

A REFERENCE AND TRAINING MANUAL FOR EUROPE

Freedom of Expression, Media Law and Defamation

MLDI

Media Legal
Defence Initiative



International
Press
Institute

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INTRODUCTION: HOW TO USE THIS MANUAL

This manual has been produced to accompany a training workshop on defamation for lawyers and journalists in Europe. It contains resources and background material to help trainers prepare and participants to understand the issues being discussed.

Participants in the workshops will be both journalists and media personnel – for whom the workshop will be an opportunity to learn about the general principles behind defamation law – and lawyers, who will also practice developing litigation strategies in the event of defamation suits against their clients.

For the legal participants, the assumption is that they are qualified and competent lawyers, with experience of litigation, but not necessarily of media, freedom of expression or human rights law.

The purpose of this manual is threefold:

- It can be used by trainers to prepare the workshops. The material contained here should give all that is necessary to run a two-day workshop on European defamation law (although it does not contain material specific to each country). Workshop training plans and materials (Powerpoint presentations and handouts) accompany this manual.
- It can be used by participants to prepare for a workshop. Experience in adult pedagogy shows that learning is most effective when it focuses on developing and practising skills rather than attempting to impart knowledge. If participants are familiar with some of the general principles outlined here, training exercises will be more effective.
- The manual is available to participants to use as a reference guide after the workshop. The manual contains guidance and reference to case materials that will be useful for understanding the principles of defamation law and preparing litigation in the future.

A word on definitions

This training workshop is about **defamation**. This is a generic legal term that refers to the unmerited undermining of a person's reputation. In some legal systems, the term defamation is broken down into **libel** and **slander**. The former refers to a defamatory statement that is published, whether in written form or through some other form such as broadcasting. Slander, by contrast, refers to defamation that is spoken privately and not preserved in any permanent form.

Throughout this training exercise we will use the generic term, defamation, unless it is in specific reference to statutes, judgments or jurisdictions that employ an alternative term.

A further related concept appears in some legal codes: **insult** (or **desacato** in its well-known Spanish language form). This refers to the "defaming" of offices (such as the monarchy), symbols (such as flags or insignia), or institutions (such as the state, or the legislature). It does not properly fall within the accepted international definition of protection of reputation, but since it is regarded in many countries as a species of defamation it will be covered here.

Some modern legal systems also contain offences derived from two Roman law concepts: **iniuria** and **calumnia**, both of which refer to the making of false statements about a person.

Some legal systems also contain the concept of **group defamation**, particularly in relation to religious groups. Although we will argue that this approach, like insult, is not a legitimate use of defamation – since a group cannot have a right to reputation in the same way as an individual – it will nevertheless be addressed in this manual.

Criminal defamation describes the situation where defamation is an offence under the criminal law of the state. In such circumstances, alleged defamation will normally be charged by state prosecutors and tried in the criminal justice system, with the possibility of a sentence of imprisonment being imposed upon conviction.

Civil defamation describes a civil wrong or tort. In this situation, whether an individual has been defamed is determined by a private

action before the civil courts. If defamation is found, monetary compensation may be ordered, or some other remedy, such as publication of a correction or apology. Even systems that retain an offence of criminal defamation usually also have the possibility of litigating defamation through a civil suit.

IN SUMMARY:

Defamation: the unmerited undermining of a person's reputation

Libel: defamation in a written or permanent form

Slander: defamation in spoken and unrecorded form

Criminal defamation: defamation prosecuted in the criminal courts

Civil defamation: defamation as a private action to redress a civil wrong.

1. FREEDOM OF EXPRESSION: UNDERLYING PRINCIPLES AND SOURCES

The importance attached to freedom of expression is not a new idea. In early modern Europe, thinkers such as John Milton and John Locke emphasized their opposition to censorship as a part of the development of democratic government. Most famously of all, the First Amendment to the United States Constitution said:

Congress shall make no law... abridging the freedom of speech, or of the press

However, it was only with the formation of the United Nations and the construction of a human rights regime founded in international law that the right to freedom of expression became universally acknowledged.

Article 19 of the 1948 Universal Declaration of Human Rights (UDHR) states:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.¹

Subsequently, this right was enshrined in binding treaty law in Article 19 of the International Covenant on Civil and Political Rights (ICCPR).² This echoes the wording of the UDHR, but adds some explicit grounds on which the right may be limited.

For Europeans, however, binding protection of the right to freedom of expression came even earlier. The Convention for the Protection of Human Rights and Fundamental Freedoms (usually known as the European Convention on Human Rights or ECHR) was adopted in 1950 and entered into force in 1953. The ECHR was developed under the

¹ Universal Declaration of Human Rights, UNGA, 1948.

² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

aegis of the Council of Europe. All but three recognized states on the European land mass are parties to the Convention today (the exceptions are Vatican City, Belarus and Kazakhstan).

Article 10 of the ECHR protects freedom of expression in the following terms:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.³

As with Article 19 of the ICCPR, however, Article 10 also details a number of grounds on which the right to freedom of expression may be limited.

Why is freedom of expression important?

BRAINSTORM

Make a list of reasons why freedom of expression is an important human right

Your list probably starts with freedom of expression as an *individual* right. It is closely connected to the individual's freedom of conscience and opinion (see the wording of Article 19 in both the UDHR and the ICCPR, and Article 10 of the ECHR). But the list very quickly broadens out into issues where freedom of expression is thought to have a general social benefit. In particular, this is a right that is seen to be crucial for the functioning of democracy as a whole. It is a means of ensuring an open flow of ideas and holding authorities to account. The European Court of Human Rights (ECtHR) has made this point repeatedly:

Freedom of expression constitutes one of the essential foundations of such [democratic] society, one of the ba-

³ Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222.

sic conditions for its progress and for the development of every man. Subject to Article 10(2), it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”.⁴

These words were found in a relatively early Article 10 judgment, but are repeated word for word in many later decisions.

But the benefits of freedom of expression are not only in the sphere of politics. The Nobel prize-winning economist Amartya Sen even went as far as to say that countries with a free press do not suffer famines. Whether or not that claim is literally true, the general point is that freedom of expression – encompassing media freedom – is a precondition for the enjoyment of other rights.

The very first session of the United Nations General Assembly in 1946 put it thus:

Freedom of information is a fundamental human right and... the touchstone of all of the freedoms to which the United Nations is consecrated.⁵

Freedom of information is understood here to be an inseparable part of freedom of expression – as in the “freedom to seek, receive and impart information” contained in Article 19 of the UDHR. A touchstone is an assaying tool, used to determine the purity of precious metals. So the metaphor means that freedom of expression and information are a means of determining how far rights and freedoms in general are respected.

One conclusion from this approach would be to say that freedom of expression has a higher status than other rights, since their enjoyment depends upon it. This is the approach taken, most famously, in

⁴ *Handyside v. United Kingdom*, Judgment of 7 Dec. 1976, Series A no. 24

⁵ GA Resolution 59(I), 14 December 1946.

the United States, where the First Amendment to the Constitution and the jurisprudence of the Supreme Court have repeatedly stressed the primacy of free expression. Although the ECtHR occasionally draws upon US Supreme Court judgments, this is not the approach that is generally taken in Europe (nor, for that matter, in the UN human rights instruments).

As we will discuss below, freedom of expression is a right that may be limited in a number of circumstances, such as to protect the reputation of others (and may be suspended altogether in times of national emergency). This means that it enjoys a lower status than some other rights, such as freedom of conscience or the right not to be tortured.

Freedom of expression and media freedom

It follows from what has been said so far that the role of the mass media is of particular importance. Again, the role of “public watchdog” is something that the ECtHR has stressed on many occasions:

Not only does [the press] have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of “public watchdog”.⁶

And:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.⁷

What this means – a point made both by the ECtHR and national courts in Europe and elsewhere – is that the right to freedom of the press does not only belong to individual journalists. The French *Conseil con-*

⁶ *Thorgeirson v. Iceland*, Judgment of 25 June 1992, Series A no. 239

⁷ *Castells v. Spain*, Judgment of 23 April 1992, Series A no. 236

stitutionnel, for example, has said that this right is enjoyed not only by those who write, edit and publish, but also by those who read.⁸

In a famous judgment on press freedom, the Inter-American Court of Human Rights said:

When freedom of expression is violated ... it is not only the right of that individual [journalist] that is being violated, but also the right of all others to “receive” information and ideas.⁹

Article 10 of the European Convention explicitly states that the right to freedom of expression does not exclude the possibility of “licensing of broadcasting, television or cinema enterprises.” However, licensing should properly be seen as a mechanism for ensuring the fair distribution of access to the media. The ECtHR has rejected the idea that the state has any role in prior restraint – or telling broadcasters what they may say.

Limitations on freedom of expression

Freedom of expression is not an absolute right. It is a general principle of human rights law, found both in the UN instruments and the European Convention (Article 17) that human rights may not be exercised in a manner that violates the rights of others. Both Article 19 of the ICCPR and Article 10 of the ECHR lay out a number of purposes for which freedom of expression may be limited:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;**
- (b) For the protection of national security or of public order (ordre public), or of public health or morals. (ICCPR)**

⁸ CC, 29 July 1986, 110.

⁹ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 Nov. 1985, Series A no. 5, 7 HRLJ 74 (1986), para 30.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. (ECHR)

In addition, Article 17 of the ECHR is the so-called “abuse clause.” This provides that no one may use any of the rights in the Convention to seek to abolish or limit the rights contained within it. This has not been applicable to the issue of defamation, although it has been invoked in relation to some other freedom of expression issues, such as Holocaust denial.

TO SUMMARIZE:

In Europe, freedom of expression may be limited on any of the following grounds:

- To protect the rights or reputations of others
- National security
- *Ordre public* (which means not only public order, but also general public welfare)
- Public health or morals
- Territorial integrity or public safety
- Confidentiality of information received in confidence
- Authority and impartiality of the judiciary.

This is a long list and perhaps, from the perspective of a journalist or other defender of media freedom, it is a rather frightening one.

However, the process of limiting freedom of expression (or any other human right) is not a blank cheque for dictators. It is not sufficient for a government simply to invoke “national security” or one of the other possible limitations and then violate human rights.

There is a well-established process for determining whether the right to freedom of expression (or any other human right) may be limited.

As employed by the ECtHR, the process takes the form of a *three-part test*.

Step 1: Any restriction on a right must be prescribed by law.

Step 2: The restriction must serve one of the prescribed purposes listed in the text of the human rights instrument.

Step 3: The restriction must be *necessary* to achieve the prescribed purpose.

To elaborate further:

Step 1: Prescribed by law

This is simply a statement of the *principle of legality*, which underlies the concept of the rule of law. The law should be clear and non-retrospective. It must be unambiguously established by pre-existing law that freedom of expression may be limited (for example in the interests of safeguarding the rights and reputations of others).

The ECtHR has said that to be prescribed by law a restriction must be “adequately accessible” and “formulated with sufficient precision to enable the citizen to regulate his conduct.”¹⁰

The Human Rights Committee (the treaty body monitoring the ICCPR) adds that any law restricting freedom of expression must comply with the principles in the Covenant as a whole, and not just Article 19. In particular, this means that restrictions must not be discriminatory and the penalties for breaching the law should not violate the ICCPR.¹¹

What is a law?

A law restricting the right to freedom of expression must be a written statute. The Human Rights Committee says that this may include laws of parliamentary privilege or laws of contempt of court. Given the serious implications of limiting free expression, it is not

¹⁰ *The Sunday Times v. United Kingdom*, Judgment of 26 April 1979, Series A no. 30

¹¹ Human Rights Committee, General Comment No. 34, “Article 19: Freedoms of Opinion and Expression,” CCPR/C/GC/34, 12 September 2011, para 26.

compatible with the ICCPR for a restriction “to be enshrined in traditional, religious or other such customary law.”¹²

Step 2: Serving a prescribed purpose

The list of legitimate purposes for which rights may be restricted in each of the human rights instruments is an exhaustive one. For example, seven such purposes are listed in Article 10 of the ECHR. These are the only ones that provide a possible basis for restricting freedom of expression.

Legitimate restrictions in Article 10(2) of the ECHR

- interests of national security
- territorial integrity or public safety
- prevention of disorder or crime
- protection of health or morals
- protection of the reputation or the rights of others
- preventing the disclosure of information received in confidence
- maintaining the authority and impartiality of the judiciary

Step 3: Necessary in a democratic society

The ICCPR requires that any proposed restriction must be “necessary,” but the ECHR couples this with a phrase to be found in the UDHR: “in a democratic society.” This stresses the presumption that the limitation of a right is an option of last resort and must always be proportionate to the aim pursued. “Necessary” is a stronger standard than merely “reasonable” or “desirable,” although the restriction need not be “indispensable.”¹³ The law must be precise and accessible to the public. “A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.”¹⁴

¹² Ibid, para 24

¹³ *Handyside v. United Kingdom*, paras. 48-50; *The Sunday Times v. United Kingdom*, para. 62.

¹⁴ Ibid, para 25.

In deciding whether a restriction is “necessary in a democratic society,” the ECtHR considers the public interest in a case. If the information to be restricted relates to a matter of public concern, it would be necessary to demonstrate that it was “absolutely certain” that dissemination would damage the legitimate purpose identified.

The nature of the restriction proposed is also an important consideration. The US Supreme Court has stated that any limitation on freedom of expression must be the least restrictive possible:

Even though the Government’s purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.¹⁵

This is broadly the same approach favoured by the ECtHR. The Human Rights Committee has stated that restrictions on freedom of expression “may not put in jeopardy the right itself.”¹⁶

In assessing the legitimacy of restrictions, the ECtHR allows a “margin of appreciation” to the state. This means that there is a degree of flexibility in interpretation, which is especially applicable if the restriction relates to an issue where there may be considerable differences among European states – for example, protection of morals. The margin of appreciation will be less when the purpose of the restriction is more objective in nature (such as protecting the authority of the judiciary).¹⁷

¹⁵ *Shelton v. Tucker*, 364 US 479, 488 (1960).

¹⁶ Human Rights Committee, GC 34, para 21

¹⁷ *Handyside v. United Kingdom*, para. 48; *The Sunday Times v. United Kingdom*, paras. 79-81.

2. DEFAMATION

What is defamation?

The law of defamation dates back to the Roman Empire. The offence of *libellis famosus* was sometimes punishable by death. While the penalties and costs attached to defamation today are not as serious, they can still have a notorious “chilling effect,” with prison sentences or massive compensation awards still an occupational hazard for journalists in many countries.

Defamation continues to fall within the criminal law in a majority of states, although in many instances criminal defamation has fallen into disuse. Defamation as a tort, or civil wrong, continues to be very widespread.

In terms of modern human rights law, defamation can be understood as the protection against “unlawful attacks” on a person’s “honour and reputation” contained in Article 17 of the ICCPR. In recent years, the ECtHR has understood the right to a reputation to be encompassed within Article 8 of the European Convention (right to private and family life).¹⁸ Both Article 19 of the ICCPR and Article 10 of the ECHR use the identical words “rights and reputations of others” (although not in the same order), as a legitimate grounds for limiting the right to freedom of expression.

Who can sue for damage to reputation?

Defamation law is only intended to protect the individual right to a reputation. It follows, therefore, that only an individual can sue to protect that right.

So, can the following sue to protect their reputation:

- A flag or an insignia?
- An office (such as King or President)?
- An institution (such as the army)?
- A group of people (such as a religious denomination)?

¹⁸ *Sipos v. Romania*, Application No. 26125/04, Judgment of 5 May 2011

- A member of a group (such as a religious group), if they are not individually defamed?
- A representative (such as a family member) of a dead person who has been defamed?

The answer in each case *should* be No. In none of these instances is there an individual human person whose reputation may have been infringed. Either the potential complainant is not a person at all. Or the person is not individually defamed (the King or the member of a religious group). Or they are no longer alive to sue.

In the last example – families of dead people – the European Court has not ruled out the possibility that they might sue, saying:

the reputation of a deceased member of a person’s family may, in certain circumstances, affect that person’s private life and identity, and thus come within the scope of Article 8 [the right to private and family life].¹⁹

However, the fact that the suit is not brought by the defamed person himself is taken as a relevant factor in considering whether an interference with Article 10 is proportionate.²⁰

Of course, many countries still have laws that do allow a suit for defamation (or insult, or religious defamation or something similar) by each of the groups listed above. The point, however, is that they do not constitute a legitimate grounds for limiting freedom of expression *on the basis of protecting reputation*.

There *may* arguably be a reasonable argument for limiting hate speech against religious groups, for example, but this should not be included in defamation laws.

Many defamation laws, either in intention or in practice, are used to address issues that should properly be the subject of other laws (or of no laws at all). In particular, defamation laws are often misused to penalize criticism of governments or public officials.

¹⁹ *Putistin v. Ukraine*, Application No. 16882/03, Judgment of 21 November 2013, para 33.

²⁰ *Ibid*, para 34.

Criminal defamation

Many defamation laws originated as part of the criminal law of the state. This suggests that there is perceived to be a public interest in the state initiating criminal prosecutions against journalists or others – something that goes beyond the right of the individual to protect his or her reputation. It is closely related to the concept of sedition (“seditious libel” in the common law), which penalizes speech and other expression that is critical of government or state. Yet increasingly the whole notion of criminal defamation is seen as antiquated and anachronistic.

The United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression is among a number of international and regional mechanisms that have been arguing that “criminal defamation laws should be repealed in favour of civil laws as the latter are able to provide sufficient protection for reputations...”

Criminal defamation laws represent a potentially serious threat to freedom of expression because of the very sanctions that often accompany conviction. It will be recalled that a number of international bodies have condemned the threat of custodial sanctions, both specifically for defamatory statements and more generally for the peaceful expression of views...

International jurisprudence also supports the view that Governments and public authorities as such should not be able to bring actions in defamation or insult. The Human Rights Committee has, for example, called for the abolition of the offence of “defamation of the State”. While the European Court of Human Rights has not entirely ruled out defamation suits by Governments, it appears to have limited such suits to situations which threaten public order, implying that Governments cannot sue in defamation simply to protect their honour. A number of national courts (e.g. in India, South Africa, the United Kingdom, the United States, Zimbabwe) have

also refused to allow elected and other public authorities to sue for defamation.²¹

The Human Rights Committee has recommended:

States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty. It is impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously – such a practice has a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others.²²

As the Special Rapporteur noted, the ECtHR has not completely ruled out the possibility of criminal defamation charges. However, there are a number of very strict protections that should apply when a criminal defamation law remains on the statute book:

- If defamation is part of the criminal law, the criminal standard of proof – beyond a reasonable doubt – should be fully satisfied.
- Convictions for criminal defamation should only be secured when the allegedly defamatory statements are false – and when the mental element of the crime is satisfied. That is: when they are made with the knowledge that the statements were false or with reckless disregard as to whether they were true or false.
- Penalties should not include imprisonment – nor should they entail other suspensions of the right to freedom of expression or the right to practice journalism.
- Should not resort to criminal law when a civil law alternative is readily available.²³

²¹ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, E/CN.4/2000/63, 18 January 2000.

²² General Comment 34.

²³ See for example *Amorim Giestas and Jesus Costa Bordalo v. Portugal*, app. No. 37840/10, para. 36.

Every case of imprisonment of a media professional is an unacceptable hindrance to freedom of expression and entails that, despite the fact that their work is in the public interest, journalists have a sword of Damocles hanging over them. The whole of society suffers the consequences when journalists are gagged by pressure of this kind...

The Assembly consequently takes the view that prison sentences for defamation should be abolished without further delay. In particular it exhorts states whose laws still provide for prison sentences – although prison sentences are not actually imposed – to abolish them without delay so as not to give any excuse, however unjustified, to those countries which continue to impose them, thus provoking a corrosion of fundamental freedoms.²⁴

The danger with criminal defamation – and one of the many reasons why defamation should be a purely civil matter – is that the involvement of the state in prosecuting alleged defamers shifts the matter very quickly into the punishment of dissent. At the least it gives additional and excessive protection to officials and government. We will return to this issue later.

Civil defamation

There is broad agreement that some sort of remedy should be available for those who believe that their reputation has been unfairly undermined. This should take the form of a civil suit by the person who claims their damaged reputation.

But even given this consensus, the actual practice of defamation law throws up a number of potential issues.

²⁴ Parliamentary Assembly of the Council of Europe, Resolution 1577 (2007), "Towards decriminalization of defamation."

Can a true statement be defamatory?

Put that way, the answer is clear. Of course, when we talk about protecting reputations, we only mean reputations that are deserved. It follows, therefore, that if a statement is actually true, then it cannot be defamatory.

A pro-family, religious politician is engaged in an extra-marital affair. The politician should be unable to sue successfully for defamation. It is true that exposure of the affair would damage his reputation – but the reputation was undeserved.

Hence proving the truth of an allegation should always be an absolute defence to a defamation suit.

The ECtHR has invariably found that a true statement cannot be legitimately restricted to protect a person's reputation.

What is reputation?

The concept of "reputation" is unclear, perhaps dangerously so, given that it can be used as the basis for limiting human rights. For example, what does it have to do with public profile or celebrity? Does a public figure have a greater reputation than an ordinary member of the public? Is reputation connected with how many people have heard of you? If the answer is yes, then presumably the damage to reputation will be much greater for such people. This opens up the possibility of abuse of defamation law by public figures.

Perhaps a better approach is to tie the concept of "reputation" to human dignity. Human rights law has as its purpose the protection of dignity – equally for all people, whether they are celebrities or not. This would mean that the ordinary person, whose first appearance in the media occurred when their reputation was attacked, would be as worthy of protection as the public figure whose activities are reported every day.

And is reputation an objective phenomenon?

What if a statement is untrue? If it is damaging to a person's reputation, does this automatically mean that it is defamatory?

The past half century has seen a developing trend in which *reasonable publication* is not penalized, even if it is not completely accurate. The term "reasonable publication" encompasses the idea that the author took reasonable steps to ensure the accuracy of the content of the publication – and also that the publication was on a matter of public interest.

The ECtHR often refers to public interest as a factor to be weighed against restrictions on freedom of expression, when it is considering whether a restriction is "necessary in a democratic society." It often stresses the importance of the role of the media as a "public watchdog."²⁵

The argument is that media freedom would be hampered – and the public watchdog role undermined – if journalists and editors were always required to verify every published statement to a high standard of legal proof. It is sufficient that good professional practice be exercised, meaning that reasonable efforts were made to verify published statements. Journalists' honest mistakes should not be penalized in a way that limits media freedom.

Expressions of opinion

Discussion so far has focused on factual statements that may be defamatory. But what about expressions of opinion?

The ECtHR has taken a very robust view of this: no one can be restricted from expressing opinions. An opinion is exactly that: it is the journalist or writer's view, based upon her understanding of the facts. It is something different from the facts themselves.

However, countries with "insult" laws may penalize these expressions of opinion. When a political campaigner called the French President a "sad prick," he was found guilty of insult. The ECtHR found that his right to freedom of expression had been violated.²⁶

²⁵ For example *Sunday Times v. United Kingdom*, *Thorgeirson v. Iceland*.

²⁶ *Eon v. France*, Application No. 26118/10, Judgment of 13 March 2013.

[A] careful distinction needs to be made between facts and value-judgements. The existence of facts can be demonstrated, whereas the truth of value-judgements is not susceptible of proof. ... As regards value judgements this requirement [to prove their truth] is impossible of fulfilment and it infringes freedom of opinion itself²⁷

Is there a right to a reputation?

Article 12 of the Universal Declaration of Human Rights provides that:

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

This is echoed in identical words in Article 17 of the International Covenant on Civil and Political Rights (and hence is binding on law upon states that are party to that treaty).

As we have already seen, there is also a separate reference in Article 19 of the ICCPR to protection of “the rights and reputation” of others as a legitimate grounds for restricting freedom of expression.

The European Convention on Human Rights, as we have seen, also contains a reference to “reputation and rights” as a legitimate grounds for restrictions.

In recent years the Court has begun to regard “honour and reputation” as a substantive right contained within Article 8 (as if the wording of that Article were the same as Article 17 of the ICCPR):

The Court considers that a person’s reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her “private life”. Article 8 therefore applies.²⁸

²⁷ *Lingens v. Austria*, Judgment of 8 July 1986, Series A no. 103

²⁸ *Pfeifer v. Austria*, Application No. 12556/03, Judgment of 15 November 2007, para 35.

More recently, the Court has slightly modified this approach. In *A v Norway*, it acknowledged that Article 8 did not “expressly” provide for a right to reputation. In this case it concluded that:

In order for Article 8 to come into play, the attack on personal honour and reputation must attain a certain level of gravity and in a manner causing prejudice to personal enjoyment of the right to respect for private life.²⁹

In *Karako v. Hungary* the Court underlined this by saying that the defamation must constitute “such a serious interference with his private life as to undermine his personal integrity.”³⁰

What is the right way to deal with defamation?

When a person is found to have been defamed, they are clearly entitled to a remedy. The problem – and the reason that defamation law has such notoriety among journalists – is that the remedies imposed are so often punitive and disproportionate.

We have already seen that sentences of imprisonment for criminal defamation are regarded as disproportionate for their impact on freedom of expression. Likewise, heavy fines, whether in criminal or civil cases, are aimed at punishing the defamer rather than redressing the wrong to the defamed.

The ridiculous sums awarded in defamation damages in some jurisdictions have led to the phenomenon of “libel tourism,” whereby plaintiffs shop around to find the most lucrative jurisdiction in which to file their suit.

Whenever possible, redress in defamation cases should be non-pecuniary and aimed directly at remedying the wrong caused by the defamatory statement. Most obviously, this could be through publishing an apology or correction.

²⁹ *A v. Norway*, Application No. 28070/06, Judgment of 12 November 2009, para 64.

³⁰ *Karako v. Hungary*, Application No. 39311/05, Judgment of 28 April 2009.

Applying a remedy can be considered as part of the “necessity” consideration in the three-part test for limiting freedom of expression. A proportional limitation – which can be justified when defamation has been proved – is one that is the least restrictive to achieve the aim of repairing a damaged reputation.

Monetary awards – the payment of damages – should only be considered, therefore, when other lesser means are insufficient to redress the harm caused. Compensation for harm caused (known as pecuniary damages) should be based on evidence that the harm actually happened.

3. DEFAMATION AND PUBLIC DEBATE

Criticism of public officials

Historically, defamation laws have offered greater protection to public officials. In part, they have done this through the notion of “insult.” Criticism of a politician or other holder of public office is defined as an “insult” to the office itself. In many countries, this additional protection of public officials continues today.

There are other advantages often held by public officials. They may have access to state funds – that is, taxpayers’ money – to fund a defamation suit. There may be harsher penalties for those who are found to defame public officials.

International jurisprudence, however, has moved decisively in the opposite direction. The ECtHR has argued for more than a quarter of a century that there are a number of good reasons why public officials should enjoy *less* protection from criticism than others:

Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society The limits of acceptable criticism are, accordingly, wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed ... and he must consequently display a greater degree of tolerance.³¹

This reasoning – from the *Lingens* case in 1986 – has been echoed in a number of judgments since:

- Freedom of political debate is a core and indispensable democratic value;

³¹ *Lingens vs. Austria*.

- The limits of criticism of a politician must hence be wider than for a private individual;
- The politician deliberately puts himself in this position and must hence be more tolerant of criticism.

The [politician] inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism.³²

The doctrine that public officials should face a higher threshold in proving allegations of defamation originates from the United States Supreme Court. In the famous case of *New York Times v Sullivan*, it concluded:

public officials, in order to sustain an action for defamation, must prove the falsity of the allegedly defamatory statement as well as “actual malice”, i.e., that the defendant published a falsehood with knowledge that it was false or with reckless disregard of its truth or falsity.

The judgment criticized the notion that defendants in defamation cases should be required to prove the truth of their statements about public officials:

Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which steer far wider of the unlawful zone. The rule thus dampens the vigour and limits the variety of public debate ...³³

In a later case, the Supreme Court extended the *Sullivan* rule to apply to all “public figures,” on the basis that public figures have access to the media to counteract false statements.³⁴

³² *Oberschlick v. Austria*, Judgment of 23 May 1991, Series A no. 204

³³ *New York Times v. Sullivan*, 376 US 254 (1964).

³⁴ *Gertz v. Robert Welch Inc.*, 418 US 323 (1974)

POINT FOR DISCUSSION

Is it really true that all public figures have “voluntarily exposed themselves” to defamatory falsehoods? If your chosen profession is to be an actor – or even a prominent lawyer – does that mean you are fair game? What are the arguments for and against?

The *Sullivan* reasoning – although obviously not a binding precedent anywhere but in the United States – has been influential in later judgments in defamation cases, not only in common law jurisdictions such as England, India and South Africa, but also in the Philippines and in Europe. The argument in the US courts about the burden of proof lying with the plaintiff has *not* generally been accepted. But the argument about greater latitude in criticizing public figures has.

Although the “actual malice” standard is slightly different, it is closely related to the “reasonableness” standard for publication discussed earlier.

The ECtHR has been influenced by US free speech jurisprudence, although it seldom follows its reasoning fully. Where there is clearly common ground, however, is in the additional latitude given to criticism not only of public officials or politicians, but of the government specifically:

The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.³⁵

Although the ECtHR has not taken this step, the reasonable position is that “the Government” as an entity should have no standing to bring a case for defamation. The government is an institution, not a person,

³⁵ *Castells v. Spain*, Judgment of 23 April 1992, Series A no. 236.

and as such enjoys no right to a reputation. In *Romanenko v. Russia* the Court said that there might be good reasons for this as a matter of policy, although it did not rule on the point.³⁶

In a landmark British case, the House of Lords found:

It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.... What has been described as “the chilling effect” induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available. This may prevent the publication of matters which it is very desirable to make public.³⁷

The ECtHR has admitted the possibility of corporate bodies suing for defamation. In the *Jerusalem* case, two Austrian associations sued a local government councillor for defamation for describing them as “sects.” However, the Court found that there had been a violation of the councillor’s rights under Article 10:

In the present case the Court observes that the IPM and the VPM were associations active in a field of public concern, namely drug policy. They participated in public discussions on this matter and, as the Government conceded, cooperated with a political party. Since the associations were active in this manner in the public domain, they ought to have shown a higher degree of tolerance to criticism when opponents considered their aims as well as to the means employed in that debate.³⁸

³⁶ *Romanenko v. Russia*, Application No. 11751/03, Judgment of 8 October 2009.

³⁷ *Derbyshire County Council v. Times Newspapers Ltd*, [1992] 3 All ER 65 (CA), affirmed [1993] 2 WLR 449.

³⁸ *Jerusalem vs. Austria*, Application No. 26958/95, Judgment of 27 February 2001.

POINT FOR DISCUSSION

In the famous “McLibel” case, the fast food company McDonald’s sued two British environmental activists for libel, for circulating a pamphlet criticizing the company’s practices in sourcing their meat. The two activists had no legal representation for most of the time – since free legal aid is not available for libel cases – in a case that became the longest such case in British legal history. McDonalds won – and the activists took their case to the ECtHR. The Court found a violation of Article 10 because of a lack of procedural fairness and an excessive award of damages. There was no “equality of arms” between the parties.³⁹

One question here might be whether corporations should be allowed to sue for defamation in the first place. Does McDonald’s have a “right to reputation” in the same way as an individual person? What are the arguments for and against?

Protection of political speech

The reasoning in the *Jerusalem* case echoes a broader point that is often to be found in ECtHR judgments on Article 10 cases: the importance of freedom of political speech. Recall the discussion earlier about how freedom of expression is important not only as an individual right, but also because of the social benefits of a free flow of information.

“Freedom of political debate is at the very core of the concept of a democratic society,” the court concluded in one of its landmark Article 10 judgments.⁴⁰ As it elaborated in a more recent judgment:

The Court emphasises that the promotion of free political debate is a very important feature of a democratic society. It attaches the highest importance to the freedom of expression in the context of political debate and considers that very strong reasons are required to justify restrictions on political speech. Allowing broad restrictions on political speech in in-

³⁹ *Steel and Morris vs. United Kingdom*, Application No. 68416/01, Judgment of 15 February 2005.

⁴⁰ *Lingens vs Austria*.

dividual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned...⁴¹

This principle is seen to be so fundamental that it can be found in the judgments of superior courts in Europe and elsewhere. Spain's Constitutional Court underlined the importance of freedom of political expression:

Article 20 of the Constitution [on freedom of expression] ... guarantees the maintenance of free political communication, without which other rights guaranteed by the Constitution would have no content, the representative institutions would be reduced to empty shells, and the principle of democratic legitimacy ... which is the basis for all our juridical and political order would be completely false.⁴²

True democracy can only thrive in a free clearing-house of competing ideologies and philosophies - political, economic and social - and in this the press has an important role to play. The day this clearing-house closes down would toll the death knell of democracy.⁴³

Freedom of speech and expression consists primarily not only in the liberty of the citizen to speak and write what he chooses, but in the liberty of the public to hear and read what it needs The basic assumption in a democratic polity is that government shall be based on the consent of the governed. The consent of the governed implies not only that consent shall be free but also that it shall be grounded on adequate information and discussion aided by the widest possible dissemination of information from diverse and antagonistic sources...

... There must be untrammelled publication of news and views and of the opinions of political parties which are critical of the actions of government and expose its weakness. Government must be prevented from assuming the guardianship of the public mind.⁴⁴

⁴¹ *Feldek vs. Slovakia*, Application No. 29032/95, Judgment of 12 July 2001.

⁴² *Voz de España* case, STC of June 81, *Boletín de Jurisprudencia Constitucional* 2,128, para 3

⁴³ Bombay High Court, *Binod Rao v. M R Masani* (1976) 78 Bom. LR 125.

⁴⁴ *M Joseph Perera & Ors v. Attorney-General*, App.Nos. 107-109/86, (SC) Judgment of 25 May 1987.

Privilege for members of parliament and reporting statements made in parliament

Almost all legal systems encompass the concept of privilege for statements made in the legislature, and usually in other similar bodies (such as regional parliaments or local government councils). The purpose, clearly, is to protect freedom of political debate.

This privilege extends to reporting of what is said in parliament (or other bodies covered by the same privilege). Hence, as a general principle, not only would a member of parliament not be liable for a defamatory statement made in parliament; nor would a journalist who reported that statement.

The ECtHR has generally been very firm in upholding the principle of parliamentary privilege in defamation cases. In one case from the UK, a member of parliament had made a series of repeated statements that were highly critical of one of his own constituents. The MP gave both the name and address of the constituent, following which she was subject to hate mail, as well as extremely critical media coverage. The Court refused to find that her rights under Article 6(1) – the right to have a civil claim adjudicated by a judge - had been violated, since the protection of parliamentary privilege was “necessary in a democratic society.”⁴⁵

In light of the above, the Court believes that a rule of parliamentary immunity, which is consistent with and reflects generally recognised rules within signatory States, the Council of Europe and the European Union, cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court as embodied in Article 6 § 1....⁴⁶

In the *Jerusalem* case from Austria, the Court deemed the applicant to have privilege, even though the alleged defamatory statements were made at a meeting of the Vienna Municipal Council and not parliament. This was justified in the following terms:

⁴⁵ *A vs. United Kingdom*, Application No. 35373/97, Judgment of 17 December 2002.

⁴⁶ *Ibid*, para 83

In this respect the Court recalls that while freedom of expression is important for everybody, it is especially so for an elected representative of the people. He or she represents the electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament, like the applicant, call for the closest scrutiny on the part of the Court...⁴⁷

Privacy of public figures

The privacy of public figures is a consideration that is sometimes used to limit media reporting. This is, of course, quite distinct from reputation, but in practice can sometimes be intertwined.

Privacy is explicitly protected under Article 8 of the ECHR – and so would fall under the ground “rights and reputations of others.”

As we have seen, the ECtHR has frequently underlined that public figures must be subject to greater latitude of criticism than others. We have also asked the question, what constitutes a public figure? This would certainly include politicians. But would it include, say, members of politicians’ families? Or other individuals who are privately involved with politicians (in extramarital affairs, perhaps)?

The ECtHR considered a case of an Austrian newspaper that had been penalized for breaching the privacy of a politician. It had published a picture of him to accompany an article alleging that some of his earnings had been gained illegally. The national courts had found that although he was a member of parliament he was not well known to the public. The paper was breaching his privacy by publishing a picture of him *in the context of critical allegations*.

Not surprisingly, in view of its previous jurisprudence, the Court found that the newspaper’s Article 10 rights had been violated.⁴⁸

⁴⁷ *Jerusalem vs. Austria*, para 36.

⁴⁸ *Krone Verlag GmbH & Co. KG vs. Austria*, Application No. 35373/97, Judgment of 26 February 2002.

Insult to institutions

The principle that political speech should be protected is well-established, both at European level and in many national jurisdictions. It is curious, then, that it should continue to co-exist with the notion that it is possible to defame or insult offices, institutions or even symbols.

Is the President of France to be understood as a politician (and hence required to be tolerant of greater criticism than an ordinary person)? Or is he national symbol or office (hence meriting greater protection)? The French press law of 1881 provided protection of the presidency as a symbol.

In 2008, French farmer and political activist Hervé Eon waved a small placard as a group including the President, Nicolas Sarkozy, approached. The placard read: "Casse-toi pauv' con" ("Get lost you sad prick.") The words had been previously spoken by Sarkozy to a farmer at an agricultural show who had refused to shake his hand.

Eon was charged under Article 26 of the 1881 law. Under this charge there is no possibility of pleading truth (unlike an ordinary defamation case). On the other hand, it is necessary to establish the *mens rea* of the offence, which is that the accused acted in bad faith. Eon was convicted and a suspended fine was imposed. After appealing unsuccessfully through the national courts, the case went to the European Court of Human Rights.

The ECtHR found in Eon's favour. It concluded that "the repetition of the phrase previously uttered by the President cannot be said to have targeted the latter's private life or honour, or to have amounted merely to a gratuitous personal attack against him.... the applicant's intention was to level public criticism of a political nature at the head of State."⁴⁹

The Court considers that criminal penalties for conduct such as that of the applicant in the present case are likely to have a chilling effect on satirical forms of expression relating to topical issues. Such forms of expression can themselves play a very important role in open discussion

⁴⁹ *Eon vs. France*, para 57-58.

of matters of public concern, an indispensable feature of a democratic society...⁵⁰

Unfortunately, the ECtHR in the *Eon* case did not go quite as far as it had in the earlier French case of *Colombani*. In the latter, the issue was the section of the Press Law criminalizing insult of a foreign head of state. A journalist on *Le Monde* newspaper had been convicted of insulting the King of Morocco in an article about the drugs trade in that country, which relied upon an official report.

The French courts were highly critical of the fact that the report in *Le Monde* simply reproduced the contents of the official report on which it was based, without a separate attempt to verify its claims. The ECtHR said that this was unreasonable – the press was entitled to regard such documents as credible and not be required to verify each allegation.

The Court concluded that the offence of insult to foreign leaders:

...is to confer a special legal status on heads of State, shielding them from criticism solely on account of their function or status, irrespective of whether the criticism is warranted. That, in its view, amounts to conferring on foreign heads of State a special privilege that cannot be reconciled with modern practice and political conceptions. Whatever the obvious interest which every State has in maintaining friendly relations based on trust with the leaders of other States, such a privilege exceeds what is necessary for that objective to be attained.⁵¹

In a partially dissenting judgment in the *Eon* case, Judge Power-Forde from Ireland argued that a similar reasoning should have been applied. The Court did not draw upon the reasoning in *Colombani* because that case involved press freedom, whereas *Eon* did not. But Judge Power-Forde argued that identical principles applied in relation to the outdated and unwarranted shielding of heads of state from vigorous criticism.⁵²

⁵⁰ Ibid. paras 60-61.

⁵¹ *Colombani vs. France*, Application No. 51279/99, Judgment of 25 June 2002, para 66-68.

⁵² *Eon vs. France*, Judge Power-Forde, partially dissenting opinion.

In another case involving insult of a head of state, the ECtHR was very firm in ruling that a state had violated Article 10. The case of *Otegi Mondragon* was from Spain, where the head of state, the monarch, is not a politician but plays a constitutionally neutral role.

In this case, Mondragon, a Basque nationalist politician, had been charged with insulting King Juan Carlos, when he identified him as the head of a state that tortured Basque nationalists and gave immunity to torturers. Although he was acquitted by a Basque court, a higher court convicted him and sentenced him to a year's imprisonment, also removing his right to stand for election.

The ECtHR in a strongly worded judgment, echoed its reasoning in an earlier Turkish case (*Pakdemirli*)⁵³ and found in favour of Otegi Mondragon:

...the fact that the King occupies a neutral position in political debate and acts as an arbitrator and a symbol of State unity should not shield him from all criticism in the exercise of his official duties or – as in the instant case – in his capacity as representative of the State which he symbolises, in particular from persons who challenge in a legitimate manner the constitutional structures of the State, including the monarchy.... the fact that the King is “not liable” under the Spanish Constitution, particularly with regard to criminal law, should not in itself act as a bar to free debate concerning possible institutional or even symbolic responsibility on his part in his position at the helm of the State, subject to respect for his personal reputation.⁵⁴

The press as public watchdog

In a judgment more than 20 years ago, the ECtHR took the notion of protection of political speech a step further.

The case concerned an Icelandic writer named Thorgeir Thorgeirson, who had written press articles about the issue of police brutality to-

⁵³ *Pakdemirli vs. Turkey*, Application No. 35839/97, Judgment of 22 February 2005.

⁵⁴ *Otegi Mondragon vs. Spain*, Application no. 2034/07, Judgment of 15 March 2011, para 56.

wards suspects. He was convicted in the national courts on charges of defaming members of the Reykjavik police force. When the case came to the European Court, the Icelandic government's lawyers argued, among other things, that this case was distinct from earlier ECtHR cases (such as *Lingens*), because it did not entail *political* speech, which the Court had found to be specially protected.

The Court was not persuaded by this argument and used its judgment to develop a new doctrine, which has been referred to in a number of subsequent cases. It talked of the importance of the role of the media as a "public watchdog" on matters of importance – not only politics, but also other matters of public concern, such as those in *Thorgeirson's* articles:

Whilst the press must not overstep the bounds set, inter alia, for "the protection of the reputation of ... others", it is nevertheless incumbent on it to impart information and ideas on matters of public interest. Not only does it have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog"....⁵⁵

In another case, almost contemporary with *Thorgeirson*, the Court was required to pronounce on a case involving a press exposé of alleged cruelty in Norwegian seal hunting. The report, in the newspaper *Bladet Tromso*, relied heavily on a leaked and unpublished official report, written by journalist Odd Lindberg. The paper and its editor were sued for defamation by members of the crew of a sealing vessel whose practices were described in the Lindberg report. The Court concluded in a very similar tone to its *Thorgeirson* judgment:

Having regard to the various factors limiting the likely harm to the individual seal hunter's reputation and to the situation as it presented itself to *Bladet Tromso* at the relevant time, the Court considers that the paper could reasonably rely on the official Lindberg report, without being required to carry out its own research into the ac-

⁵⁵ *Thorgeirson vs. Iceland*, para 63.

curacy of the facts reported. It sees no reason to doubt that the newspaper acted in good faith in this respect.⁵⁶

On the publication of allegations regarded as damaging the reputation of some crew members, the Court's reasoning hinged (as usual in these cases) on whether the limitations on freedom of expression resulting from the defamation cases were "necessary in a democratic society." In doing so, it took into account the immense public interest involved in the case – albeit not necessarily sympathetic to the editorial line taken by the *Bladet Tromsø*:

[T]he Court must take account of the overall background against which the statements in question were made. Thus, the contents of the impugned articles cannot be looked at in isolation of the controversy that seal hunting represented at the time in Norway and in Tromsø, the centre of the trade in Norway. It should further be recalled that Article 10 is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population....⁵⁷

[I]t appears that the thrust of the impugned articles was not primarily to accuse certain individuals of committing offences against the seal hunting regulations or of cruelty to animals.... The impugned articles were part of an ongoing debate of evident concern to the local, national and international public, in which the views of a wide selection of interested actors were reported.⁵⁸

On the facts of the present case, the Court cannot find that the crew members' undoubted interest in protecting their reputation was sufficient to outweigh the vital public interest in ensuring an informed public debate over a matter of local and national as well as international interest.⁵⁹

⁵⁶ *Bladet Tromsø and Stensaas vs. Norway*, Application no. 21980/93, Judgment of 20 May 1999.

⁵⁷ *Ibid*, para 62

⁵⁸ *Ibid*, para 63

⁵⁹ *Ibid*, para 73

One of the particular points of interest of this particular case, however, is that a minority of the Court's bench strongly disagreed with the decision. The dissenting judgment concluded that the judgment sent a bad message to the European media, encouraging them to disregard basic ethical principles of the profession.

POINT FOR DISCUSSION

What is the public interest? How does it differ from what interests the public? How would you construct a "public interest" argument in defence of a story on, for example, scandals in the private life of a politician?

Religious defamation

Many European states have laws prohibiting defamation of religions, while in the common law there exists the crime of blasphemous libel.

Because of the doctrine of the "margin of appreciation," the ECtHR has been very reluctant to find against states in matters of blasphemy and defamation of religions. Because this falls within the area of "public morals," the Court often declines to interfere in decisions made at the national level:

The absence of a uniform European conception of the requirements of the protection of the rights of others in relation to attacks on their religious convictions broadens the Contracting States' margin of appreciation when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or religion...⁶⁰

The European Court of Human Rights applies a doctrine of the "margin of appreciation." This refers to the flexibility available to states in applying the European Convention on Human Rights. The margin in cases involving political speech, for example, will be very small because this is regarded as being a common value of great importance. The margin will be considerably greater for cases involving "public morals" because this is an area of greater cultural difference between European countries.

⁶⁰ *Giniewski vs. France*, Application no. 64016/00, Judgment of 31 January 2006, para 44.

In recent cases, however, the Court has been reluctant to find that religions have been defamed. In a French case, in which a writer published an article critically examining Roman Catholic doctrine and linking it to anti-semitism and the Holocaust, the Court found that a verdict of defaming religion was a violation of Article 10. While it invoked the margin of appreciation doctrine, the Court still underlined the importance of a liberal application of Article 10 on matters of general public concern (of which the Holocaust is undoubtedly one):

By considering the detrimental effects of a particular doctrine, the article in question contributed to a discussion of the various possible reasons behind the extermination of the Jews in Europe, a question of indisputable public interest in a democratic society. In such matters, restrictions on freedom of expression are to be strictly construed. Although the issue raised in the present case concerns a doctrine upheld by the Catholic Church, and hence a religious matter, an analysis of the article in question shows that it does not contain attacks on religious beliefs as such, but a view which the applicant wishes to express as a journalist and historian. In that connection, the Court considers it essential in a democratic society that a debate on the causes of acts of particular gravity amounting to crimes against humanity should be able to take place freely....⁶¹

In a case from Slovakia, a writer published an article criticizing the head of the Roman Catholic church for calling for the banning of a film poster and later the film itself, on moral grounds. He was convicted of the offence of "defamation of nation, race and belief," on the basis that criticizing the head of the church was tantamount to defaming the religion itself. The ECtHR rejected this reasoning and found a violation of Article 10:

The applicant's strongly worded pejorative opinion related exclusively to the person of a high representative of the Catholic Church in Slovakia. Contrary to the domestic

⁶¹ Ibid., para 51.

courts' findings, the Court is not persuaded that by his statements the applicant discredited and disparaged a sector of the population on account of their Catholic faith. [...] The fact that some members of the Catholic Church could have been offended by the applicant's criticism of the Archbishop and by his statement that he did not understand why decent Catholics did not leave that Church since it was headed by Archbishop J. Sokol cannot affect the position. The Court accepts the applicant's argument that the article neither unduly interfered with the right of believers to express and exercise their religion, nor did it denigrate the content of their religious faith...⁶²

These recent cases contrast with the earlier decisions of the ECtHR. In one Austrian case, the Court declined to find that the seizure of a film deemed to offend Roman Catholics was a violation of Article 10. In exercising the right to freedom of expression, people had an

obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights and which do not contribute to any form of public debate capable of furthering progress in human affairs. This being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration, provided always that any "formality", "conditions", "restriction"; or "penalty" imposed be proportionate to the legitimate aim pursued.⁶³

The Court reached a similar conclusion in a British case involving a short film with erotic content that was banned on the grounds that it would be guilty of the criminal offence of blasphemous libel.⁶⁴

⁶² *Klein vs. Slovakia*, Application no. 72208/01, Judgment of 31 October 2006, paras 51-52.

⁶³ *Otto-Preminger-Institut vs. Austria*, Application No. 13470/87, Judgment of 20 September 1994, para 49.

⁶⁴ *Wingrove vs. United Kingdom*, Application No. 17419/90, Judgment of 25 November 1996.

4. TYPES OF DEFAMATORY MATERIAL

Opinions v facts

We discussed how a defence of truth should be absolute in defamation cases. That is to say: if I write that the Minister embezzled his expenses, then I cannot have defamed him if this can be shown to be true.

But what if my allegedly defamatory statement was not a fact that could be proved or disproved, but an opinion? What if I called the Minister “a sad prick”?

The ensuing case is clearly not going to revolve around proving whether or not the plaintiff is “a sad prick.” He will claim that I have been gratuitously insulting. Should the case ever reach the European Court of Human Rights, it is most likely that it is my freedom of expression that will be upheld, not his right to reputation. (The Court will probably conclude that, as a politician, he should be prepared to tolerate such insults. And if, as in the Sarkozy case, it was a phrase that he himself had used, the judges may also, in their measured way, tell the Minister to get a sense of humour.)

The ECtHR has a long established doctrine that distinguishes between facts and value judgments:

[A] careful distinction needs to be made between facts and value-judgements. The existence of facts can be demonstrated, whereas the truth of value-judgements is not susceptible of proof. ... As regards value judgements this requirement [to prove their truth] is impossible of fulfilment and it infringes freedom of opinion itself....⁶⁵

This was elaborated further in the *Thorgeirson* case, already mentioned. Thorgeirson, the Icelandic journalist who wrote about police brutality, had not himself documented such instances, but commented on other accounts of police violence. Even though some of the evidence

⁶⁵ *Lingens vs. Austria*, para 46.

on which Thorgeirson had based his argument proved to be incorrect, some of it was true. The fact that this was also a matter of considerable public concern meant that the burden of establishing a connection between his value judgment and the underlying facts was light.

So, if I called the Minister “corrupt,” would that be defamatory? One avenue open to me is obviously to prove that this is factually true (he fiddled his expenses). But if there are other reports of his embezzlement, I could argue that my opinion that he is corrupt is a value judgment with a factual basis – without myself having to prove its accuracy.

Humour

When Hervé Eon designed his insulting placard, the point of its content was not a gratuitous insult to the French President. It was a repetition of the words that Sarkozy himself had used. Since the public generally recognized the words, their repetition was humorous. President Sarkozy clearly did not get the joke, and nor did the French courts. But the European Court, on this occasion, did.

It is surprising how often public figures seem to lose their sense of humour. An article in an Austrian newspaper mused in satirical manner on the national angst surrounding their national ski champion, Hermann Maier, who had broken his leg in a traffic accident. The sole exception, according to this article, was his friend and rival Stefan Eberharter, whose reaction was: “Great, now I’ll win something at last. Hopefully the rotten dog will slip over on his crutches and break his other leg too.”⁶⁶

There followed a series of increasingly incredible developments:

- Alone in the whole of Austria, Eberharter did not realize this was a joke.
- He went to a lawyer who did not tell to go home and get a life.
- The lawyer took the case to court, where Eberharter won a defamation action against the newspaper.
- The Vienna Court of Appeal upheld the conviction.

⁶⁶ *Nikowitz vs. Austria*, Application No. 5266/03, Judgment of 22 February 2007, para 6.

The judgment in the ECtHR was one of its shorter ones. Its conclusion can be summarized as "It's a joke!":

The article, as was already evident from its headings and the caption next to Mr Maier's photograph, was written in an ironic and satirical style and meant as a humorous commentary. Nevertheless, it sought to make a critical contribution to an issue of general interest, namely society's attitude towards a sports star. The Court is not convinced by the reasoning of the domestic courts and the Government that the average reader would be unable to grasp the text's satirical character and, in particular, the humorous element of the impugned passage about what Mr Eberharter could have said but did not actually say.⁶⁷

The Court awarded all claimed damages and costs.

This was neither the first nor the last time that a plaintiff in a defamation action manages to undermine his own reputation.

The ECtHR has maintained a consistent position of allowing greater latitude for humorous and satirical comment. In the case of *Klein*, discussed earlier in the context of religious defamation, the fact that the article criticizing the Roman Catholic Archbishop was framed as an elaborate intellectual joke counted significantly in the journalist's favour.

However, the mere fact of an alleged defamation being published in a satirical magazine would not be enough to protect it. In a Romanian case, a politician named Petrina applied successfully to the ECtHR, claiming that his Article 8 rights had been violated by the false allegation that he was a former member of the notorious Communist secret police, the *Securitate*. The fact that the publication was in a satirical magazine was irrelevant. The message of the article was "clear and direct, devoid of any ironic or humorous element."⁶⁸

This general latitude for humour and satire applies to other creative writing. In two Turkish cases, *Karatas* and *Alinak*, the Court found

⁶⁷ Ibid, para 25.

⁶⁸ "[C]lair et direct, dépourvu de tout élément ironique ou humoristique." *Petrina vs. Romania*, Application No. 78060/01, Judgment of 14 October 2008, para 44.

that material that might in other circumstances be seen as a grounds for restricting freedom of expression (in these instances incitement to violence) were to be permitted because of their artistic context. In a case involving an alleged attack on reputation, the Court was prepared to be more tolerant of an artistic creation:

The Court finds that such portrayal amounted to a caricature of the persons concerned using satirical elements. It notes that satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care.⁶⁹

This latitude is not limitless, however. In *Lindon, Otchakovsky-Laurens and July*, the court found a novel featuring a fictionalized version of the far-right leader Jean-Marie Le Pen to be defamatory – although this 2007 judgment of the Grand Chamber provoked a fiercely reasoned dissenting judgment accusing the majority of departing from the previous jurisprudence of the Court.⁷⁰

Statements of others

How far is a journalist responsible for the (possibly defamatory) things that someone else says? Most journalists spend a large part of their time reporting the words of others or, in the case of broadcasting, giving others a platform to speak through interviews and discussions.

The European Court of Human Rights has considered several cases in which national courts have held journalists liable for statements made by others. This is evidence that many national jurisdictions still tend to regard journalists as responsible for reporting the words of others. The ECtHR's reasoning, however, gives greater cause for hope.

The most celebrated case of this type did not involve defamation. *Jersild* was a Danish journalist who made a television documentary

⁶⁹ *Vereinigung Bildender Künstler vs. Austria*, Application No. 68354/01, Judgment of 25 January 2007, para 33.

⁷⁰ *Lindon, Otchakovsky-Laurens and July vs. France*, Applications Nos. 21279/02 and 36448/02, Judgment of 22 October 2007.

featuring a group of neo-Nazi youths. In the course of the film, the subjects made a series of extreme and grossly offensive racist statements. After public complaints, both Jersild and the subjects of his documentary were prosecuted and convicted under racial hatred laws. In its consideration of the case, the ECtHR made an observation, often repeated subsequently, about the courts having no role in determining how journalists go about their work:

the methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. It is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists.⁷¹

The views broadcast were not only not those of Jersild himself, but were clearly presented as part of a serious public discussion on the problem of racism:

Taken as a whole, the feature could not objectively have appeared to have as its purpose the propagation of racist views and ideas. On the contrary, it clearly sought - by means of an interview - to expose, analyse and explain this particular group of youths, limited and frustrated by their social situation, with criminal records and violent attitudes, thus dealing with specific aspects of a matter that already then was of great public concern.⁷²

Hence:

The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.⁷³

⁷¹ *Jersild vs. Denmark*, Application No. 15890/89, Judgment of 23 September 1994, para 31.

⁷² *Ibid*, para 33.

⁷³ *Ibid*, para 35.

In a more recent case, Greek broadcaster Nikitas Lionorakis was found liable for defamation and ordered to pay damages to an individual who was insulted by a studio guest interviewed in a live radio broadcast. The European Court found several grounds for determining that Lionariki's Article 10 rights had been violated, giving particular emphasis to the interviewer's lack of liability for the live remarks of an interviewee. It also reiterated a point to be found in a number of its judgments on media cases:

requiring that journalists distance themselves systematically and formally from the content of a statement that might defame or harm a third party is not reconcilable with the press's role of providing information on current events, opinions and ideas.⁷⁴

In other words, it should be taken as given that a journalist is not automatically associated with the opinions stated by others and it is unnecessary for this to be repeated in relation to each reported opinion or fact.⁷⁵

⁷⁴ *Lionarakis vs. Greece*, Application No. 1131/05, Judgment of 5 July 2007.

⁷⁵ See also *Filatenko vs. Russia*, Application No. 73219/01, Judgment of 6 December 2007.

5. DEFAMATION CASES IN COURT

Defences to defamation suits

From what has already been said, it is clear that there are a number of possible defences to a suit of defamation:

Truth: The ECtHR has held that truth is an absolute defence to a suit of defamation. That is, if something is true it cannot be defamatory.

Reasonable publication: The European Court jurisprudence has developed the idea that if a publication is reasonable then it may be justified even if it is not wholly true. These are some of the elements that might go to define “reasonableness”:

- The journalist made good faith efforts to prove the truth of the statement and believed it to be true.
- The defamatory statements were contained in an official report – with the journalist not being required to verify the accuracy of all statements in the report.
- The topic was a matter of public concern and interest.

Opinion: The statement complained of was not a statement of fact but an expression of opinion. There may be some expectation that it has a reasonable factual basis, but it is not a requirement to prove this.

Satire: The statement was not intended seriously and no reasonable person would understand it thus.

Absolute privilege: If the defamatory statement was reported from parliament or judicial proceedings, it would normally be absolutely privileged. That is, neither the original author of the statement nor the media reporting it could be found to have defamed. This rule may also apply to other legislative bodies and other quasi-judicial institutions (such as human rights investigations).

Qualified privilege: The ECtHR has also found that there is a degree of protection for media reporting other types of statement, even if they do not enjoy the privilege accorded to parliament or the courts. This might apply to, for example, public meetings, documents and other material in the public domain.

Statements of others: Journalists cannot be responsible for the statements of others, provided that they have not themselves endorsed them. This would apply, for example, in the case of a live interview broadcast.

Whose burden of proof?

If I sue you, then I will have to prove my case against you if I want to win. Right?

Well, no. In the case of defamation this general principle is usually wrong. In many (but not all) legal systems, the burden of proof lies not with the claimant – the person who says that they were defamed – but with the defendant. In any other civil action seeking redress for an alleged tort, it would automatically be the responsibility of the person who had been wronged to prove that:

- The defendant had carried out the action (made the defamatory statement in this case).
- That the action was a wrong against the claimant (that it damaged his/her reputation).

But in defamation cases, this burden is reversed on the second point. If the claimant can demonstrate that the defendant made the statement – usually fairly straightforward – it then becomes a matter for the *defendant* to show that the statement was true, and therefore not defamatory.

The striking exception to this rule is the United States. In the celebrated case of *New York Times v Sullivan*, already discussed here, the US Supreme Court corrected the anomaly of the burden of proof in libel cases brought by public officials. In a later case this new rule was extended to all public figures.

Of course, this new rule does not absolve journalists of the responsibility of reporting accurately – these matters may still be debated in court, after all – but it does allow them to be bolder in pursuing matters of public interest.

On this point, the difference between US and European defamation law is striking. While the European common law jurisdictions (UK, Ireland, Malta and Cyprus) follow the anomalous tradition of English law, the

civil law jurisdictions derive their approach from Roman law, which has a slightly different approach, although with similar effect. The Roman law principle is that the burden should lie on the party that can prove the affirmative. This derives from the supposed difficulty of proving a negative. In the case of defamation proceedings, this will mean, of course, that the onus of proving that a statement is true will lie with the defendant.

DISCUSSION

What do you think? Should the burden of proof in defamation cases be reversed?

The European Court of Human Rights has been completely unpersuaded by arguments to shift the burden of proof. While it has been influenced by other aspects of the evolving US jurisprudence on defamation – as discussed above – it has explicitly set its face against the new rule from *New York Times v Sullivan* and subsequent American cases.

In *McVicar*, the Court was asked to adjudicate on the Sullivan rule, as part of the claim by a British journalist that he should not have been required to prove the truth of allegations about drug use by a well-known athlete. It concluded:

the Court considers that the requirement that the applicant prove that the allegations made in the article were substantially true on the balance of probabilities constituted a justified restriction on his freedom of expression under Article 10 § 2 of the Convention...⁷⁶

Protection of anonymous sources

Interestingly, this raises another issue on which the case law of the ECtHR has been much more progressive. One of the problems that *McVicar* had in proving the truth of his allegations was the reluctance of informants to testify on his behalf. In many instances, of course, media allegations of wrongdoing will rest upon sources whose anonymity has been guaranteed. The protection of anonymous sources is seen as a principle of journalistic ethics.

⁷⁶ *McVicar vs. United Kingdom*, Application No. 46311/99, Judgment of 7 May 2002, para 87.

In the landmark case of *Goodwin*, a British journalist who refused a court order to reveal his sources, the European Court observed:

Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest.

It found in *Goodwin*'s favour, as it has in a number of subsequent similar cases.

Yet, the requirement that a journalist prove the truth of defamatory statements may well impose an ethical dilemma that the journalist can only resolve by failing to offer such proof. Of course, the journalist would not be *compelled* to reveal the source – but the penalty for not doing so could be the loss of a defamation suit.

The Special Rapporteur on Freedom of the Media for the Organization for Security and Cooperation in Europe (OSCE) has specifically recommended how courts should address situations where journalists may testify in court proceedings:

Journalists should not be required to testify in criminal or civil trials or provide information as a witness unless the need is absolutely essential, the information is not available from any other means and there is no likelihood that doing so would endanger future health or well being of

the journalist or restrict their or others' ability to obtain information from similar sources in the future.

The Committee of Ministers of the Council of Europe recommended:

In legal proceedings against a journalist on grounds of an alleged infringement of the honour or reputation of a person, authorities should consider, for the purpose of establishing the truth or otherwise of the allegation, all evidence which is available to them under national procedural law and may not require for that purpose the disclosure of information identifying a source by the journalist.⁷⁷

Remedies/penalties

One reason why defamation suits – whether criminal or civil – are so feared is the impact of the penalties or awards often made against the media in such cases. Reference is often made to the “chilling effect” of heavy penalties or large defamation awards. As that phrase makes clear, the concern is not only for the journalist involved in any particular case, but also the deterrent that defamation law can pose to vigorous, inquiring journalism.

As discussed above, international bodies have focused their concern on criminal defamation and the danger that journalists might be imprisoned for exercising their profession and their freedom of expression.

The European Court has considered a number of cases involving criminal defamation and although, as noted above, the Court will not rule out criminal defamation in principle, it has commented several times on the penalties imposed, as in this Romanian case:

The circumstances of the instant case – a classic case of defamation of an individual in the context of a debate on a matter of legitimate public interest – present no justification whatsoever for the imposition of a prison sentence. Such a sanction, by its very nature, will inevitably have a chilling effect, and the fact that the applicants did not

⁷⁷ Council of Europe, Committee of Ministers, Recommendation No. R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information, <https://wcd.coe.int/ViewDoc.jsp?id=342907&Site=CM>.

serve their prison sentence does not alter that conclusion, seeing that the individual pardons they received are measures subject to the discretionary power of the President of Romania; furthermore, while such an act of clemency dispenses convicted persons from having to serve their sentence, it does not expunge their conviction....⁷⁸

In this case the Court was also highly critical of an order imposed on the journalists, as part of the sentence for their conviction, prohibiting them from working as journalists for a year:

[T]he Court reiterates that prior restraints on the activities of journalists call for the most careful scrutiny on its part and are justified only in exceptional circumstances.... The Court considers that... it was particularly severe and could not in any circumstances have been justified by the mere risk of the applicants' reoffending.

...The Court considers that by prohibiting the applicants from working as journalists as a preventive measure of general scope, albeit subject to a time-limit, the domestic courts contravened the principle that the press must be able to perform the role of a public watchdog in a democratic society.⁷⁹

In civil defamation cases, the principal cause of the "chilling effect" is large monetary awards against the media in favour of defamation claimants. In a civil suit, the purpose of the award is not to punish the defendant (the defamer), but to compensate the plaintiff, the person who was defamed, for any loss or damage caused by the defamation.

It follows that the claimant should be able to prove that there was actual loss or damage as part of their suit. If this cannot be demonstrated, then it is unclear why there should be any monetary award. Usually a defamatory statement could be rectified by a correction or an apology.

The problem often comes in the area of non-pecuniary damages. This refers to monetary awards made to compensate losses that cannot be ac-

⁷⁸ *Cumpana and Mazare vs. Romania*, Application no. 33348/96, Judgment of 17 December 2004, para 116.

⁷⁹ *Ibid.*, paras 118-119.

curately calculated in monetary terms – such as loss of reputation. Courts should take into account not only the damage to reputation, but also the potential impact of large monetary awards on the defendant – and also more broadly on freedom of expression and the media in society.

The European Court has been critical of large non-pecuniary monetary awards, even on occasions finding them to be a violation of Article 10 in themselves. The landmark case was that of *Tolstoy Miloslavsky*, who was author of a defamatory pamphlet confronted with damages of £1.5 million (in 1989) awarded by a British libel jury. The Court found the award grossly disproportionate and that Tolstoy Miloslavsky's right to freedom of expression had thereby been violated, even though the fact that he had committed libel was not in dispute.

In the case of *Steel and Morris v. the United Kingdom* (the McLibel case), the Court concluded that the size of the award of damages had to take into account the resources available to the defendants. Although the sum awarded by the British court was not very large "by contemporary standards," it was "very substantial when compared to the modest incomes and resources of the ... applicants ..."⁸⁰

In the case of *Filipovic v. Serbia*, the Court recalled its conclusions in *Tolstoy Miloslavsky* and *Steel and Morris*: that the award should be proportionate to the moral damage suffered, and also to the means available to the defendant. In this case, although the defendant had incorrectly accused the plaintiff of "embezzlement," it was nevertheless a fact that the plaintiff was under investigation for tax offences.

Hence the moral damage was not great. And the award by the court was equivalent to six months' salary – an amount that the ECtHR found excessive and a violation of Article 10.⁸¹

It should also be noted that the European Court itself very rarely awards non-pecuniary damages. It normally concludes that the finding that a right has been violated is sufficient – a principle that domestic courts might be advised to follow where possible.

⁸⁰ *Steel and Morris vs. United Kingdom*, para 96.

⁸¹ *Filipovic vs. Serbia*, Application no. 27935/05, Judgment of 20 November 2007.

How can international human rights law be applied in national courts?

Much of the discussion in this manual focuses on the standards for protecting freedom of expression set out in international and regional human rights law. But how can these standards be applied at the national level? Will a civil or criminal court simply ignore any argument based upon these standards?

All European states, with only a couple of exceptions, are party to the European Convention on Human Rights. This means that they are bound by Article 10, the protections it provides and the strict criteria for applying restrictions.

An even greater number of European states are party to the International Covenant on Civil and Political Rights. Likewise, this creates a binding obligation on the state to comply with the obligations it creates.

The body that monitors states' compliance with the ICCPR is the Human Rights Committee, a body of independent experts that gives interpretative guidance on how the Covenant is to be implemented. It also periodically reviews each state party's progress in implementing its ICCPR obligations. And, if the state has also ratified the first Optional Protocol to the ICCPR, it may consider individual complaints from individuals who allege that their rights have been violated, provided that they have first exhausted all domestic remedies.

The ICCPR requires:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.⁸²

However, the exact way in which international law obligations are implemented domestically is a matter of great variation.

⁸² ICCPR, Art 2(2).

Theoretically, states are said to fall into one of two categories: *monist* and *dualist*.

Monist states are those where international law is automatically part of the domestic legal framework. This means that it is possible to invoke the state's treaty obligations in domestic litigation (such as a defamation trial).

Dualist states are those where international treaty obligations only become domestic law once they have been enacted by the legislature. Until this has happened, courts could not be expected to comply with these obligations in a domestic case.

States with common law systems, such as the United Kingdom, the Republic of Ireland, Cyprus and Malta, are invariably dualist. Socialist states are also dualist. States with civil law systems are more likely to be monist, but many are not (for example the Scandinavian states). All the previously dualist post-Communist states of Central and Eastern Europe are now monist.

That is the theory. The practice is more complicated.

In monist states, although ratified treaties are automatically a part of domestic law, their exact status varies. Do they stand above the constitution? On a par with it? Above national statutes? Or on a par with them? The answer varies from country to country.

In dualist states, some parts of international law may be automatically applicable. In states such as the United Kingdom and the United States, customary international law may be directly invoked, provided that it is not in conflict with national statute law. The US Constitution also says that "all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land."

In practice, however, the Supreme Court has found many treaties (including those on human rights) to be "non self-executing," which means that they must first be incorporated by Congress. However, even where treaties have not been incorporated in dualist states, courts are likely to consider them as interpretive guidance in deciding cases.

It is very difficult, therefore, to give general guidance on how far domestic courts will admit arguments based upon international legal standards. It will be for practitioners in each country to understand this.

There is, however, a common problem that potentially cuts across different legal systems: judges may simply be unaware of states' treaty obligations, or the contents of the treaty, or how the treaty should be interpreted and applied. It is unlikely to be a good strategy in litigation to tell judges that they should apply treaty law. A better approach in most instances would be to invoke international law as a means of interpreting national law.

The situation in relation to the European Convention on Human Rights is slightly different.

Under Protocol 11 to the ECHR, the European Court of Human Rights has compulsory jurisdiction over the states that are party to the Convention. This means that a person who is unable to secure a remedy to a violation of rights protected under the Convention may apply to the Court.

The judgments of the ECtHR are only binding upon the state to which they apply. Nevertheless, the decisions and reasoning of the Court *may* be persuasive in other similar cases within other national jurisdictions. In some states, such as Spain and Belgium, the courts are obliged to follow the interpretation offered by the ECtHR in relevant cases, provided that this does not narrow the scope of the right in question.

The case law of the ECtHR in relation to defamation, insult, privacy and related issues is extremely extensive and forms the basis of much the content of this manual. Courts may feel free to disregard ECtHR judgments, but a very strong argument can be made for regarding them as persuasive and authoritative interpretations of a state's obligations under Article 10.⁸³

⁸³ This manual relies heavily on the ECtHR jurisprudence, because this is the most progressive body of law available in Europe on freedom of expression, and because national courts may be persuaded by it.

It does have some weaknesses, however. It could be argued that the Court has:

- not been tough enough in condemning criminal defamation;
- exaggerated the importance of the "right to a reputation," which does not even exist in the ECHR;
- confused the protection of reputation with other grounds for limiting freedom of expression, including public order and privacy.

What about case law from other jurisdictions?

In this manual we refer sometimes to landmark cases from national courts. Of course, the decision of a national court in one country does not bind the court of another, even when they have similar laws and legal systems and even when, as in the common law countries, they operate according to a doctrine of precedent.

The importance of consulting cases from other countries is simply to learn what are the most advanced decisions and most persuasive reasoning in freedom of expression cases. If these arguments are introduced into cases in national courts, this must be done in a careful and diplomatic fashion, so as not to antagonize judges. It is important, however, that judges hearing defamation cases be educated in the case law of other countries.

6. USING THIS MANUAL

In the Introduction we presented the three purposes of this manual:

- As a resource for participants who wish to prepare for a training workshop on defamation;
- As a reference book for participants (usually lawyers) in preparing litigation;
- As a source book for trainers preparing a workshop on defamation.

The first two should be self-explanatory.

For trainers preparing to use this manual as a teaching aid, additional resources are available, namely a set of plans for each session of a workshop, supplemented by materials, including Powerpoint presentations, case studies and a moot court scenario.

The manual and training materials were prepared with the initial aim of running a series of workshops for a mix of lawyers and journalists, each over two days. The outline agenda for such a workshop is as follows:

TRAINING WORKSHOP ON DEFAMATION LAW: OUTLINE AGENDA

Day 1 (lawyers and journalists)

Session 1: Underlying principles and sources
Limitations on freedom of expression (90 minutes total)

Session 2: Introduction to defamation (60 minutes)

Session 3: National law on defamation (and related matters)
(90 minutes)

Session 4: Examination of defamation scenarios (90 minutes)

Day 2 (lawyers only)

Session 5: Defamation in the case law of the ECtHR (90 minutes)

Session 6: Defamation cases in court (90 minutes)

Session 7: Moot: arguing hypothetical/fictionalized defamation case
Concluding discussion: lessons of moot, observations on differences between national law and ECHR jurisprudence

Editorial Seminar (journalists only)

Best reporting practices for balancing the public's right to know with respect for ethical and legal boundaries related to protection of reputation.

As noted above, it is suggested that the legal training be complemented by an editorial seminar for journalists on best practices in the newsroom for balancing the public's right to know with the need to respect ethical and legal boundaries related to the protection of reputation. This session should ideally be led by an experienced editor, and possibly include a lawyer who can clarify journalists' practical questions.

If a workshop is held for lawyers only, this agenda could be compressed, since Sessions 5 and 6 cover similar ground to Sessions 2 and 4, but with greater legal detail. It would even be possible to compress the whole training exercise into a single day, by omitting a discussion of underlying principles and sources of freedom of expression and combining sessions 2 and 4 with 5 and 6, as well as shortening the moot court exercise.

Pedagogy and adult learning

Lawyers are more accustomed than most people to constant reading in order to develop their knowledge and understanding – it is a constant professional requirement. Even so, they are not exempt from a general principle of adult pedagogy that says that people are far more likely to retain knowledge and develop understanding if they say and do things in a learning exercise, rather than simply reading or hearing.

Throughout the manual and the accompanying training plans there are various "brainstorms" and "points for discussion," which are intended to mark opportunities for the trainer to bring participants into the discussion. The former are intended as quick, open-ended discussions, usually at the point where a topic is first being introduced. The latter are a cue for more substantive and reasoned discussion. Of course, a good trainer will probably want to open up discussions on many other points, too.

The case studies in session 4 and the moot in session 7 are a particularly important part of the learning process. They are intended to consolidate the more theoretical parts of the exercise by encouraging participants to appraise different scenarios and argue different positions. The trainer may find it particularly useful to vary key aspects of these scenarios in the course of the discussion (given that they are all fictional) in order to underline particular points of importance.

IPI: Defending Press Freedom for Over 65 Years

The International Press Institute (IPI), the oldest global press freedom advocacy organisation, is a worldwide network of editors, media executives and leading journalists dedicated to furthering and safeguarding press freedom, promoting the free flow of news and information, and improving the practices of journalism. Based in Vienna, IPI is a politically neutral organisation and holds consultative status before a number of inter-governmental bodies.



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The Media Legal Defence Initiative

is a non-governmental organisation which helps journalists, bloggers and independent media outlets around the world defend their rights.

We help journalists who publish via print, broadcast or the internet, by making sure they have good lawyers to defend them. If necessary we pay legal fees and we work alongside lawyers to make sure the best possible legal defence is provided. We work directly with individual lawyers around the world, and we also have partnerships with national organisations who provide legal aid to journalists. Our long-term goal is to strengthen media legal defence capacity around the world by supporting initiatives that enhance the legal knowledge, skills and effectiveness of those working in the field.



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