

Chapter 79

Criminal Defamation, the Criminalisation of Expression, Media and Information Dissemination in the Digital Age: A Legal and Ethical Perspective

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ABSTRACT

Criminal defamation and the criminalisation of communication in general often result in severe punishment for the media and other content producers accused and prosecuted for committing such 'crimes'. There are severe financial penalties involved and /or the incarceration of those who are convicted of breaking the law. This chapter studies the existence and feasibility of criminal defamation in largely contemporary Africa, but also making references to 'older' democracies in the Western hemisphere. In short, the chapter critiques criminal defamation and the criminalisation of expression, making a strong legal and ethical perspective quite often using empirical materials from the courts. The inception and proliferation of new digital technologies amongst ordinary citizens also means that besides the traditional media or fourth estate, ordinary non-professional communicators are also highly likely to get into trouble over defamation, criminal defamation and other forms of crimes associated with the criminalisation of communication.

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INTRODUCTION

Criminal defamation and the criminalisation of communication in general often result in severe punishment for the media and other content producers accused and prosecuted for committing such ‘crimes’. There are severe financial penalties involved and/or the incarceration of those who are convicted of breaking the law. This chapter studies the existence and feasibility of criminal defamation selected contemporary African countries, but also making references to the USA as an ‘older’ democracy. The chapter critiques criminal defamation and the criminalisation of expression, making a strong legal and ethical perspective quite often using empirical materials from the courts. The inception and proliferation of new digital technologies amongst ordinary citizens also means that besides the traditional media or fourth estate, ordinary non-professional communicators are also highly likely to get into trouble over defamation, criminal defamation and other forms of crimes associated with the criminalisation of communication. Firstly, in a criminal case a prosecutor on behalf of the state brings charges against a defendant, whereas in a civil suit the plaintiff brings suit (Creech, 2007). Secondly, the chargeable offense is considered grave or serious that it can result in the imprisonment of the defendant (Feltoe, 2002, p 12). Criminal defamation and other criminal offences that are linked to utterances and or publication of information is a common and long standing feature of most legal systems. Their existence is justified on the basis that freedom of expression as with other rights, is not absolute and has to be exercised in cognisance of other rights and as such, it can be limited. Even in one of the oldest democracies - the USA - there are debates on whether or not America’s First Amendment confers absolute rights of the media and expression, or there are specific justifiable limitations (Packard, 2010).

Criminal charges can be invoked for disturbing public peace through publications in the conventional media (fourth estate) or in the new media (fifth estate). The internet is a fairly easy and accessible medium for committing the publications or communication related crimes, in the same way conventional defamation can be committed against individuals and organisations there. There is need to trace how libel or criminal defamation charges have been instituted in countries of the North and South such as Zimbabwe and Tanzania, and the USA against communicators that use internet and other channels of public communication. When assertions are made that criminal defamation is undemocratic, archaic and backward, is this a statement to dissuade and censure countries of the South that are often viewed as lagging behind in adherence to ideals and tenets of modern democracy? These countries seem to have a higher prevalence of such type of litigation. Are criminal defamation and the criminalisation of expression, including sedition and criminal insults of powerful politicians, a universal phenomenon found even in so-called developed and progressive nations? When a country such as the USA arrests and gives a lengthy sentence to Chelsea Manning for leaking sensitive materials in the so-called Cablegate case, or when it demands the arrest of activists such as Edward Snowden or investigates a man like Julian Assange, what are the ethical and legal implications given that some sections of global society view these accused as iconic proponents of freedom of information? Again are states justified in intruding into the personal communications of all citizens, and alternatively, do ‘whistleblowers’ such as WikiLeaks have a right to publish personal information which is not of ‘public’ importance? All these questions have a bearing on criminal libel.

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