A Study on the Requirements for Establishing Tort of Defamation for the PROTECTION of Personal Rights - Compared Mainly to Japanese Law

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Abstract

In order for defamation to be established, the abuser must be intentional or negligent, and in Article 709 of the Japanese Civil Code, the infringement of rights is required to establish tort. In principle, there is no problem in this respect from the standpoint of personality rights. Because illegality is required in the establishment of illegal acts, and acts that infringe on the right to personality are illegal in principle, so defamation is established unless there is a reason for illegality.

It is explained that nominal damages are not recognized in Japan under the English-American Law, but recent cases have been recognized in the field of privacy rights to recognize nominal damages.

The problem is that in Japan, the infringement of the honorary personality of the deceased in relation to the legal interests of the defamation charges in Japan is a direct protection theory. It is classified and explained. Direct protection theory thinks that indirect protection is insufficient, and actively discusses the possibility of recognizing the personality of the person as its own legal interest. That is to say, even a messenger must possess personal value and claim that the infringement of that value must be protected by law.

The Korean Civil Law is generally regarded as extinguished due to the loss of the subject due to the provisions of Article 3 and the nature of the right of personality, which is a perpetual right. However, if the copyright law and the criminal law provide for the protection of the personal right of the person, and if it is impossible to prohibit the acts such as defaming the honor of the person, the human rights and dignity of the constitutional law cannot be guaranteed. In addition, today’s rapid development of mass media often damages the copyright or honor of the victim, and the practical necessity to recognize the personality is also recognized.

[Keywords] Protection of the Personal Rights, The Defamation, Tort, Social Evaluation, Public Interest

1. Intro

Honors have long been important to the protection of the law so that it is no exaggeration to say that infringement of the right of personality is defamation. The judicial system of the Republic of Korea says that honor is “social evaluation, that is, the objective evaluation that society gives to people”[1]. In order to be defamatory, one must objectively be disgusted or disdainful, or otherwise defamatory may not be considered defamatory[2]. Therefore, it is judged individually considering the status and occupation of the victim. Defamation is the act of lowering this reputation, that is, the social evaluation of a person[3].

In our legal system, defamation provisions play a very important role in protecting the rights of individuals. On the one hand, it is necessary to have a clearer understanding of the important parts of our law in order to protect the honor of the individual and not impair the freedom of speech on the other. Therefore, in the following, we will consider
and examine the types of defamatory parties, the aspects of defamation, and the requirements for establishing torts based on defamation, focusing on Japanese legal system similar to our legal system.

2. A Party to Defamation

2.1. The natural person

There are no current civil code provisions for subjects of general personality rights, but in principle only natural persons. Anyone who is a natural person can be a victim of defamation because he has dignity as a human being and has a certain social evaluation through social activities. A suit regarding defamation is a matter of victim's individuality and cannot be filed on the basis of another person's defamation, but if defamation of a person affects another person's social evaluation, it may be brought on its own right[4].

2.2. The corporation and unincorporated association

A division or foundation capable of forming a corporate and a unified mind also has a reputation and social status in the area of transactions in which he operates, so slandering his sincerity, credit, ability and other corporate character can be libelous. This is the case with unions or non-rights-capable divisions, where defamation is established and an appeal for an apology is recognized for acts that undermine the social evaluation.

2.3. A deceased person

The deceased may not be the subject of damages resulting from defamation due to loss of character[5], but it may be necessary to protect the interests of the stakeholders by respecting the existing order of identity or economy formed around the deceased. It also recognizes the personal rights of those killed by the Supreme Court and academic theories[6].

There is a precedent that a playwright's right to become famous throughout the country through verbal expressions such as his words and voice continues after his death, and that such a right also includes the right to oppose the use of this artistic trait for advertising purposes with the help of a meteor imitator[7].

However, Article 308 of the Criminal Law punishes the defaming of the deceased[8], and the nation's conventional wisdom regards the protection of the libel law of the deceased as the honor of the deceased in itself, and it is questionable whether it will recognize the defaming of the deceased as an illegal act, even for civil purposes. As stated in Article 308 of the Criminal Law concerning the defamation of the dead, Article 3 of the Civil Act stipulated that "one becomes the subject of rights and duties while alive." With the special provision in section 762 of the Civil Act that the fetus, which is rarely seen as a person "while alive, is "the position of the fetus in the right to claim damages," the ministry considered that the fetus was already born regarding the right to claim damages. However, there is a view that it is impossible under civil law to recognize the right to claim damages due to defamation, contrary to Article 3 of the Civil Law[9]. In response, the Supreme Court ruled that "by reporting articles that contain facts that do not conform to the truth, we defamed the deceased by violating the social evaluation of the deceased and the social evaluation of the deceased's bereaved family, the honor of the deceased, and the remembrance of the deceased, with the purpose of damaging the honor of the deceased and defamation[10].

In Japan, references to the deceased in historical research and history literature are impossible without speculation, and in view of the importance of freedom of thought and expression, we can find cases such as imposing falsehood requirements or prioritizing consideration of freedom of expression as a requirement for defamation of the bereaved family[11].

3. Requirements for Establishment of Tort Due to Defamation

In order for victims of defamation to claim damages, it is necessary for the perpetrators
to meet the general requirements for the establishment of illegal acts (Article 750 of the Civil Act).

3.1. Intentional or negligent

As a principle for defamation to be established, the perpetrator must be intentional or culpable. Intentional is a state of mind that dares to act knowing that certain outcomes occur, and the concept of negligence refers to cases in which a person violates a duty of caution, even though they must prevent the occurrence of certain outcomes. Some say that media companies should be held accountable for their negligence, but only a small minority. This would be resolved by increasing the obligation of the entity to pay. On the other hand, according to the New York Times case, in order to secure freedom, there is a theory that defamation does not take place without a 'pure of reality'. Although generally denied, it is worth considering in advance or post-regulation of public figures.

In our case, there was a case in which the broadcaster believed the contents of the broadcast were sincere and for a considerable reason that it was not responsible for the illegal activities because there were no intentional or culpable reasons in the nonfiction drama of Baekbeom Kim Koo's assassination. As such, the case is viewed as intentional or false if there is any "reasonable reason" for the reason of violation, which indicates that the case is based on a single view of illegality and culpability as a requirement for illegal activities.

3.2. Infringement and illegality

According to Article 709 of the Japanese Civil Act, there is a need for something 'infringement of rights' to establish illegal activities. There is no problem in principle in this regard in terms of recognition of personal rights. In principle, infringement of personal rights is illegal even if illegality is necessary for the establishment of illegal acts, and defamation is established unless there is a reason for the breach.

What matters in reality in the relationship between libel and illegality is when the illegality is carved out. Illegality is a negative value judgment reflected in the entire legal order, and in judging illegality, the principle of the so-called 'consequential anti-value' theory should be based on the principle of profit taking into account the theory of counter-value.

Therefore, any libel action is judged by the logic that it is carved. Therefore, the burden of proof of illegality lies with the one who breaks the presumption. In other words, if the profits sought by expression are not superior to the profits infringed upon by it, illegality will be recognized as it is, and vice versa.

3.2.1. Victim's approval

In principle, illegality is carved if there is a victim's consent regarding the general nature of infringement, not limited to defamation. In some cases, even though the victim's consent is the victim's consent, it does not constitute a breach of law.

3.2.2. Legal defense

According to the Law on Self-Defense under the Criminal Law, illegality will be carved if even illegal acts under the Civil Act meet the requirements of self-defense (Article 761 of the Civil Act). An example is the case in which a person's libelous remarks and actions are defamed as a result of a counterattack to protect his or her body. Although the German criminal code retains the slogan of self-righteousness as the reason for the crime of libel, it can be said that the idea of self-defense was embodied in the field of libel. The reading case, which recognized the fragmentation of illegality by self-defense or advocacy of self-interest in libel law, is a precedent of Japan's highest court in 1964. Although there was a dispute over the establishment of libel in exchanging opinions between academic societies, the highest court stated that "even if we are forced to speak and speak of undermining others' reputation and credibility in order to defend their legitimate inter-
ests, such conduct is not illegal unless we exceed the accepted limits of how and what the other person has said.”

3.3. The occurrence of damage

It takes someone’s loss to establish an illegal act. Article 751 of the Civil Code of Korea recognizes alimony for psychological damage in addition to property infringement in case of infringement of personal rights. Therefore, it is necessary to prove that there is a property infringement on the property damage, and that the claim for the mental damages is necessary. On the other hand, there is a question of whether damages are necessary as a requirement for the restoration of honor, and since the restoration of honor is subject to the establishment of illegal activities, it is necessary for the occurrence of damages to be recognized as responsibility for illegal activities. However, the damage in this case will not be a big problem in practice because it is sufficient for the mental damage[17].

Meanwhile, although the Anglo-American law explains that damages for nominal purposes are not recognized in Japan, recent cases have emerged that recognize damages for nominal purposes in the area of privacy rights. Although Germany and others have been passive in acknowledging alimony for the infringement of personal rights and for the compensation of property damage, there is no problem in Japan in that regard. However, the mental distress should be a loss to be saved by law with alimony.

3.4. Causality

For the establishment of illegal activities, there must be a causal relationship between libelous rhetoric and damages. Japan’s court also ruled that “in the event of defaming the mother by pointing out the falsehood of the plaintiffs’ mother, the defamation of the plaintiffs, their children, must exist in order for the defamation to take place, such as revealing that they are related to their parents and children other than will or negligence, and thus cannot be held liable for defamation of the plaintiffs unless they are named directly.” It is especially problematic as to how far the police should shift their responsibility in the event that a false announcement by the police authorities is reported in the newspapers and damages have been incurred or expanded by it. In addition, in the latest case, the company’s executive officer imposed a large amount of damages for providing information and publishing materials in cases where articles defaming the company were posted as a result of providing confidential information to weekly reporters.

4. Outro

I considered defamation while comparing it with Japanese law. In Japan’s view of recognizing human rights, the violation of human rights, saying that illegality is necessary for the establishment of illegal activities, is illegal in principle, and defamation is established unless there is a reason for a breach of illegality.

Furthermore, the statement classifies the identity of the deceased’s personality as indirect protection if the deceased’s honor violates the law of defamation or the law, and the bereaved’s sense of reverence for the deceased. The theory of direct protection is deemed insufficient by indirect protection, and actively discusses the possibility of recognizing the personal rights of the deceased as the inherent interests of the deceased. In other words, they argue that even if they are dead, they have personality values and that infringement of their values must be protected by law.

It is common to assume that our civil law is extinguished by the loss of the subject due to the provisions of Article 3 and the nature of the right of one’s personal rights. However, the Copyright Act or criminal law has provisions to protect the personal rights of the deceased and cannot guarantee the basic constitutional right of human dignity and value if it cannot prohibit acts such as defaming the deceased. Moreover, the copyright and reputation of the deceased are often damaged by the rapid development of mass media today, and the realistic need to recognize the person’s personal rights is also recognized, so I think the conventional view of recognizing
the person’s rights to the person who died is reasonable.

An act that infringes on another's reputation, even if it takes up criminal matters, will cause too much pain and property damage to the individuals and families of the person being acted upon. It is also creating evils such as the hot-tempered case of a well-known actress, who is so deadly that she can't get out of the misery of her entire life, and, by extension, even to her own death. Especially in the case of celebrities and public figures, the damage will be even more severe because an unspecified number of people may see and hear.

Therefore, in the event of defamation, it is necessary to ensure a complete restoration of honor with judicial action in parallel with the legal remedy.

5. References

5.1. Journal articles


5.2. Thesis degree


5.3. Books


5.4. Additional references