A Briefing

on

the Abolition of Seditious Libel
and Criminal Libel

Prepared by Index on Censorship and English PEN

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Free speech is an essential component of democracy. The abolition of sedition and criminal defamation laws in Ghana is said to have “breathed new life into Ghanaian democracy.”

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The amendments have the support of politicians from all major parties. The Secretary of State for Justice, Jack Straw, has also acknowledged the need for reform. The amendments also have the support of all major UK human rights groups, including PEN, Index on Censorship, Article 19, Liberty, Justice and the NUJ.
**Introduction**

In July 2009, British Parliamentarians have a valuable opportunity to abolish the outdated offences of seditious libel and criminal defamation. The Coroners & Justice Bill, currently before Parliament, offers an appropriate home for a clause that would abolish these offences.

Amendments to the Coroners & Justice Bill, inserting just such a clause, were tabled in the House of Commons on 23rd March 2009. Unfortunately, the House was unable to debate the amendments due to time constraints. However, similar amendments have been introduced to the Bill, in the House of Lords, by Lord Lester of Herne Hill, Baroness D’Souza, and Baroness Kennedy of The Shaws. The amendments are numbered 178 and 179.

This briefing document collects reports and articles from a wide range of parliamentary, legal and human rights organisations, presenting the case for the acceptance of the amendments, and therefore immediate abolition of these offences.

**History**

**Definitions**

Seditious libel and Criminal libel (often referred to as Criminal defamation in many texts) are common law offences in the United Kingdom. A seditious libel is a statement which brings into “hatred or contempt” the Monarch, her heirs, the Government or its officials. Criminal libel is the prosecution of any form of libel through the criminal rather than civil courts, and is used to prosecute libels against the state or other groups, rather than individuals.

The definition of seditio in Stephen’s *Digest of the Criminal Law* is a widely cited text:

> Sedition consists of any act done, or words spoken or written and published which (i) has or have a seditious tendency and (ii) is done or are spoken or written and published with a seditious intent. A person may be said to have a seditious intent if he has any of the following intentions, and acts or words may be said to have a seditious tendency if they have any of the following tendencies: an intention or tendency to bring into hatred or contempt, or to excite disaffection against the person of, Her Majesty, her heirs or successors, or the government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite Her Majesty’s subjects to attempt, otherwise than by lawful means, the alteration of any matter in Church or State by law established, [or to incite any person to commit any crime in disturbance of the peace] or to raise discontent or disaffection among Her Majesty’s subjects, or to promote feelings of ill-will and hostility between difference classes of such subjects.
Proving the truth of any statement which causes this “hatred or contempt” is no defence against charges of seditious libel. The crime is in the act of bringing about this contempt. By contrast, some charges of criminal defamation may be defended by proving the truth of any factual statement, provided the charge is not of seditious libel.

**Origins**

These common law principles evolved from some of Britain’s oldest laws, such as the Statute of Westminster 1275, when the divine right of the King and the principles of a feudal society were not questioned. Seditious libel was established by the Star Chamber case *De Libellis Famosis* of 1606. Not only was truth no defence, but intention was irrelevant, as was the actual harm (reputational or otherwise) done by the libel. Punishments for the crime included imprisonment and the loss of the offenders’ ears.

Later, the Criminal Libel Act 1819 made statutory provisions for the seizure, confiscation and destruction of all seditious materials.

Seditious libel (criticism of the government) was closely linked to blasphemous libel (criticism of religion), since church and state were interchangeable at the time. Blasphemy and blasphemous libel was abolished in 2008 as part of the Criminal Justice and Immigration Act 2008.

Criminal libel and seditious libel laws were used extensively in the eighteenth and nineteenth centuries, perhaps most famously against the renegade MP and civil rights campaigner John Wilkes, whose publication *North Briton* was declared a seditious libel and publicly burned.³

In the twentieth century however, as British democracy evolved and liberalised, the number of prosecutions for these offences declined sharply. the 1970s was the last decade to see any prosecutions. Of the three offences during that decade, one defendant (1971) received a sentence of six months, the second (1972) received a suspended sentence, and the third (1978) received a conditional discharge.⁴
Redundancy and consensus

One argument for retaining seditious libel and criminal defamation is that they might be required to prosecute incitement to violence. However, current UK law already has adequate provision against these concerns.

The Liberty briefing on the report stage of the Coroners & Justice Bill explains: 5

70. Clearly incitement to violence should be (and already is) a criminal offence. However, the common law offence of sedition and seditious libel is now outdated and unnecessary. There are already numerous offences on the statute book that relate to this issue. It is, of course, an offence under the common law to solicit or incite another to commit a crime. 32 Incitement to hatred on the grounds of race, 33 religion 34 and sexual orientation 35 are also all offences. The Public Order Act 1986 also creates offences of using threatening, abusive and insulting words. 36 There are also a number of other statutes dealing with incitement (many of which should themselves be reviewed). For example, section 91 of the Police Act 1996 makes it an offence for a person to cause or attempt to cause, or do anything which is intended to cause, disaffection among members of the police force, or to cause etc a member of a police force to withhold his or her services. In addition, the Incitement to Disaffection Act 1934 makes it an offence to “maliciously and advisedly” endeavour to seduce members of the armed forces from their duty or allegiance to the UK, including by possessing material designed to do this ...

34 See Part IIIA of the Public Order Act 1986, as introduced by the Criminal Justice and Immigration Act 2008.
35 See sections 4 and 5.

The Law Commission has also recommended the replacement of seditious libel and criminal defamation. In its 1977 report it was of the view that

there is likely to be a sufficient range of other offences covering conduct amounting to sedition, we think that it is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is “political”. Our provisional view, therefore, is that there is no need for an offence of sedition in the criminal code. 6

In its 1985 report, the Commission recommended abolishing criminal libel, suggesting it might be replaced with a narrower offence of “deliberate and serious defamation”, a proposal which was unfortunately not adopted by the Conservative Government of the day. 7 Since 1985, The Law Commission has not seen fit to return to this subject.
Twenty-five years ago, Lord Denning expressed the opinion that the offence of seditious libel is now obsolete:

The offence of seditious libel is now obsolescent. It used to be defined as words intended to stir up violence, that is, disorder, by promoting feelings of ill-will or hostility between different classes of His Majesty's subjects. But this definition was found to be too wide. It would restrict too much the full and free discussion of public affairs...So it has fallen into disuse for nearly 150 years.⁸

The redundant and inappropriate nature of these offences has been established consensus for a generation.

The threat of prosecution

Why spend time repealing dead-letter law?

Wherever and whenever such laws have existed, the mere threat of criminal prosecution and the possibility of a prison sentence and fine, has served to discourage people from speaking out. Many of the cases handled by PEN and reported by Index on Censorship involve charges of sedition that are later dropped by the authorities. This is an especially widespread tactic in Senegal: around twenty criminal cases are brought against journalists every year, yet few are ever imprisoned.⁹

This need not be solely an African phenomenon. The threat of imprisonment faced by the campaigner and future Minister Peter Hain in 1974, shows how the existence of criminal libel laws in the UK could be used to intimidate writers and campaigners, without a prosecution actually having to take place.¹⁰ Even ‘dead-letter’ law can act as an effective Sword of Damocles.

The Daily Telegraph

Hain faced call for criminal libel action

By Peter Day, 22 Jul 2004

The cabinet minister Peter Hain narrowly escaped a Downing Street-inspired prosecution for criminal libel 30 years ago over the Norma Levy prostitution scandal.

Mr Hain - now Leader of the Commons who chaired the Young Liberals at the time and was an anti-apartheid campaigner - had used a magazine, Liberator, to name the late Tory environment secretary, Geoffrey Rippon, as a third minister in the scandal.

Miss Levy, whose revelations had prompted the resignations of the defence minister, Lord Lambton, and the Lord Privy Seal, Lord Jellicoe, told police she did not know Mr Rippon, but said others in the call-girl ring might have.

Sir Robert Armstrong, principal private secretary to the then prime minister, Edward Heath, wrote to the attorney general’s office, calling for action against Mr Hain. He said: “The suggestion has been made to me that the time has come to revive the use of criminal libel proceedings.”

The correspondence, released yesterday at the National Archives, shows that Tony Hetherington, legal adviser to the attorney general Sir Peter Rawlinson, replied that they had considered this action. However, a prosecution would attract widespread publicity and might give the appearance of a “state trial” on a subject the victim might prefer to forget.

Sir Robert maintained his opinion, saying: “The knowledge that they were not immune from criminal proceedings could bring about a certain pause for reflection among those concerned.”
Word crime.
‘Criminal defamation’ laws are used to attack those who highlight incompetence or wrongdoing.
Friday 4 May 2007

As people all over the world celebrated World Press Freedom Day yesterday, some might have wondered whether the event, inaugurated by Unesco 17 years ago, is delivering the goods.

Eynulla Fatullayev, founder and senior editor of Realny Azerbaijan and Gundelike Azerbaijan, might be one such person. On April 20 he was convicted on charges of criminal defamation and sentenced to two-and-a-half years’ imprisonment. He was taken into custody directly from the courtroom.

On May 2, the day before World Press Freedom Day, Syrian lawyer and activist Anwar al-Bunni, who had already been in detention for nearly a year, was sentenced to five years’ imprisonment for disseminating false news which harms the dignity of the State. His crime was to sign the “Beirut-Damascus, Damascus-Beirut Declaration”, which advocated greater sovereignty for Lebanon.

In March this year, the Senegalese newspaper Walf Grand-Place was ordered to pay exorbitant damages of 10 million CFA Francs (about $21,000). Two of its journalists, Faydy Drame and Jean Meissa Diop, were convicted of criminal defamation and sentenced to six months’ imprisonment, although the sentence was suspended.

These are just a few of the recent cases of criminal defamation being used against journalists and others who seek to highlight wrongdoing and incompetence, or simply to promote a level playing field in the political arena. According to an ongoing survey by Article 19 - to be published in June this year - the vast majority of countries still have criminal defamation laws on their books. While charges are becoming rare in more democratic countries, our research indicates that at least 250 people were imprisoned over the last two years under criminal defamation laws, many of them journalists. Politicians and public officials initiated a large number of these cases.

The cases demonstrate the severe chilling effect of criminal defamation laws, which is why groups like Article 19 have for many years been advocating their complete repeal, on the basis that they represent an unacceptable restriction on freedom of expression. We recognise that the media, in particular, can operate irresponsibly or, even worse, vindictively, and that it can sometimes cause serious harm to reputation. However, we believe that civil defamation laws (the option of choice for those who genuinely seek to restore their reputations) provide sufficient redress.

The criminalisation of a particular activity implies a clear state interest in controlling it, which Article 19 does not believe to be justified in relation to the protection of an individual’s reputation. The severe sanctions which a criminal conviction may entail, along with the serious social stigma associated with a criminal record, are a totally excessive response to defamation. Furthermore, the experience of the growing list of states which have done away entirely with criminal defamation laws - including countries like Ghana, Ukraine, Sri Lanka, Georgia and Togo, but none of the so-called established democracies - shows that civil defamation laws provide adequate protection to reputation.

It is not just that criminal defamation laws are inherently offensive to freedom of expression. In most countries, these laws are too broad in their application and fail to provide for adequate defences, leaving them open to serious abuse by the powerful to prevent debate about issues of legitimate public concern. In some cases, they are specifically designed to shield the powerful from criticism, for example by discouraging debate about public institutions or prohibiting criticism of senior officials.

The criminal defamation law of the UK is a good example of this problem. Proof of truth is a full defence to a civil defamation claim. The reason for this is fairly obvious: one should not be able to protect a reputation one does not deserve. Absurdly, those charged with criminal defamation must not only prove the truth of their statements, but also that publication was for the public benefit. As Lord Diplock stated in the last criminal defamation case to go before the House of Lords, in 1980: “This is to turn article 10 of the [European Convention on Human Rights] on its head ... article 10 requires that freedom of expression shall be untrammelled [unless interference] is necessary for the protection of the public interest.” (Gleaves v Deakin)

It is now high time that democracies like the UK got rid of their anarchic rules on criminal defamation. These rules breach the right to freedom of expression and they no longer serve any practical purpose, having fallen into almost complete disuse. At the same time, they are often pointed to by repressive regimes as justification for their own, rather more threatening, criminal defamation laws.

Agnes Callamard and Toby Mendel
The International example

International bodies

The law of criminal defamation has been criticised by all the international mandates on freedom of expression. The UN Special Rapporteur on Freedom of Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression, have all called on states to repeal their criminal defamation laws. The European Court of Human Rights has repeatedly stressed that any constraints on freedom of expression that might be necessary in a democratic society, should be proportionate to the threat posed. The penalties for speaking out are clearly disproportionate in these cases.

Sedition and criminal libel in use overseas

In 2008, sedition and criminal defamation generated a quarter of all cases on the International PEN case list.12

- Iran has a particularly poor record in this area, imprisoning at least five journalists every year. Iran also adds to the various forms of defamation legislation the charge of “insulting the founder of the Islamic Republic and its sacred values”.
- In the 56 member OSCE, all but seven countries have laws of criminal defamation. Uzbekistan has the worst record. In 2006, Saidjahon Zaynobiddinov was sentenced to seven years imprisonment for defamation and “anti-government activities”, for providing the international media with eyewitness accounts of the Andijan massacre in 2005.
- As discussed in the previous section, in Sudan and Senegal similar laws are used in more creative ways. Although few people are imprisoned for defamation, both countries use the laws as an excuse to initiate criminal proceedings against writers. This process serves to intimidate and silence journalists, exerting a severe ‘chilling’ effect on the media. Sedition and criminal defamation laws encourage self-censorship and stunt democracy.

The continued presence of the laws of sedition and criminal defamation in the UK merely serves to condone and encourage those states which routinely abuse their citizens’ rights in this way. In our dealings with officials overseas, the existence of sedition and criminal defamation laws in the UK are regularly cited as a reason to retain their own highly restrictive laws. In particular, Turkey (a candidate for EU membership) presents this as a reason to retain its notorious Article 301 law that forbids “denigrating Turkishness”, under which the murdered journalist Hrant Dink and the Nobel Prize winner Orhan Pamuk were prosecuted.
A galvanising influence

Throughout the world, Britain is still seen as a beacon of parliamentary democracy. Laws created here have a profound influence on lawmakers overseas. The abolition of seditious libel and criminal defamation here will have a profound and galvanising influence abroad, first in the Commonwealth Countries and in Europe, and then worldwide. The UK, with a strong tradition of democracy and human rights behind it, should be at the vanguard of change on this issue.

Criticism from the Foreign and Commonwealth Office

In its Annual Report on Human Rights 2008 (launched in March 2009 by the Foreign Secretary David Miliband), the Foreign & Commonwealth Office explicitly highlighted the laws of seditious libel and criminal defamation as being a threat to human rights worldwide, saying:

> On the national level, some countries exploit criminal and civil law to silence or stifle legitimate debate whether through accusations of sedition, libel, defamation, or violations of laws on tax or national security.\(^\text{13}\)

The FCO’s international advocacy of human rights would surely be enhanced by the repeal of similar laws in the United Kingdom. The contradiction between the FCO view and UK law cannot be allowed to stand.

Free Speech is essential for democracy and development

Freedom of expression is important not merely as an irritant to the state – though that function is surely a key aspect of democratic life. Journalists, publishers, bloggers and NGOs are citizens with the capacity to highlight issues of concern, and to propose solutions. When their right to speak freely and frankly is curtailed, either directly by the state, or indirectly by the threat of disproportionate civil action, so is their ability to underwrite the fundamental rights and freedoms of their fellow citizens. Free speech serves to highlight areas where the state is failing in its duty to the people. Without a vigorous culture of free speech, the state becomes a stranger to the views of the people.

For example, the abolition of sedition laws in Ghana in 2001 is said by the International Federation of Journalists to have “breathed new life into Ghanaian democracy” and the country is now cited as one of Africa’s democratic success stories.\(^\text{14}\) It is noteworthy that of the few countries worldwide without sedition laws, almost all are relatively new democracies.
Political and popular support

Cross party amendment

On 23rd March 2009, the amendments to the Coroners & Justice Bill was tabled by Dr Evan Harris MP (Liberal Democrat); Denis MacShane MP (Labour, former FCO Minister); Robert Marshal-Andrews QC (Labour); and Andrew Dismore (Labour).

Ammendments 178 and 179 have been tabled by Lord Lester (Liberal Democrat), Baroness D’Souza (cross-bencher) and Baroness Kennedy (Labour).

Support from the Secretary of State for Justice, Rt Hon Jack Straw MP

*Hansard 31 Mar 2009 : Column 1066W*

**Dr. Evan Harris:** To ask the Secretary of State for Justice what plans he has to abolish the offence of criminal libel; and if he will make a statement. [267172]

**Mr. Straw:** Government accept that there is a case for early abolition of the rarely-used offence of defamatory libel. At present, this is an issue on which we are preparing to consult as part of a consultation paper which will focus primarily on certain issues relating to defamation and the internet. However, there will be an opportunity to debate this issue and whether immediate repeal could be justified during the passage of the Coroners and Justice Bill.

**Dr. Evan Harris:** To ask the Secretary of State for Justice what plans he has to abolish the offences of (a) sedition and (b) seditious libel. [267173]

Mr. Straw: The Government accept that there is a case for abolition of these rarely-used offences. We are considering whether this can sensibly be disentangled from the reform of the law on treason, a project in the Law Commission’s 10(th) programme. There will be an opportunity to debate this issue during the passage of the Coroners and Justice Bill.

Following productive meeting between English PEN/Index on Censorship, and the Secretary of State, a statement of the Government’s position on this issue is expected ahead of the debate.
Support of the human rights and literary community

THE TIMES
Defamation laws must be updated

Antiquated offences of Seditious libel and criminal defamation come from an age where the critics were silenced

Sir, On Monday Parliament will have a unique opportunity to repeal the arcane and antiquated offences of seditious libel and criminal defamation. These two crimes date from an era when governments preferred to lock up their critics than to engage them in debate, and are incompatible with the universal right to freedom of expression. Their repeal is long overdue, and will send a powerful signal to states around the world which routinely use charges of sedition and criminal defamation to imprison their critics and silence dissent.

In The Gambia, Abdul Hamid Adiamoh, editor of the independent Today newspaper, is standing trial for “publishing with seditious intention” a report on poverty in that country. In Turkey, defamation laws were used in an attempt to silence the writer and Nobel prizewinner Orhan Pamuk, while similar lese-majesty laws in Thailand have been used to suppress criticism of the government as well as of the king. There has been no attempt to use criminal defamation in the UK since 1982, a measure of the redundancy of the offence.

We commend the continued efforts of Evan Harris, MP, to haul this country’s laws into the 21st century, and urge MPs of all parties to back his amendments to the Coroners and Justice Bill. The repeal of seditious libel and criminal defamation will protect the rights not only of British citizens, but of people the world over, and opens the way to wider reforms of England’s much abused libel laws.

Sincerely, etc.

Jonathan Dimbleby
Chairman, Index on Censorship
Shami Chakrabarti
Director, Liberty
Lisa Appignanesi
President, English PEN
Agnes Callamard
Director, Article 19
Jo Glanville
Editor, Index on Censorship
Jonathan Heawood
Director, English PEN
John Kampfner
Chief Executive, Index on Censorship
Roger Smith
Director, Justice
Jeremy Dear
General Secretary, NUJ

March 20, 2009

The Observer
Comedian backs MP’s move to end sedition

Vanessa Thorpe, Sunday 22nd March 2009

Actor Rowan Atkinson and leading lawyer Geoffrey Robertson are among prominent names speaking out this weekend to back the efforts of Liberal Democrat MP Evan Harris to rid the legal system of the offence of sedition.

“An opportunity to rid ourselves of censorious legislation should always be grasped with both hands,” said Atkinson.

Harris has put forward an amendment to a bill that could repeal the 17th-century crime of “seditious libel” in a Commons vote tomorrow.

Seditious libel is the act of writing something that “brings into hatred or contempt” the Queen or her heirs, or the government, or the constitution and the justice system, and is punishable by life imprisonment.

It was invoked unsuccessfully in 1991 as a way of attacking Salman Rushdie for his novel The Satanic Verses
commendable as a first steps towards the provisions from the defamation articles. The general reluctance of legislators to address the issue has impeded the decriminalisation of defamation. In older democracies, this seemingly has not affected free journalism, as courts adhere to the case law of the European Court of Human Rights and generally do not produce verdicts contestable in Strasbourg. However, this reluctance seriously hinders decriminalisation efforts in newer democracies. They often refer to the existence of the crime of defamation on the legal books in, for instance, European Union member states, and logically question the need for reform at home.

The world’s media community badly needs success stories from the West to help the rest. Hopefully, there are a few coming.

In Ireland, the minister of justice decided to decriminalise defamation in early 2008; this initiative is still pending in parliament.

The president of France announced in his January 2009 speech at the Court of Cassation in Paris that defamation should be decriminalised. The reform of the criminal defamation provisions has been discussed in France since December 2008 following the shocking arrest of Vittorio De Filippis, a Liberation journalist, who had earlier been convicted for defamation.

Decriminalisation in France and Ireland would serve as an inspiring example to other EU nations and beyond. Had France and Ireland been faster, it might have prompted parliaments in Prague and Ljubljana to liberalise their criminal libel laws.

In February 2009, the Czech Senate approved the new Criminal Code retaining the old defamation provisions, thus having missed a good opportunity to do away with these outdated clauses.

The new Slovenian defamation provisions are even more worrying: the Criminal Code adopted in 2008 not only failed to decriminalise defamation but extended criminal liability to editors, publishers and printing companies. The stifling effect of this toughened legislation has been aggravated by several cases that public figures, including the former prime minister, recently attempted to initiate against journalists.

Why do states criminalise defamation? And why are legislators and the judiciary so reluctant to delete these rudimentary clauses from the books?

Let us think of the legitimacy of entrusting governments with the duty of persecuting citizens for speech offences, and for defamation in particular. Most constitutions protect human honour and dignity as fundamental values of their societies. The most convenient way to do this, apparently, is to declare anyone who damages another’s good name a criminal.

This was the logic of the Romanian Constitutional Court which, in 2007, abolished the much awaited decriminalisation of defamation approved by parliament a few months before. The Court ruled that it was unconstitutional to delete the defamation articles from the Romanian Criminal Code because it acts that harm the human personality, dignity, honour and reputation ‘are not discouraged by the penal law, they would lead to permanent conflicts, capable of turning impossible the social coexistence, that implies respect to all members of the community and the just appreciation of everybody’s reputation’.

Is it really critical for our societies to have people serving jail terms for their words, written or spoken? This obviously does not make people better, purer, and more respectful of each other, but rather generates fear of talking about facts and expressing opinions which others may find offensive. Therefore, the state should not interfere in a verbal dispute between two individuals by offering them a procedure, which makes it possible to brand the author of an offensive remark as a criminal. Civil courts exist expressly for that purpose. They are generally friendlier to freedom of speech, provided reasonable ceilings are applied in calculating the amounts of financial compensation.

Numerous national and intergovernmental institutions campaign against criminal libel and insult provisions, based on the ever growing consensus against these laws.

The Representative on Freedom of the Media of the OSCE, Miklos Haraszt, is an outspoken critic of repressive defamation laws. Based on the set of strong OSCE commitments to pluralism and media freedom, the Representative has consistently asked the states to abolish all criminal libel and insult provisions altogether and transfer handling of these offences into the civil law domain.

In 2005, Haraszt’s office studied all
criminal and civil defamation provisions and court practice in the participating states of the OSCE. As a result, a database was put together which has been a useful reference tool for officials, journalists and academics who promote reform of defamation laws in their countries (http://www.osce.org/item/4361.html).

Along with the OSCE commitments, which set a general requirement for pluralism in a democratic society, the Council of Europe (CoE) has contributed to formulating the minimum legal standards in the field of criminal defamation law and practice. The case law of the European Court of Human Rights has produced a plethora of judgements in defamation cases which offer weighty arguments in favour of the decriminalisation.

Although the Strasbourg Court has never ruled that criminal defamation laws have to be abolished, it may be derived from its judgements that in no case involving public interest or initiated by a public official would instituting criminal charges against a journalist be compatible with modern freedom of expression principles enshrined in Article 10 of the European Convention of Human Rights.

In the 1992 case of Castells v. Spain, the Court ruled that ‘[T]he 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.’

The Court ruled out imprisonment for offences resulting from journalists’ work in the case of Cumpănă and Mazăre v. Romania in 2004: ‘Although sentencing is in principle a matter for the national courts, the Court considers that the imposition of a prison sentence for a press offence will be compatible with journalists’ freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence.’

This standard is hard to underestimate: decriminalisation advocates in the CoE member states should quote it when they protest against each case of an imprisoned media worker. Why would an independent court in a twenty-first-century democratic nation pronounce a sentence that is very unlikely to withstand the scrutiny in Strasbourg?

Even more significant is the Court’s standard on cases involving public officials and public interest stories. Several rulings defended the right of the society to scrutinise public officials, who have consciously chosen the limelight: ‘The limits of acceptable criticism are accordingly wider with regard to a politician acting in his public capacity than in relation to a private individual. The former 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’ (Oberschlick v. Austria, judgement of 25 April 1991).

In recent years, several high officials of the Council of Europe have joined the OSCE Representative in calling on member states to repeal criminal defamation laws. Terry Davis, the Secretary General of the Council of Europe, appealed on 3 May 2006 to the member states to decriminalise defamation, calling it ‘a particularly insidious form of intimidation’ of journalists. The same appeal was heard from Thomas Hammarberg, the CoE Commissioner for Human Rights.

Decriminalisation of defamation is not an end in itself, but it should be a means to an end: uninhibited public debate in the media on any controversial issues.

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Endnotes


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