



Association of Caribbean Mediaworkers

Unit 1, Upper Level, Elan Place, 137 Eastern Main Rd,

St. Augustine, Trinidad & Tobago

T: 1 (868) 296-8009

E: acmmail@gmail.com

W: www.acmediaworkers.com

WORLD PRESS FREEDOM DAY 2007 CARIBBEAN OBSERVANCE, CASTRIES ST. LUCIA

Criminal Libel and journalistic practice in the Caribbean in the context of the CSME: a proposal for discussion

*Prof. Sheila I. Vélez Martínez
Facultad de Derecho Eugenio Maria de Hostos
Mayaguez , Puerto Rico*

The concept of freedom of the press

The importance of the preservation of freedom of the press resides in the dual nature of this right. Journalists must enjoy their own right to freedom of expression and communication as citizens and as members of the press. Collectively however, the press is the facilitator of the common citizens exercise of various fundamental human rights, that is the right to receive information, the right to participate in the political life, the right of freedom of expression and association just to name a few.

That is so because historically the press has performed a unique and important function in facilitating the public's exposure to the information needed for enlightened understanding and decision making. The press has an important role to play in shaping and defining the choices incident to the creation and consolidation of the Caricom Single Market and Economy and beyond the CSME in the construction of a better Caribbean in general. As the region matures, it has become more complex and national governments have also become a more dominant presence, the educative role of the press has become more crucial. Thus an unfettered exercise of this role is called for, this is so even if it also rubbish will be spread and reputation concerns take a backseat.

In this sense, it is my view that the proxy relationship of the press and the public should afford the press a protection as an institution. This should include the secured not just freedom to publish but also an opportunity to access, acquire, interpret and process information.

Defamation

Is against this background that I take on to analyze the concept of defamation and libel in the criminal and civil areas.

Almost every nation recognizes freedom of the press in either a or by custom. Press freedom, however, is not absolute: laws and judicial interpretations limit press freedom by balancing it against competing societal values. An individual's reputation is a societal value often in conflict with freedom of the press. Harm to



Association of Caribbean Mediaworkers

Unit 1, Upper Level, Elan Place, 137 Eastern Main Rd,

St. Augustine, Trinidad & Tobago

T: 1 (868) 296-8009

E: acmmail@gmail.com

W: www.acmediaworkers.com

reputation (i.e., defamation) was 'one of the earliest injuries recognized by virtually every legal system.

Criminal libel has a long and troubled history--longer and even more troubled than its counterpart in civil law. In its early guises, it was notable as an instrument of state repression alongside other variants of libel such as blasphemy and sedition and, in part, as a corrective to the end of press licensing. But its usage in the nineteenth and twentieth centuries became less state-oriented. Though its status as a crime inevitably brings with it an element of official sanction, criminal libel has latterly evolved as the weapon of most destruction in the arsenal of libel law. In this role, it has become a rarity but has survived attempts at eradication in England and Wales and even the United States and is alive and well in most of the Caribbean nations. Its continuance is itself controversial, as well as its content and impact

The most critical question is how to accommodate both freedom of the press and the law of defamation. As First Amendment scholar Frederick Schauer noted: 'The law of defamation in a society reflects, to a large extent, the assumptions of that society respecting the relative importance of an untarnished reputation, on the one hand, and an uninhibited press on the other. ' A comparative look at American libel laws illuminates the differing assumptions concerning the sociopolitical and legal boundaries of press freedom vis-a-vis the individual's interest in her reputation.

The publications which are the subject of civil and criminal libel are largely the same. However, some communication can amount exclusively to criminal libel while others, such as one form of defamation (slander) and other "non-serious" libels, are generally excused from criminal liability in many jurisdictions . As the rationale of these differences is often the erstwhile concern with the maintenance of social order, their survival in contemporary times may and should be questioned.

The criminalization of speech is suspect in any context. Absent the threat of immediate harm, classical liberal theory contends that even foolish and erroneous speech must take its place in the marketplace of ideas where it will help to illuminate the truth.

The critique is then: does criminal libel give excessive protection for the right to reputation; conversely, is insufficient weight given to the right to free expression?

Criminal libel in EEUU

Criminal libel has been largely, but not completely, curtailed in the United States . The adoption by American secessionists of the mechanics of English repression was paradoxical, especially as its application in colonial times had been the



Association of Caribbean Mediaworkers

Unit 1, Upper Level, Elan Place, 137 Eastern Main Rd,

St. Augustine, Trinidad & Tobago

T: 1 (868) 296-8009

E: acmmail@gmail.com

W: www.acmediaworkers.com

source of much agitation. Nevertheless, crimes against individual reputation did resurface, primarily at the state level including limits on truth as a defense, which were generally reversed by state statutory versions as the nineteenth century wore on. Their use declined over a century and a half, as much for cultural as legal reasons. Yet, it took until the 1966 case of *Ashton v. Kentucky* for an unequivocal condemnation of the inherent vagueness and breadth of the common law crime. Amongst the problems are that the level of one's social reputation cannot be objectively determined and therefore there is no objective standard against which to judge criminal harm.

Those states which have retained criminal libel have adopted statutory versions of criminal libel, either in response to *Ashton* or beforehand. Yet other problems of constitutionality remain. In the U.S. the Supreme Court held that the crime must meet the First Amendment demands for respect of free speech, including an unqualified respect for truth as a defense and proof of "actual malice" in cases affecting public figures as in *New York Times Co. v. Sullivan*. The "actual malice" standard is distinct from common law malice, which refers to spite or ill will. (actual malice does not mean "hatred, ill will or enmity or a wanton desire to injure").

Public figures deserve less protection, not more. In general they have placed themselves in the center of public life voluntarily and obtain substantial benefits from it. They also have access to the media to counterbalance the objected expression. It is my view, that in the case of public officials there should remain little space of action outside public scrutiny.

Then the question turns to who is a public figure.

The courts originally defined "public official" narrowly. The Court later extended actual malice protection to speech about public figures as well as public officials. While the definition of "public figure" remains opaque, political candidates unquestionably fall under that rubric. This is so because the impact of public officials in the market place of ideas may be rivaled or even exceeded by an individual because of the stature, fame, credibility or personality command attention. : Dwight Yorke or Brian Lara.

The public official exception to liability for defamation without proof of actual malice does not extend only to the discharge of official duties, but to anything which might touch on an official's fitness for office, including dishonesty, malfeasance, or improper motivation.

This also includes people that occupy positions of such pervasive power and influence that they are deemed public figures for all purposes. Presidents of corporations for example.



Association of Caribbean Mediaworkers

Unit 1, Upper Level, Elan Place, 137 Eastern Main Rd,

St. Augustine, Trinidad & Tobago

T: 1 (868) 296-8009

E: acmmail@gmail.com

W: www.acmediaworkers.com

The concept of public figures also comprises people that have thrust themselves into the forefront of particular public controversies in order to influence the political process: activist.

It may also include people that are "involuntary" public figures. This can be achieved by means of their association with public figures or by uniqueness of circumstances: heart transplant patient.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the Court also applied constitutional constraints to civil suits for defamation when the plaintiff is a private person but the statement involves matters of public concern. *Id.* at 335, 347, 94 S.Ct. 2997. For actual damages to be awarded, such statements are not afforded the actual malice protection given to statements concerning public officials or figures, but some level of fault must be proven, be it negligence or something more.

Present state of the law

Following these decisions, it is widely perceived that "there remains little constitutional vitality to criminal libel laws especially as few statutes clearly articulate the required standards on truth and public figures. Consequently, only those state statutes that require actual malice, or have a strong dependence on the old rationale of public disturbance or are directed against extortion, or protect purely private individuals have survived. Yet the perception of a constitutionally inspired "death blow" to the offense of criminal libel, even in public issue cases, is belied by the survival of the crime in twenty-five states and territories despite the strong signal given by the Model Penal Code which, since 1962, has omitted the offense of criminal libel.

The offense of criminal libel has been more often struck down, than its civil counterpart. Examples during the past decade include *State v. Helfrich* (on the grounds that the statute prohibited truthful criticism when not communicated for good motives and justifiable ends); *Mangual v. Rotger-Sabat* (because the Puerto Rican statute on criminal libel had no requirement of absolute malice and did not recognize truth as an absolute defense *Ivey v. Alabama* (on the grounds that the statute did not require proof of actual malice); [FN189] and *IML v. Utah* (because the relevant offense had no requirement of absolute malice and did not recognize truth as an absolute defense).

Criminal libel could be condemned on more sweeping constitutional grounds, which are more difficult to remedy by legislative wordplay, and it has been commented that the U.S. Supreme Court failed "miserably" in *Garrison* by simply applying Sullivan civil standards to the more draconian restraint of criminal libel.



Association of Caribbean Mediaworkers

Unit 1, Upper Level, Elan Place, 137 Eastern Main Rd,

St. Augustine, Trinidad & Tobago

T: 1 (868) 296-8009

E: acmmail@gmail.com

W: www.acmediaworkers.com

First, it could be argued that its vague breadth allows arbitrary or overbroad enforcement, which is particularly dangerous in the field of speech. Criminal libel triggers the further constitutional problem that the key terms such as hatred, contempt, or ridicule can be said to be impermissibly content-based.

In Puerto Rico

In Puerto Rico criminal libel has been completely abolished, it was excluded from the Penal Code adopted in 2005. This was not however the result of a voluntary agreement of the political bodies, but due to a decision entered by the United States Court of Appeals for the First Circuit in the case of Tomas de Jesus Mangual vs. Fuentes Agostini (Rotger Sabat) in 2003.

The speech threatened here with prosecution under the criminal libel statute was at the heart of the freedom of the press protections of speech and the press.

The core facts were these: A newspaper publishes a series of stories about corruption in government. In turn, the government responds with actual and threatened criminal prosecution of the reporters. The newspaper later publishes a story critical of a candidate for high public office; the reporter is threatened with criminal prosecution. The free press is threatened for commenting on public officials on matters of public concern.

The court noted that “[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion*65 of governmental affairs.” *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966). “For speech concerning public affairs is more than self-expression; it is the essence of self-government.” *Garrison*, 379 U.S. at 74-75, 85 S.Ct. 209.

“The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.

Against these fundamental principles the Court evaluated the criminal libel statute challenged here and found that the statute was unconstitutional under the First Amendment standards established by the Supreme Court. It did not recognize the actual malice test and also placed the burden on the Defendant to establish that the publication was not only true but also fair.

Puerto Rico 's criminal libel statute was not at that time an antiquated and moribund statute; it was less than thirty years old. Although it had been



Association of Caribbean Mediaworkers

Unit 1, Upper Level, Elan Place, 137 Eastern Main Rd,

St. Augustine, Trinidad & Tobago

T: 1 (868) 296-8009

E: acmmail@gmail.com

W: www.acmediaworkers.com

amended four times since, the amendments had not attempted to conform the statute to the requirements of the First Amendment. The most recent amendment was in December 1999; it increased the criminal penalties dramatically in order to deter "anti-social" acts, including increasing the maximum fine tenfold. When the Department of Justice was asked to comment on this change during the pendency of this litigation, it supported the increased penalty without raising any federal constitutional concerns. The only constitutional protection the Department of Justice raised was "the constitutional protection that exists against attacks against honor and reputation. There have been at least two other prosecutions under the criminal libel statute in the first six months of 2001. One of the complaints was brought on behalf of a Police Department lieutenant; the defendant was convicted and fined. In both cases, district attorneys from the Department of Justice were prosecuting.

I should also note that last month the Appeals Court in PR confirmed an award of \$1.8 million in favor of a public prosecutor against a major newspaper. The litigation lasted more than 10 years. There the court found that the prosecutor was indeed a public figure but that the newspaper had acted with actual malice.

International Law

The position in favor of elimination of criminal libel laws is also favored by International Human Rights Law. The Universal Declaration of Human Rights states

Everyone has the right to freedom of opinion and expression: this rights include the freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers

The International Covenant on Civil and Political Rights also recognizes these rights and allows a limited restriction on the right to freedom of opinion and expression in the interest of "respect of the rights or reputations of others". In the late 90's a Special Rapporteur was given the task of examining the state of freedom of expression.

The Special Rapporteur's attention was drawn to cases and a number of instances in which libel and defamation suits, or even the threat of such suits, has had, or has potentially had, a direct and negative impact on freedom of expression, access to information and the free exchange of ideas. The effect is often described as "libel chill", a climate of fear in which writers, editors and publishers become increasingly reluctant to report and publish on matters of great public interest not only because of the large awards granted in these cases but also because of the often ruinous costs of defending such actions.



Association of Caribbean Mediaworkers

Unit 1, Upper Level, Elan Place, 137 Eastern Main Rd,

St. Augustine, Trinidad & Tobago

T: 1 (868) 296-8009

E: acmmail@gmail.com

W: www.acmediaworkers.com

International case law in the area of libel and defamation has consistently found in favour of disclosure and public criticism of public figures, when warranted. In this regard, the Special Rapporteur notes that, in *Verbitsky v. Argentina*, in which a writer was convicted under the *desacato* ("contempt") law for defaming the Argentine Supreme Court Minister, the Inter-American Commission on Human Rights stated, "in democratic societies political and public figures must be more, not less, open to public scrutiny and criticism". / *Verbitsky v. Argentina*, 20 September 1994, Case No. 11.012, Report No. 22/94, 3 HRR 52; the Inter-American Commission on Human Rights. / In this case, the conviction was reversed and the Government repealed the *desacato* law.

The European Court of Human Rights has also considered a number of cases, one of the most famous possibly being *Lingens v. Austria*. In that case a journalist accused the Chancellor of, inter alia, the "basest opportunism" and "immoral" and "undignified" behaviour. / *Lingens v. Austria*, 8 July 1986, 8 EHRR 407, para. 42./ At the time the case came before the courts, Austrian law required that the truth of the allegations be proved. The journalist was convicted partly for failure to do this. On appeal, the European Court held, inter alia, that: the law was unreasonable; it was impossible to prove the truth of opinions; the characterization of the politician had been reasonable; and the journalist's article had been part of a larger political debate and not merely a gratuitous attack on the individual concerned.

Following on from this, the Special Rapporteur strongly suggested that it is critical to raise the public conscience to ensure that criminal laws are not used (or abused) to stifle public awareness and suppress discussion of matters of general or specific interest. At minimum, according to the Special Rapporteur, it must be understood that:

(a) The only legitimate purpose of defamation, libel, slander and insult laws is to protect reputations; this implies defamation will apply only to individuals - not flags, States, groups, etc.; these laws should never be used to prevent criticism of government or even for such reasons as maintaining public order for which specific incitement laws exist;

(b) Defamation laws should reflect the principle that public figures are required to tolerate a greater degree of criticism than private citizens; defamation law should not afford special protection to the president and other senior political figures; remedy and compensation under civil law should be provided;

(c) The standards applied to defamation law should not be so stringent as to have a chilling effect on freedom of expression;



Association of Caribbean Mediaworkers

Unit 1, Upper Level, Elan Place, 137 Eastern Main Rd,

St. Augustine, Trinidad & Tobago

T: 1 (868) 296-8009

E: acmmail@gmail.com

W: www.acmediaworkers.com

(d) To require truth in the context of publications relating to matters of public interest is excessive; it should be sufficient if reasonable efforts have been made to ascertain the truth;

(e) With regard to opinions, it should be clear that only patently unreasonable views may qualify as defamatory;

(f) The onus of proof of all elements should be on those claiming to have been defamed rather than on the defendant; where truth is an issue, the burden of proof should lie with the plaintiff;

(g) In defamation and libel actions, a range of remedies should be available, including apology and/or correction; and

(h) Sanctions for defamation should not be so large as to exert a chilling effect on freedom of opinion and expression and the right to seek, receive and impart information; penal sanctions, in particular imprisonment, should never be applied.

The situation in the Caribbean

As presented by Mr. Claude Robinson in his paper the situation in the Caribbean requires immediate action to ensure full protection for the press. The situation in Antigua and Grenada are particularly noteworthy as examples of situation that should not be tolerated and the indeed can present a chilling effect on the work of journalists.

It is my opinion that the position adopted by the Privy Council in the case of Mr George Worme in the sense that it opens the door for qualified defenses against libel is insufficient, the concept should be immunity. I must also add a note on the civil aspects of libel. A libel suit from a public official is but a subterfuge for state repression. In certain cases the consequences of a civil lawsuit can be even worse than a criminal fine or some jail time. An award of millions of dollars can place a small media house or an individual journalist out of business forever.

CONCLUSION

Criminal libel has a chilling effect on freedom of the press and thus should have no place in democratic society. The goals the state alleges that aspires to achieve are adequately met by non penal tools such as civil actions. However, civil action cannot be use as a subterfuge for retaliation against for performing its social function. Access by public figures to these suits should be curtailed or at least qualified.

In exercising the sovereign prerogative of self-governance in modern society, the people necessarily depend upon certain institutions for information about the



Association of Caribbean Mediaworkers

Unit 1, Upper Level, Elan Place, 137 Eastern Main Rd,

St. Augustine, Trinidad & Tobago

T: 1 (868) 296-8009

E: acmmail@gmail.com

W: www.acmediaworkers.com

positions of politicians competing for office and to evaluate government policies. Today, the organized press, particularly the broadcast media, is the major institution that performs this informative and evaluative function. To perform these democratic functions, the press must be protected both from the state and from private threats. Stated otherwise, the press certainly needs a degree of autonomy from the state, but also needs help from it. Although most proponents of free speech would deny or indeed even find certain aspects of this view dangerous, even deplorable, the state can be both a friend and an enemy of the press. This is particularly so in our region.

The context of the CSME provides an excellent opportunity for the promotion and creation of the discourse that it is necessary to achieve a profound regional commitment to the principle that debate on public issues should be, in the words of Justice Brennan, uninhibited, robust and wide open and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government officials". I also add that as a by product, also the protection of rubbish.

I do not expect you to agree with me, but I do expect you to accept the invitation to have this discussion.