

# FREEDOM FROM FEAR

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*Imprisoning journalists does not make society a better place, says Ilia Dohel. The repeal of criminal defamation is long overdue*

Over the last decade, criminal defamation laws – meant to protect honour and dignity from untrue or other kinds of libellous statements – have remained the most ‘popular’ means of legal pressure on the independent media, especially in the newer democratic states. No matter whether dormant or vigorously applied against the media, any criminal libel and insult law protects the powerful from criticism. Even in those states where criminal defamation laws have not been used for many years, there is always a chance that a radical politician or a cranky public personality will resort to it to discipline a journalist.

In the 56-country region of the Organisation for Security and Cooperation in Europe (OSCE), which includes all European States, the CIS, Canada and the United States, only seven countries do not criminalise defamation. The United States, where free speech is protected by the First Amendment, has never had a federal criminal libel law. Bosnia and Herzegovina, Cyprus, Estonia, Georgia, Moldova, and Ukraine, have all decriminalised defamation within the last decade.

It is remarkable that younger democracies are taking the lead in liberalising their defamation laws. None of them has reported an increase in defamatory statements in the media following decriminalisation.

Imprisonment is a sanction for defamation in most states that maintain criminal defamation regimes. The enormous ‘chilling effect’ on media freedom of seeing fellow journalists behind bars is evident. Some states have chosen to repeal imprisonment provisions from the defamation articles of their criminal codes. Such moves are commendable as a first step towards the complete decriminalisation of libel and insult.

After their transition to democracy, Bulgaria, Croatia, the Former Yugoslav Republic of Macedonia, Montenegro, Romania and Serbia decided not to sanction libel with imprisonment, but with a fine or corrective labour. Still, a conviction for defamation is detrimental for journalists’ reputations as it carries a shameful social stigma and may jeopardise their future career.

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 if 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 inter-governmental 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 Haraszti, 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, Haraszti'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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