THE COST OF REPUTATION: FREEDOM OF SPEECH AND DEFAMATION

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Submitted to
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In partial fulfilment of the requirements for the degree of Master of Laws

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Budapest, Hungary
2010

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Chapter One

Introduction

> The peculiar evil of silencing the expression of an opinion is that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.
>
> ~John Stuart Mill, *On Liberty*, 1859

1.1. Introduction

Freedom of speech is accepted as one of the fundamental liberties by established and new democracies having written constitutions and bill of rights around the world.[1] In a number of constitutions this fundamental right is provided as freedom of expression and opinion. Similarly, international human rights instruments such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) guarantee the right to free expression. The preamble of the UDHR states that freedom of speech is one of the highest aspirations of common people.[2]

Further, Article 19 of the Universal Declaration of Human Rights states that "Everyone has

[1] First Amendment, The Constitution of the United States; Article 19, the Constitution of India, 1950, Article 12 Interim Constitution of Nepal 2007, Article 16, Constitution of the Republic of South Africa

[2] Preamble, Universal Declaration of Human Rights, United Nations, *Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948*

the right to freedom of opinion and expression; this right includes freedom to hold opinion without interference and to seek, receive and impart information through any media and regardless of frontiers." Article 19 of the ICCPR guarantees the right to freedom of expression in a similar manner.[3]

Freedom of expression has been guaranteed under regional human rights instruments such as the European Convention on Human Rights (ECHR) and the African Charter on Human and People's Rights (ACHR) in very similar manner. Article 10 of the ECHR states that "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."

However, the right to free expression under national constitutions or international or regional human rights instruments is not an absolute right. From the early days this right is subject to limitation and it can be traced back to French Declaration of Rights of Man 1789. The Declaration states that citizen shall be responsible for abuses of the freedom of communication of ideas and opinions.[4] Clause-2 of Article 10 of the ECHR states that "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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the

[3] "Right to freedom of expression shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers" Article 19 (2), ICCPR, 1966

[4] Article 11, Declaration of the Rights of Man, 1789

judiciary."

In similar manner a proviso under Article 12 of the Interim Constitution of Nepal authorizes the state to make laws to impose reasonable restrictions "on any act which may undermine the sovereignty and integrity of Nepal, or which may jeopardize the harmonious relations subsisting among the people of various castes, tribes, religions or communities, or on any act of defamation, contempt of court or incitement to an offence, or on any act which may be contrary to decent public behavior or morality".[5]

Similarly, a number of court decisions around the world have established the importance of protection of reputation. For example the Supreme Court of Canada has stated clearly that "the protection of the good reputation of an individual is of fundamental importance in a democratic society".[6]

Thus, one of the common limitations on the right to freedom of expression under national constitutions and international and regional human rights instruments is either protection of the respect for others or defamation. Thus 'defamation' is recognized as one of the limitations on the right to free expression. The main objective of the law of defamation is protection of reputation of people and the main issue between defamation and freedom of speech is how to reconcile the objective of defamation with the purposes of free speech.[7] Similarly, organizations working for promotion of freedom of expression claim that defamation laws

[5] Article 12(3)(a), *Interim Constitution of Nepal*, available at *www.unmin.org.np/.../Interim.Constitution.Bilingual.UNDP.pdf*, accessed on 25 April 2010

[6] *Hill v Church of Scientology of Toronto* (1995), 2 SCR 1130, [1995] 126 DLR (4th) (SCC) [120]

[7] John G. Fleming, *The Law of Torts* (8th ed.), Law Book Company, 1992, p. 524

often represent unnecessarily and unjustifiably broad restrictions on freedom of expression.[8]

There is a consensus among scholars and intellectuals that concept of freedom of speech and principles of liability for defamatory statements reflect opposite value system or competing interest.[9] In recent years, defamation has been used as a tool to suppress the right to free speech around the world. World Press Freedom Committee report of 1996 states that at least 99 journalists, writers and artists were prosecuted after the Egyptian Peoples Assembly adopted a restrictive press law in May 1995.[10] In Turkey, then Prime Minister Erdogan had filed libel charges against a number of political cartoonists and writers in 2005. In one of the case, "an Ankara court convicted Musa Kart of the daily *Cumhuriyet* for a cartoon portraying Erdogan as a cat. The court ordered Kart to pay $3,800. In March Erdogan filed a lawsuit against *Penguen* seeking $28 thousand (38,178 lira) in compensation for depicting him as various animals".[11] Multinational companies are also using libel law to silence journalists throughout the world. In March 2008, a retail chain company Tesco has sued newspaper columnist Ms. Nongnart Harnwilai. Ms. Harnwilai has published a story about Tesco in Thai-language business daily *Krungthep Turakit*, a sister-publication of the English-language 'The Nation'. Tesco has demanded 100 million baht in damages claiming the story defamatory.[12] Tesco

[8] *Defamation ABC*, Article19, November 2006, p. 3 available at http://www.article19.org/pdfs/tools/defamation-abc.pdf , accessed on 13 November 2008

[9] Alfred H. Kelly, *Constitutional Liberty and the Law of Libel: A Historian's View*, American Historical Review, Volume LXXIV, December 1968, p. 430; *Unfair Publication: Defamation and Privacy*, Report No. 11, The Law Reform Commission, Australian Government Publishing Service, Canberra, 1979, p. ix

[10] James H. Ottaway, Jr. and Leonard H. Marks, *Insult Laws: An Insult to Press Freedom*, World Press Freedom Committee, 1996, Capetown, South Africa, p. 5

[11] *2005 Country Reports on Human Rights Practices*, US Department of State, Report available at http://www.state.gov/g/drl/rls/hrrpt/2005/61680.htm, accessed on 1 December 2008

[12] *Tesco's libel spree continues with third defamation suit in Thailand*, Southeast Asian Press Alliance, available at http://www.prachatai.com/english/news.php?id=593, accessed on 1 December 2008

sued Guardian Magazine also in April 2008.[13]

Thus, defamation is one of the main challenges the media is facing universally. So, the need is to achieve the proper balance between the fundamental importance of free speech and the limits set out in defamation law. **This study shall explore whether defamation law is instrumental in obstructing the right to free speech.**

A number of literatures including books, case studies, academic journals, articles, governmental and non-governmental reports and publication have been reviewed for this study. Freedom of speech and Defamation has always been two conflicting ideas for legal scholars. Intellectuals and writers have often dealt this topic under First Amendment rights while dealing with American jurisprudence. There are articles dealing with jurisprudence of defamation developed under ECHR but no robust literature has been found. Moreover, the writer couldn't find study focusing comparison between the jurisprudence developed by US Supreme Court and ECHR. In following paragraphs follows a brief review of literature.

A number of literatures are based on the theories developed by John Milton and J.S. Mill and commentaries on them for the theoretical underpinning of freedom of expression. Mill has based his theory on 'Truth' and says that any restriction on speech may deprive society an opportunity of exchanging error for truth.[14] Justice Holmes, in his dissenting opinion in the case of *Abrams v. United States* argued that the test of truth is best judged in the competition

[13] *Tesco takes legal action against Guardian*, available at http://www.guardian.co.uk/business/2008/apr/05/tesco.supermarkets?gusrc=rss&feed=networkfront, accessed on 1 December, 2008

[14] John Stuart Mill, *On Liberty*, John W. Parker and Sons, 1859

in the market.[15] He says that the truth depends on the power of the thought to get acceptance in the market. In Defamation and Freedom of Speech, Dario Milo has dealt with these ideas as the theoretical basis of freedom of expression. In addition he says that "the protection of opinions must also extend to 'false opinions' also otherwise the great benefit of obtaining a 'clearer and livelier impression of truth provided by its collision with error' will be lost."[16] He tries to explain how the values underpinning the right to reputation should permeate the principles of defamation law.

In the article 'Constitutional liberty and the law of libel: Constitutional perspective', Alfred H. Kelly has given the historical development of law of libel. He traces back the history of libel law emerging from the English common-law courts of the England in seventeenth and eighteenth century.[17] Starting from the libel laws in England he explores defamation laws of American colonies, and then court cases in the United States. He has analyzed major Supreme Court cases related to defamation up to 1968. This article is one of good source to look into American cases.

However there are not only scholars who are happy with the philosophies in favor of free speech. There are scholars who are not happy with all these theories which take speech as right. In the Tolerant Society, Lee C. Bollinger starts the introduction of the book saying "The origin of this book lie in a dissatisfaction with the current explanations and theories for the modern concepts of freedom of speech, particularly as they apply to extremist speech.[18]

[15] *Abrams v. United States*, 250 US 616 (1919) 630

[16] Dario Milo, *Defamation and Freedom of Speech*, Oxford University Press, Oxford, 2008, p. 56

[17] Alfred H. Kelly, *Constitutional Liberty and the Law of Libel: A Historian's View*, American Historical Review, Volume LXXIV, December 1968, p. 430

[18] Lee C. Bollinger, *The Tolerant Society*, Oxford University Press US, 1988, p. 3

He opines that under the philosophical theories highly subversive and socially harmful speech are also protected. Views of Bollinger will be analyzed in the part of this study dealing with the philosophical analysis of theories of freedom of speech.

1.2. Scope of the Study

This study is focused on the relationship between the right to free speech and the right to reputation. It shall explore the theoretical and jurisprudential basis of freedom of speech and the right to reputation. Similarly, it will discuss principles and jurisprudence developed by the United States Supreme Court and the European Court of Human Rights. This study shall basically focus on focus on relationship between press freedom and defamation.

1.3 Methodology of the Study

Comparative methods shall be applied for this study. This study shall compare the jurisprudence developed by the United States Supreme Court and European Court of Human Rights. A number of cases shall be selected on the basis of subject matter. Similarly a number of cases studies from other jurisdiction shall also be analyzed to test the hypothesis whether defamation law is instrumental to obstruct the right to free speech.

1.4. Limitation of the Study

This study is subject to a number of limitations including time limitation and content limitation. As the study is part of an academic obligation, it must be completed within a stipulated timeframe. 'Defamation' covers a number of components such as insult laws or

sedition, group defamation, religious defamation, defamation of public officials, contempt of court etc. However, this study shall focus the relationship between the defamation and press freedom.

1.5. Structure of the Study

This study is divided into five chapters. The first chapter of the study shall introduce the research design. This chapter deals with the research problem, scope, limitation and structure of the study.

The second chapter of the study deals with the theoretical bases of freedom of speech. Theoretical base of freedom of speech and current postulate on the basis of court jurisprudence shall be presented in this chapter. Likewise, chapter three deals with the defamation. Along with philosophical grounds of defamation, new trend of defamation along with the development of information technology shall be dealt in this section.

In chapter four is the most important part of this study. In this part it will be analyzed whether the balance between the right to free speech and right to reputation is actually balanced one or not. This chapter shall explore this idea on the basis of case-laws developed by the United States Supreme Court and European Court of Human Rights. On the basis of this analysis the hypothesis shall examined.

Chapter five is final chapter of the study and it will provide the conclusion derived from the basis of the study and recommendations thereon.

Chapter Two

Theoretical bases of Freedom of Speech

2.1. Introduction

In the first introductory chapter of this paper I have given short account how the philosophical ground of freedom of speech was originated. In this chapter I am going to deal with the some of those grounds. This paper will not deal with the question what free speech is because a distinct and depth analysis is necessary to define that, especially when the scope of free speech has expanded gradually. For example, act of expression such as flag burning has been defined by courts as protected political speech. However it would be relevant to state what Stanly Fish has said about free speech. According to him, "Abstract concept like free speech do not have any "natural" content but are filled with whatever content and direction one can manage to put into them. "Free speech" is just the name we give to verbal behavior that serves the substantive agendas we wish to advance; we give our preferred verbal behaviors that name when we have power to do so."[19] However, there is a widespread public support for the free speech principle that even speech which causes some measures of harm to the public, is entitled to a special degree of immunity from government restraint not afforded to conduct which might cause a similar amount of damage. He further adds that the coherence of this principle is debated by political philosophers since last two or three

[19] See, Stanley Fish, *There's No such Thing As Free Speech and It's Good Thing Too*, Oxford university Press, 1994

hundred years.[20]

In today's 21st century no one questions the importance of freedom of speech. Today freedom of speech is regarded as indispensable value and basic right for the realization of other rights. Speech is entitled to a degree of immunity from government regulation because of some special quality or value to be attributed to communication and expression. Further, in the present world debate about free speech is more concerned with the speech and meaning of free speech rather than the merits of general principles.[21]

There are a number of arguments or philosophical grounds scholars, philosophers and sometime jurists and courts has expounded why freedom of speech is to be protected. Like all other rights, necessity of protecting free speech can also be justified, to some extent, under libertarian claim, but is insufficient. It is not easier to identify single justification for the principles of freedom of speech because reasons for free speech are based on complex and overlapping elements.[22] In this section of the paper, I have tried to present the major arguments presented by philosophers and scholars in favor of the strong protection of freedom of speech.

[20] F. Schauer, *Free Speech: A Philosophical Enquiry*, 9 Cambridge, 1982, Ch. 1. Cited by Eric Barendt, *Freedom of Speech*, Clarendon Press, 1985, p. 1

[21] Eric Barendt, *Freedom of Speech*, Clarendon Press, 1985, p. 8

[22] Kent Greenawalt, *Free Speech Justifications*, Columbia Law Review, Vol. 89, No. 1 (Jan., 1989), pp. 119-155

2.2 The Truth Theory

Historically, the most durable argument for free speech principle has been based on the importance of open discussion to the discovery of truth.[23] The principle of freedom of speech for the discovery of truth was expounded by John Stuart Mill (1806-1873). Mill was one of the most influential English Utilitarian Philosopher. His treatise 'On liberty', published in 1859, is the best known and the most instrumental of his writings concerning freedom of speech.

Mill has dealt with liberty of thought and discussion under chapter two of the 'On liberty'. Mill starts his argument in support of a protection of personal opinion of an individual. He says that even if an opinion is a personal possession without any value except to the owner and if that is obstructed, it will certainly make a difference by the fact that the injury (obstruction in the enjoyment of expression) is inflicted only on few people or many. So, what harm is there in silencing that expression of an opinion? He says that "it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error."[24]

In the above statement Mill favors for the protection of the speech, notwithstanding the fact whether the opinion is true or false. There are two dangers, according to him, that if the

[23] *Ibid,* 21

[24] *Ibid,* 14

statement is true; overall human race and existing generation (if truth is never allowed to expressed, not only the existing generation but next generation will also be deprived) are deprived the opportunity to know the truth and at the same time if he was wrong again the people with loose the opportunity to have 'clearer perception and livelier impression of truth'.

Further, Mill has advocated for the diversity of opinions and he rejects the idea that there is only one true statement of opinion and others are false. According to Mill (even) "conflicting doctrines… share the truth between them; and the nonconforming opinion is needed to supply the remainder of the truth, of which the received doctrine embodies only a part".[25]

The truth theory of Mill is very close to the 'marketplace of ideas' theory started by the United States Supreme Court. It was Justice Oliver Wendell Holmes, who coined the term 'Marketplace of ideas' in his dissenting opinion in the *Abrams v. United States*[26] Supreme Court case. Holmes argued that society's ultimate good "is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market." Truth, he wrote, "is the only ground upon which" the wishes of society "safely can be carried out. That '*at any rate*' is the theory of our Constitution."[27]

However the academic world has attacked the theory of marketplace of ideas severely. C. Edwin Baker has written in his book Human Liberty and Freedom of Speech that "At least within the academic world the assumptions on which the classic marketplace of ideas theory

[25] *Ibid* 14, p. 83
[26] 250 US 616 (1919)
[27] *Id*, 630 (Holmes, J., dissenting)

rests are almost universally rejected."[28] The most common of the false assumptions, according to critics, are "(1) that everyone has access to the market, (2) that truth is objective and discoverable rather than subjective and chosen or created, (3) that truth is always among the ideas in the marketplace and always survives, and (4) that people are basically rational and, therefore, are able to perceive the truth".[29]

Similarly, there are scholars like Prof. Jarome A. Barron who believe that the constitutional theory of free speech is in the grip of romantic conception that the 'marketplace of ideas' is freely accessible. According to him protection of free expression alone is insufficient as the changes in the communications industry "have destroyed the equilibrium in that marketplace."[30] Barron has further proposed to provide access to the press to the marketplace to maintain the equilibrium of the market. However, it is not sure from the Baron's suggestion how ensuring the access to market will solve the other problems highlighted by the critics such as objective nature of the truth or perceiving truth by rational people.

Likewise, efficiency of this principle is attacked by constitutional scholars on the basis that even in United States where freedom of speech for robust marketplace of ideas originated, minority groups such as African Americans, Hispanics, gays and lesbians are not able to engage effective in that 'marketplace of ideas' because of the imbalance of power in the racist society.[31]

[28] C. Edwin Baker, *Human Liberty and Freedom of Speech*, Oxford University Press, New York, 1999, p. 12

[29] W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, J & MC Quarterly, Vol. 73, No. 1, Spring 1996, p. 44

[30] Jerome A. Barron, *Access to the Press - A New First Amendment Right*, Harvard Law Review 80, May 1967

[31] See, *Campus Anti-racism Rule: Constitutional Narratives in collision*, 85 Nw. U.L. Rev. 343 (1991), as cited by Nocholas Wolfson, *Hate Speech, Sex Speech, Free Speech*, Praeger Publishers, Westport, 1997, p. 6

2.3 Self fulfillment Theory

Personal autonomy or self-determination is a complex notion consisting of three basic elements. In particular, it presupposes a combination of capabilities, opportunities and self-reflection.[32] This second theory of the freedom of speech is based on the autonomy of the human being. Freedom of speech is an integral part of each individual's right to self-development and fulfillment.[33] Science has proved that human beings are imbedded with the best intellectual power in this world and the reason is the power to think. Every individual has different personality because of their power to think, perceive and reflect and it is necessary for the growth of that personality that people are not inhibited to say, write or tell other people what they think. Similarly, it is necessary for people to know what other people think also for their self fulfillment.

The idea of self-fulfillment is related with the development of faculties. Self-fulfillment is not possible is not possible if there is obstruction in the development of faculties. In this juncture what Justice Brandeis said in the case of Whitney v. California is very important. According to him the people who fought and won the independence of United States believed that the final end of the State was to make men free to develop their faculties and they valued liberty both as an end and as a means.[34]

One of the basic different between the truth theory and self fulfillment theory or theory based on the autonomy of the people is the focus the latter puts on individual. In the first theory the

[32] Filimon Peonidis; *Freedom of Expression, Autonomy, and Defamation*; Law and Philosophy; Vol. 17, No. 1 (Jan., 1998), pp. 1-17

[33] *Ibid,* 21

[34] Concurring opinion of Justice Brandies, *Whitney v. California*, 274 U.S. 357 (1927) 375

focus is on the revelation of the truth and the individual whose expression is to be protected is not very important. In other words, his expression has the protection but not for his advancement but to find the truth. In this theory, the expression is protected because that is necessary for the self-realization of the person who is expressing that idea.

Under the autonomy theory every kinds of speech irrespective of its nature is protected, which means that the protection is not limited to political speech, but applies to all speech which provides the audience with information and opinion relevant to the formation of its own beliefs.

The theory of free speech is criticized by some largely because of the weaknesses of the notion of personal autonomy which lies at its root. They argue that the focus is limited to the personal autonomy of individuals and other societal and political value of free speech is overshadowed. Schauer, for example, does not recognize autonomy, or self-realization in the narrow sense as an element of a distinctive free speech principle.

2.4 Citizens' participation in Democracy Theory

One of the reasons why freedom of speech is regarded pristine is its importance for the citizens' participation in the democracy. It is related with informed choice, uninhibited discussion of ideas, dissemination ideas necessary for the discussion to participate in the democracy. Freedom of speech is necessary to let people express their view, their criticism of the government and that is the minimum requirement for the public discussion. Those views unwarranted by the government are more important than the one supportive of the government to make a political system more democratic and responsive.

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".[35]

Some scholars have used this theory as one of the justifications for freedom of speech which is exposure and deterrence of abuses of authority. Freedom of speech works as a check on abuse of authority, and specially government authority. Countries where press is free and freedom of speech is highly respected, the degree of corruption is low compared to the countries where the press and free speech is controlled. The relationship between freedom of speech and corruption and abuse of authorities can be found from some of the international studied carried out by the organizations such as Transparency International and World Development Reports. Abuse of governmental authority and political corruption is pervasive in the countries of developing world, where the press freedom is controlled by the

[35] *New York Times v. Sullivan*, 376 U.S. 254 (1964)

government in one or another way and people cannot exercise their freedom of speech.

Citizens' participation in democracy theory is closer to the 'Self-Government' concept of Professor Alexander Meiklejohn. He has described the importance of free speech for the self government and suggested a distinction between speech implicating the public welfare and speech implicating merely private goods.[36] For him the touchstone of free speech coverage is speech bearing on "issues with which voters have to deal.[37] It is not clear how the 'issues' to be dealt by the voters is to be defined. With the use of term voter, Meiklejohn has limited the protection of free speech only to the political expressions. Because of this it can be argued that the theory of Meiklejohn is either unduly narrow or misleadingly phrased.

[36] See A. Meiklejohn, *Free Speech and Its Relation to Self-Government*, as cited in R. George Wright, *A Rationale from J. S. Mill for the Free Speech Clause*, The Supreme Court Review, Vol. 1985 (1985), pp. 149-178

[37] *Ibid*

Chapter Three

Defamation

This part of the paper shall deals about defamation and its different facets. In the first section the paper will conceptualize defamation. History and definition of defamation and types of defamation is dealt in this chapter. Similarly, defamation as a legitimate restriction of freedom of expression is also analyzed.

3.1. Conceptualization of 'Defamation'

Defamation is an act which involves making a false statement about a third person which harms the reputation of that person. Such false statements are regarded as defamatory statements. The law regulating the defamation is not of recent origin as it was developed as a part of the law of tort in England. The Restatement (Second) on Laws on Torts states that the Common Law Defamation consists of "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication".[38]

Legal Scholar Salmond has dealt on defamation on his treatise on Torts.

"The wrong of defamation consists in the publication of a false and defamatory

[38] *Restatement (Second) of Torts*, (1977), p. 558

statement concerning another person without lawful justification. That person must be in being. Hence not only does any an action of defamation not survive for or against the estate of a deceased person, but a statement about a deceased or unborn person is not actionable at the suit of his relatives, however great their pain and distress, unless the statement is in some way defamatory of them."[39]

Here Salmond has stressed more on publication, not in oral defamation or slander. Similarly, he has denied the possibility of defamation of anyone *who is not in being*. The Black's Law Dictionary has defined defamation as the act of the harming the reputation of another by making a false statement to a third person, or a false written or oral statement that damages another's reputation. It shows that the form of defamation either can be oral or written.

Defamation is divided into two distinct notions, i.e. libel and slander, on the basis how the defamatory statement was produced. If the defamatory statement is in the transitory form (spoken), its slander and if is in fixed form for example in printed format, its libel. This distinction also affects how the defamatory statement was produced, for example in slander the spoken word must be proved to have been uttered, while a libelous document can simply be produced.[40] However, the distinction between libel and slander, the distinction of spoken words and written words become cumbersome when libel was extended to include pictures, signs statues, motion pictures, and even conduct carrying a defamatory imputation, such as hanging the plaintiff in effigy, erecting a gallows before his door, dishonoring his valid check drawn upon the defendant's bank or even … following him over a considerable period in a conspicuous manner.[41]

[39] R.F.V Heuston, *Salmond on the law of Torts*, 17th ed., 1977, p. 138

[40] David Hooper, *Reputation under Fire*, Little, Brown and Company, 2000, London, p. 3

[41] W Page Keeton et al., *The law of Tort*, § 112, 5th ed., 1984, p. 786

Showing the difference between libel and slander Heuston in Salmond on the Law of Torts states that:

> *"Although libel and slander are for the most part governed by the same principles, there are two important differences: (1) Libel is not merely an actionable tort, but also a criminal offence, whereas slander is a civil injury only. (2) Libel is in all cases actionable per se; but slander is, save in special cases, actionable only on proof of actual damage. This distinction has been severely criticized as productive of great injustice"*[42]

However, the distinction between libel and slander is narrow and irrelevant these days with the development of technology resulting in broadcasting, computer transmission, webcasting and podcasting. Broadcasts and computer generated transmission are now defined as libel.[43]

Nepalese law on defamation has not made provision for libel and slander separately. Defamation Act 1958 has defined defamation as dishonoring someone with gesture, symbols or spoken words; or printing or writing something deliberately with adequate reasons to believe it is not true, to dishonor someone.[44]

The Indian Penal Code, 1860 defines defamation as the wrong done by a person to another's reputation by words, signs or visible representation. According to the Section 499 of the

[42] *Ibid,* 39

[43] *Ibid,* 40

[44] *Defamation Act 1959,* available at http://lawcommission.gov.np/index.php/en/acts-nepali?start=40 (*Gali ra Beijjati Ain* in Nepali), available at, accessed on 25 July 2010

Code, "Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame the person."[45]

The distinction between the libel and slander is narrowed down gradually and many reports on reform of defamation law have urged to abolish such distinction. For example, the Law Reform Commission of Ireland has suggested for abolishment of such distinction in its Report on the Civil Law of Defamation. It argues that the basis of the distinction is purely historical and has made the law unnecessarily complex.[46]

3.2. History of Defamation Law

Modern law of defamation is based primarily on English tort law. English legal systems have provided a remedy to defamed person since pre-Norman Times. In medieval England, as in other cultures, duels armed raids and other violent retaliation were regarded as natural, honorable responses to defamation. They relied first on the church and then on their own court to offer a peaceful alternative.[47]

Until the sixteenth century, the ecclesiastical courts exercised general jurisdiction over defamation as defamation was regarded as 'sin' and the ecclesiastical courts had exclusive jurisdiction over spiritual wrongs. Thereafter the common law courts developed an action on

[45] Article 499, Indian Penal Code

[46] *Report on the Civil Law of Defamation*, The Law Reform Commission, 1991, p. 5

[47] Theodore F.T. Plucknettt, *A Concise History of the Common Law*, 5th ed., 1956, pp 483-90, as referred in the Libel and Privacy, Bruce W. Sanford, 2nd ed, Aspen Publishers, 2008, p

the case for slander where 'temporal' (as distinct from 'spiritual) damage could be established. Much later, the common law courts acquired jurisdiction over libels, too, and they then forged a distinction between libel and slander on the basis that damage could be presumed in libel, but that the claimant would have to prove 'special damage' for slander.

In the late nineteenth and early twentieth centuries, liability in defamation was extended because of the ménage to reputations occasioned by the mass circulation of the new, popular press. The recent history of defamation is marked by continuing conflict between the need to protect the character and privacy of individuals, on the other hand, and the right to freedom of speech, on the other. [48]

Meanwhile scope of regulation of defamation was expanded with enactment of new laws. Under a 1275 law, political or seditious libel was codified and expanded.[49] Under this '*De Scandalum Magnatum*' law, 'gossipers' who disparaged the king and his lords were jailed as an inducement. This led to a system of royal proclamation and monopolies which controlled the press.[50] Whereas protection of reputation was under the jurisdiction of Court of Star Chamber in the seventeenth century, Fox Libel law was passed in 1792 to enable juries to fix libel damages and to protect litigants from the judges. Libel moved from being predominantly a criminal matter to a civil one in the England.[51] Fox's Libel Act of 1792 is still the law governing criminal prosecution for libel in the United Kingdom. Despite its existence, criminal libel is no longer significant in British law. Modern-day prosecutions are

[48] See. eg, Barendt, '*Libel and Freedom of Speech in English Law*' [1993], PI. 449. (as stated in John Murphy, *History of Defamation*, Harry Street, Oxford University Press, p. 517, 2007)

[49] Bruce W. Sanford, *Libel and Privacy*, 2nd ed, (1996 Supplement)Aspen Publishers, , p. 2-3

[50] *Ibid*, 39; p. 1

[51] *Id*

uncommon and, against news media, almost nonexistent.[52] Civil libel suits in Britain are governed by common law and statute. In 1996, Britain amended Defamation Act of 1952 and enacted Defamation Act 1996. One of the major distinctions of the British libel regime is regarding burden of proof. A plaintiff in Britain does not have burden to prove that the statement was false.

Recently, the Britain has decided to reform its defamation law regime. The Coroners and Justice Act (2009) decriminalizes defamation, including repeal of the criminal offences of sedition and seditious libel, defamatory libel, and obscene libel in England, Wales and Northern Ireland. This law was passed on 12 November 2009.[53]

American law of defamation is stemmed from and largely reflects the common-law roots.[54] US federal courts had been upholding common-law convictions, including seditious defamation until 1812. However in United States v. Hudson and Goodwin, the Supreme Court put an end to the common-law conviction and required enactment of statutory law for conviction. In this case "Barzillai Hudson and his codefendant George Goodwin were indicted in federal court in 1806 and 1807 for common law seditious libel, for publishing a report that President Thomas Jefferson had conspired with Napoleon Bonaparte".[55] Justice William Johnson, in the majority decision stated that federal Courts derive their powers solely from the Constitution and the Congress has no residual jurisdiction.[56] This case

[52] *Ibid* 48; pp 2-9

[53] See, http://www.article19.org/pdfs/press/united-kingdom-defamation-decriminalised.pdf , accessed on 26 July 2010

[54] Paul C. Weiler, *Defamation, Enterprise Liability and Freedom Of Speech*, The University of Toronto Law Journal, Vol. 17, No. 2 (1967), pp. 278-343, available at http://www.jstor.org/stable/824967

[55] Hall, Kermit L. et al (Edit), *The Oxford Companion to the Supreme Court of the United States*, 2nd ed., Oxford University Press, 2005, p. 477

[56] *United States v. Hudson and Goodwin*, 11 U.S. 32 (1812)

changed the regime of common-law criminal defamation in the United States.

In the 1798 American congress has enacted the Sedition Act which criminalized publication of insults (false and scandalous material) against the President, the Government or members of congress.[57] The law expired on March 3, 1801 as provisioned in the Act.

Similarly Sedition Act 1918 (Amendment in the Espionage Act of 1917) was enacted making it a crime to ‘‘willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language’’ about the United States’ form of government.[58] This Act also worked as a form of criminal defamation law for that time.

In the United States there are no federal criminal defamation or insult laws of any kind in force at present. On the state level, 17 states and two territories continue to have criminal defamation laws "on the books".[59]

According to ARTICLE19, a global campaign for free expression which carried out an extensive research on defamation in 2009, 146 countries still have criminal defamation laws in one or another form. The research has reviewed 168 countries covering all continents of the world and had found 10 countries which had only civil defamation laws.[60]

[57] *Act for the punishment of certain crimes against the United States*, enacted on 14 July 1798, available at http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=719 accessed on 1 August, 2010

[58] *Ibid* 55, p. 893

[59] *Libel and Insult Laws: A Matrix on Where We Stand and What We Would Like To Achieve: A Comprehensive Database on Criminal and Civil Defamation Provisions and Court Practices in the OSCE Region*, Organization of Security and Cooperation in Europe, 2005, Vienna, p. 171

[60] See, http://www.article19.org/advocacy/defamationmap/overview.html, accessed on 2 August 2010

3.3. Types of Defamation

In the earlier part of the paper it is already discussed that defamation can be both criminal offence and civil tort. Despite the fact there is a wave of abolishing criminal defamation around the world; many countries still have criminal defamation. Looking at the defamation laws of different countries, researchers have opined that it is not easy to make a clear demarcation between criminal defamation and civil defamation. For example, Defamation Act 1959 of Nepal has provided for a fine up to Rs. 50,000 or imprisonment for up to 2 years. Imprisonment is by nature criminal sanction. But defamation in Nepal is a not a state case, which means that state machinery doesn't prosecute the case of defamation, and police power is not employed in the investigation of the offence. Plaintiff has to start the process and file application in the court of law. The Nepalese law itself is silent whether defamation is a criminal or civil offence.[61]

3.3.1. Civil Defamation

As referred earlier history of the defamation law has shown that the act of defaming someone was regarded as sin in England. Later, it was developed further and it came under the jurisdiction of court of law.

The civil law version of the defamation was developed from the Roman *actio iniuriarum*, which focused on the "intentional and unjustified hurting of another's feelings" more than

[61] *An Agenda for Change*, Article19 et al, 2008, p. 21

damage to public reputation.[62] In England, the common law courts began to develop a civil action for slander. This jurisdiction was gradually taken over from the Ecclesiastical Courts, whose jurisdiction began to wane after its peak towards the end of the 15th century.

Despite the existence of both civil and criminal defamation in many countries, it is not easy to distinguish between civil and criminal defamation. Difference between these two has to be indentified on the basis of legal proceedings and the role played by the state in bringing the case. Generally, in the civil defamation law state's criminal justice machinery is not involved. Aggrieved party of the dispute (plaintiff) brings the case in the court of law. As state machinery is not involved, the degree of chilling effect on the freedom of expression is potentially less.[63] However, it is claimed that the chilling effect on freedom of expression is not dependant exclusively on whether state plays the role in bringing the case. In case the civil defamation laws are not formulated ensuring prevention of abuse, proper defenses against defamation is not allowed or no reasonable limitation on compensation is set; the chances for adverse chilling effect is apparent.[64]

3.3.2. Criminal Defamation

The roots of modern criminal libel law can be traced to the Roman Empire, where the offense

[62] *Die Spoorbond v. South African Railways, 1946 (2) SALR 999, 1010 (CC) (S. Afr.) (Schreiner, J.A., concurring),* as cited by, Docherty, Bonnie Defamation Law: Positive Jurisprudence, Harvard Human Rights Law Review, available at http://www.law.harvard.edu/students/orgs/hrj/iss13/do,cherty.shtml#fn10 , accessed on 2 August, 2010

[63] *Civil Defamation: Undermining Free Expression*; ARTICLE19, 2009, p. 1

[64] *Id,*

could be punished by death.[65] In the medieval England defamation was regarded as spiritual offence and slanderous words gave rise to a cause of action in the ecclesiastical courts.[66] Later the jurisdiction is shared by both the church and king's court and this set up was evolved due to the struggle between Church and State over the administration of justice in England. The king's court had jurisdiction over the criminal defamation and law was passed to limit the exercise of the spiritual jurisdiction so as not to deter from the prosecution of the offenders before the king's justices.[67] Thus the earliest form of libel known to English law was an offence of a criminal nature known as *scandalum magnatum* (slander of magnates). This offence was created by a statute in 1275 in the reign of Edward I.[68]

Many countries around the world still have criminal defamation laws[69] and the justification given by many state for the criminal defamation relates to public interests rather than protection of personal interest i.e. reputation. The justification generally includes maintenance of public order or national security, or friendly relation with other countries.[70]

As aforementioned in this paper it is not easier to define civil defamation and criminal defamation. Some argue that one of the bases for such distinction is the sanction for the defamation and if it carries only pecuniary damages that is civil defamation whereas if the sanction also includes imprisonment, which is generally of criminal nature that is criminal

[65] 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); cited in, Jane E. Kritley, *Criminal Defamation: An Instrument of Destruction*, 2003

[66] *Id*

[67] Van Vechten Veeder, *The History and Theory of the Law of Defamation I*, Columbia Law Review, Vol. 3, No. 8 (Dec., 1903), pp. 546-573

[68] *Id*

[69] See, http://www.article19.org/advocacy/defamationmap/overview.html, accessed on 2 August 2010

[70] *Defining Defamation*; ARTICLE 19; London, July 2000 p. 5

defamation. However this distinction seems holding no water as a number of national laws in different countries provide for imprisonment without referring defamation a criminal offence. One of such examples includes the Defamation Act of Nepal.

It is also argued that distinction between civil and criminal defamation is based on who initiates the case. According to this line of argument in the criminal defamation state brings the case and state prosecutorial mechanism is engaged in the proceedings whereas in the civil defamation, the aggrieved party has to initiate the case.

Looking at different arguments it can be said that whether defamation is criminal or civil depends on the fact how a particular country has made the arrangement. If the defamation law is properly classified as a criminal one, defamation is a criminal offence. Similarly, if it provides for imprisonment, then it is automatically criminal in nature, since this is a criminal penalty. Further other criteria, such as getting a criminal record, the possibility of the State bringing the case, etc. is also important in the distinction between civil and criminal defamation.

3.4. Defamation: A Legitimate Restriction on Freedom of Expression to protect reputation?

International human rights law have recognized freedom of expression as a fundamental human right essential both to the effective functioning of a democratic society and to individual human dignity. Though not legally binding to the member states, the Universal Declaration of human rights, under Article 19 stipulates that

> *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."*[71]

In the similar manner International Covenant on Civil and Political Rights (ICCPR) has made provision on Freedom of Expression under Article 19. According to this provision:

> *"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."*[72]

Freedom of expression is not guaranteed only in the international human rights instruments but also under regional human rights instruments. European Conventions on Human Rights and Fundamental Freedoms (ECHR) was the first regional human rights treaty enforced. This convention regulates the right to freedom of expression in Article 10 and provides that,

> *"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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."*

[71] The declaration is available at United Nations Web Portal, see http://www.un.org/en/documents/udhr/index.shtml#a19, accessed on 25 July, 2010

[72] Article 19(2), International Covenant on Civil and Political Rights (ICCPR), available at http://www2.ohchr.org/english/law/ccpr.htm#art19, accessed on 25 July 2010

Likewise, Inter-American Convention on Human Rights has protected the right to freedom of information under Article 13 and provides that the "everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice"[73]

Freedom of expression is not only guaranteed under international and regional human rights instrument but is significantly protected also under the bill of rights and constitutional fundamental rights provisions around the world. Similarly, growing number of countries have promulgated legislative statutes to protect right to freedom of expression.

Freedom of expression is regarded as one of most important human rights and one of the basic conditions for the progress of a democratic society and for the development of every man. According to the European Court of human Rights "Freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every human being."[74]

However, this right is not an absolute right and is subject to a number of limitations. The ICCPR has clearly set that the exercise of the rights regarding freedom of expression carries "special duties and responsibilities" and therefore "… be subject to certain restrictions".[75] The Covenant states that the right can be restricted for the "respect of the rights or reputations of others; protection of national security or of public order, or of public health or

[73] Article 13, American Convention on Human Rights, Available at http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm, accessed on 25 July 2010

[74] *Handyside v.United Kingdom* (1976), Application No. 5493/72

[75] Article 19(3), ICCPR

morals".[76] So According to the Convention the right to freedom of expression can be restricted for the respect of the rights or reputation of others and it is the point where the defamation comes in.

The European Convention has also made provision for the limitation on the right to freedom of expression. Paragraph 2 of Article 10 enounces the legitimate aims that can justify the restriction of freedom of expression:

> *"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."*[77]

Like in the ICCPR, the European Convention has included protection of the reputation or rights of others. Further, it has made provision for the restriction and punishment necessary for maintaining the authority and impartiality of the judiciary, which is subject of either laws regulating contempt of court or defamation in many national legislation.

The American Convention on Human Rights has also envisaged restriction on freedom of expression and includes respects for the rights and reputation of others as one of the basis. The convention says that such restriction shall be expressly established by law to the extent

[76] *Id*

[77] Paragraph 2, Article 10, ECHR

necessary[78] to ensure the respect and reputation.

National legislation and statutes has also recognized restriction on right to freedom of expression. Even in countries where there is not express restriction provided, jurisprudence developed by the court has made arrangements for legitimate restriction. For example, in the United States the first Amendment regulates the right to freedom of expression and according to that:

> *"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."*[79]

Literally, it is clear that congress cannot make any law which restricts the freedom of speech or freedom of the press, however the US Supreme Court has expounded a number of principles how these rights can be regulated.

Likewise the Interim Constitution of Nepal guarantees the right to freedom of expression[80] but authorizes the state to make laws to impose reasonable restrictions "on any act which may undermine the sovereignty and integrity of Nepal, or which may jeopardize the harmonious relations subsisting among the people of various castes, tribes, religions or communities, or on any act of defamation, contempt of court or incitement to an offence, or

[78] Article13, ACHR

[79] First Amendment, US Constitution, Available at http://www.america.gov/constitution.html, accessed on 25 July 2010

[80] *Ibid*, 5

on any act which may be contrary to decent public behavior or morality".[81]

Looking at the international and regional human rights instruments and some of the national legislations, it is clear that the right to freedom of expression is not absolute and there are a number of legitimate restrictions. Protection or respect for the rights and reputation of others is one of such legitimate aim to limit the right to freedom of expression.

[81] *Id.*

Chapter Four

The Right to Reputation versus Freedom of Speech: Conflicting Interest and Necessary Balance

4.1. Defamation and Defenses

Earlier chapters of this paper have dealt on free speech, theories of free speech, defamation and types of defamation. In this chapter the paper will assess the interrelation between conflicting interests of right to reputation and defamation. While dealing with the subject, the analysis shall be made from the freedom of expression viewpoint. The cases reviewed in this chapter under the United States Supreme Court Jurisdiction and the European Court of Human Right jurisdiction is identified and analyzed for the purpose of balancing right to freedom of expression and right to reputation.

4.1.1. Defenses under US Jurisprudence

The first amendment of the United States Constitution protects the right to free speech and free press. The amendment guarantees the free speech by stating that the "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to

assemble, and to petition the Government for a redress of grievances."[82]

Despite the constitution protection on free speech, it is not an absolute right. The Court has expounded a number of principles where it has set the scope of free speech and constitutional protection available for different classes of speech. Defamatory or libelous expression was one of such class of speech not protected under the constitution. The Supreme Court has recognized the reputation of individual since long back. The US Supreme Court as early as 1922 indicated that there was to be no blanket First Amendment protection from either civil action or criminal prosecution for those who defame others.[83] Likewise, in the *cantwell v. Connecticut,*[84] the Supreme Court has found that:

> *"Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."*

In the similar manner the Court has agreed that there were "certain well defined and narrowly limited classes of speech the prevention and punishment of which has never been thought to raise any Constitutional problem".[85] That class of speech included the "lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words -- those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace".[86] Thus libelous or defamatory speech was outside the first amendment protection in the US. The 1964 case of

[82] *Ibid,* 77

[83] *Balzac v Porto Rico,* 66 L. Ed. 627, 1922

[84] C*antwell v. Connecticut* , 310 U. S. 296 (1940)

[85] *Beauharnais v. Illinois,* 343 U.S. 250 (1952)

[86] *Id.*

the *New York Times v. Sullivan*[87] changed the first amendment protection regime of the United States.

The case of *Sullivan* was related with the alleged defamation of the public official by the erroneous newspaper publication. L. B. Sullivan, Commissioner of Public Affairs, with duties to make supervision of the Police Department has brought libel action against the four individual petitioners including the New York Times Company which publishes the New York Times. His complaint alleged that he had been libeled by statements in a full-page advertisement published in the New York Times on March 29, 1960 with the signature of renowned person in it. Sullivan was awarded the claimed damage of US$ 500,000 by the jury of Circuit Court of Montgomery County. The award was further affirmed by the Supreme Court of Alabama.[88]

Despite the fact that the advertisement published in the newspaper did not specifically dealt about him, he mentioned that the word 'police' was targeted to him. Thus, he argued "the paragraph would be read as accusing the Montgomery police".[89] Similarly, "respondent and six other Montgomery residents testified that they read some or all of the statements as referring to him in his capacity as Commissioner."[90]

The claims made in the newspaper were not all factual and many issues were elaborated. In most of the situations, the respondent had nothing to do with the incidents. Interestingly, when the times newspaper knew that the news had libeled respondent they sent him

[87] *New York Times v. Sullivan,* 376 U.S. 254 (1964)

[88] *Id*, 259

[89] *Ibid.*

[90] *Ibid.*

retraction letter asking him to response to it. However, without filing the retraction letter, he filed a law suit.

The jury was asked to find the legal injury on the basis of the publication itself. Further it was stated that "general damages need not be alleged or proved, but are presumed," and "punitive damages may be awarded by the jury even though the amount of actual damages is neither found nor shown." Jury found for the petitioner and awarded US$ 500,000 as damage which was subsequently affirmed by the Supreme Court of Alabama.[91]

The Supreme Court reversed the decision of the Supreme Court of Alabama and remanded the case. In its decision, the Court expanded the traditional common-law truth defense and held that:

> "A *rule compelling the critic of official conduct to guarantee the truth of all his factual assertions -- and to do so on pain of libel judgments virtually unlimited in amount -- leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred.*"[92]

According to the Court such a rule may deter would-be critics of official conduct from voicing their criticism despite their belief that those criticisms are true. Further the Court believed that such rule "dampens the vigor and limits the variety of public debate and is inconsistent with the First and Fourteenth Amendments."

[91] Id. 257

[92] Id. 280

The Court held that "the constitutional guarantees require a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was madewith "actual malice" -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[93]

Likewise, the Court held that the American Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. As the Court found the proof presented to show actual malice lacking the convincing clarity demanded by the constitutional standard it did not constitutionally sustain the judgment for respondent.[94]

After Sullivan, the Supreme decided another case and extended privilege to defamatory criticism of 'pubic figures'. In *Curtis Publishing Co. v. Butts*[95], the US Supreme Court dealt with the issue of defamation of those individuals who were not public officials but "are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."[96]

In *Curtis* the court said that the libel action against public figures "cannot be left entirely to the state libel laws, unlimited by any overriding constitutional safeguard" on one hand and "the standard set by the Sullivan was not the only appropriate accommodation" on the other. Therefore, the court hold that a "public figure who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation

[93] Id. 280

[94] Id. 265

[95] *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967)

[96] Id. 164

apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[97]

In this case, concurring the opinion of the court CJ Warren balanced the right of the press and protection to the private individual. According to him "communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office or assumed an influential role in ordering society." According to him "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."[98]

Gertz v. Robert Welch[99] is another important case decided by the United States Supreme Court. The Supreme Court interpreted the relation between defamation and freedom of speech again in the case of *Gertz v. Robert Welch*. The Supreme Court interpreted first amendment protection in defamation cases brought by private individuals in this case. In this case the Supreme Court granted certiorari to "reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen and the principle question whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury inflicted by those statements."[100]

[97] *Id.* 155

[98] *Id.* 164

[99] *Gertz v. Robert Welch,* 418 US 323 (1974)

[100] *Id.*

In this case, Elmer Gertz, a lawyer from Illinois has filed a defamation case against the publisher of the 'American Opinion', a monthly outlet for the views of the John Birch Society. In one of its article "FRAME-UP: Richard Nuccio And The War On Police", the publication has stated that petitioner had been an official of the "Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our government." It labeled Gertz a "Leninist" and a "Communist-fronter." It also stated that "Gertz had been an officer of the National Lawyers Guild, described as a Communist organization that "probably did more than any other outfit to plan the Communist attack on the Chicago police during the 1968 Democratic Convention."[101]

The facts stated in the American Opinion were inaccurate. The implication that petitioner had a criminal record was false and even though it was true that the petitioner had been a member and officer of the National Lawyers Guild earlier but he had not taken any part in planning demonstrations in Chicago as stated. "There was also no basis for the charge that petitioner was a "Leninist" or a "Communist-fronter." And he had never been a member of the "Marxist League for Industrial Democracy" or the "Intercollegiate Socialist Society."[102]

Despite the jury's finding for the petitioner subsequent award of $50,000[103] the District Court decided that the New York Times standard should govern the case even though petitioner was not a public official or public figure, accepting the respondent's contention that that privilege protected discussion of any public issue without regard to the status of a person

[101] Id, 326

[102] Id, 327

[103] Id, 329

defamed therein.

The petitioner appealed in the Court of Appeals for the Seventh Circuit. However, the court noted that Gertz failed to demonstrate the actual malice as required by the case of Sullivan and suggested that since the article concerned a subject of public interest, that standard could be held to apply without regard to the status of the individual or individuals alleging libel. Citing precedent, it said that Gertz also could not prove reckless disregard on the basis of failure to investigate alone unless he could also prove that the respondents had good cause to believe the article might be false. Yet, it affirmed the trial court's verdict. In other words, the Court of Appeal found that petitioner had failed to prove knowledge of falsity or reckless disregard for the truth.[104]

On the appeal to the Supreme Court, the court interpreted the relation between the free press and the defamation. Similarly, it discussed the different protection level provided to the public official, public figures and private individuals. According to the Justice Powell, who delivered the opinion of the Court, the legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. The decision also reaffirmed that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties.[105] Because of this, according to the Court, private individuals are more vulnerable to injury, and the state interest in protecting them is correspondingly greater. The Court thus hold that the States may define for themselves the appropriate standard of liability for a publisher or broadcaster

[104] Id, 332

[105] Id, 341

of defamatory falsehood injurious to a private individual so long as they do not impose liability without fault.[106]

Without declaring the approach adopted in the Sullivan regarding public officials that expansion thereof in applicable in the context of private individuals, the Court endorsed the Court recognized the strong and legitimate state interest in compensating private individuals for injury to reputation.[107]

However, the Court made a balance by holding that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

The Court declined to accept the petitioner Gertz a public figure for the purpose of the litigation as he had not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome. The Court concluded that the New York Times standard was inapplicable to the case.

Philadelphia Newspapers, Inc. v. Hepps[108] is another important case where the United States Supreme Court has interpreted the relation between the freedom of expression and right to reputation. The significance of this case is the interpretation regarding burden of proof in the libel cases and the Supreme Court had turned the traditional common law burden of proof in libel cases upside down in this case.

[106] Id, 348

[107] Id, 349

[108] *Philadelphia Newspapers, Inc. v. Hepps*, 475 US 767 (1986)

The case is related with the publication of series of article by the Appellant Philadelphia Newspaper against Maurice S. Hepps, principle stockholder of a Corporation. In those article published between May 1975 to May 1976, it was claimed that Hepps had links to organized crime and used some of those links to influence the State's Governmental Processes, both legislative and administrative.

In the case brought by Hepps, the Pennsylvania state court decided that the burden of proving the truth of the statements on the defendant under the Pennsylvania's statute violated the Federal Constitution. However, on appeal the Pennsylvania Supreme Court held that "the burden of showing truth on the defendant did not unconstitutionally inhibit free debate", and remanded the case for a new trial. The decision was appealed in the United States Supreme Court.

The Supreme Court, referring the decision of Sullivan and Gertz where the common law rule on defamation was superseded, held that "the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages". Further, interpreting the rules on burden of proof the court clearly stated that:

> *"To ensure that true speech on matters of public concern is not deterred we hold that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern."*[109]

Thus, while balancing the press freedom and right to reputation, the court tipped over towards the free speech and put the burden of proving falsity or fault in the speech to the

[109] Id, pp. 777-778

plaintiff.

Hustler Magazine, Inc. v. Falwell[110] is another important case decided by the United States Supreme Court. In this case, petitioner Hustler Magazine has published a "parody" of an advertisement for a popular Campari Liqueur in which it described a drunk Falwell, respondent including his name and picture as "Jerry Falwell talks about his first time." Falwell filed a diversity action in Federal District Court against petitioners claiming damages for libel and intentional infliction of emotional distress.[111]

The jury found against respondent on the libel claim, specifically finding that the parody could not "reasonably be understood as describing actual facts . . . or events," but ruled in his favor on the emotional distress claim, stating that "he should be awarded compensatory and punitive damages" and awarded $150,000 in damages. Subsequently, the Supreme Court required to examine "whether the award was consistent with the First and Fourteenth Amendments of the United States Constitution."[112]

In a 8-0 decision the Supreme Court reversed the decision made by the lower courts stating that "the public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one in the issue without showing, in addition, that the publication contains a false statement of fact which was made with "actual malice," i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true." [113]

[110] *Hustler Magazine, Inc. v. Falwell* , 485 U.S. 46 (1988)

[111] Id. 47

[112] Id. 48

[113] Id. 57

Earlier, the respondent claimed that he was intentionally inflicted upon him resulting to his emotional distress from the parody. While deciding the case in favor of the hustler magazine, the court has given certain basis to their judgment. The primary reason referred by Court is "to protect the free flow of ideas and opinions on matters of public interest and concern." The court highlighted various previous examples where higher public officials were similarly criticized in the same manner through caricatures and cartoons. In fact, the court asserts that the role played by the caricatures and cartoons to maintain the public interest is vital.[114]

The second equally important reason is that the court finds absence of actual malice like in the case of Sullivan. The court has clearly mentioned that there is absence of knowledge through the magazine that the statement was true and they did it recklessly which were the major factors while determining the case of libel. Furthermore, in this case, the court has clearly mentioned that judgment is not a copy of Sullivan judgment and is not based on that judgment. The court hold that the decision in this case was "not merely a "blind application" of the New York Times standard" and decided that "such a standard (is) necessary to give adequate "breathing space" to the freedoms protected by the First Amendment."[115]

The third and one of the crucial reasons for a decision like this is based on the fact that the first amendment of the US Constitution has protected the free flow of information to all including against the state officials and public officials. Moreover, the court asserts that free flow of information in case of public interest is even crucial that is protected by the first amendment of the US Constitution. The court citing its earlier judgment of Garrison v. Louisiana, 1964 has mentioned that, …"Debate on public issues will not be uninhibited if the

[114] Id. 55

[115] Id, 57

speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth."[116]

The Court recognized that intent to inflict emotional distress is civilly culpable in most jurisdictions if the conduct in question is sufficiently outrageous. The court hold, however, that "But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment."[117]

Analysis of US Supreme Court Jurisprudence

On the basis of the United States Supreme Court cases discussed above, basic conclusion can be drawn regarding the scope of the freedom of speech in relation to press freedom in the United States. It is clear from the United States jurisprudence that all classes of speech are not exclusively protected by the constitution and defamatory or libelous expression is one of such class of speech not protected under the US constitution. It is also clear that the Supreme Court has recognized the reputation of individuals and no blanket First Amendment protection from either civil action or criminal prosecution for those who defame others.

In the case of *Sullivan,* the Court established that requirement of "Actual Malice", which was necessary to prove defamation of public officials. According to the Court to prove actual malice the statement in dispute must have been made with knowledge that it was false or with recklessness by disregarding falsity thereof. In its jurisprudence the Court has balanced the freedom of speech by holding "false statements of fact particularly valueless as they

[116] Id, 54

[117] *Ibid*

interfere with the truth seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counter speech, however persuasive or effective."

The supreme court has expanded the traditional common-law truth defense and is cautious that such defense of truth will lead to the 'self-censorship' among media and that will not only deter false speech but also true speech, for which media is not sure that they can prove the truthfulness of the statement.

There are examples around the world where such a burden of proof has deterred the media from disseminating news. One of such example includes the case of Sir Robert Askin of Australia. Mr. Askin was Premier of the state of New South Wales for a decade beginning in 1965. Despite rumor about his involvement in corruption and organized crime media was reluctant to report about him and his activities due to the probable threat of defamation case. Immediately after the death of Askin in 1981 the National Times ran a front-page story entitled "Askin: friend to organised crime."[118] Thus the Supreme Court rightly concluded that the burden of proof on defendant leads to the self-censorship.

The Supreme Court held that "a public official could recover damages for a defamatory falsehood relating to his official conduct only after proving that the statement was made with "actual malice" -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Such a safeguard established by the Supreme Court has expanded the scope of free speech and provided the space for the uninhibited discussion regarding conduct of the public officials.

[118] See, http://www.uow.edu.au/~bmartin/dissent/documents/defamation.html
David Hickie, *"Askin: friend to organised crime" National Times*, 13-19 September 1981, pp. 1, 8

After the issue of defamation of public officials the Supreme developed the principles regarding ‘public figures’. The court defined the public figures as those individuals "who are intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large" and further hold that "libel action against public figures cannot be left entirely to state libel laws, unlimited by any overriding constitutional safeguard." The court hold that "public figures could also recover damages in defamation cases if they can show highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."

After public officials and public figures, the case also interpreted the scope of first amendment protection in the issue of defamation relating to private individuals. In the case of *Gertz v. Robert Welch* the Supreme Court held that private individuals are more vulnerable to injury compared to public official and public figures and because of state’s interest is greater for their protection. In this case the Supreme Court agreed that 'States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual" but any such standard should not "impose liability to the defendants without fault."

4.1.2. Defenses under ECHR Jurisprudence

European Convention on Human Rights (ECHR) was the first regional human rights instrument which entered into force on 3 September 1953. The convention applies to its member states and applicable at national level. It has been incorporated into the legislation of

the States Parties, which have undertaken to protect the rights defined in the Convention. Domestic courts therefore have to apply the Convention. Otherwise, the European Court of Human Rights would find against the State in the event of complaints by individuals about failure to protect their rights.[119]

The Convention has guaranteed the right to freedom of expression under Article 10, which reads that "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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."[120] The clause following this provision states that "the right to freedom of expression 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", as the right to freedom of expression "carries duties and responsibilities along with".[121]

In line with the provision 10(2) of the convention, the Court has developed its jurisprudence relating to three-part test regarding the restriction on freedom of expression cases. The convention says that any interference (formalities, conditions, restrictions or penalties) on the exercise of freedom of expression are to be prescribed by law. It denotes that "an interference with the right to freedom of expression cannot be merely the result of the whim of a public

[119] *The European Court of Human Rights: The ECHR in 50 Question*, Council of Europe, September 2009, p. 3

[120] Article 10(1), ECHR

[121] Article 10(2), ECHR

official. There must be an enacted law or regulation which the official is applying. In other words, only restrictions which have been officially and formally recognized by those entrusted with law-making capacity can be legitimate."[122]

The second part of the test or the second requirement for the restriction on freedom of expression is that such restriction must fulfill one of the legitimate aims stated by the Convention. The Convention includes the list of legitimate aim in clause 10(2). According to this any restriction must be 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 third and final part of the three-part test requires the Court to inquire whether the aim was proportional with the means used to reach that aim. In order to prove that an interference was "necessary in a democratic society" the domestic courts, as well as the European Court, must be satisfied that a "pressing social need", requiring that particular limitation on the exercise of freedom of expression, did exist.[123] While assessing whether any interference is necessary "in a democratic society" the Court has settled its case law that "this depends on whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient."[124]

[122] *Central Asian Pocketbook on Freedom of Expression*, ARTICLE19, October 2006, p. 40

[123] Monica Macovei, *A Guide to the Implementation of Article 10 of the European Convention on Human Rights*, Human Rights Handbooks No. 2, Council of Europe, (2001), p. 35

[124] see, among other authorities, *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 58, ECHR 1999-III).

While going through the abovementioned three-part test, once the Court finds that the State fails to prove one of the three requirements, it will give no further examination and will decide that the respective interference was unjustified, and therefore freedom of expression violated and if the Court finds that all three requirements are fulfilled, the State's interference will be considered legitimate. [125]

Now this paper will discuss some of cases from European Court of Human Rights where the Court has dealt the issue of defamation in relation to freedom of expression specially focusing on the right of the press. The case of the *Lingens v. Austria*[126] was probably the first case where the Court addressed the issue of libel involving politician.

Lingens v. Austria was a case where the applicant had published two articles in the Vienna magazine "Profil". The then Chancellor of Austria brought two private prosecutions against Mr. Lingens. Vienna Regional Court and the Vienna Court of Appeal found against the applicant for defamation through the press.[127] Mr. Lingens applied to the ECHR claiming that "the impugned court decisions infringed his freedom of expression to a degree incompatible with the fundamental principles of a democratic society."

In this case the Court reiterated the principle it has set in previous cases that "freedom of expression, as secured in paragraph 1 of Article 10 (art. 10-1), constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment" and "it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also

[125] *Ibid,* 123

[126] *Lingens v. Austria*, Application no. 9815/82

[127] Id, Para 29

to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"".[128]

According to the court "the mentioned principles are of particular importance as far as the press is concerned. Whilst the press must not overstep the bounds set, inter alia, for the "protection of the reputation of others", it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest." The Court further stressed that "the press not only does have the task of imparting such information and ideas: the public also has a right to receive them." The Court rejected the idea that "the task of the press was to impart information and the interpretation thereof had to be left primarily to the reader."[129]

The Court highlighted the importance of the freedom of the press as "one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders" and concluded that "the limits of acceptable criticism wider compared to a private individual." The reason given by the Court for such wider scope is the fact that "the politician inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance."[130]

In the case of *Lingens*, national court had ordered for confiscation of the relevant issues of the magazines also. The Court took this issue seriously and held that "such penalty amounted to a kind of censure, which would be likely to discourage the applicant from making

[128] Id, Para 41, see also *Handyside* case in which the Court stated this principle.

[129] *Ibid*

[130] Id. Para 42

criticisms of that kind again in future; would be likely to deter journalists from contributing to public discussion; and might hamper the press in performing the role of public watchdog."[131]

Castells v. Spain[132] is another important Case where the Court further clarified the principle set in the *Lingens* and hold that the limits of permissible criticism of the government wider than that of the politicians. This case started when a member of Spanish senate published an article relating to impunity for the murders happened in the Basque Country of Spain. He was accused of insulting the insulting the Government which was a crime under Criminal Code of Spain.

In this case, the Court held that "the limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician." According to the Court in a democratic system "the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion." Further, The Court held that "the dominant position of the Government is the reason to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media."[133]

Dalban v. Romania[134] is another case where the European Courts of Human Rights found the violation of Article 10 of the Convention when state of Romania found criminal libel for a

[131] Id. Para 44

[132] *Castells v. Spain*, Application No. *11798/85*, 236 Eur. Ct. H.R. (Ser. A) (1992)

[133] Id. Para 46

[134] *Dalban v. Romania*, Application No. 28114/95

journalist, Mr Ionel Dalban, who had published a story in a local weekly run by him regarding frauds in a State-owned agricultural company.[135]

In this case, the Court highlighted the essential function the press fulfils in a democratic society. It balanced the right to freedom of expression with other conflicting rights and concluded that "Although the press must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest."[136]

The European Court agreed that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation. Further the Court held that "it would be unacceptable for a journalist to be debarred from expressing critical value judgments unless he or she could prove their truth."[137]

Analysis of ECHR Jurisprudence

This section of the paper briefly analyzes the freedom of expression, especially freedom of the press and defamation in the decisions of the ECHR referred in the previous section. It is already mentioned that any interference with the right to freedom of expression guaranteed by the European Convention on Human Rights should pass all three parts of the test set by the convention and the jurisprudence of the Court. According to this standard, at first any interference with the right to freedom of expression should have been prescribed by the law,

[135] Id. Para 12-13

[136] Id. Para 49

[137] *Ibid*

which means "only restrictions which have been officially and formally recognized by those entrusted with law-making capacity can be legitimate."[138] The Second requirement is that only to ensure the interest expressed in Article 10 (2) of ECHR, the interference by the state can be entertained. It means the restriction on freedom of expression must fulfill one of the legitimate aims stated by the Convention. The third requirement is that the aim for restricting the freedom of expression must be proportional with the means used to reach the mean, which in actual the court needs to inquire whether such interference was "necessary in a democratic society".

Protection of "reputation and rights of others" is by far the "legitimate aim" most frequently used by national authorities for restricting freedom of expression. Rather often, it has been invoked to protect politicians and civil servants against criticism.[139] As stated in the previous chapter in *Lingens v. Austria*[140] (1986), the Court probably for the first time addressed the issue of libel involving politician where the applicant Lingens claimed that his freedom of expression was infringed "to a degree incompatible with the fundamental principles of a democratic society."

The court reiterated the principle in line with the Article 10 that "the freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb" and "where the press must not overstep the bound set for the "protection of the reputation of others", it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest." The court also held that "no such order

[138] *Ibid,* 122
[139] *Ibid,* 123
[140] *Lingens v. Austria,* Application No. 9815/82

should be given which would deter any journalist contributing to public discussion; and might hamper the press in performing the role of public watchdog."[141]

In another case, *Castells v. Spain*[142], the court further clarifying the principles set in the *Lingens* case held that "the limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician." The Court maintained that "in a democratic system the actions or omissions of the Government must be subject to the close scrutiny of the press and public opinion."

European Court of Human Rights, in the another case *Dalban v. Romania*[143] found the violation of the Article 10 of the convention. In this case the Court has focused on the duty of the press "to impart the information and ideas on all matter of public interest" on one hand and the obligation of press "not to overstep certain bounds in respect of the reputation and rights of others" on the other.

Thus, the above decision of the European Court shows the progressive wider interpretation of the Article 10 of the convention and agrees that the journalistic freedom even "covers possible recourse to a degree of exaggeration, or even provocation." Further the European Court of Human Rights has held that permitting journalists to express critical value judgment only if they could prove the truthfulness of statement is unacceptable.[144]

[141] Id. Para 44

[142] *Castells v. Spain*, Application No. *11798/85*, 236 Eur. Ct. H.R. (Ser. A) (1992)

[143] *Dalban v. Romania*, Application No. *28114/95*

[144] *Ibid*

4.2. Defamation: A Tool to obstruct Free Speech?

It is already stated in this paper that under the European Convention that Protection of "reputation and rights of others" is by far the "legitimate aim" most frequently used by national authorities for restricting freedom of expression. Rather often, it has been invoked to protect politicians and civil servants against criticism. As the focus of the study is to analyze the relationship between the defamation or libel (protection of reputation) and freedom of expression generally and press freedom specifically, this chapter will analyze whether law on defamation is used as a tool to obstruct free speech.

Governments around the world try to control mass media and they use different methods to influence. With the advancement of the communication and technology which enabled the dissemination of information in seconds around the world and with the democratization of countries around the world, officials use legislation to put pressure on media.[145] Law on defamation is one of such tool which has been used by authorities, politicians and public officials to control free speech.

One such example where the law is used to control the free speech is following Moldovan Case. 'Timpul' was one of the most popular Moldovan Weeklies. The weekly published an article entitled "Luxury in a country of poverty" describing the purchase of 42 luxurious cars by the Government without any tender from DAAC-Hermes Company. The Article has quoted rumors about the bribe underneath this purchase. DAAC-Hermes Company filed a

[145] Arthur Corghencea, *Defamation: The Phenomenon of Journalists as Defendants And Plaintiffs*, Media Online: Southeast European Media Journal, November 24, 2004, available at http://www.mediaonline.ba/en/?ID=336

case of defamation against the newspaper with the claim of US$ 200000 as compensation for moral damages. The trial court found the newspaper guilty of defamation violating Article 16 of the Civil Code but reduced the amount of compensation to US$ 100,000 from 2,000,000. The Court of appeal upheld the decision made by the trial court.[146]

Such cases apparently obstruct the dissemination of information, ideas and news by the media and moreover work as a chilling effect causing self-censorship on not only that concerned media but other media also.

In many cases it is not only media but general public who are sued for speaking out against government, officials and corporations. For example, in the United States large numbers of people and groups are sued every year for their expression against government and other institution. Generally they are sued for "circulating petitions, writing to public officials, speaking at, or even just attending public meetings, organizing boycotts and engaging in peaceful demonstrations." [147] These lawsuits, many times in the form of defamation suit, have been labeled "Strategic Lawsuits Against Public Participation" or SLAPPs.[148] Twenty-eight states in US have anti-SLAPPs law in effect, whereas a bill on anti-SLAPPs '*Citizen Participation Act of 2009'* has been introduced recently in federal level.[149]

Going through the reports of international organizations and institutions working on freedom of expression it can be seen that both criminal defamation and civil defamation is used to

[146] *Ibid*

[147] Sharon Beder, *SLAPPs--Strategic Lawsuits Against Public Participation: Coming to a Controversy Near You*, Current Affairs Bulletin, vol.72, no. 3, Oct/Nov 1995, pp.22-29.

[148] See, George W. Pring and Penelope Canan, `*SLAPPs, Getting Sued for Speaking Out*", Temple University Press, 1996

[149] See, http://www.anti-slapp.org/?q=node/71, accessed on 20 August 2009

obstruct free speech around the world.[150] There is growing demand for the abolition of the criminal defamation not only by the international organizations but also from the world bodies such as United Nations. The UN Special Rapporteur on Freedom of Opinion and Expression, the Organisation for Security and Cooperation in Europe (OSCE) Representative on Freedom of the Media and the Organisation of American States Special Rapporteur jointly declared in 2000 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.[151]

According to the declaration "government bodies, and public authorities of all kinds should be prevented from bringing defamation actions, plaintiff should bear the burden of proving the falsity of any statements of facts of matters of public concern; and there should be no liability under defamation law for expression of an opinion."[152]

This declaration also endorsed principle set by different international human rights court that "public figures are required to accept a greater degree of criticism than private citizens."[153]
It also suggested the measures for the civil sanctions for defamation. According to the Declaration "civil sanctions for defamation should not be so large as to exert a chilling effect on freedom of expression" and should be designed "to restore the reputation harmed, not to

[150] See, *Decriminalising defamation: an IFJ campaign resource for defeating criminal defamation*, International Federation of Journalists (IFJ), 2005

[151] *Joint declaration by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom*, 30 November 2000, available at http://www.iidh.ed.cr/comunidades/libertadexpresion/docs/le_relator/e-cn%204-2001-64%20en.htm Accessed 24th August 2010

[152] *Ibid*

[153] *Ibid*

compensate the plaintiff or to punish the defendant."[154]

The United Nations Special Rapporteur on the promotion and protection of the right to Freedom of Opinion and Expression has repeatedly acknowledged that "defamation has a direct and negative impact on freedom of expression, access to information and the free exchange of ideas and defamation." Analyzing the communication received by its office it concluded that "the climate created by those suits causes writers, editors and publishers to be reluctant to report on and publish matters of public interest not only because of the large awards granted in these cases but also because of the high costs of defending."[155] The Special Rapporteur recommended the Governments "to ensure that press offences are no longer punishable by terms of imprisonment, except in cases involving racist or discriminatory comments or calls to violence."[156]

Recently in February 2010 the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to

[154] *Ibid*

[155] See, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain*, submitted in accordance with Commission resolution 1999/36, E/CN.4/2000/63, 18 January 2000, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G00/102/59/PDF/G0010259.pdf?OpenElement accessed on 24 August 2010; and *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, submitted in accordance with Commission resolution 2000/38,* E/CN.4/2001/64 available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G01/111/23/PDF/G0111123.pdf?OpenElement accessed on 24 August, 2010

[156] *Ibid*

Information adopted a declaration on Ten Key Threats to Freedom of Expression.[157] According to this declaration criminal defamation law is one of the threats to freedom of expression in the coming decade.

However it is not only the criminal defamation which is problematic to the freedom of expression. Civil sanctions also cause chilling effect on the freedom of speech. According to the IFJ "widely inappropriate financial awards can have just as crippling an effect on press freedom as imprisonment" and further adds that "Newspapers have closed down, journalists have lost their jobs, and the 'offending' news outlet has been just as effectively silenced with the civil sanctions."[158]

In this reference it would be relevant to note the decision made by the European Court of Human Rights in the case of *Tolstoy Miloslavsky v. the United Kingdom*. The Court drew a link between "the imposition of excessive sanctions and a chilling effect on freedom of expression" and ruled that "excessive damages for defamation violated article 10 of the European Convention on Human Rights."[159]

Like the three international mandates on freedom of opinion and expression stated in their joint declaration and individual reports there is a need to abolish criminal defamation and ensure that civil sanctions for defamation is not that large as to exert a chilling effect on freedom of expression. Any sanction for defamation is for the restoration of the reputation harmed, not to obstruct the free speech itself.

[157] *Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade*, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.23.Add.2_en.pdf accessed on 24th August 2010

[158] *Decriminalising defamation: An IFJ Campaign Resource for Defeating Criminal Defamation*, International Federation of Journalists (IFJ), 2005, p. 5

[159] *Tolstoy Miloslavsky v. the United Kingdom* , Application No. 18139/91

Chapter Five

Conclusion and Recommendation

5.1. Conclusion

Freedom of speech is accepted as one of the fundamental liberties around the world. It has been guaranteed by the international and regional human rights instruments as well as in the national constitutions around the world. However freedom of speech is not an absolute right and it has been recognized that in certain situation interference is possible in the exercise of this right. International instruments such as International Covenant on Civil and Political Rights (ICCPR) (under Article 19(2) and regional instrument such as European Convention on Human Rights (ECHR) (under Article 10(2) has stated possible grounds where right to freedom of expression can be limited. Similarly, national constitutions also make provision for such limitation. Article 12(3)(a) of Nepalese Interim Constitution is one of such example.

According to Article 19 of the ICCPR right to freedom of expression can be restricted either "for respect of the rights or reputations of others or for the protection of national security or of public order or of public health or morals." Similarly, According to Article 10(2) of the ECHR this right can be interfered 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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

To give an example of restriction under the national constitution, the interim constitution of Nepal under the Article 12(3)(a) provides that the State can make laws "to impose reasonable restrictions on any act which may undermine the sovereignty and integrity of Nepal, or which may jeopardize the harmonious relations subsisting among the people of various castes, tribes, religions or communities, or on any act of defamation, contempt of court or incitement to an offence, or on any act which may be contrary to decent public behavior or morality".

Looking at the international and national provisions it is clear that right to freedom of expression and opinion is not an absolute right and states can impose reasonable restriction in the exercise of this right. Similarly, it is also clear from the abovementioned examples that protection of reputation of others is one of the common bases among international and national instruments for the restriction on freedom of expression. This interest is generally protected by the law of defamation around the world. Defamation can either be a civil tort or a criminal offence, depending on the legal regime of the particular country.

Though the legitimate aim of the law on defamation is to protect the reputation and honor of the citizens, it is abused by the authorities, public officials and others to obstruct the legitimate freedom of speech. As stated above in the fourth chapter protection of "reputation and rights of others" is by far the "legitimate aim" most frequently used by national authorities for restricting freedom of expression in the European Court of Human Rights and often, it has been invoked to protect politicians and civil servants against criticism.

This study has focused on the jurisprudence developed by the United States Supreme Court

and the European Court of Human Rights to see the relationship between the right to freedom of expression in general and press freedom in specific and the right to reputation. In this process, focus is given to the cases where such relationship is described and analyzed by the respective courts.

The analysis from these courts set the principle that public officials are subject to high standard of tolerance in the cases of defamation. Through the interpretation of court it can be seen that the objective of such principle is to open up the possibility for the public debate on the matters of public interest. If the authorities, who are directly involved in the matter of public interest, can easily obstruct the public opinions then the scope of open public debate diminishes and it certainly hampers the democracy. It is more relevant in the case of press which is regarded as 'watchdog' of government.

As stated above defamation can be a civil tort or a criminal offence. There is a growing trend of decriminalizing defamation. Some of the countries that have decriminalized defamation include Bulgaria, France, Ghana, Sri Lanka and Bosnia and Herzegovina. Recently, the United Kingdom has decriminalized defamation. International Courts, International organizations, human rights bodies of United Nations has time and again urged government around the world to replace criminal sanctions with the civil once. Criminal sanction generally produces chilling effect on media and results in self-censorship by journalists and media. Similarly, allowing public officials and authorities to bring defamation cases permits them to file suit for the purpose of preventing criticism of the Government.

Replacing criminal sanction with the civil one alone is not enough to balance the right to freedom of expression with the right to reputation. Other standards such as rules on burden of

proof, rules on defense of truth, value judgment, expression of opinion, rules on who can bring the defamation suit in a particular legal system also plays very important role in shaping the balance. The aim of the balance should be uninhibited exercise of right to freedom of expression without compromising of protection of reputation of individuals.

5.2. Recommendation

This paper has dealt with the two very important rights guaranteed as human rights by the international instruments. Both freedom of speech and right to reputation are core values in almost every society of the world. The challenge found is to balance between these two rights so neither the right to freedom of expression is violated nor the right to reputation is compromised. International law and courts as well as national statutes and court have developed vast jurisprudence in the effort the produce such balance. Based on the earlier parts of the paper following recommendation has been drawn.

Study shows that the democratic countries have adopted the principle of freedom of speech, its importance for the open and public debate which is indispensible for democracy. However, the practice in emerging democracies or new democracies are not able to balance the free speech and protection of reputation, rather they are still using or abusing the second to curb the right to freedom of expression and opinion.

Looking at the effect of the criminal sanction for defamation on the free speech in general and press freedom in specific, it is recommended that criminal sanction for defamation should be replaced with the civil sanctions. The aim of law of defamation is to protect and restore the reputation and honor and it cannot be said that imprisonment to the defendant restores the reputation and provides the compensation to the victim.

The principle set by the international jurisprudence that the public authorities and public officials and public figures are required to accept a greater degree of criticism compared to private individuals should be included in the statutes on defamation reflecting the importance of open debate about the matters of public importance and concern.

Similarly, law on defamation should limit who can bring the suit of defamation, excluding public officials and authorities from that list if criticism is made about their official functions. Such a measure shall help to end the abuse of defamation laws by authorities to obstruct legitimate criticism of their activities. Likewise, any laws providing special protection to the public figures should be repealed and provision should make it clear that no suit of defamation can be brought to protect the reputation of state organs/institutions as it is an established jurisprudence that institutions do not have their own reputation. One of the reasons behind not allowing public institutions to bring suit of defamation is the opportunities available with those institutions to defend themselves.

Burden of proof under law on defamation in emerging and new democracies is another area which needs reform. It is rightly stated by the United States Supreme Court that rules which put the burden on the defendant may deter would-be critics of the government conduct from voicing their criticism despite their belief that those criticisms are true. So, to create a situation favorable for open public debate, the burden of proving the falsity of statement of fact on the matters of public concern should be borne by plaintiffs.

Another measures necessary in the reform in the law of defamation is the protection of expression of an opinion or value judgment. Jurisprudence on this matter has agreed that

truthfulness of the value judgment cannot be established. Therefore, it is recommended to amend laws that make one liable for the expression of opinion.

In many countries they have criminal defamation laws 'on the books'. It means that those laws are still in existence but rarely used. However, those laws in force, despite their rare use, affect the media and works as a sword hovering above the head resulting to self-censorship. Thus such criminal defamation laws in existence should be abolished.

The United States Supreme Court and the European Court of Human Rights both, in their respective jurisprudence, has indicated that truth should be considered a defense in criminal libel cases. So, it is recommended that the truth should an absolute defense in the criminal cases. If the statement of fact in dispute is found true, claim of reputation should not be held.

Compensation is another area which needs reform in the law on defamation. Replacing criminal sanction with civil one only is not adequate if no standard or ceiling is set on civil sanction or compensation. Large sum of compensation in the Asian countries has exerted chilling effect on freedom of expression. As the jurisprudence of the European Court has stated any pecuniary damage should be proportionate to the harm done to the reputation.

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