

Criminal Defamation: An “Instrument of Destruction”

A Background Paper

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November 18, 2003

Introduction

Freedom of expression is regarded as a fundamental right in democratic society. The right of the press to report and comment on matters of public concern is essential to create and maintain an informed electorate.

However, it is often said that freedom of expression is not absolute. No individual or media organization has the right to knowingly publish false and damaging statements about another individual without consequence. Individuals whose reputations have been harmed as a result of such publications should have the right to redress through the civil courts.

Criminal libel, by contrast, is an unfortunate and outdated legacy of autocratic, totalitarian, or colonial states, and has no place in any society that claims to support the concept of freedom of expression. It is inimical to democracy because it strangles dissent and debate, punishing legitimate criticism of government officials and institutions. Too often, it serves no purpose other than to provide government and government officials with the power, through intimidation or post-publication sanctions, to discourage journalists, scholars, politicians and ordinary citizens from expressing critical views that might be deemed offensive, insulting or defamatory. Although the rights of private individuals to protect their reputations may appear superficially more compelling, even in those cases, providing appropriate monetary damage awards to compensate for actual losses suffered is more than sufficient to address the interests at stake.

Historical overview

The roots of modern criminal libel law can be traced to the Roman Empire, where the offense could be punished by death.¹ By the thirteenth century, an English statute, *De Scandalis Magnatum* (1275, 3 Edw. 1, Stat. West. Prim. C. 34), threatened those who “[told] or publish[ed] any false News or Tales” with imprisonment. The infamous Court of Star Chamber developed common law criminal libel rules in 1488, contemporaneously with the development of the printing press. Although originally intended primarily to protect the monarchy or the aristocracy from criticism or insult, criminal libel laws also applied to nonpolitical defamatory statements about private persons.² Common law libel rules remained in place in England for well into the nineteenth century, and were, in turn, enforced in the American colonies.

Meanwhile, in Europe, laws such as the French press law of 1881 created criminal penalties for harming the reputation of an individual, as well as for insulting the President, judiciary, and others within government. Many countries which follow the civil code model adopted similar statutes.³

The rationale supporting criminal libel seems counterintuitive to modern sensibilities. At its heart, criminal libel was believed to be an essential weapon to avert breaches of the peace, by dueling or vigilantism, by those who sought satisfaction for affronts to their honor or dignity. “Defamation, either real or supposed, is the cause of most of those combats which no laws have yet been able to suppress.”⁴

Dueling no longer seems a realistic threat, yet most countries retain criminal libel laws on their books, under a variety of pretexts. For example, in Germany, criminal defamation laws have been defended as necessary to protect the individual’s right to dignity as guaranteed by the Basic Law of the German Constitution.⁵ Portugal has argued that the State has a duty to protect

1. Yanchukova, Elena, “Criminal Defamation and Insult Laws: An Infringement on the Freedom of Expression in European and Post-Communist Jurisdictions,” 41 *Colum. J. Transnat’l L.* 861 (2003).

2. See, e.g., *De Libellis Famosis*, 5 Coke 125a, 77 Eng. Rep. 250, 251, *cited in* MLRC Bulletin, “Criminalizing Speech About Reputation: The Legacy of Criminal Libel in the U.S. After Sullivan and Garrison,” at 1 (March 2003).

3. See Yanchukova, *supra* note 1, at 863.

4. Livingston, Edward, “A System of Penal Law for the State of Louisiana,” (1833), *cited in* *Garrison v. Louisiana*, 379 U.S. 64, at 68 (1964).

5. See Quint, Peter E., “Free Speech and Private Law in German Constitutional Theory,” 48 *Md.*

the reputation of the individual, and that criminal law is an appropriate tool to do so.⁶

In the totalitarian states of the former Soviet Union, criminal libel was utilized as a tool to quash counter-revolutionary activities, and subsequently, justified as necessary to protect nascent democracies from damaging criticism that would encourage “popular distrust, apathy, and nonparticipation in the political process.”⁷

Whatever justifications might exist for allowing criminal sanctions for false and defamatory statements about individuals, there is no justification whatsoever for imposing them when it the institutions of government that are the target of censure, or ridicule. A government that is criticized, whether “fairly” or not, is not diminished, but strengthened.⁸

The United States Experience

The trial of printer John Peter Zenger was the most famous criminal libel prosecution in colonial America. Zenger had printed issues of the *New York Weekly Journal* which criticized the colonial governor for removing the Chief Justice after he ruled against him. The jury, urged on by Zenger’s lawyer, Andrew Hamilton, disregarded the presiding judge’s admonition that the truth of the assertion was no defense to the charge, and acquitted Zenger.

After independence, the Sedition Act of 1798 made it a federal crime to publish false, scandalous and malicious writings about the government, Congress, or the President. Although the Act expired in 1801, it was not until 1964, in *New York Times v. Sullivan*, that the Supreme Court of the United States declared that seditious libel was incompatible with the U.S. Constitution’s guarantees of freedom of speech and of the press.⁹ As Justice William Brennan wrote, the need for citizens to be informed in a democratic nation is based on “a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”¹⁰

L. Rev. 247 at 295 (1989), *cited in* Yanchukova, *supra* note 1, at 869.

6. Case of Lopes Gomes Da Silva v. Portugal, Eur. Ct. H.R. Sept. 28, 2000, *cited in* Yanchukova, *supra* note 1, at 869.

7. See Foster, Frances H., “Information and the Problem of Democracy: The Russian Experience,” 44 Am. J. Comp. L. 243 at 253-256 (1996), *cited in* Yanchukova, *supra* note 1, at 870.

8. See, e.g. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

9. *Id.*

10. *Id.* at 270.

Yet in the same term, the high court declined to rule that all criminal defamation statutes were necessarily unconstitutional. In *Garrison v. Louisiana*,¹¹ the Supreme Court struck down the Louisiana criminal libel statute because it limited the use of truth as a defense, and did not require that actual malice – knowledge of falsity, or reckless disregard for the truth – be demonstrated, as required in civil cases by *Sullivan*. Yet Justice Brennan, again writing for the Court, acknowledged that “different interests may be involved where purely private libels, totally unrelated to public affairs, are concerned.”¹² Accordingly, the individual states remained free to retain or enact criminal libel laws as long as the statutes conform with these constitutional requirements.

In the decades following *Garrison*, sixteen states, and the District of Columbia, repealed their criminal libel statutes.¹³ Courts in other states subsequently struck down the laws on constitutional or other grounds. As a result, only 17 of 50 states retain criminal libel statutes. In most of those jurisdictions, the laws are either limited to private libels, or remain “on the books,” but effectively dormant.¹⁴ The Media Law Resource Center reported that five criminal libel cases were filed in the United States in 2000, as compared to 14.5 million criminal cases of all types filed in state courts in that same year, representing only .00003 per cent of the cases filed.¹⁵

Nevertheless, in a few of the states, criminal libel prosecutions remain a possibility, and as recently as 2002, the publisher and editor of an alternative newspaper, *The New Observer*, were convicted of criminal defamation after publishing articles alleging that the Mayor of Kansas City, who was running for reelection, lived outside of the county in violation of the Kansas law. Both journalists were ordered to pay \$3,500 in fines, and sentenced to one year unsupervised probation, with sentences suspended, pending appeal.¹⁶

The European Experience

11. 379 U.S. 64 (1964).

12. *Id.* at 72, n. 8.

13. MLRC Bulletin, *supra* note 2, at 12.

14. *Id.* at 15.

15. MLRC Bulletin, *supra* note 2, at 36.

16. *Kansas v. Carson*, No. 01-CR-301 (Kansas Dist. Ct. Wyandotte County July 17, 2002) (unreported).

The laws of all Western European countries include some type of defamation or insult provision, but they vary widely in their scope and application. The criminal laws, which may carry sanctions ranging from fines to imprisonment for periods of up to six years, also differ from the American approach in that they generally do not consider truth to be an absolute defense in defamation cases.

In the United Kingdom, although the crime of libel remains “on the books,” it is rarely prosecuted, in part because procedural rules require private plaintiffs to obtain leave of a High Court Judge before proceeding.¹⁷ Civil libel actions continue to provide a remedy for aggrieved individuals.

Similarly, in countries such as Denmark, Norway, the Netherlands and Sweden, criminal defamation laws are almost never invoked against the press, whereas Austria, Spain, Greece and Turkey frequently do so.¹⁸ France, Germany and Italy also retain their criminal defamation laws, but they are usually interpreted narrowly.¹⁹

Article 10 and the ECHR

Under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the “Convention”), freedom of expression is protected as a universal although not absolute, right. It reads, in part:

“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”

“The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

The European Court of Human Rights (ECHR) hears appeals where it is claimed that judgments rendered by courts of nations that are signatories to the Convention have infringed

17. See, Feigelson, Jeremy and Bierbauer, Erik, “Criminal Defamation: International Reforms Advance Against a Global Danger” at 117 (2002) (available at <http://216.147.196.167/projects/feigelson.pdf>).

18. See Yanchukova, *supra* note 1, at 871-875.

19. *Id.*

upon rights guaranteed by the Convention. Applicants must first exhaust all domestic judicial remedies and file complaints within specified time limits. Although the ECHR does not have the power to annul or alter decisions of domestic courts, it may award “just satisfaction,” including remission of fines, and/or legal costs, to the applicant.²⁰ Its rulings are binding on all member states.

To determine whether an “interference” or infringement has occurred, the ECHR utilizes a three-part test: 1) was it prescribed by law; 2) does it serve a legitimate purpose, 3) is it necessary in a democratic society. Because on several occasions the ECHR has effectively overturned criminal libel convictions, this treaty has profoundly affected the application of criminal libel statutes in the 45 countries which, as members of the Council of Europe, have ratified it.

A few examples include:

*Lingens v. Austria*²¹: overturning a criminal defamation conviction of the publisher of an Austrian magazine about the then-Chancellor of Austria. The ECHR ruled that politicians, who “inevitably and knowingly” open themselves to scrutiny by journalists and the public, must accept harsher criticism, and further noted that the burden of proof would lie with the defamed person, not the speaker. It cautioned that convictions like Lingens’ could have a chilling effect on the press and discourage the press in its role as public watchdog.

*Castells v. Spain*²²: an insult law case, but nevertheless important because, in reviewing the conviction of a member of the Spanish senate who had accused the government of shielding police who had murdered Basque separatists, the ECHR found that the limits of permissible criticism would be even wider for the government than for politicians.

*Dalban v. Romania*²³: finding that the conviction of the publisher of a magazine who had reported on fraud committed by the chief executive of a state-owned agricultural company violated Article 10, because even though the articles “did not correspond to reality,” they concerned a matter of public interest and fulfilled an essential press function in a democratic society.

The ECHR does not invariably rule in the applicants’ favor, however. Other decisions have indicated, for example, that judges do not have to tolerate the same degree of criticism as

20. Korzenik, David and Houck, Mona, “An American Lawyer’s Comparative Introduction to the Developing Law of the European Court of Human Rights in Libel Cases,” at 42, MLRC Bulletin (September 2003).

21. 103 Eur. Ct. H.R. (Ser. A); 8 Eur. H.R. 407 (1986).

22. 236 Eur. Ct. H.R. (Ser. A) (1992).

23. No. 28114/95 (1999), <http://www.echr.coe.int/Eng/Judgments.htm>.

the government or political figures.²⁴ Nevertheless, it is fair to say that, on balance, the ECHR's rulings have "cemented the principle that journalists have wide latitude to report on public officials and matters of public concern."²⁵

The Eastern European/Central Asian Experience

The post-Communist nations of Eastern and Central Europe and Asia represent a different situation. Although a few countries, such as Croatia, Moldova and Ukraine, have abolished their criminal defamation laws, most have retained these statutes "on the books," and in some nations, the penalties are even more severely enforced than during the Soviet era. In her excellent overview of the subject,²⁶ Elena Yanchukova catalogs the status of criminal defamation in these countries.

She characterizes several countries, somewhat diplomatically, as having shown "less progress" toward freedom of speech: Belarus, Azerbaijan, Uzbekistan, Kazakhstan, Kyrgyz Republic, Tajikistan, and Turkmenistan, all of which have prosecuted and convicted multiple journalists of criminal libel in recent years. Yanchukova identifies Russia, Armenia, Albania and Romania as countries where criminal libel prosecutions have been brought, or are pending, and adds that criminal libel remains an offense, encouraging self-censorship, in the Federal Republic of Yugoslavia. She further notes that of the countries in the region identified by Freedom House as having a "free press" (Bulgaria, Estonia, Hungary, the Czech Republic, Poland, Latvia, Lithuania, Slovakia and Slovenia), nearly all retain criminal code provisions covering libel or insult, or both, which, though "not frequently invoked," nevertheless encourage self-censorship.²⁷

Yanchukova suggests that one of the best ways for these countries to develop into full-fledged democracies would be for them to sign onto and follow existing human rights treaties and conventions. She notes that Poland, Slovenia, the Slovak Republic, Bulgaria and the Czech Republic, all designated as nations with a "free press," ratified the Convention between 1991 and 1994, whereas other countries, such as Armenia, Azerbaijan, the Russian Federation and Ukraine, which ratified the Convention later, remain only "partly free."

But ratification of the Convention would admittedly be only a first step. As noted previously, the ECHR has not invariably ruled that criminal libel convictions violate Article 10. The Convention, and, in turn, the ECHR, struggle to balance the competing interests of subsidiarity and universality – to respect and accommodate legitimate national interests and

24. See, e.g., *Barford v. Denmark*, 149 Eur. Ct. H.R. (Ser. A) (1989).

25. See Feigelson, *supra* note 16, at 119, and cases cited therein.

26. See Yanchukova, *supra* note 1, at 883-891.

27. *Id.* at 889-890.

differences while establishing uniform and universal human rights standards for all signatories.²⁸

The Death-Knell for Criminal Libel?

Professor Herbert Wechsler of Columbia Law School in New York, who was later to argue *New York Times v. Sullivan* in the U.S. Supreme Court, initiated a project to produce a Model Penal Code for the American Law Institute, acting as its Chief Reporter. In a comment to the draft, he wrote:

It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security. . . . It seems evident that personal calumny falls in neither of these classes in the USA, that it is therefore inappropriate for penal control, and that this probably accounts for the paucity of prosecutions and the near desuetude of private criminal libel legislation in this country.²⁹

Why, then, do libel laws persist, resisting repeal or judicial dissolution?

As described earlier in this paper, criminal libel law was rooted in authoritarianism and autocracy, in intolerance of dissent, and in distrust of public opinion. It was justified as a way to keep the masses in their place and under control, by suppressing information about rulers that might incite unrest or rebellion. Alternately, it was seen as “a peaceful alternative to the duel and other violent forms of self-help.”³⁰

But as democracies matured, criminal libel has seemed to be less relevant, and to make less sense in our modern world. The United States Supreme Court and the ECHR have both opined that truth should be considered a defense in criminal libel cases. If that is so, then the efficacy of criminal libel statutes in preventing breaches of the peace is seriously undermined, and the traditional justification for their existence effectively erased. As a result, criminal prosecutions have evolved into little more than a surrogate for civil libel suits. Yet, as many authors have suggested, criminal proceedings are not an appropriate forum to redress damage to reputation, because they are aimed at retribution rather than compensation to the victim.³¹ Compensation is most readily and appropriately provided through civil litigation.

28. See Korzenik, *supra* note 19, at 44.

29. Model Penal Code, Tent. Draft No. 13, 1961, §§ 250.7, Comments, at 44, cited in MLRC Bulletin, *supra* note 2, at 8.

30. MLRC Bulletin, *supra* note 2, at 31.

31. See, e.g., ABA-Africa Law Council, “Analysis of the Law of Defamation for the Republic of Algeria” at 10 (July 24, 2002).

The sanctions that flow from criminal prosecutions – fines and imprisonment – constitute a profound threat to freedom of expression and to the free flow of information. Journalists who fear this type of retribution will be inclined to engage in self-censorship. This, in turn, discourages the public debate on political issues that is the lifeblood of any democracy.

This, of course, is exactly what the governments in the jurisdictions which continue to retain and utilize criminal libel wish to do. A review of a few cases in recent months is illustrative:

Russia: On Oct. 7, 2003, the Kalininsky District Court in Chelyabinsk upheld journalist German Galkin's conviction on criminal defamation, and sentence of one year in a labor camp. In a case eerily reminiscent of the American colonist John Peter Zenger, Galkin was publisher of a newspaper that allegedly libeled a deputy governor, even though he was not listed as the author (and denied having written the articles).³²

Belarus: Journalists Mikola Markevich and Paval Mazheika were convicted of libeling President Aleksandr Lukashenko in June 2002 shortly before the elections and of publishing the statement of an unregistered civic organization. They were sentenced to corrective labor for periods of two-and-a-half and two years, respectively, subsequently reduced to one year each. Another journalist, Viktor Ivanshkevich, was similarly convicted, and sentenced, also for libeling the President for an article accusing Lukashenko of corruption.³³

Azerbaijan: Rovshan Kabirli and Yashar Agazade were convicted of criminally libeling the brother of President Heydar Aliyev, and sentenced to five months in prison in May 2003. Although they were granted amnesty and released, they retain the status of convicted criminals.³⁴

As James Ottaway and Leonard Marks have written, "Democratic leaders get as upset over unflattering press reports as dictators do."³⁵ The common thread that runs through these cases, and others like them throughout Europe, Asia, and even the United States, is that elected officials are unwilling to tolerate criticism, and will use the force of law to suppress it.

Conclusion

32. Committee to Protect Journalists, "2003 news alert: Federal court upholds journalist's conviction" (Oct. 7, 2003).

33. Committee to Protect Journalists, "2003 news alert: Court amends imprisoned journalist's sentence" (March 7, 2003).

34. Committee to Protect Journalists, "2003 news alert: Independent journalists convicted for libeling president's brother" (May 22, 2003).

35. Weldon, Ruth, *Insult Laws: An Insult to Press Freedom*, at 4 (World Press Freedom Committee, 2000).

In his concurring opinion in the criminal libel case, *Garrison v. Louisiana*, U.S. Supreme Court Justice William O. Douglas lamented that the Bill of Rights in the U.S. Constitution was in danger of being “constantly watered down” through the majority’s attempt to “balance” the absolute language of the First Amendment³⁶ “and what judges think is needed for a well-ordered society.”³⁷ Particularly pernicious, he suggested, was the toleration of criminal libel actions brought by government officials, which would inevitably result in anyone who “outraged the sentiments of the dominant party” being “deemed a libeler.”³⁸

Douglas reminded his colleagues that the contemporary common law doctrine of seditious libel was a creation of the infamous Court of Star Chamber. He concluded, “It is disquieting to know that one of its instruments of destruction is abroad in the land today.”³⁹

Douglas was not exaggerating. Criminal libel is no less than an “instrument of destruction.” It is an instrument used to destroy discussion, debate and dissent. It has no place in any society that calls itself a democracy.

36. “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .” U.S. Const. amend. I.

37. 379 U.S. 64 at 81-82 (1964).

38. *Id.* at 82.

39. *Id.*

