

FREEDOM OF EXPRESSION AND DEFAMATION

A study of the case law
of the European Court
of Human Rights

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Executive summary

This study examines the voluminous case law of the European Court of Human Rights (“The Court”) relating to freedom of expression and defamation. It starts by clarifying the concept of defamation and positioning it in relation to freedom of expression and public debate. It explains how defamation laws that are overly protective of reputational interests and that provide for far-reaching remedies or sanctions can have a chilling effect on freedom of expression and public debate. The principle of proportionality in respect of defamation laws and their application is therefore very important when it comes to preventing such a chilling effect.

The importance of public debate for a democratic society, and the need to foster it, are constant values or aims of the Court’s case law concerning Article 10 (Freedom of expression) of the European Convention on Human Rights (“the Convention”). As a result, the Court takes a dim view of any interference with the right to freedom of expression that can have a chilling effect on the exercise of this right or on public debate. Given the important roles played by journalists, the media and others who contribute to public debate – either as public or social watchdogs or as purveyors of information and ideas, the Court is particularly wary of interferences with their right to freedom of expression.

This has led to the identification of various principles that facilitate journalists and the media (in particular) but also non-governmental organisations (NGOs), individuals and online intermediaries when they fulfil the democratic roles ascribed to them. Such principles include editorial freedom and possible recourse to exaggeration and provocation. This does not, however, give them carte blanche to act as they will – their right to freedom of expression is governed by duties and responsibilities that are both general in nature and tailored to the specific characteristics and exigencies of their roles. This study explores how the Court has developed these principles, which are functionally relevant for the media and others who contribute to public debate, as well as the duties and responsibilities that shape the same principles. The constant interplay between freedom of expression and protection of reputation has resulted in a range of emphases and caveats, like the distinction between facts and value judgments (which is very important in defamation proceedings, as the truth of the latter is not susceptible of proof) and efforts made to verify information prior to publication. Whether the person targeted by the allegedly defamatory statement is a public figure is also a crucial consideration due to the importance of open discussion on matters of public interest.

Besides examining the granular details of the Court’s case law on defamation, the study also traces broader patterns in how the Court has applied these principles in practice. In doing so, it explores a range of substantive and procedural issues that have been considered by the Court in its relevant case law. The substantive issues include the scope of defamation (law), its application to different subjects, the responsibility and liability of different actors, and defences to defamation. The procedural issues include procedural safeguards, civil measures and remedies, and criminal sanctions.

Although a chilling effect can arise from any kind of interference with the right to freedom of expression, the Court has consistently held that prior restraint and criminal sanctions clearly have a chilling effect on freedom of expression and public debate, and should be used with great restraint, if at all. An examination of the necessity and proportionality of an interference – in light of the impugned expression’s contribution to public debate – is therefore essential. The following elements are taken into account and governed by free speech and proportionality principles: “the position of the applicant, the position of the person against whom his criticism was directed, the subject matter of the publication, characterisation of the contested statement by the domestic courts, the wording used by the applicant, and the penalty imposed on him”.¹

The Court has consistently held that the nature and severity of sanctions are of particular importance when assessing the proportionality of an interference with the right to freedom of expression. It takes the view that criminal convictions inherently have a chilling effect on freedom of expression and very often finds – depending on the circumstances of the case – that even “moderate” fines or suspended prison sentences are disproportionate interferences and therefore contribute to or amount to violations of the right to freedom of expression.

1. *Krasulya v. Russia*, § 35

Introduction

BACKGROUND

The present study is a continuation of previous work on the relationship between the right to freedom of expression and defamation by the Media and Internet Division of the Council of Europe.

In 2012, the secretariat of the Steering Committee on Media and Information Society (CDMSI) prepared a “Study on the alignment of laws and practices concerning defamation with the relevant case-law of the European Court of Human Rights on freedom of expression, particularly with regard to the principle of proportionality”.² The study was itself an update and revision of the working document prepared by the CDMSI’s forerunner, the Steering Committee on the Media and New Communication Services (CDMC), published on 15 March 2006.³

The 2012 study investigates, among other things, the case law of the European Court of Human Rights (“the Court”) on freedom of expression in the context of defamation cases, and it reviews Council of Europe and other international standards on defamation. It contains information on the legal provisions on defamation in various Council of Europe member states. It also attempts to identify trends in the development of rules on defamation, both in national legal systems and in international law.

STRUCTURE AND SCOPE

The present study examines the voluminous case law of the Court relating to freedom of expression and defamation, but not the other focuses of the 2012 study. This shift of emphasis has facilitated an examination of the Court’s case law that is much more detailed than that of the 2012 study. As such, a different structure has been chosen, in order to organise the expanded material in an appropriate manner. It remains in line with the 2012 study, though, not least by retaining the principle of proportionality as one of its central focuses. It also draws on the original text of the 2012 study in places, as appropriate.

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2. CDMSI(2012)Misc11Rev2, available at www.coe.int/en/web/media-freedom/resources, accessed 6 May 2016.
 3. The document in question is the final version of CDMC(2005)007 by the former Steering Committee on the Media and New Communication Services (CDMC).

The study starts by clarifying the concept of defamation and positioning it in relation to freedom of expression and public debate. It explains how defamation laws that are overly protective of reputational interests and that provide for far-reaching remedies or sanctions can have a chilling effect on freedom of expression and public debate. The principle of proportionality in respect of defamation laws and their application is therefore very important when it comes to preventing such a chilling effect.

The study then identifies the key principles governing that relationship and traces patterns in how the Court has applied those principles in its case law dealing with defamation. In doing so, it explores a range of substantive and procedural issues that have been considered by the Court in its relevant case law. The substantive issues include the scope of defamation (law), its application to different subjects, the responsibility and liability of different actors, and defences to defamation. The procedural issues include procedural safeguards, civil measures and remedies, and criminal sanctions.

As the Court's expansive jurisprudence on freedom of expression and defamation continues to grow, in both volume and complexity,⁴ the main aim of this study is to provide a detailed, yet accessible, analysis of this body of jurisprudence.

4. An overview of the Court's case law dealing with the protection of reputation can be found in: European Court of Human Rights Press Unit, "Fact sheet – Protection of reputation", January 2016, available at www.echr.coe.int/Documents/FS_Reputation_ENG.pdf, accessed 6 May 2016.