

Freedom of expression, privacy and defamation on the Internet

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Summary

UNESCO's approach to the Internet is a useful way to begin to conceptualise a balance between the rights to freedom of expression and reputation in the online environment. This is especially relevant to understanding defamation in the digital age. The limits on defamatory expression, both off- and online, should be assessed in terms of international standards for legitimate limitations, as well as how they intersect with the issues of Internet openness, accessibility and multi-stakeholder participation.

Introduction

Member States of UN bodies, including UNESCO, have recognised on several occasions that human rights should apply as much online as they should offline. This implies that in instances where rights may conflict with each other offline and need to be balanced amongst each other, so too the same should apply online. Defamation is one such balancing act – between, primarily, freedom of expression and the right to reputation. As will become evident below, debates about defamation in offline media generally translate directly into the online realm, although with some features specific to the nature of the Internet.

To add value to balancing the rights implicated in defamation online, it is useful to note that UNESCO's 38th General Conference of its 195 Member States endorsed a particular approach to the Internet. Captured by the phrase "Internet Universality", this approach highlights the importance of promoting an Internet that respects human rights, advances openness and accessibility, and is characterised by multi-stakeholder participation (summarised under the acronym ROAM). The first part of the discussion below discusses the human rights dimension; a second part discusses how this plays out online, and the last part deals with how all this interrelates with Internet issues of openness, accessibility and multi-stakeholder participation.

The right to freedom of expression

The Universal Declaration of Human Rights and the International Covenant on Civil Political Rights (ICCPR) set out the right to freedom of expression as a fundamental right, that may only be limited under very specific conditions and for very particular reasons. In essence, if limits are to be legitimate, and not to count as a violation of rights, they need to be in law, and be necessary to achieving a just purpose, which can be the rights of others. This points to what would be required for legitimate limits on freedom of expression in order to protect the right to reputation, which is the essence of a defamation limit. It is important to recognise that the "necessary" criterion for a legitimate limitation is directly bound up with proportionality. Thus, a disproportionate limit on free expression would

exceed the bounds of what is necessary to achieve the purpose, and therefore constitute a violation of the right. This very important point will be raised extensively later in this argument. Also vital to note is that the Universal Declaration of Human Rights adds the proviso that limits must be necessary “in a democracy”. This key qualifier highlights that democratic concerns must be a reference point.

For immediate consideration, however, it has to be noted that human rights are the rights of persons, and so defamatory expression is generally considered only in cases applying to individuals, and not to a business, a religion, an ideology or a social group.

In addition, it can be observed that defamation is generally a matter of a person’s right to a reputation, which is not identical to a person’s right to dignity. In some cases, expression that violates an individual’s dignity is referred to as *crimen injuria*, as distinct from defamation.

Lastly, the point can be made that defamation as a violation of reputation may arise through speech that violates the right to privacy. However, not all violations of privacy through expression amount to a violation of reputation; and not all violations of reputation are based on a violation of privacy.

How to balance rights

Limiting speech in favour of reputation is a delicate balancing issue. In human rights law, all rights are equal. Freedom of expression cannot be taken as something that should always trump the right to reputation. However, what has been made very clear by the UN Human Rights Committee, is that any balancing should maintain the essence of all the rights involved, to the greatest extent possible.

To do this requires the same formula as for any limitation of a right: it must meet conditions of: being in law, necessary and proportionate, and within the norms of a democracy. One way this last dimension has been widely interpreted is that any balancing which entails limiting one right vis-à-vis another needs to take into account the public interest – rather than a particular interest.

At this point, it needs to be acknowledged that the balance in many cases worldwide is not in terms of public interest, but has been in favour of narrow political interests. While exploiting defamation charges for political purposes is not legitimate, it is very common. In many places, the primary actors who bring defamation cases are political actors holding state office and acting with partisan political motives. In such instances, defamation may serve less to protect reputation than to curtail the right to free expression. Compounding this is when defamation is a criminal matter, meaning that political officials can use state power to initiate proceedings for political purposes.

When freedom of expression is violated

In the perspective of this discussion, a violation of a right is an unjustifiable - and therefore illegitimate - limitation. In this perspective, the key question is whether, in a given situation, defamation law and practice amounts to a violation or a limitation of free expression. This in turn raises the question of what kind of defamation limitations would constitute a legitimate regulation of tensions between rights to free expression and reputation. In order to answer this, it is helpful to first identify what kinds of defamation limitations may exceed the conditions for a legitimate limitation:

Proposition 1: when defamation leads to lengthy prison sentences, this is generally disproportionate / unnecessary in that other less intrusive options are normally available, such as civil damages or apologies, which can prevent, punish or redress damage to reputation).

Proposition 2: when there are prison sentences per se – and for the same reasons as Proposition 1 above, that necessity and proportionality are hard to justify.

Proposition 3: criminal defamation, even without jail sentences may still be disproportionate / unnecessary, again because other options are available.

Proposition 4: even with civil defamation, financial penalties may be disproportionate to the actual reputational damage done.

Proposition 5: financial penalties per se may be disproportional when the damage can be remedied by an apology / correction / reply.

Proposition 6: defamation findings that ignore 'mens rea' (which can lead to a 'good faith' defence) are weak in terms of law. Even in cases where the defaming information is found to be false, the absence of malice should at least be a mitigating factor.

Proposition 8: similarly, defamation law that puts the onus on the accused to prove innocence, rather than for the accuser to prove guilt, constitutes a weakness in terms of law.

Proposition 9: defamation findings that ignore the public office status of the offended person are arguably in violation of the notion of limitations needing to be necessary in a democracy. This is not to say that persons in public office lose all right to reputation, but to acknowledge that politics is a space of robust criticism of, and among, the actors involved, particularly given the public interest involved in candidates who compete for public office.

Proposition 10: 'Insult laws' (which represent an archaic extension of the concept of reputation to the incumbent of a defined political office) also fall short of needing to be necessary in a democracy.

Proposition 11: defamation and especially 'Insult laws' may violate freedom of *opinion* – which is absolute and may not be limited (ICCPR). An opinion is considered to be a statement that cannot be proved either way.

Proposition 12: defamation findings that disallow a public interest defence are missing a key component of the balancing act. For example, expression can legitimately override reputation (and privacy) if it brings to light hidden facts of corruption or abuse.

Proposition 13: defamation laws that do not distinguish a "truth" defence versus "false information" undermine the differing public interest between the types of information which can defame. Although "truth" alone is not always a defence in a defamation case, and needs to be coupled with public interest, it is at least a mitigating factor.

Proposition 14: when defamation law and practice ignores empirical evidence of the quantum of damage to reputation, this constitutes disproportionality.

When defamation limits are legitimate

When defamation law and practice avoids the 14 potential violating instances noted above, it can indeed serve as a legitimate limitation on freedom of expression. Such law and its application can counter abuse of freedom of expression by discouraging, protecting against, or redressing, violations of reputation.

At the same time, we need to beware the extensive problems of defamation law and its use that falls short of international standards. It is because of these problems that there is, overall, a worldwide trend to decriminalise defamation offences (see UNESCO report: "World Trends in Freedom of Expression and Media Development", 2014, p.29). Adding weight to such a trend are the existence of effective self-regulation systems whereby complainants can seek redress without court intervention, and where those individuals who lack the means to institute civil proceedings have access to legal aid options.

How does all this play out online?

Defamatory expression can be more ubiquitous online because:

- There are vastly more actors in public communication, which increases the potential volume of expression that violates the right to reputation
- There is a lack of awareness by non-journalists about the significance and the responsibilities of mass communication in terms of respecting the right to reputation
- Parts of the Internet lack civility; instead of netiquette, there is trolling and abusive speech, fuelled in part by mediated, para-anonymous communication possibilities and a sense of impunity
- The longevity of much online content which can compound defamation
- The easy replication and linking within online content which may amplify defamation.

Adding to the complexities are the jurisdictional difficulties due to the global nature of the Internet – which State should act in relation to allegedly defamatory content? On the one hand, a defamed person’s “local state” may be helpless to act – or may wish to impose an interpretation even beyond its borders that does not meet the international standards for limitations on free expression. On the other hand, well-off private people have engaged in civil “defamation tourism” to exploit jurisdictions known to lean in favour of stiff penalties, sometimes even when there is only the theoretical possibility or very limited reality of allegedly offending content being downloaded within that country where the case is brought.

However, norms are evolving to focus more appropriately on where the defamation emanates, and/or where it is aimed and received. There is also some recognition that even where offending expression does reach a large audience on the Internet, the impact may be discounted to an extent by the sheer volume of information lacking credibility within the online environment.

However, what continues to complicate defamation issues online are the layers of actors and their identities. For example, who is responsible for dealing with a defamatory comment posted on Facebook? The company? The person’s page on which the comment has been added? The 3rd person who added the comment? What about someone who posts a link to the posting? And how does one track the legal ID of the original poster?

This raises an important issue about when an Internet platform is treated merely as a “neutral conduit”, and when it is regulated as “media” - something that varies around the world. Increasingly, however, Internet intermediaries of various forms are operating self-regulatory systems, where complaints can be directed to at least have defamatory content removed. However, the other side of the coin is the danger of risk-aversion by Internet intermediaries which could violate the right to expression – by taking offline any content that may simply seem defamatory, irrespective of its truth and public interest. The system may be disproportionately skewed towards favouring take-down as the easiest option – at the expense of legitimate freedom of expression.

Online defamation also points to a further issue: at what point does specifically legal liability kick in (as well as for whom)? On publication of the allegedly offending expression? At time it is brought to the notice of a responsible actor? At the time of the actor’s response (eg. Such as a implementing a Take-down, Apology, Right to Reply)? In addition, there is the issue of tracking down identities. Steps to require disclosure of identity may be a prerequisite for legal action against the actual author or host of the content, and this raises further issues requiring balance between the rights to privacy and reputation, thereby adding to the complexities of jurisdiction and layers of actors.

In this tangled environment, it is difficult to envisage easy solutions to ensuring that limitations on expression in the interests of reputation will meet the criteria of being in law, and necessary within a democracy.

Using UNESCO's ROAM approach

To recap, UNESCO stands for Internet Universality which promotes human Rights, Openness, Accessibility and Multi-stakeholder participation (ROAM) in regard to issues on the Internet.

It is evident from what has been written above that online defamation issues entail balancing Rights online, and upholding the framework whereby any limitation of expression is legitimate and not a violation. In regard to online defamation in particular, this balancing consideration is relevant to the actions of individuals, states and the various layers of Internet intermediaries who may be implicated.

As indicated above, the primary balancing in defamation is between expression and reputation. However, the right to privacy may also be implicated, as already discussed, in the way that expression may violate reputation by way of a violation of privacy. Respect for privacy in this sense can also be a way that reputation is protected. At the same time, it is also apparent that there can be tensions between reputation and privacy. Thus, privacy as a right can be strengthened by anonymity, which means that any balancing between expression and reputation should be wary about limiting anonymity - even if such anonymity shields the identity of those committing defamation.

Overall, any limitation of expression online in the interests of reputation needs to align with the conditions for legitimacy under human rights law, and to avoid the pitfalls outlined in the 14 propositions cited earlier. Internet companies operating in a multiple jurisdictional space need to put in writing their terms of service and standard operating procedures. While not quite "soft law", this brings them closer to one of the criteria for legitimate limitations. The same companies should follow the Ruggie principles and ensure that their policies and practices regarding alleged defamation are aligned with international standards in terms of necessity within a democracy. In the absence of harmonised international law on defamation issues, and the difficulty of securing cross-jurisdictional solutions, the trans-jurisdictional norms by which companies operate are key in devising and implementing balancing acts between expression and reputation. Proportionality in response to complaints about alleged defamation is vital.

In addition to consideration of the complex balancing entailed in all this, the ROAM approach also calls for consideration of the three other principles needed to underpin the universality of the Internet.

Therefore, turning to Openness, the risk of over-reach in limiting expression on the basis of defamation is one of shrinkage of Internet content unnecessarily, and/or of dividing cyberspace into national intranets. For example, not only may legitimate content be removed, but archiving of content may be constricted. Special caution is needed about seeking limitations of expression that appears to be defamatory. One alternative is developing Notice-Notice practices, where an Intermediary provides an opportunity for the host or poster of the offending content to respond, rather than implement an immediate Take Down. Another alternative is promoting a right to reply for the offended party. The ecosystem should be open to both those with a case that content violates their right to reputation, and those with a different position.

As far as Accessibility goes, media and information literacy is needed so that all actors can better appreciate the ethics of using expression in ways that do not violate reputation (or privacy). Such knowledge and competencies are also needed so that, in the absence of state remedies, users can report or counter defamatory speech, as well as make full use of self-regulatory mechanisms. Ultimately, a more civil culture on the Internet is essential for improved accessibility to users, and for a situation where there are fewer people subjected to reputational violation.

Finally, given the confluence of so many issues in all this, it seems evident that dealing with defamation issues in the digital age can only benefit from multi-stakeholder discussion. Such discussion might debate the problems of criminalising defamatory expression whether offline or online, both as a principle and as a practicality in the face of the Internet's complexity. Involved in such discussion needs to be government, parliamentarians, judges, Internet companies, media, human rights NGOs, academics and users. If a policy and/or legal framework is left to unilateral decision-making, it will be all the poorer in the way that it balances Rights and intersects with Openness and Accessibility issues. In the digital age, old approaches to defamation need to be updated in order to take into account the changed conditions related to the rise of the Internet.

Conclusion

Defamation exists as a particular interface between two rights – expression and reputation. Major risks exist whereby defamation law and policy can violate expression, and the need in many places is to establish frameworks for legitimate limitations, at least in national offline space. As if this were not already a challenge, however, the arrival of the Internet and online defamation issues, adds to the complexity. However, the ROAM model provides some pointers as to how issues of defamation could best be handled to adapt to the digital era. Certainly, to reduce the potential of defamation to contribute to national-based fragmentation of the Internet, cross-cutting norms and debate are needed. As part of Internet Universality, a more universal approach is needed – albeit at a general level – for the balancing act between rights, and their implications for Openness, Accessibility and Multi-stakeholder participation.