Defamation Law in Bhutan: Some Reflections

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Introduction

The recent judgment of the Thimphu High Court in the defamation case involving the former Director of Revenue and Customs, Sangay Zam, the present Finance Minster, Lyonpo Wangdi Norbu, and Lyonpo Yeshey Zimba, on the one hand, and the former authorised agent of PlayWin online lottery, Sangay Dorji, raises some interesting questions about the manner in which reputational interests of individuals are protected under Bhutanese law.

The case, which arose out of comments made by Sangay Dorji at a workshop on "Review of Anti-Corruption Strategies" conducted by the Anti Corruption Commission of Bhutan in August 2007, was first filed in the Thimphu District Court by the Office of the Attorney General (OAG) which reportedly acted at the behest of the three complainants. The District Court delivered a judgment in July 2008 in which it dismissed the case and laid down certain principles to be followed in defamation suits.

The case was then taken in appeal to the High Court by the OAG. A Full Bench of the High Court heard arguments from both sides and delivered the abovementioned judgment on 30 December 2008 which effectively affirmed the verdict of the District Court, holding it to be "fair and reasonable enough".[1]

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[1] "Defamation suit comes unstuck", *Kuensel*, 31 December 2008, p.4. The judgment of the High Court was rendered in Dzongkha and since no English translation has been published, the author has relied on the above newspaper report for guidance.

Basic principles

Before we analyse the two judgments, it would be helpful to cast a quick glance at the basic principles of, and approaches to, defamation law in some major jurisdictions. For the sake of convenience and to keep this discussion within manageable limits, reference will be made particularly to the position prevailing in England and the United States of America, two of the most widely respected legal jurisdictions in the world.

The law of defamation rests on the value that people attach to the reputation of individuals. In most countries, a person's reputation is considered to be as important as his personal possessions – in other words, the right to reputation is treated as being on par with the right to property. Shakespeare put it even higher when he said:

> "Who steals my purse, steals trash; 'tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name,
> Robs me of that which not enriches him,
> And makes me poor indeed."[2]

Therefore, just as the law provides for compensation to be paid when a person is wrongfully deprived of his property, so the law also requires the payment of compensation to anyone whose reputation is damaged. Additionally, some countries also allow for punishment – in the form of a fine or imprisonment – for the defamer, although this aspect of the law is fast falling into disuse.[3]

There are two types of defamation: libel and slander. Libel consists of defamation in a permanent form, e.g. in print,

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[2] *Othello*, Act 111, Scene 3, 167.

[3] Most Western countries have either abolished, or abandoned the use of, prosecutions for defamation. However, such prosecutions continue in a number of Asian jurisdictions, e.g. India, Malaysia, Singapore, and Thailand.

tape, or compact disc, while slander consists of defamation in non-permanent or transient form, e.g. in spoken words. Sometimes, the same matter may constitute both libel and slander: for example, when a person utters defamatory words during a live radio broadcast (slander) which is then recorded on tape by another person (libel). Some legal systems provide for special rules in respect of slander but, generally speaking, the effects of both types of defamation are the same in law.

Arguably, the most important question that arises is: what constitutes defamation? Although there are some variations between countries, the most commonly used definition states that defamation consists of any act which results in the reputation of a person being lowered in the eyes of other right-thinking members of society. Note that the lowering of the reputation must be in the eyes of *others*, not the person concerned himself. This means that, if someone were to say something highly abusive about another person to his face, the abused person cannot complain of being defamed, however hurt he may be by the abuse. Note also that the effect of a defamatory statement will be judged on right-thinking members of society, viz. reasonable people of ordinary sensibilities, not someone who is hypersensitive or very thick-skinned.

It is important, of course, that the statement being complained of must be false. True accusations against someone, even if it has the effect of lowering his reputation, cannot amount to defamation. This means that truth can be a defence by anyone accused of defaming another person.

The law recognises a number of other defences as well to a charge of defamation. The most commonly used among these, particularly by the media, is fair comment and privilege. Fair comment involves the defendant arguing that the statement complained of was an honest and reasonable opinion expressed by him without malice on a matter of public interest and upon facts which had been clearly established. In order to succeed, the comment should have

been expressed in moderate language. It should not be motivated by personal grudge or other selfish considerations.

As for privilege, the law recognises certain occasions when the public interest requires complete freedom of speech, including protection from proceedings for defamation, even if the speech is subsequently shown to be false or mistaken. There are two types of privilege: absolute privilege and qualified privilege. Absolute privilege allows a person to say or write anything, even maliciously, and still not face the possibility of defamation suits. The most commonly cited example of this type of privilege is speeches made by Members of Parliament on the floor of the House.[4] Qualified privilege, on the other hand, requires that those making statements which may turn out to be defamatory do so without malice. The basis of qualified privilege is that the speaker or writer has a duty to say or write the words complained of to protect a legitimate interest, and the audience to which the words are addressed has an interest in receiving those words. An example of qualified privilege would be job references: here, the person writing a reference has a duty to speak frankly about the person being written about, and the person who has sought the reference has an interest in obtaining a frank opinion about him.

Qualified privilege and the media

In recent years, the defense of qualified privilege has been creatively adapted by the courts in some countries to give the media a greater degree of freedom to comment on matters of public interest without fear of being sued for defamation. This has been done on the premise that journalists have a duty to tell their readers, listeners and viewers about matters of public interest and the readers, listeners and viewers have an interest in receiving such information. The leading case which laid down this principle is *Reynolds v. Times*

[4] It needs to be remembered, however, that the extent of an MP's freedom to speak in Parliament is limited by the control exercised by the Speaker of the House.

Newspapers,[5] which was decided by the House of Lords in England. In this case, the court set out the following 10 factors that judges should take into account when deciding whether the duty and interest tests were met sufficiently for a media defendant to succeed in a defamation case:

1. The seriousness of the allegation: the more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true.
2. The nature of the information, and the extent to which the subject-matter is a matter of public concern.
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
4. The steps taken to verify the information.
5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the claimant. He may have information others do not possess or have not disclosed. An approach to the claimant will not always be necessary.
8. Whether the article contained the gist of the claimant's side of the story.
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
10. The circumstances of the publication, including the timing.[6]

The *Reynolds*' defence, as it has come to be called, has been seen as furthering the cause of media freedom in a significant way, especially in countries like England where, traditionally,

[5] [1998] 3 All ER 961.

[6] The above list was prepared by Lord Nicholls, one of the Law Lords who gave judgment in the case. The word 'claimant' used in the list refers to the person bringing the case, i.e. the 'plaintiff'.

the law of defamation has been seen as a major hurdle for investigative journalism. It needs to be remembered, however, that this defence can only be availed of by media defendants and then only in matters involving the public interest.

This defence has since been developed further, notably in the case of *Jameel v. Wall Street Journal Europe*,[7] where the House of Lords ruled that, as long as the media engaged in 'responsible journalism', viz. checked its facts, behaved reasonably and ethically, did not sensationalise the story, offered the alleged victim of defamation an opportunity of 'setting the record straight' in relation to any errors that may have crept into the story, and acted in the public interest, it could escape liability for defamation. The result is that, as the authors of a leading textbook put it, "[t]he writer and publisher on subjects of public interest will henceforth only be liable if he has acted negligently – by putting defamations believed to be true in the public domain without making reasonable checks."[8]

The use of qualified privilege in favour of the media – albeit not to the same extent as laid down in the *Jameel* case – has precedents in other countries as well. Courts in Australia and NZ, for example, have in the late-1990s delivered judgments that have had a liberalising effect on the law of defamation.[9]

Public figures and the law of defamation

One of the other important aspects of the law of defamation which is worth noting is the distinction that is made between public figures and ordinary citizens by the courts of certain

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[7] [2006] UKHL 44.
[8] Robertson and Nicol (2008), *Media Law,* London: Penguin, 5th ed., p. 100.
[9] E.g. *Lange v. Australian Broadcasting Corporation* (1997) 189 CLR 520 (Australia); *Lange v. Atkinson* No. 1 [1998] 3 NZLR 424 and No. 2 [2000} NZLR 385 (New Zealand).

countries. The most prominent of such countries is the United States of America where, in a series of decisions going back to at least 1964, the Supreme Court has held that public figures should enjoy a lesser degree of protection against defamation.[10] As a result, if a public figure was to bring a suit for defamation against, say, a journalist, the suit would be thrown out by an American court unless the public figure was able to show actual malice (e.g. a personal grudge or an ulterior motive) on the part of the journalist.

This distinction has proved controversial. The media have generally welcomed it, arguing that it affords greater protection for investigative journalism against those in the public eye (especially politicians), but others have strongly criticised it, arguing that it is discriminatory. One of the problems is that there can be disputes about whether someone is a public figure or not. This is particularly the case with minor celebrities who may not hold any public office or exercise any public function but who may simply be famous by virtue of their success in a certain profession, calling or occupation. Such persons may feel genuinely aggrieved that the law treats them – and their desire for privacy and dignity – less favourably than many of their less well-known fellow citizens.

An example of possible injustice as a result of the 'public figure' rule arose in a case involving the former Prime Minister of India, Morarji Desai. Mr Desai was the subject of an allegedly defamatory allegation in a book authored by the American writer, Seymour Hersh.[11] Since the book was sought to be sold in both the United States and India, and since Mr Desai had a reputation to defend in both countries, he sued Mr Hersh and the publisher of the book in the courts in both places. Unfortunately for him, his case in the US was thrown out because American law did not allow public figures

[10] See, e.g. *New York Times v. Sullivan* 401 US 265 (1964).
[11] The book in question, *The Price of Power*, critiqued the role played by Dr Henry Kissinger in the shaping and conduct of American foreign policy.

to bring defamation cases unless they could show that the alleged defamer had acted maliciously. Indian law did not make any such distinction, but Mr Desai was still unable to obtain any redress because civil litigation in India is notorious for its delays (such cases often take up to twenty years or more to be heard), and Mr Desai, who was already in his seventies at the time, died before his suit came up for hearing.[12]

The Sangay Dorji case

Bhutanese law does, like its counterparts in other South Asian countries, allow for both civil and criminal liability to attach to defamatory statements. Indeed, the Sangay Dorji case involved the use of criminal law, i.e. Section 317 of the Bhutan Penal Code which says that:

> "A defendant shall be guilty of the offence of defamation if the defendant intentionally causes damage to the reputation of another person or a legal person by communicating false or distorted information about the person's action, motive, character or reputation."

What is striking about the Sangay Dorji case is that the courts – at both District and High Court levels – have thought fit to go beyond the standard requirements applicable in most Anglo-Saxon countries and introduced two further elements to be established by the prosecution before they can procure a conviction, namely:

1. that, if the person aggrieved by the alleged defamation (the complainant) is a public figure, the prosecutor must prove that the person or persons responsible for the defamation (the accused) acted with actual malice; and

2. that prosecutor must further prove that the accused knew that the statement in question was false when he made it.

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[12] In most countries, defamation suits come to an end when the plaintiff dies.

While the first stipulation has some precedents to support it (e.g. the law in the United States noted above – although the Bhutanese courts do not refer to any precedents), the second is somewhat unique, at least in the common law world. It imposes a higher than normal burden on the part of the prosecution and therefore makes successful prosecutions much more difficult. However, it would be lauded by those free speech campaigners who have, over the years, argued that the traditional approach of requiring the defendant to prove the truth of the alleged defamatory statement was unfair and out of line with the normal rules of burden of proof in criminal cases.

Although the judgments in the Sangay Dorji case do not elaborate on the concept of 'public figure', they do make it clear that this concept is "broader than celebrities and politicians".[13] Accordingly, they have concluded that Mrs Sangay Zam, the then Director of Revenue and Customs (who was one of the complainants in this case), was – despite being neither a celebrity nor a politician – a public figure. How the concept of 'public figure' is developed in the future by the Bhutanese courts will be important, because that will determine the outcome of many defamation cases. Obviously, some caution is required lest the law of defamation becomes skewed against a whole class of people who, sometimes for no fault of their own, find themselves in the public eye.

Another noteworthy aspect of the judgments is that the District Court has attempted to signal its preference for reduced protection for the reputation of public officials as a group compared to other citizens. "The jurisprudence adopted by the Bhutanese court," it says, "is clear that public officials enjoy lesser protection of their reputation since they are routinely exposed to public opinion because of their public profile."[14] This may be seen as a welcome development from the point of view of freedom of speech in a democracy,

[13] Unnumbered para. 10, Part II of the District Court judgment.
[14] Unnumbered para. 17, ibid.

because it echoes the liberalising trend evident in a number other countries in this regard. As far back as 1993 the House of Lords in London expressed the view that if public bodies were allowed to sue for defamation, they might misuse that power to stifle legitimate criticism of their activities.[15] This, said the court, would have a "chilling effect" on free speech. In the words of one of the judges, it would be "a serious interference . . . if the wealth of the State, derived from the State's subjects, could be used to launch against those subjects actions for defamation because they have, falsely and unfairly it may be, criticised or condemned the management of the country."[16] In England, it is now not possible for local authorities, government-run corporations and political parties to sue for defamation. This principle has also been accepted by the Supreme Court of India.

The Thimphu District Court has been equally vigorous in its affirmation of this principle. It has said that

> "in a modern democratic society, constructive criticism by any individual citizen against the government should be accepted as a necessary evil for effective governance. It is only the freedom of expression and thought that would translate the true meaning of democracy [sic]."[17]

The role of the Attorney General

One of the particularly controversial aspects of the Sangay Dorji case appears to be the involvement of the Office of the Attorney General in launching the prosecution – and the subsequent appeal – which led to the two court judgments. The OAG is reported to have acted on the basis of a directive issued by the Cabinet Secretary, but this came in for some criticism by the courts. The judges noted that, although the Attorney-General has a "special responsibility to be a

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[15] *Derbyshire County Council v. Times Newspapers* [1993] AC 534.
[16] Ibid. At 557-59 (per Lord Keith).
[17] Ibid., para. 5.2 (Note: from the copy of the judgment obtained by the author, it is not entirely clear why some paragraphs have been numbered and others have not.)

guardian of rule of law, which include guardian [sic] of the public interest," his responsibility for individual criminal prosecutions

> "must be undertaken on strictly objective and legal criteria, free of any political considerations and independent of the traditional cabinet decision. Any deviation would lead to dysfunction of the democratic process and will be becoming more pronounce [sic] in the near future. No prosecution of this nature may be initiated in the court at the cost of the public purse."[18]

The High Court reportedly endorsed this view and suggested that "[s]uch cases should not be represented by the OAG and left to the aggrieved individual."[19] The basis for this finding was that the alleged defamatory statement did not materially affect the reputation of the Revenue and Customs Department of which the aggrieved person, Mrs Sangay Zam, was at the relevant time the Secretary.

Quite clearly, this is a matter which deserves serious consideration. Where public expenditure is involved, it is important that the highest standards of probity are adhered to. For this reason, it would be desirable if proper norms and guidelines are framed about the extent, and the manner of exercise of, the Attorney-General's discretion in such matters. These norms and guidelines should have regard not only to the peculiar needs of Bhutanese society but also to best practices in other democracies.

Other issues

The Sangay Dorji case raises a number of other issues as well which it would be beyond the scope of the present article to elaborate on. These include:

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[18] Ibid., para. 5.3.

[19] "Defamation suit comes unstuck", *Kuensel*, December 31, 2008, p. 4.

1. the manner in which the defence of 'truth' vis-a-vis defamation has been dealt with by the courts, and its apparent conflation with the defence of 'fair comment';[20]
2. the use and evidentiary value of Parliamentary Resolutions in defamation proceedings (and in court proceedings generally);[21]
3. the manner of collection of evidence prior to the launching of proceedings for defamation;[22]
4. the proper scope and limits of the offence of 'sedition' and its relevance to cases involving alleged attacks on individual reputation;[23] and
5. the proper scope and limits of the offence of 'spreading false information' and its relevance to cases involving alleged attacks on individual reputation.[24]

More generally, the case points to the need for a wider and deeper debate involving legal professionals, policy analysts, the government's law officers, the media, and members of the public who may have an interest in such matters, over the place that defamation law should occupy in a new democratic Bhutan, the relative merits of resort to prosecutions on the one hand and civil proceedings on the other for the vindication of individual reputations, and the strengths and weaknesses of the present Bhutanese law on defamation.

Conclusion

The Sangay Dorji case offers both opportunities and challenges for the reform of media law in Bhutan. It is

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[20] See unnumbered para. 15 of the District Court judgment.
[21] See unnumbered paras. 13-15, ibid.
[22] In the present case, the Office of Attorney General reportedly prepared and put out questionnaires which those attending the ACC workshop were asked to complete and return to the OAG. Some of the recipients of the questionnaire were apparently unsure of the legal status of the document and their own legal rights in relation to it.
[23] See Part III of the District Court judgment.
[24] See Part I, ibid.

arguably the first case in which the courts have undertaken a major assessment of the complex issues that defamation law often throws up. The importance of engaging with such issues is heightened by the fact that Bhutan now has a written constitution which guarantees freedom of speech and expression and which therefore requires policy makers, prosecutors and the judiciary to ensure that the correct balance is struck between that important freedom and other competing interests such as the right to personal reputation. As Bhutanese democracy matures, and as the country's economic, social and cultural development gathers pace, more and more cases of this kind are likely to emerge, calling for creative solutions and sophisticated approaches to dispute resolution.

For all the limitations of Bhutan's nascent legal infrastructure – including obvious constraints of judicial capacity – both the Thimphu District Court and the High Court have, in the present case, made a promising, if imperfect, start which, on the whole, augurs well for the healthy development of defamation law in the future. Quite clearly, a number of crinkles need to be ironed out and a range of both conceptual and practical issues need to be clarified fairly quickly. The Bhutanese political and judicial leadership would do well to look at the experience of media law reform in comparable jurisdictions elsewhere, and also seek expert advice from those with an understanding of the needs and aspirations of transitional societies. Recent years have seen remarkable developments in defamation law and practice all over the world, and this branch of the law is still evolving.