

Running the Marathon: The Effort to Reform Albania's Defamation Laws

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In early 2012, Albania adopted comprehensive reforms of its criminal and civil defamation laws, bringing them into much closer alignment with European democratic standards. The reforms were the culmination of many years of lobbying by local and international actors, spanning three consecutive legislatures. They are also an interesting case study of a long-term effort to generate political momentum for politically unpalatable reforms: defamation law changes are notoriously difficult to achieve in young (and sometimes older) democracies since they are often perceived by the political class as a matter of personal and political survival.

The specific amendments were drafted and promoted, for more than seven years, by the Albanian Media Institute (AMI) and the Open Society Justice Initiative (OSJI) – with help by many other actors, including local media and civil society, like-minded parliamentarians from both sides of the isle, and a range of European institutions that critiqued the country's defamation laws and practices over the years. The insistence of the European Commission on the need for reforms was particularly important, considering the Commission's leverage in a country eager to obtain candidate status for EU membership.

This paper includes a short overview of libel law and practice in recent years; followed by a description of the advocacy efforts in favor of the reforms and a summary of the adopted amendments. It concludes with some remarks on the possible effects of the reforms.

LIBEL IN RECENT LAW AND PRACTICE

Much has been written about the use of libel laws – and especially those of a criminal nature – to harass or stifle the media and political opponents in Albania. In the 1990s and early part of 2000s, such lawsuits were common and produced real harm. In 2002, I researched and wrote a report for Human Rights Watch that looked into political libel cases in some detail.² One case that stays in mind involved a young reporter who was regularly dragged to questioning by prosecutors for a fairly mild piece that was critical of then-speaker of parliament Skender Gjinushi. The reporter was never charged, but those periodic visits to the police station for several months had left serious scars. (I also recall that he received practically no support from his media employer).

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² Human Rights Watch, *The Cost of Speech: Violations of Media Freedom in Albania* (2002), at <http://www.hrw.org/reports/2002/06/13/cost-speech-violations-media-freedom-albania>.

The most troubling of all were Sections 239 to 241 of the Criminal Code, which included prison terms for defendants charged with defaming public officials, from a lowly civil servant to the president of the republic. While ordinary citizens who claimed to be victims of libel had to act as private prosecutors, public officials had the benefit of being represented by public prosecutors and assisted by the police, who prosecuted such cases as crimes against the state (as in the case brought by Mr. Gjinushi). This was seditious libel with a modern face.

In recent years, however, criminal prosecutions went largely into disuse due to the political stigma associated with public figures trying to send reporters and others critics to jail. Even where criminal cases were pursued, they generally resulted in fines and suspended sentences, rather than served prison terms. However, at the same time politicians and others discovered the power of civil libel lawsuits to cause serious financial pain to their critics.

It did not help, in this respect, that the Civil Code contained only a few meager articles, and little guidance for judges, on the application of so-called moral or non-pecuniary damages for reputational harm. In the absence of proper regulation, and faced with highly partisan disputes, judges began handing out damage awards running into tens of thousands of Euros in cases of core political controversies. To bring just a recent example, a DP member of parliament, Albana Vokshi, sued several opposition MPs over allegations of failure to declare her assets and supposed shady business deals with the government. One of the first cases to be decided, against SP MP Saimir Tahiri, resulted in a damage award of 3.3 million leke (more than 23,000 Euros), reduced on appeal to one million leke (equal to about seven monthly salaries of an Albanian MP; more on this case below.) The out-of-control awards granted by courts in civil cases, with little concern for the free speech implications, provided another urgent rationale for the reform of civil libel laws.

THE REFORM PROCESS: A SEVEN-YEAR SAGA

Starting in late 2004, AMI and OSJI drafted the first version of the reform proposals, which were endorsed and introduced into the legislative process by a bipartisan group of MPs – a rather unusual case in Albanian parliamentarism, where the overwhelming majority of legislative initiatives come from the executive branch. However, the proposal ran out of time with the legislature, then dominated by Fatos Nano's Socialist Party (SP), coming to an end in the summer of 2005. An ongoing challenge (and perhaps also a blessing) for the reforms was the fact that they required the support of both major parties since the Albanian Constitution requires a three-fifths supermajority for changes to the civil and criminal codes, which govern civil and criminal liabilities for defamation.

The July 2005 elections brought back to power the Democratic Party. One of the first decisions of returning Prime Minister Sali Berisha was to bar all senior government officials from suing the media for defamation. While the legal validity of such an act was questionable, it was meant to signal a departure from the high-profile libel cases of the Nano period and for several years it was generally complied with by DP officials.³ The case was also a reminder of how media freedom issues have generated political theater in Albania's highly partisan political scene of the past two decades. Only a few years earlier the SP had made a point of distancing itself from a highly-criticized press law adopted by a previous

³ In the last couple of years, DP ministers, members of parliament and members of Berisha's own family have brought a number of high-profile libel cases against SP parliamentarians and officials.

Berisha government by repealing all of its provisions except its first article, which declared that “the press shall be free.”

In December 2006, the AMI/OSJI libel reform proposals were reintroduced in the DP-controlled parliament, again with the support of a bipartisan group of MPs. In May 2007, however, the Berisha government, in a surprise move, adopted the reform proposal as its own and sent it to Parliament for approval as an executive initiative.⁴ The move seemed to backfire as the SP faction, which had certain reservations on the civil society proposal from the outset, decided not to support them in order not to give the DP a chance to appear as free speech champions.

In mid-2009, after the closest election results since 1991, the DP won a second term in office thanks to a surprise alliance with Ilir Meta’s Socialist Movement for Integration. In the meantime, the European Commission, the Council of Europe and the OSCE media freedom watchdog, among others, continued to demand libel law reforms; the Commission kept raising the issue in its annual report cards on Albania’s compliance with EU criteria. In Parliament, a rare opportunity presented itself in late 2011, after a thaw in government-opposition relations that included a commitment (short-lived in hindsight) to pass legislation of special importance to European integration. AMI and OSJI made another push for the libel amendments, which the DP government had already approved in principle; the opposition lifted its objections and, with a number of modifications, provided the votes necessary to adopt them in late February and early March 2012.

In addition to the political challenges, it is interesting to note the objections of a good chunk of the legal establishment to libel reforms, and especially the repeal of criminal libel. For example, the Ministry of Justice, long seen as “the guardian of the codes” in the country’s Napoleonic tradition, was consistently hostile to the changes, irrespective of the politics of the minister. The same could be said for a substantial portion of the legal profession and academia, which remain skeptical of the pre-eminence of the “new” constitutional rights and values, such as free speech, over the traditional regulation of criminal and civil matters. In that sense, the constitutionalization of ordinary law – a seismic process through which much of Western Europe went through in the decades after 1945 – is far from complete in Albania. Such skepticism presented itself forcefully at times in the most recent parliamentary debates, and is responsible for some of the compromises that were made (e.g. the decision to maintain libel as a criminal misdemeanor or to water down some of the protections in the civil context).⁵

The popular reputation of the local media, which are widely seen (rightly or wrongly) as partisan, unprofessional and “perhaps freer than they should be”, has not helped either. Unless that changes over time, it may become difficult to retain the 2012 reforms on the books once Albania no longer needs to fit the straitjacket of the EU integration criteria.

THE AMENDMENTS: WHAT ACTUALLY CHANGED

The changes to the criminal and civil defamation laws adopted by Parliament in early 2012 were substantial and for the most part positive. They can be summarized as follows—

⁴ See Decision of the Council of Ministers (VKM) of 4 May 2007.

⁵ One objection that was particularly troubling was to a proposed provision that would have made truth a complete defense in civil defamation (harm to reputation) cases. The provision was taken out of the final version, which simply requires courts to consider, among other factors, whether the allegations were true.

-- on criminal defamation:⁶

- The three articles on defamation of public officials, including the president of the republic, were repealed altogether. Public officials will no longer enjoy any special protections, including no involvement by public prosecutors, and must act as ordinary citizens.
- Insult (Art. 119 PC) and libel (or calumny, Art. 120 PC) were maintained as misdemeanors, subject to a fine. Prison terms were abolished but maximum fine amounts were increased to 3 million leke (21,000 Euros). They are to be privately prosecuted by the alleged victim, as before, with no involvement of the police or public prosecution. However, a conviction under either article will still produce a criminal record.
- An amendment to Art. 120 clarified that, to be found guilty of calumny, a defendant must have acted with “knowledge of the falsity” of the defamatory utterances. This is a pretty high bar for the prosecution, if properly applied by the courts.
- Two provisions on insulting foreign dignitaries (Art. 227 PC) and desecrating foreign state symbols (Art. 229 PC) were also repealed. Art. 268 on the desecration of the Albanian flag or national anthem was amended to apply only when occurring “during an event organized by public authorities”; maximum prison terms were reduced from two years to three months.

-- on civil defamation:⁷

- The amendments to Art. 625, which governs all forms of moral damage, clarified that there will be causes of action for harm to one’s honor, reputation or personality; new causes of action were introduced for violation of the right to one’s name (Art. 625(c)) and breach of privacy (Art. 625(ç)).
- A new Art. 647/a introduces criteria for assessing whether a defendant should be held liable for causing harm to one’s honor or reputation, and if so, for determining the amount of compensation. As a general principle, any compensation granted should be proportionate and seek to “reinstate the right that has been violated,” rather than punish the defendant.
- The new provision sets out eleven specific and non-exhaustive factors to be taken into account by the courts in determining liability. These include: whether the allegations constitute fact or opinion; whether they are true/false or constitute accurate references to third-party statements; whether they relate to “matters of public interest, or persons in government functions or running for election”; and whether the author has complied with any relevant rules of professional ethics (e.g. in the case of journalists).

⁶ See Law No. 23/2012 on Certain Additions and Amendments to the Penal Code (adopted on 1 March 2012, entered into force on 11 April 2012)

⁷ See Law No. 17/2012 on Certain Additions and Amendments to the Civil Code (adopted on 16 February 2012, entered into force on 29 March 2012)

- With respect to the amount of compensation awarded, courts are required to consider whether the damages “may significantly worsen the financial condition” of the defendant. This would apply, for example, where high damages might send a small media outlet bankrupt.
- The statutory limitation period for bringing defamation and privacy actions was reduced from three years to one year (Art. 115(e) CC).
- The amendments are not retroactive; in other words, they do not apply to ongoing cases, but only to new cases initiated after their entry into force.

AMI and OSJI drafted also a set of amendments aimed at regulating civil liability for defamation on or through the Internet. However, they were dropped because our parliamentary interlocutors felt that such interventions were perhaps premature in the Albanian context. For what it may be worth, a semi-obscure piece of legislation on electronic commerce⁸ from 2009 grants Albanian intermediaries a conditional safe-haven in terms practically identical to those of the European Union’s E-Commerce Directive (2000). In essence, intermediaries are exempted from liability for illegal *third-party* content provided (a) they had no knowledge of the illegality; and (b) upon obtaining such knowledge, they act expeditiously to remove or disable access to the illegal content. To my knowledge, it has never been tested in court.

HAVE THEY MADE A DIFFERENCE IN PRACTICE?

There is no question that the amendments are generally good news for free speech and media freedom in the country. The specter of criminal sanctions is much weaker and the regulation of civil defamation much more detailed and reflective of modern European standards. E.g. judges will have to pay extra care when ruling on statements involving value judgments or journalistic work that contributes to matters of public concern.

The proper answer is, however, that it is too early to tell and much will depend on how the changes are construed by the courts. There is also a difference here between the Penal Code and Criminal Code amendments. The changes to the Penal Code entered into effect more or less immediately since they tend to be favorable to defendants and, as such, must also be applied to ongoing/undecided cases. E.g. any charges brought under the repealed offenses of libel or insult against public officials must be immediately dismissed by the trial judge. Thus, in October 2012, Genc Pollo, a cabinet member, withdrew a criminal libel case he had brought against a Socialist MP, citing the March 1 amendments to the Penal Code (though he continued to demand civil damages).

The amendments to the Civil Code, on the other hand, cannot be applied, strictly speaking, in court proceedings that started before their entry into force on 29 March 2012. Considering that civil defamation cases in Albania generally take years to come to a final judgment, there have hardly been any new cases decided on the basis of the reformed provisions.

It can be argued, however, that judges should take into consideration the new amendments insofar as they represent a distillation of the relevant jurisprudence of the European Court of Human Rights, which has been directly binding on Albanian courts at least since the adoption of the current Constitution in 1998.

⁸ See Law No. 10.128 (2009) on Electronic Commerce, art. 17.

Recent judgments are not too encouraging in that respect. There have been no systematic analyses, but I looked at one of the high-profile libel trials of the past year: the above-referenced case involving A. Vokshi and S. Tahiri, which resulted in a one-million-leke fine against the Socialist MP (reduced from 3.3 million in the first instance).⁹ The appeal court, which is arguably the most experienced on libel matters in the country, paid lip service to the Article 10 jurisprudence of the Strasbourg Court and even evoked the famous precedent of the U.S. Supreme Court in *New York Times v. Sullivan*. Its application of comparative jurisprudence was, however, superficial, highly selective and in the case of *Sullivan*, plain wrong.¹⁰ Likewise, the key ECHR precedent cited by the appeals court was a marginal judgment on which the Strasbourg panel itself was badly divided (with a 4-3 majority and a strong dissent by the three judges in minority). It was an odd choice that ignored the seminal judgments of the Strasbourg Court on the question of political speech, but that appeared to usefully endorse the appeal court's conclusion in the case before it.

The most disturbing aspect of the case law in recent years is the amounts of damages awarded in cases involving essentially political disputes. Even if the decisions in favor of the plaintiffs were justified – and that is a big “if” – there is no question that the amounts of compensation granted, running into tens of thousands of Euros, are out of control. If these cases were to be taken to Strasbourg, they would unquestionably be found disproportionate and in violation of Article 10. In the longer run, the 2012 reforms will have failed if they do not cause the damage amounts to come down. It is also high time for the Albanian Supreme Court to intervene to bring some order and reason in this area of law.

It is also of little consolation that the most high-profile disputes of recent years seem to involve intra-species fights among members of parliament and other politicians, rather than, say, the media or independent observers. More than anything, it may be a reflection on the state of the media in the country and the painfully meager supply of investigative journalism.

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⁹ See *Tahiri v. Vokshi*, Tirana Court of Appeal, Judgment No. 30-2013-53 of 11 January 2013. Mr. Tahiri stated that he will appeal to the Supreme Court.

¹⁰ Students of the First Amendment will be astounded by the Albanian court's easy conclusion that the defendant acted with “actual malice” and would be guilty under the *Sullivan* doctrine. The court also completely ignored the fact that, under the *Sullivan* principles, the burden of proof lay with the plaintiff, whereas the Albanian court placed it on the defendant.