



THE ONLINE DEFAMATION LAW
IN MALAYSIA AND INDONESIA:
A COMPARATIVE ANALYSIS

BY

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A dissertation submitted in fulfilment of the requirement
for the degree of Master of Comparative Laws

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JUNE 2012

ABSTRACT

Defamation law exists to balance two interests, the rights of freedom of expression and the rights of reputation. It aims to ensure the protection of the person's reputation from being attack or harm by another person. However, with the advent of the internet, the problem on defamation becomes more complicated. The nature of the internet that is easy to access and could reach millions people all over the world, make defamation through this media is more harm to the person's reputation. The present thesis thus compares the law of online defamation in Malaysia and Indonesia on some point; the relevant law of Malaysia and Indonesia relating to cyber defamation; the elements of online defamation; the liability of ISP; the defences and remedies that available under Malaysian and Indonesian law of defamation. This thesis also analyses the basic concept of defamation from Islamic perspective. The methodology of this study is a qualitative and doctrinal research using both analytical and comparative approaches. The primary sources are taken from Malaysian and Indonesian statutes and decided cases. This study also employs unstructured interview with several correspondences who are experts on the issue at hand in order to enrich the analyses on this study. This study discovers that the civil law of defamation in Malaysia is seems well-established while the criminal defamation is almost unknown. While defamation under Indonesian law of defamation is considered as a crime. This situation becomes a common issue that criminal defamation in Indonesia may limit the rights of freedom of expression and democracy. Furthermore, the Islamic law of defamation is more comprehensive and contains solutions to many problems in all circumstances. This research is concluded with a suggestion that there is a clear need for Indonesia to have well-defined provisions regarding civil defamation and criminal defamation. It is perhaps desirable that provisions on criminal defamation to be reconsidered or perhaps should be eliminated from the proposed new defamation law. On the other hand, although Malaysia has already well-established civil defamation law which in line with the principle of freedom of expression, it is better to absorb the principle of Islamic law of defamation. Because the Islamic law of defamation contains the provisions relating to all the problems of individual, communities and states as well.

ملخص البحث

قانون التشهير موجود لتحقيق التوازن بين الحقين ، وهما الحق في حرية التعبير والحق في السمعة. ويتم إصدار قانون التشهير لضمان حماية سمعة الشخص من ألا يكون هناك هجوماً أو أذى من قبل الآخرين . لكن مع تطور الإنترنت، تزداد المشاكل التي يواجهها قانون التشهير. من طبيعة شبكة الانترنت، يمكن الوصول إليه بسهولة ويمكن أيضا أن تصل إلى الملايين من الناس في جميع أنحاء العالم، مما يجعل من التشهير عبر الإنترنت أكبر تأثيراً على سمعة الشخص . يهدف هذا البحث إلى المقارنة بين قانون التشهير عبر الانترنت في ماليزيا واندونيسيا في عدة نقاط ، وقانون التشهير متعلقة بالانترنت في ماليزيا واندونيسيا، وعناصر من التشهير على شبكة الانترنت، مسؤولية مقدمي خدمات الانترنت مزود ؛ الدفاع والسياسة التعويضية في قانون التشهير عبر الانترنت في ماليزيا واندونيسيا. هذا البحث أيضا يقوم بتحليل المفهوم الأساسي للتشهير من منظور الإسلام. والمنهج لهذا البحث هو أسلوب نوعي من التحليل والمقارنة. أن البيانات الرئيسية لهذا البحث من القوانين في ماليزيا واندونيسيا، فضلا عن الحالات الموجودة في البلدين. واستخدمت أيضا في هذه الدراسة أسلوب المقابلة غير منظمة مع بعض المراسلين الذين هم خبراء في هذا المجال من أجل إثراء المواد الدراسية. والنتيجة من هذا البحث أن قانون التشهير في ماليزيا راسخة، والقضايا الجنائية تكاد غير مسموعة أو قليلة جدا. أن التشهير من منظور القانون في اندونيسيا هو جريمة . هذا الوضع يصبح قضية كبيرة أن التشهير من الناحية الجنائية قد تحد من حرية التعبير والديمقراطية. وعلاوة على ذلك، أن السب والتشهير في منظور الإسلام أكثر شمولا، لديه الحلول لمختلف المشاكل في مجموعة متنوعة من الظروف. والخلاصة من هذه الدراسة أن الحاجة إلى قانون التشهير في اندونيسيا لتوضيح قواعد التمييز بين القضايا المدنية والجنائية في التشهير. ومن الأرجح، القول أن قواعد قوانين التشهير الجنائي يجب أن يعاد النظر فيها ويمكن إزالتها في تكوين قانون التشهير الجديد. وبالإضافة إلى ذلك، على الرغم أن ماليزيا كان لها قانون التشهير المدني هو أكثر انسجاما مع الحق في حرية التعبير، ولكن من الأفضل الاعتماد على مبادئ الشريعة الإسلامية. وهذا بسبب التشهير من منظور الإسلام يحلل المشاكل من حيث الأفراد والمجتمع والأمة ككل.

APPROVAL PAGE

I certify that I have supervised and read this study and that in my opinion, it conforms to acceptable standards of scholarly presentation and is fully adequate, in scope and quality, as a thesis for the degree of Master of Comparative Laws

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Supervisor

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DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any degrees at IIUM or others institutions.

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**THE LAW ON ONLINE DEFAMATION IN MALAYSIA AND INDONESIA;
A COMPARATIVE STUDY**

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*In the name of Allah, the Most Beneficent and the Most Merciful,
This work is dedicated to my beloved parents and my lovely siblings*

“It takes many good deeds to build a reputation, and only one bad one to lose it”

~Benjamin Franklin~

ACKNOWLEDGEMENTS

Alhamdulillah. All praise of gratitude and thankfulness are due to the Allah SWT, for enabling me to complete this work and peace and blessings of Allah be upon His Messenger Muhammad *pbuh*. This thesis is the end of my journey in obtaining my MCL and it would not have been possible without the support and assistance of numerous people. At the end of my thesis, it is a pleasant task to express my thanks to all those who contributed in many ways to the success of this study and made it an unforgettable experience for me.

In the first place, I would like to record my gratitude to Assoc. Prof. Dr. Naemah Amin for her supervision, advice and guidance from the very early stage of this research as well as giving me extraordinary experiences throughout the work. I cannot forget her hard times, she used to review my thesis progress, give her valuable suggestions and made corrections.

I am also extremely indebted to my guide Assoc. Prof. Dr. Sonny Zuhuda. I am thankful that in the midst of his activity, he accepted to give advice, guidance for this work. I will always be very grateful to the International Islamic University Malaysia, particularly the Ahmad Ibrahim Kulliyah of Laws for giving me the opportunity to pursue my study, and I would like to thank to all the lecturer and staff for their help and encouragement.

Where would I be without my family? My parents deserve special mention for their inseparable support and prayers. My father Prof. Dr. H. Sirajuddin Zar, MA, in the first place is the person who put the fundament my learning character, showing me the joy of intellectual pursuit ever since I was child. My mother, Dra. Arni Darwis, is the one who sincerely raised me with her caring and gently love. Fuad Mahbub Siraj, PhD, dr. Elfitri Sakinah Siraj and Young Pionir Siraj, thanks for being supportive and caring siblings.

Finally, I would like to thank everybody who was important to the successful realization of this thesis, as well as expressing my apology that I could not mention personally one by one.

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Indonesia

Civil Code (*Kitab Undang-Undang Hukum Perdata*)

Criminal Code (*Kitab Undang-Undang Hukum Pidana*)

Criminal Procedures Code (*Kitab Undang-Undang Hukum Acara Perdata*)

Information and Electronic Transaction (ITE) No. 11 year 2008

Telecommunication Law No. 36 year 1999.

CHAPTER ONE

INTRODUCTION

1.0 BACKGROUND

The law of defamation is concerned with one particular kind of interest namely the protection of a person's reputation. Reputation is one of the most essential rights of human being. The law of defamation is aimed to protect reputation of individual. The protection of the right to reputation has been acknowledged by many countries including Malaysia and Indonesia. Both countries have enacted several statutes that ensure the protection of other's reputation within their jurisdiction. In addition, Islam as a religion of peace teaches all people especially Muslim to respect other person's reputation in order to set up harmony within the society.

In order to protect reputation, the law comes into direct conflict with the right of freedom of expression. Self expression and communication with others are also fundamental right of individual. Freedom of expression exists from individual and based on the freedom of thinking.¹ However, the right of freedom of expression is not absolute and it is limited based on the individual's right and interest especially in regards of the person's reputation. Hence the law of defamation are designed to mediate between these rights.

Generally speaking, defamation is the action of harming someone's reputation by making a false statement to a third party.² This statement concerning another person reaches the third party through a publication of the statement made by defamer.

¹ Dario Milo, *Defamation and Freedom of Speech*, Oxford University Press, 2008, at 43.

² Stephanie Blumstein, "The New Immunity in Cyberspace: The Expanded Reach of The Communication Decency Act to The Libelous "Re-pouster", B.U.J. SCI & TECH. L, Vol. 9. 2, 2000, at 2-3.

Thus, defamation law provided provisions about a person who can be held liable for defamation action and a person whose reputation has been injured may bring an action for defamation to clear his or her name. In simple terms, defamation can be defined as a false attack on someone's reputation.

Historically, the original doctrine of defamation law was heritage from Roman law.³ Even early on, defamation regulations were used as a tool by governments to strengthen their authority and repress freedom of expression. During the Augustan Age (63 BC-14AD) the number of defamation trials significantly increased.⁴ Through generations, it was inherited to several legal systems in other countries, such as England with the Common law and France as one of the key countries of the European Continental system (civil law).⁵

This thesis attempts to compare between the law of defamation in Malaysia which is based on the Common law system and the law of defamation in Indonesia which is based on the Civil law system. In Malaysia, section 3 and 5 of the Civil Law allows for the application of English common law, equity rules and statutes in Malaysian civil cases where no specific law has been made and it becomes the background why the law of defamation in Malaysia is mostly civil wrong of tort and for criminal defamation is almost unknown. On the other hand, in Indonesia, the majority of statutes are originally from the Netherlands, as up until now some of the statutes are still considered to be the prevailing law including the provisions regarding defamation have not been updated. Thus, under Indonesian law defamation is still considered as a crime.

³ Van Vechten Veeder, "The History and Theory of The Law of Defamation", *Columbia Law Review*, Vol. 3, No. 8, December, 1908, at 547.

⁴ Caveat, *Indonesia's Monthly Human Rights Analysis*, Vol. 1, 01, June, 2009, at 4.

⁵ *Ibid.*

In recent years, the advance of the internet has created a new challenge for the law of defamation. The issue of defamation on the internet has become one of hot topic on the defamation law. Because the internet is like a paradise where a person can do and say whatever he or she likes.⁶ And the Internet has created a new paradigm in human life. Life changed from a purely real to the new virtual reality.⁷ Because of the international connectivity of the internet, its speedy transmission of huge amounts of data simultaneously to multiple destinations, and also general lack of respect for national borders, it is extremely easy for individual to make a defamatory statement via internet.

The growth of the internet as a communication media has changed the trend on the law of defamation. Prior the development of the internet, each country had the law of defamation that govern the publication of defamatory statement through traditional media. It must be acknowledged from the very beginning that the internet has revolutionized communications and the potential to dramatically altering the law of defamation.⁸

The use of internet increases the ways and extent in which defamatory statements or materials can be published. Publication can occur on the internet through the use of emails, Facebook, Twitter, posting to news groups and bulletin boards. Once a person publishes defamatory statements on the internet, it can create many problems and raised many difficult questions. Focusing on the law of defamation in Malaysia and Indonesia, how the law of defamation in both countries deal with the new form of cyber defamation? Does the existing law could extend to

⁶ Teresa Fuentes Camacho, *The International Dimensions of Cyberspace Law*, UNESCO Publishing, at 219.

⁷ Abdul Wahid & Mohammad Labib, *Kejahatan Mayantara (Cyber Crime)*, PT. Refika Aditama, 2005, at 103.

⁸ Ahmad Masum, "The Freedom of Speech and The Internet: A Case Study of Malaysia", *The Malayan Law Journal*, Vol. 3, 2009, at 8.

govern the online defamation? All of these issues will be discussed further in this thesis.

1.1 STATEMENT OF PROBLEM

In this research, the statement of problem can be elaborated into the following questions:

1. What is online defamation?
2. What law regulates online defamation in Indonesia and Malaysia?
3. Who should be responsible for publishing the online defamatory statement?
4. Whether the existing law which was enacted to regulate conventional defamation is adequate to deal with cyber defamation?
5. How Islamic law of defamation deal with the defamation action especially on online defamation?

1.2 OBJECTIVES

The objectives of this thesis are:

1. To compare the law on online defamation in Malaysia and Indonesia on some points:
 - a. The relevant law of Malaysia and Indonesia relating to cyber defamation.
 - b. The elements of online defamation in Malaysia and Indonesia.
 - c. The liability of ISP in Malaysia and Indonesia.
 - d. The defences that available under Malaysian and Indonesian law.
 - e. The remedies for defamation action in Malaysia and Indonesia.

2. To analyse the law of defamation from Islamic Perspective.
3. To recommend the improvement to the current legal framework.

1.3 HYPOTHESIS

Based on the above background and observation, the hypothesis laid down in this study is as follows:

1. The existing law is not sufficient to regulate the new form of cyber defamation especially on the defences that available for the defendant in online defamation claim.
2. The civil defamation law in Malaysia is well-established and should be followed by Indonesian law of defamation.

1.4 LITERATURE REVIEW

There have been very few articles, journals, books and legal thesis in which the authors deal with the issues pertaining defamation. Nevertheless, such a discussions on law of defamation are found to have only touched on specific issues or to limit them to certain contexts or application of defamation law.

Rafeah Saidon⁹ wrote a master's thesis on the law of defamation under the Malaysian and Islamic law. In her research, Rafeah discuss about the definition and the scope of Malaysian and Islamic law regarding defamation. The study then compares the law of defamation under the civil and the criminal law of Malaysia and Islamic law. While such assessment brought by Rafeah forms a good starting review for the present research that defamation under the Islamic law is complete in every aspect and there is nothing which it does not cover.

⁹Rafeah Saidon, "The Law of Defamation Under The Civil, Criminal Law of Malaysia And Islamic Law, A Comparative Study, (MCL Thesis, International Islamic University of Malaysia, 1997).

Burkell and Kerr discuss defamation law in order to understand how an online communication is received and understood by its recipients, the authors then investigate three differences between electronic and other media of communications: i) that the technology-mediated and text-based character of electronic communication makes the process of communication more difficult and the incidence of miscommunication more likely; ii) that the nature of social interaction in the online setting has a tendency to increase hostile communications that might be considered defamatory; iii) that the cultural context and standards of communication that develop in online communities will reduce the significance of these hostile communications. Applying these considerations to the law of defamation, the authors conclude by rejecting the naive point of view that a libel published through the Internet ought to be dealt with in exactly the same way that a libel published in a newspaper is dealt with. The authors end by calling for further empirical research about the content that is produced as a consequence of contextual challenges in electronic communication.¹⁰

Rakochev et al¹¹ research the law of defamation and the internet has important implications for the internet users, intermediaries and victims of internet defamation. The research result suggested that any internet user must be aware of the content they post online. Emails, blogs and other postings written hastily or in a moment of anger may result in potentially defamatory material being posted online for anyone to view. Such messages are also difficult to remove or retract once they are made, and could easily attract a defamation lawsuit. Therefore, through intermediaries includes anyone who forwards emails, posts hyperlinks, or allows others to post comments on websites

¹⁰ Jacquelyn Burkell, Ian R. Kerr, 'Electronic Miscommunication and the Defamatory Sense', *Canadian Journal of Law and Society*. Volume 15, 2000, at 9.

¹¹ Robert Rakochev, Mark Rogers, Holly Wuntke, Kelly Moffet-Burima, Rebecca Graham, *Defamation Bytes: The Law Of Internet Defamation in Canada*, Federated Press, 5th Internet Law Course, 2011.

within their control. Where the intermediaries should be aware of their legal rights, involve a delicate balance between permitting freedom of expression to occur and prohibiting defamatory material to remain. So with such a person who feels they have been defamed online should keep a record of the defamatory material, request that any website owner remove the messages from their website, demand that any known defendants stop posting messages about them, and if necessary, bring a defamation action quickly to increase the likelihood that an anonymous defendant can accurately be identified.

In addition, there are some articles and books relevant to this study. Norchaya Talib, in her book discusses the theoretical concept of the tort of defamation. Defamation arises when there is a publication which has tendency to lower the person's reputation or to cause him to be shunned or avoided by reasonable person in society, thereby adversely affecting his reputation. The interest that is protected by this tort is a person's good name and reputation. Thus, the person to whom the defamation statement is made had right to sue for defamation. A fundamental concept pertaining the law of defamation under Malaysian law and syari'ah law is discussed by Syed Ahmad Alsagoff.¹² In his book, he explores about the definition, elements of defamation, defences and remedies. From the basic concepts of traditional defamation above, the author could gains the benefit from it to further expand this research focusing on online defamation. This is what will make this research to be different from the books above.

¹²Syed Ahmad Alsagoff, *The Law of Torts in Malaysia And The Syariah*, Mas'adah Sdn Bhd, 2004, at 353 - 414.

Furthermore, this study also obtains help from Evans,¹³ Muladi¹⁴ and Altaf.¹⁵ On the issue of publication, Evans states that, it is sometimes said the words must have been published maliciously. In his book he discusses that malice is presumed to exist once it has been shown that a defamatory statement had been published to a third party. According to Prof. Muladi, the person can bring an action for defamation if he or she can prove that the statement of publication tends to discredit him. Moreover Prof. Altaf argues that there is a need for the courts not only to focus on the dimension of the publication and the extent of damage but also the nature of the defamatory statement. Where defamatory statement involves a serious allegation affecting the social, economic and political life of a person, then the magnitude of publication and extent real damage should be given less importance and the claim be allowed.

Truda Gray and Brian Martin write that the standard perspective on defamation law is that it is an attempt to balance the protection of two contrary values, reputation and free speech. On the one hand, defamation actions serve to penalize those who make inaccurate and malicious assaults on a person's reputation and to provide recompense to those whose reputations are unfairly tarnished. On the other, defamation laws must not be so restrictive that they restrain free speech, including public debate and investigative journalism that are essential for a well-functioning democracy.¹⁶

Arjuna Dibley tries to find the link between criminal defamation law and democracy in Indonesia, the Right to Free Expression. Freedom of expression is

¹³Keith R Evans, *The Law of Defamation in Singapore And Malaysia*, 2nd Edition, Butterworths, 1993, at 32-33.

¹⁴Prof. Muladi, *Ancaman Pencemaran Nama Baik Mengintai*, 30 Mei 2005, <<http://www.hukumonline.com>> viewed on 9 May 2011.

¹⁵Prof. Dr. Mohd. Altaf Hussain Ahangar, "Relevance Damage In Defamation Claim: Reflections on Jameel", *Malayan Law Journal*, Volume 2, 2007, at Cxix .

¹⁶Truda Gray and Brian Martin, *Defamation and the Art of Backfire*, <http://www.bmartin.cc/pubs/06dlr.pdf> viewed on 9 May 2011.

widely regarded by political scientists as a necessary precondition of democracy.¹⁷ While Meikle John argues that free expression is fundamental to democracy, because it allows the people to access information they need to make political decisions; decisions such as who to elect, when to take political action and what political issues to rise with elected representatives. In other words, freedom of expression is the "conduit" through which the people rule government.¹⁸ The notion of free expression is a prerequisite for democracy has also been widely accepted in practise. Indeed, many democracies protect the right to freedom of expression in their constitutions or separate legislation.¹⁹

It was noted however that the approaches taken by those authors appear to be thematic and do not necessarily reflect the current situation regarding the law of defamation. The law of defamation exist to protect and to ensure the balance between the rights of freedom of speech and the reputation of the person. However, as the new era change, this present research on the other hand, looks further to reassesst and discuss legal issues which deals with online defamation. This is in the same view with F.A. Trindade in which he argues that the law of defamation will change as we move into a new millennium. Communications, in the new millennium will be dominated by the new technologies and in particular, the internet.²⁰

Furthermore, this research discusses the online defamation law in Indonesia and Malaysia, and any cases that have occurred in both countries. Moreover this research will try to find out whether the conventional defamation law is adequate to

¹⁷Arjuna Dibley. "Criminal Defamation and Democracy in Indonesia: Regulating or Relegating Free Expression?", This paper was presented to the 18th Biennial Conference of the Asian Studies Association of Australia in Adelaide, 5-8 July 2010.

¹⁸Alexander Meikle John, *Political Freedom: The Constitutional Powers of the People*, Harper, 1960, at 160.

¹⁹Supra.

²⁰F.A Trindade, "The Law of Defamation In The New Millennium", *Journal of Malaysian And Comparative Law*, Vol. 27, 2005, at 23.

regulate the new form of defamation through the online environment as well as trying to find the weaknesses and gaps in both countries and also compare with the law of defamation in Islam.

1.5 METHODOLOGY

This study is a qualitative and doctrinal research using both analytical and comparative approaches. The materials relevant to the study will be gathered from primary sources in the form of statutes, rules, regulations and case laws; as well as secondary sources which include books and manuscripts, academic journals, parliamentary reports, newspaper articles and other periodicals. In addition, information is gathered from unpublished materials such as seminar papers, thesis and various other related materials. The Web-based materials including online databases and web portals are also used because they provide the latest development on law, especially the laws of other countries. The relevant data from the court for defamation cases will be analysed in order to know the effectiveness of the present defamation law in Malaysia and Indonesia. Undoubtedly, all the above materials play a crucial part in shaping the contents and debate on the law of defamation.

The perspective on Malaysian law and Indonesian law regarding the law of defamation is mainly analysed through the doctrinal research approach. Reference is made to various materials consisting of statutes, regulations and case laws, books, academic journals, newspaper articles, seminar papers and others materials that related to the topic.

The study also adopts a comparative approach to give a clearer perspective of the issue and to show the differences and the similarities between the Indonesian and Malaysian legal systems, which are examined in this study. The Indonesian and

Malaysian defamation laws will be compared with Islamic law. Islamic law is selected for the obvious reason that Islamic law provides better protection to one's reputation from being defamed and that the future legal development in the country may be influenced by the Islamic law.

In order to appreciate the issues and understand the challenges more practically, this study will also include a series of unstructured interviews and discussion with several correspondences from various organizations who are experts on the issues at hand. Their views and experiences are arguably necessary to enrich the analyses in this study particularly on the latest development of outstanding issues on defamation law in Indonesia and Malaysia.

1.6 SCOPE AND LIMITATION OF STUDY

The thesis will address the tort of defamation through the internet and the protection provided under the law. This study will exclusively cover the theories and concept of online defamation in Indonesia and Malaysia with particular emphasis focusing on the statutes, rules and regulations and case law regarding online defamation. Islamic law on this issue is also analysed. The scope of this thesis only limited on Indonesia, Malaysia and Islamic law and only qualitative legal research methodology is used. This research also compares and contrasts the law of defamation which is available under Indonesian laws and Malaysian laws. The research also tries to find out the weakness and the loopholes of Indonesian and Malaysian laws.