defamation. Third, this article analyses internet defamation, duties and responsibilities of an Internet news portal as regards online comments posted by users. Under this section one can find specific judgements of the European Court of Human Rights (hereinafter “the Court”) related to this issue.

What is Defamation law?

Defamation is any intentional false communication, either written or spoken, that harms person’s reputation, decreases the respect, regard or confidence in which a person is held or induces disparaging, hostile, or disagreeable opinions or feelings against

a person. There is always a delicate balance between one person’s right to freedom of expression and another’s right to protect their good name. It is often difficult to know which personal remarks are proper and which run afoul of defamation law.

In terms of modern human rights law, defamation can be understood as the protection against “unlawful attacks” on a person’s “honour and reputation” contained in Article 17 of the ICCPR, Article 8 of the ECHR. Both Article 19 of the ICCPR and Article 10 of the ECHR use the identical words “rights and reputations of others” (although not in the same order), as a legitimate grounds for limiting the right to freedom of expression. Defamation law is only intended to protect the individual right to a reputation. It follows, therefore, that only an individual can sue to protect that right. The term “defamation” is an all-encompassing term that covers any statement that hurts someone’s reputation.

There are two types of defamation:

1. Oral defamation. If the hurtful statement is spoken, the statement is called “slander”. For example, comments or stories told at a meeting or party.

2. Published defamation. If the statement is made in writing and published, the defamation is called “libel”. For example, a newspaper article or television broadcast. Pictures as well as words can be libellous.

Defamatory statements are usually in written or spoken words (and include material on the internet) but pictures, photographs, gestures and other acts can also be defamatory.

It is important to distinguish between personal information about defamation. Defamation is inaccurate information, which harms person’s reputation. But personal information should not be disseminated even though it is true. This information may be disseminated, and there should be particular principles for the dissemination such as public interest.

The government can’t imprison someone for making a defamatory statement since it is not a crime. Instead, defamation is considered to be a civil wrong, or a tort. A person that has suffered a defamatory statement may sue the person that made the statement under defamation law.

Elements of a Defamation Lawsuit. There are normally some accepted standards that the

statement is considered as a defamatory statement. If the person thinks that he or she has been the victim of some defamatory statement, whether slander or libel, then that person will need to file a lawsuit and in order to win lawsuit, he/she must show that:

1. someone made a statement;
2. that statement was published;
3. the statement caused him/her injury;
4. the statement was false;
5. the statement did not fall into a privileged category.

Let's look at each element more closely:

The Statement - A "statement" needs to be spoken, written, or otherwise expressed in some manner. Because the spoken word often fades more quickly from memory, slander is often considered less harmful than libel.

Publication - For a statement to be published, a third party must have seen, heard or read the defamatory statement. A third party is someone apart from the person making the statement and the subject of the statement. Unlike the traditional meaning of the word "published" a defamatory statement does not need to be printed in a book. For a defamatory statement to be published, it must be seen, heard, read, and so forth, by someone other than the person being defamed. Rather, if the statement is heard over the television or seen scrawled on someone's door, it is considered to be published.

Injury - To succeed in a defamation lawsuit, the statement must be shown to have caused injury to the subject of the statement. This means that the statement must have hurt the reputation of the subject of the statement. As an example, a statement has caused injury if the subject of the statement lost work as a result of the statement.

Falsity - Defamation law will only consider statements defamatory if they are, in fact, false. A true statement, no matter how harmful, is not considered defamation. In addition, because of their nature, statements of opinion are not considered false because they are subjective to the speaker. The burden of proof is on the defendant to prove that the statement made is true, rather than on the claimant to prove that it was false.

Unprivileged - Lastly, in order for a statement to be defamatory, it must be unprivileged. Lawmakers have decided that you cannot sue

for defamation in certain instances when a statement is considered privileged. For example, when a witness testifies at trial and makes a statement that is both false and injurious, the witness will be immune to a lawsuit for defamation because the act of testifying at trial is privileged. Likewise, lawmakers themselves are immune from defamation suits resulting from statements made in legislative chamber or in official materials.

Whether a statement is privileged or unprivileged is a policy decision that rests on the shoulders of lawmakers. The lawmakers must weigh the need to avoid defamation against the importance that the person making the statement has the free ability to say what they want. If a class of people is defamed there will only be an action available to individual members of that class if they are identifiable as individuals. If a man wrote that all doctors were thieves, no particular doctor could sue him unless there was something to point to the particular individual. If the defendant made a reference to a limited group of people, for example the tenants of a particular building all will generally be able to sue.

Some kinds of defamatory statements are considered especially harmful. Examples include:

- Accusations that the plaintiff has committed a crime.
- Statements that hurt the plaintiff's business reputation.
- Allegations that the plaintiff has a "loathsome disease."
- Accusations that the plaintiff has engaged in sexual misconduct.

Defamation of Public Figures - A public figure is a politician, celebrity, or other individual who has voluntarily placed him or herself in the midst of the public controversy. Public figures have a much more difficult time proving defamation. To prove defamation, public figures must show the statement was made with actual malice.

In the context of defamation, actual malice is the knowledge that the statement was false or was made with a reckless disregard for its truth. Example: The Action Render Team create and publish a "tell all" nonfiction graphic novel about popular rock singer Opie Um's decline into drug abuse. The novel depicts Opie's police record: He was arrested once carrying a small amount of marijuana, and his friends

give interviews saying that he routinely went on benders. The novel's captions uses phrases like "Opie slid into the dark depths of drug abuse and despair"; and "there was a monkey on his back - a monkey named addiction!" Opie sues for defamation. He produces evidence that the marijuana bust was the first and last time he ever took illegal drugs, and that he was far from an addict. He proves that the "benders" his friends referred to were actually stories cooked up by his agent to cover up the fact that he was in South America doing missionary work a fact that would hurt his public image with his hard rockin' fans. In short, Opie demonstrates that the statements made in the graphic novel were false. Will Opie automatically win his suit? Not necessarily. Because he is a public figure, Opie will still have to show that the statements were made with knowledge that they were false or that they were made with a reckless disregard for the truth. This may be tough, considering the producer relied on police records of a drug arrest and interviews with Opie's friends.

There are a number of possible defenses to a charge of defamation.

1. Truth. Defamatory statements are presumed to be false unless the defendant can prove otherwise. Example: The Action Render Team creates another nonfiction graphic novel titled "Prostitutes and the Policemen Who Love Them," which features interviews with prostitutes naming the police officers with whom they have had sexual congress. Sergeant Lou Scivious, named in the book, sues A.R.T. for libel. At trial, A.R.T. shows footage of Officer Scivious handing money to, and entering a hotel room with, the call girl in question. A.R.T. produces evidence showing that Officer Scivious was not engaged in an undercover vice operation targeting prostitution. The court will most likely find that the film's statements about the officer were true, and therefore none of the members of A.R.T. will be liable for libel.

2. Fair comment. The purpose of this defence is to protect defendants who criticise claimants so long as they act fairly, honestly and base their comments on true facts. This clearly reinforces freedom of expression but within a limited sphere. In order to give rise to this defence there are three requirements that need to be fulfilled:

a) The comment must be in the public inter-

est;

b) The comment must be on true facts;

c) The comment must be fair and honest;

3. Privilege. Privilege can be absolute or qualified. Absolute privilege is a stronger form of privilege because it provides the defendant with an absolute defence in situations where freedom of speech is of the essence, such as is the case for members of parliament (*Hamilton v Al Fayed*).

4. Consent. If someone consents to the publication of a defamatory statement, he will not be able to bring a claim for defamation. This is why any time you draw or write about a real living person for your graphic novel you should get them to waive all claims of defamation.

5. Humor or parody. There is no libel when the material is clearly understood as parody, satire, humor, or fantasy and is not capable of a defamatory meaning. For Example: Beard-Oil illustrates a Mad Magazine piece about Gus Grimes, insinuating that he is a crook. Because this is a well-known humor and satire magazine, the skit will probably not be considered defamatory.

Moreover, Article 5 of "Declaration on freedom of political debate in the media" stipulates that the humorous and satirical genre, as protected by Article 10 of the Convention, allows for a wider degree of exaggeration and even provocation, as long as the public is not misled about facts.

The case is directly related to a picture of a carnival parade in which US president Barack Obama is shown with wings carrying the text of his campaign phrase "Yes we can", to which the figure Europa is clinging with the text "We too". Benevolent humour with a clear reference to a topical political issue. Two cases of comparable satire were decided by the Court recently. In both cases the authorities involved had violated the freedom of expression in punishing various forms of satire.

Over the years, U.S. courts have made it abundantly clear: parody and satire are not defamatory. Does that mean all satirists and biting comics emerge victorious from defamation scraps? Absolutely not. Why? Because the nature of humor plays an important role and, as you may know from experience, one person's humor may leave another person stone-faced.

A careful distinction needs to be made between facts and value judgements. The exist-

tence of facts can be demonstrated, whereas the truth of value-judgements is not susceptible of proof. ... As regards value judgements this requirement to prove their truth is impossible of fulfilment and it infringes freedom of opinion itself...

More recently, the Court has slightly modified this approach. In *A v. Norway*, it acknowledged that Article 8 did not “expressly” provide for a right to reputation. In this case it concluded that:

“In order for Article 8 to come into play, the attack on personal honour and reputation must attain a certain level of gravity and in a manner causing prejudice to personal enjoyment of the right to respect for private life”.

In *Karako v. Hungary* the Court underlined this by saying that the defamation must constitute “such a serious interference with his private life as to undermine his personal integrity.”

Every citizen - not just celebrities and public figures - is entitled to a private life free from media intrusion - unless they specifically invite media attention or can be shown to be engaged in corruption, law-breaking, abuse of power or hypocrisy.

Legal liability for defamation. The risks of criminal defamation.

Defamation may be a criminal or civil charge. In the laws of many countries defamation is defined both as a civil wrong and a criminal offence. In other words, a person can either be sued for compensation by the affected person or be criminally prosecuted by the state. Although many countries still prohibit defamation as a criminal offence, there is an increasing tendency to view criminal defamation as an unjustifiable restriction on freedom of expression and to abolish it in favour of civil defamation. Countries such as Bosnia and Herzegovina (2002), Georgia (2004), Ghana (2001), Sri Lanka (2002) and the Ukraine (2001) have already decriminalised defamation and a number of other countries are considering doing so. Yet other countries have limited the impact of criminal defamation laws, for example by doing away with the possibility of imprisonment.

There are some risks of criminal defamation. First and foremost, one of the main concerns with criminal defamation is the serious chilling effect it exerts on freedom of expression.

Criminal defamation laws are especially problematic from the point of view of free expression. They can lead to the imposition of harsh sanctions, such as a prison sentence, suspension of the right to practise journalism or a hefty fine. Even if they are applied with moderation, criminal defamation laws still cast a long shadow: the possibility of being arrested by the police, held in detention and subjected to a criminal trial will be in the back of the mind of a journalist when he or she is deciding whether to expose, for example, a case of high-level corruption. This is not to say that defamation should not be discouraged; but in accordance with the necessity test, the means used to discourage it should be carefully targeted, to prevent the dampening of legitimate criticism.

In reference to the defamation, General Comment 34 calls on State parties to “consider the decriminalization of defamation” and recommends that, in any case of defamation, “imprisonment is never an appropriate penalty”. The General Comment highlights that :

“Defamation laws must be crafted with care to ensure that they comply with paragraph 3, and that they do not serve, in practice, to stifle freedom of expression. All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, a public interest in the subject matter of the criticism should be recognized as a defence. Care should be taken by States parties to avoid excessively punitive measures and penalties. Where relevant, States parties should place reasonable limits on the requirement for a defendant to reimburse the expenses of the successful party. States parties should consider the decriminalization 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. It is impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously - such a practice has on the

achilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others”.

On the basis of the above stated, It should be emphasized that criminalizing defamation is an entirely unwarranted restriction on free speech when the global norm is that a civil suit for damages is sufficient for protecting reputation. This overzealous restriction on free speech fails the constitutional test that such restrictions be “reasonable” and clearly needs to be struck down. The chilling effect that it has had on free speech and democratic accountability is too high a price to pay for the protection of individual reputations.

In a legal context, a chilling effect is the inhibition or discouragement of the legitimate exercise of legal rights by the threat of legal sanction. The right that is most often described as being suppressed by a chilling effect is the right to free speech. A chilling effect may be caused by legal actions such as the passing of a law, the decision of a court, or the threat of a lawsuit; any legal action that would cause people to hesitate to exercise a legitimate right (freedom of speech or otherwise) for fear of legal repercussions.

In 1996 the European Court of Human Rights used the term ‘chilling effect’ in the context of Article 10 in the case of *Goodwin v. the United Kingdom*. The case dealt with the protection of journalistic sources and the Court held:

“(–) that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance (–). Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms (–). Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that

freedom, such a measure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest. These considerations are to be taken into account in applying to the facts of the present case the test of necessity in a democratic society under paragraph 2 of Article 10 (art. 10-2).”

The government can’t imprison someone for making a defamatory statement since it is not a crime. Instead, defamation is considered to be a civil wrong, or a tort. A person that has suffered a defamatory statement may sue the person that made the statement under defamation law.

In cases of *Eynulla Fatullayev v. Azerbaijan*, *Yashar Agazade and Rovshan Kabirli v. Azerbaijan* the Courts have identified a clear position on Azerbaijan. Decisions highlighted that, according to slander and insult, the penalty was unequivocally unacceptable.

Article 8 of “Declaration on freedom of political debate in the media” stipulates that political figures and public officials should only have access to those legal remedies against the media which private individuals have in case of violations of their rights by the media. Damages and fines for defamation or insult must bear a reasonable relationship of proportionality to the violation of the rights or reputation of others, taking into consideration any possible effective and adequate voluntary remedies that have been granted by the media and accepted by the persons concerned. Defamation or insult by the media should not lead to imprisonment, unless the seriousness of the violation of the rights or reputation of others makes it a strictly necessary and proportionate penalty, especially where other fundamental rights have been seriously violated through defamatory or insulting statements in the media, such as hate speech.

Moreover, criminal defamation laws are also criticised on other grounds. Defamation is arguably a private matter between two individuals, with which the State should not concern itself. Furthermore, a criminal conviction will usually not provide the defamed person with any compensation, since in most legal systems fines go directly into the State’s pocket.

Internet defamation: who is legally responsible for online comments?

With the rise of social media, it's now easier than ever to make a defamatory statement. That's because social media services like Twitter and Facebook allow you to instantly "publish" a statement that can reach thousands of people. Whether it's a disparaging blog post, Facebook status update, or YouTube video, online defamation is treated the same way as more traditional forms. That means you can be sued for any defamatory statements you post online.

In case of *Delfi AS v. Estonia* the Court has made the following observation:

"(...) the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general (see *Ahmet Yıldırım*, cited above, § 48, and *Times Newspapers Ltd*, cited above, § 27). At the same time, the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press (see *Editorial Board of Pravoye Delo and Shtekel*, cited above, § 63)."

Besides this, in case of *Editorial Board of Pravoye Delo and Shtekel v. Ukraine* the Court said:

"It is true that the Internet is an information and communication tool particularly distinct from the printed media, especially as regards the capacity to store and transmit information. The electronic network, serving billions of users worldwide, is not and potentially will never be subject to the same regulations and control. The risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press."

One of the most crucial issues is the "duties and responsibilities" of an Internet news portal as regards online comments posted by users. The portal provided a platform, run on commercial lines, for user-generated comments on previously published content. In such cases some users – whether identified or anonymous – can post clearly unlawful comments which infringe the personality rights of others.

On 16 June 2015 the Grand Chamber of the

European Court of Human Rights has delivered the long awaited final judgment in the case of *Delfi AS v. Estonia*, deciding on the liability of an online news portal for the offensive comments posted by its readers below one of its online news articles. The Grand Chamber has come to the conclusion that the Estonian courts' finding of liability against Delfi had been a justified and proportionate restriction on the news portal's freedom of expression, in particular because the comments in question had been extreme and had been posted in reaction to an article published by Delfi on its professionally managed news portal run on a commercial basis. In this connection, the Court noted that:

"Where third-party user comments are in the form of hate speech and direct threats to the physical integrity of individuals, as understood in the Court's case-law (...), the Court considers (...) that the rights and interests of others and of society as a whole may entitle Contracting States to impose liability on Internet news portals, without contravening Article 10 of the Convention, if they fail to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties".

The Grand Chamber then laid down four criteria for determining whether or not the finding that Delfi AS was liable for comments posted by third parties had violated its freedom of expression. It took into account:

- the extreme nature of the comments in question (they violated "human dignity" and were "clearly unlawful");
- the fact that the comments were posted in reaction to an article published by the applicant company on its professionally managed news portal run on a commercial basis (readers being invited to post their comments without registering their names or providing any means of identification);
- the insufficiency of the measures taken by the applicant company to remove the offending comments without delay after publication (they were left on line for six weeks);
- and the moderate sanction imposed on the applicant company (320 euros).

In the end the Court found no violation of Article 10. The decision of the Estonian courts to hold Delfi AS accountable was justified and did not constitute a disproportionate restriction

company's right to freedom of expression. So, for the first time the Court acknowledged that the liability of the operator of a commercial news portal was engaged as a result of offensive comments posted by its users.

On 2 February 2016, the Court delivered a judgement on Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary (MTE and Index.hu). This case is extremely significant because on 16 June 2015, in a case with apparently similar facts, the ECtHR held that an Estonian news portal, Delfi, should be sanctioned for the content of comments posted by readers in response to one of its articles. The case concerned the liability of online intermediaries for user comments. Using the criteria established in the Delfi AS case of 16 June 2015, the Court found that there had been a violation of Article 10 of the European Convention on Human Rights, the right to freedom of expression. Unlike in Delfi AS, the Court decided that the incriminated comments in this case did not amount to hate speech or incitement to violence. The Court held that placing strict liability on news portals for such comments is a violation of Article 10 (Freedom of Expression) of the European Convention on Human Rights (ECHR).

It is interesting to note that the Court gave a new interpretive pattern for the Delfi ruling.

New perspectives were raised with regard to the notice-and-take-down system, which now seems to be legitimate in the eyes of the Court. In fact, in the same ruling the ECtHR "found that if accompanied by effective procedures allowing for rapid response, the notice-and-take-down-system could function in many cases as an appropriate tool for balancing the rights and interests of all those involved". This would reduce what was decided in the Delfi case, which appeared to encourage the duty of general monitoring of information. Now, the scope of that ruling appears to be narrowed to cases of hate speech and incitement to violence.

Conclusion:

Taking into account the above-stated, it is necessary to note that criminal defamation is not a justifiable restriction on freedom of expression, all criminal defamation laws should be abolished and replaced, where necessary,

with appropriate civil defamation laws. Such a law should decriminalize defamation and reform civil defamation to make it fairer.

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