

The Right of Criticism and Defamation Crime in Media: Iraq and U.S. as a Case Study

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Abstract

This paper is an attempt to find out the role of mass media in criticizing public officials in the government by referring to its constitutional framework. This role, however, can be restricted through the libel suit which might be filed by the public officials against media. Under the right of freedom of expression, media has been enabled to criticize public officials in favor of public interest. The right of criticism often empowers media to participate in public life and protect people from the tyranny system. While practicing its constitutional functions, media might be charged to defame the privacy of others. Consequently, the defamation claims may run against the right of freedom of criticism, and restrict the role of media in some legal cases. A balance between the right of privacy protection and free speech of media should be taken into consideration. Hence, the current paper shed lights on how defamation law should be set in a way that does not suppress media in performing its function. For that, defamation law in the United States and Iraq will be compared in regards to the above mentioned point.

Keywords: Free speech; Right of criticism; Criminal defamation rules; Mass media; Public officials

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Introduction

Following the collapse of the Iraqi regime in 2003, freedom of expression and criticism have become common issues in the field of media. Though the Iraqi constitutions and various laws guarantee these rights, they were never respected until the April of 2003 when a dictatorship regime was taken over. After that date, a great development of free speech and criticizing the government has achieved since it has become something real in public life and media as well. Media, then, is considered as an important method and technique for the citizens to publicly criticize the government and its officials without fear.

The new situation, however, paved a way for media to perform its functions, but media still has faced many challenges under Iraqi laws. Meanwhile the case is totally different in the US laws. The reason behind this could be attributed to the fact that the Iraqi law enacted in light of philosophy of dictatorship regimes. Moreover, it might restrict the fundamental rights in different ways and without compelling justifications. Iraqi defamation law can be considered as an example which always leads to suppress free speech and the right of criticism; especially, when the defamation case arises between public officials and media or

journalists. Therefore, it is the duty of legal scholars to inspect and review law articles in Iraq. Furthermore, some certain articles might be changed by the competent authorities in way that does not suppress human rights as it is seen in the US.

Clarification and Provisions of the Right of Criticism

The right of criticism as a form of freedom of expression is guaranteed for media to become a platform for people to explicit public problems and criticize the government so as to improve its performance. Hence, one may ask a number of related questions to the concept of criticism rights, for example: What is it? Where is it? Is it a statutory right? What are the conditions of exercising this right? The previous questions are explained below:

The concept of criticism in legal system

Criticism can be considered as a wide concept, it enters into all areas because it constitutes opinion and/or reaction towards a particular positive/negative work. So, criticism points out different aspects of something after inspection and consideration [1]. In the field of law, criticism is the expression of opinion and free speech on an issue without prejudice to the issue's owner,

i.e., without prejudice toward the owners' reputation and their position in society [2]. The Iraqi judiciary defines the right of criticism through the decision of Federal Court of Cassation number 206/public body/on 31st of August, 2009 that criticism is referred to "any opinion or correction with regard to the performance of public officials seeking to protect the national interest" without determining the concept of the national interest [3]. Similarly, in the American legal system, one can find this right in the concept of free speech. Additionally, the First Amendment protects the right of the people to "petition the government for a redress of grievances" [4]. Thus, in both legal systems, American and Iraqi, the value of this right is the people's ability to criticize the government and public officials for the purpose of redress and protect the government from corruption.

Legal basis of the right of criticism

In common and civil law system, human rights should have basis and this could be a statutory right or derived from case law. The right of criticism as a form of the expression rights is considered as one of the statutory rights in both American and Iraqi law.

Legal basis in Iraqi legal system: There are many implied indications for the right of criticism in the Iraqi constitution, treaties, international charters and secondary laws under the title of Freedom of Expression, Freedom of Opinion, and Freedom of Belief. Here are some provisions:

- Article 29, in the Constitution of the Republic of Iraq in 1963, provides that "freedom of opinion and scientific research are guaranteed, everyone has the right to express his/her opinion and publish by saying, writing, pictures, or other within the law" [5].
- Tripartite Unity Agreement (of Egypt, Iraq, and Syria in 1963) states that "public freedom is guaranteed within the law, and the United Arab Republic ensures for all citizens without discrimination, freedom of opinion and expression, freedom of criticism, freedom of press, freedom of assembly and to create associations, freedom of belief and exercise of religious rites, and other of public freedoms".
- In the Temporary Iraqi Constitution in 1968, Article 32 provides that "freedom of press, printing, and publication are protected according to Interest of the people and within of the law" [6].
- In Article 38, the recent Iraqi Constitution (2005) confirms that "the state guarantees in a way that does not violate public order and morality:
 - a) Freedom of expression, through all means.
 - b) Freedom of press, printing, advertisement, media, and publication.
 - c) Freedom of assembly and peaceful demonstration. This shall be regulated by law [7].
- Section 6 in the article 3 of the Iraqi Journalists Syndicate Law number (4) of 1998, claims that "the defense of the freedom of press and the right of journalists to provide necessary

immunity for press in order to be able to express its message for growth and prosperity".

Legal basis in American legal system: Freedom of expression in all its forms, including the right of criticism and free press, is one of the fundamental rights in the American legal system. As it is mentioned in the First Amendment in the U.S. Constitution, "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." [8]. The doctrine of the U.S Supreme Court is also obvious regarding protecting this right and finds it as an essential tool for a fair life.

Conditions of the right of criticism

As it has been explained, the right of criticism refers to a form of the right of expression which is practiced by media. This right is guaranteed in the Iraqi constitution with having some restrictions imposed on the right in the current Iraqi Constitution. Due to that, it is not absolute right. This means that it has to be organized by the law and should not violate the "public order and morality" of article (38) in the Iraqi Constitution. For this reason, it must meet some conditions. However, the jurisprudence and the judiciary in Iraq have deduced some conditions from the previous article for practicing the right of criticism in the media as follows:

Criticism and evaluating public officials performance: Media is not the place to criticize private conduct or abuse the reputation of a person since media is regarded as bridges between people and government. For that reason, public officials must be subject to oversight by the media in order to protect them from corruption that leads to the corruption in the whole body of government [9]. This is pointed out in the decision of the Federal Court of Cassation in Iraq, number 206/public body/in 31/8/2009, which restricts the right of criticism to direct only against public officials by defining this right as "any opinion or correction in regards to the performance of public officials seeking to protect the national interest". In addition, in article 2, Civil Service Law No. 64 in 1939, the public officials are defined as "any person entrusted to do a job in the government with a salary received from the general budget or special budget and follows the provisions of the pension law [10]."

Criticism and public interests: The combination of the right of criticism with the public interest or national interest comes in the same decision of the Federal Court of Cassation that is mentioned above. It is observed that the court mentions national interest without determining the concept and giving details, i.e., both national interest and public interest are mentioned. This attitude may give an interpretation that the purpose of the Iraqi judiciary in the national interest is to activate criticism in subjects of political and social importance, i.e., in subjects of common interest of the people. It is not permissible for media to interfere the private conduct and private interests. "Society does not benefit anything if a critic faces the private life of others, but that this may constitute an assault on the private life of individuals as a human right [11]."

Good faith: Good faith is an essential condition in exercising any right guaranteed by law. The basis of good faith in this right is that the critic should believe in the validity of the incident which is cited to a public official who faces the criticism; the criticism itself aims at achieving public interest, not only defaming others. If the criticism is to the private interests based on the personal reasons, it will be out of the right of criticism limitation and constitute the defamation crime. With regard to this point, the public body in the Iraqi Court of Cassation issues the decision, number 306/public body/2009 which states that “the act of defamation and libel go out for being the opinions or assessment to the performance. It is impermissible exercise and exceeds to exercise the right of criticism, which aims to achieve the national interest.” The relationships between criticisms and achieving the national interest have a positive great impact on the validity of criticism rendered to any individual. For instance, it is not allowed to any critic to exercise this right since there is no good intention with this, rather injuring the others. Moreover, Article 7 in the Iraqi Civil Law No. 40 of 1951 focuses on impermissibility of practicing the right and states that “if he/she does not has intention to benefit public order, and intent to cause injury to others.” [12]. When a critic does not have intention to benefit public order, rather has intention to injure others, he or she exceeds exercising the criticism right. The issue of good faith estimate is subject to the judge discretion, and “it does not required for the judge to extract bad faith only from the words of article, it can be extracted from other situations, like having threat from journalist and researcher against the complainant before the publication of the article and demanding an amount of money for non-publication.” Finally, the good faith is presumptive element for critic because the basis of human intention is good faith; otherwise the burden of proof is responsibility for the person who claims bad faith [13].

Using appropriate phrases: Generally speaking, the main goal of criticism is to obtain benefits to the public interests in public domain, e.g., political and social area; it is not to defame the reputation of others. Therefore, the right of criticism should be linked with appropriate words which are consistent with the purpose of criticism [14]. So, critics are not permitted to use defamatory phrases. With this in mind, most of the jurists, finds that the boundary line between the right of criticism and defamation can be derived from the wording of article. An appropriate word will be directed to address an official behavior of a person who has been criticized, while harsh phrases tend to harm the honor and person's reputation. The first represents the permissible criticism, whereas the second is considered as defamation against the reputation of others. For this reason, the issue of the appropriate words is subjected to the discretion of the judge [15].

The decision of Cairo Criminal Court No. 2453 of 2008, in case of Mohammed Bekri, Member of Egyptian Parliament, against the journalist Yasser Barakat, editor of the Mojaz newspaper can be regarded as a good example of judicial opinion. The court convicts the defendant, and concludes that “the defendant has exceeded his right to criticize performance of the plaintiff inside Parliament. The defendant has not used appropriate statements

in the article even in its cruelty. Hence, he cannot protect himself from the punishment for abusing the reputation of plaintiff, under the pretext of the right to permissible criticism even with alleging good faith or claiming to obtain public interest” [16]. The court notes that using inappropriate statement is presumption to devise bad faith in criticism which aims to defame the defendant. “The court has found that the defendant, Yasser Barakat, has exceeded the permitted criticism to challenge reputation and personality of Mohammed Bekri, Parliament Member because of using outrageous phrase; this indicates the intention of libel and contempt to plaintiff that considered as abuses and arbitrary to use the freedom of press”.

Right of Criticism vs. Defamation

After reviewing the legal basis and conditions of the right of criticism practiced by media, one can see the fact that this right in the American and the Iraqi legal system is a constitutional right with some differences in philosophical and legal conditioning. When this right is constitutionally protected, it sometimes clashes with interests served by the defamation law. While talking about freedom of media, one should claim that responsibility is prerequisite to refrain from defaming others. On one hand, the media has a great freedom to evaluate public officials' performance. On the other hand, the public officials who believe that they have been defamed by the media have the right to challenge the media by bringing libel suit [17]. Though libel suit is recognized legally and it is a protection for the public officials to stop media from unfair use of the right of criticism. Despite the previous mentioned fact, libel suits must not impede the media from performing its function within its constitutional rights. So, the questions might be asked about the distinction between criticism and defamation. Furthermore, the guarantees to protect the right of criticism beside a libel suit against the media in a way that does not lead to suppress the media might be raised as another question. Constitutions typically do not contain detail about these standards, so it is a responsibility of the jurisprudence and judiciary to create a distinguished standard between them by taking into account what is superior constitutionally and aims to the best interest.

In Iraq, the media faces many challenges because of having many libel suits which are filed by the public officials against the media. Libel suits have become lethal weapons to restrict the media and limit the freedom of criticism. Recently, filing large number of libel suits against the media and journalists has led to the withdrawal of many journalists in the press and contracted the role of media fact-finding in political issues due to fears of prosecution. In addition, the large number of judicial decisions fines journalists and the effects of these decisions on the freedom of the press results in the issuance of Order No. 7 of 2003. This order prevents the courts from accepting complaints about publishing crimes without the consent of the Coalition Provisional Authority (dissolved) in accordance with item (2) of section (2) thereof. This means that any complaint or prosecution for any media or a journalist, as well as any newspaper or other media, could not be begun without the approval of the Coalition Provisional Authority in Iraq. But, after dissolving and replacing

the Coalition Provisional Authority by Iraqi Prime Minister, the mentioned article is canceled and this weakens the legal status of the media and journalists again.

To illustrate the defamation law and how it limits the right of criticism, one may focus on the provisions of defamation with regard to public officials with judicial guarantees to be sure that it does not impede right of the media to criticize in both the American and the Iraqi legal system. Consider the following:

Defamation in Iraqi legal system

Defamation, in article 433, section 1 of the Penal-Code, is defined by Iraqi legislator as:

(1) The imputation to another in public of a particular matter which if true, would expose such person to punishment or cause him to be scorned by society. Any person who defames another is punishable by detention plus a fine or by one of those penalties. If such defamation is published in a newspaper or publication or other press medium it is considered as aggravation circumstance [18].

(2) Such person is not permitted to establish the proof of his imputation unless that imputation is directed at a public official or agent or public deputy or he is carrying out an act in the public interest or if such imputation is connected with the office or employment of aggrieved person but if he establishes the proof of all imputations made, then there is no offence."

Elements of defamation: Building on the above mentioned article, Iraqi judiciary and jurisprudence have deduced two elements of defamation through the definition: material and mental. In order to make a certain crime happens, these elements should be existed.

A- The material element in the libel crime consists of imputation and publicity. Imputation is the statement or accusation that causes a particular person to be falsely convicted of a crime or to suffer the contempt by the people. Meanwhile, publicity is a condition in the material element of the libel crime. According to law, imputation should be in public because the protected interest is referred to reputation, honor, and dignity of persons. Furthermore, publicity is achieved when imputation takes place in public or is published in media that is distributed among the people.

B- The mental element consists of science and will. The libel crime is one of the intentional crimes requires criminal intent which is represented by the knowledge of the facts and the will with respect to all aspects of the crime. Knowledge of the fact, in this crime, refers to having knowledge of the truth with regard to the defamed person, and the will is the purposeful attempt to harm a person's reputation and causes him/her the contempt in a society.

Distinction between criticism right and defamation: As a matter of fact, the Iraqi legislature defines the term of defamation in criminal law, but does not set a standard to distinguish between defamation and the exercise of freedom of expression and criticism. The legislature leaves this point to the interpretation of

legal scholars and courts. When the defendant alleges during the hearing of a libel suit, he or she practices freedom of expression guaranteed by the Constitution, and he does not intend to offend anyone, so the judge is obligated by law to adjudicate in this allegation. In Iraq, most jurists note that the boundary between the practice of the right of criticism and defamation is reflected in the distinction between directed blame and cruel phrases aimed at the honor and reputation of the person who has been criticized, or directed at his/her official acts without prejudice to his/her honor and reputation.

Generally speaking, the material element of the libel crime is similar with the material elements of the exercise the right of criticism, whereas the crucial difference between them is in the nature of the activity and the intention. The committer's intention in the defamation crime is deliberate abuse of the plaintiff and defames his/her reputation for purely personal reasons. Meanwhile, the intent of the practice of expression freedom and the criticism right is to achieve the public interest including the development of the overall performance, avoiding financial loss, and exposing the crimes of a financial or administrative corruption. Thus, the mental element is the most important standard for distinguishing between the defamation and exercise the right of criticism.

Defects of the Iraqi defamation law: The article of defamation and its judicial applications may have some defects. Consider the following:

- In Iraq, defamation against public officials is considered as criminal offences. The resort for the criminal law to protect reputation constitutes imminent danger regarding the expression right and press freedom. It is a threat which indicates that the media is a place to commit crimes without respecting its role in the society. In most democratic countries in which the reputation and privacy are protected by civil law, most jurists believe that criminal law provisions are not the correct response to redress libel directed to public officials.
- When the defamation is published in the media, it is considered an aggravating offence. Sometimes, there is an attempt by the Iraqi authorities to make media silent and this happens when media criticize the government or public officials, meanwhile the recent trend is to reduce liability upon the media to develop its role in progress.
- The most dangerous point in the article (433) is observed in section (2) which imposes the burden of proof on the defendant for the purpose of absence of offence, if it is directed to the public officials [19].

Hence, the journalists or media have to prove the truth of statements when they become defendant in the libel suit. This is often led to weaken the legal status of the defendant, and convict the media and journalists in case that the courts do not convince the validity of their statements towards the public officials. This can be considered as a main reason beyond the large number of libel suits against the media in Iraq where the public officials are sure of winning the libel suit because they do not have responsibility to prove falsehood and actual malice at the media in front of the court, as it is in the United States [20].

Furthermore, this shows a big restriction upon Iraqi media; a number of journalists have been prosecuted and convicted under article 433 of the Penal Code, while performing their role via evaluating government policies and the poor performance of public officials. Below are some courts decisions about media convicting and journalists who have written critically towards public officials:

- a) Kamal Sayid Qadir, an Iraqi Kurd was arrested in October 2005 in Erbil because of publishing online articles on Kurdistan Post, a political website, criticizing the Kurdistan Democratic Party and its leader, Massoud Barzani, whom he accused of corruption and abuse of power. Mr. Qadir was convicted and sentenced to thirty years' imprisonment on 19 December 2005 for "endangering national security". On 26 February 2006, the Supreme Court of the Kurdish Region overturned the conviction and ordered a retrial on the charge of defamation the Kurdish regional leadership. Finally, in March 2006, Mr. Qadir was convicted for publishing "defamatory" articles about the authorities in Kurdistan and was sentenced to one and a half years' imprisonment.
- b) Wasit Court issued an arrest warrant for Sada Newspaper editor in chief for publishing an article criticizing the performance Wasit Provincial Council. The court considered the article as defamation towards the members of Wasit Provincial Council, and the court later released the editor in chief on guarantor bail of five million dinars.
- c) Erbil Court imposed a fine of three million dinars to Shwan Mohammed, Awena Newspaper editor in chief, for publishing an article in his newspaper criticizing the Kurdistan Region Government performance [21]

Defamation in American legal system

It might be not necessary to provide an accurate definition and elements of defamation in American legal system, but how the criticism right and press freedom limit the government awarding libel damages brought by a public official against their critics should be taken into consideration. Chemerinsky (2005: 1284) states that "the challenge for the court in this area is to balance the need to protect reputation, the obvious central concern of defamation law, with the desire to safeguard expression, which can be chilled and limited by tort liability." The constitutional protection of the right of expression and the historic value of it make the Supreme Court protecting the right substantially. Concerning the constitutional right, the Supreme Court doctrine is clear and protects it from any attacks or attempt to convict it, or turning it to criminal conduct. Moreover, in most countries of Middle East such as Iraq, defamation law takes a way to strict the right of expression and criticism, but in American legal system, defamation law has been regulated in a way that does not contradict with this constitutional right.

Public officials in the libel suits: The first approach of the Supreme Court regarding defamation law in a way that does not contradict with the right of free speech and criticism is distinguishing between two conditions in the libel suit: the plaintiff is a public official and the plaintiff is a private figure.

The consequence of this distinction is to make defamation proof more difficult if the plaintiff in the libel suit is public official. The burden of proof is the public officials' responsibility claiming for damages of defamatory falsehood regarding his official conduct; they must prove that the statements are false and make it suits with actual malice [22].

Actual malice test: Though a burden of proof on public officials is imposed and this makes the legal status of the defendant which represents in the media or journalists strong, it is public officials' responsibility to pass a severe test in order to win the libel suit. This test is called Actual Malice which is established by the U.S. Supreme Court. The proof of falsity is not sufficient to convict the media by defamation without proof of actual malice in the media.

The Supreme Court establishes the actual malice test in *New York Times Co. v. Sullivan*, which rules "the constitutional guarantees require a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his officials conduct unless he proves 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.", as Chemerinsky (2005: 1287) claims.

Since the court imposed on public officials the requirement to prove actual malice, they have rarely won libel suits because actual malice deals with intent which is hard to be proved. It may be sufficient to the court to decide that an act is not malicious when media publish a story in good faith that aims at serving the public interest. Generally, the actual malice test provides a wide scope of freedom of criticism so as to protect the media from a variety of libel suits.

Conclusions

On the whole, the media in both the United States and Iraq practice a constitutional right when they criticize public officials' performance and government policies. The U.S. Constitution protects this right in absolute language and allows the judiciary to protect it by imposing the severe scrutiny on the government, if the government's actions restrict the right of criticism.

In comparison with the American legal system, it is observed that this right is restricted constitutionally in Iraq. This defect of the Iraqi Constitution paves the way for the government to limit the right of criticism without any high level of scrutiny from the judiciary. In addition, an article of law passed by the Iraqi legislature makes defamation a criminal matter rather than a civil one as it is seen in the US Constitution. The Iraqi law also puts the burden of proof on the media in these libel suits. For this reason, the media is reluctant to perform its function in Iraq in fear of being liable for every defamatory suit in an environment where public officials are most likely to win a libel suit. Unlike the Iraqi legal system, freedom of media is guaranteed by the U.S. Constitution, i.e., U.S. media express every statement toward public officials, even false statement. Imposing burden of proof on the plaintiff and the difficulty of proving actual malice in the media causes losing most libel suits by public officials.

Since the media perform a crucial role in monitoring the

government performance and the right of criticism is necessary for the government betterment, the fear of incrimination must be eliminated as a method of silencing the media. To accomplish this end, the current study suggests the following:

- Abolition of penal sanctions resulting from the crime of defaming public officials in their official conduct and limit the compensation for damages from libel in order to be determined by civil lawsuit with the publication of public apology by the defendant.
- Enacting provisions which clearly define the boundary between the practice of expression freedom with the right of criticism and defamation crimes. Thus, it is necessary to make the constitutional provisions related to the freedom of expression and the right of criticism.
- Re-drafting the provisions of defamation in a way that makes the burden of proof the responsibility of the public officials in the libel suit. This strengthens the legal status of the media and journalists.

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