LIMITING THE USE OF CRIMINAL LAW TO RESTRICT FREEDOM OF EXPRESSION

A GUIDE TO COUNCIL OF EUROPE STANDARDS

Division for Cooperation
on Freedom of Expression

September 2025

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

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The role and responsibility of the Council of Europe in protecting freedom of expression has been underlined in the "Reykjavík Principles for Democracy", the Reykjavík Declaration – United around our values.

Funded through the voluntary contribution of the Swedish International Development Cooperation Agency (Sida), the Project "Enhancing Institutional Capacities on Freedom of Expression and Information in Bosnia and Herzegovina" (EFEx) aims to enhance the protection of FoE and FoI in BiH by making a contribution towards human-rights based legal framework and practices, through enhancing the capacities of key duty bearers (the Ministry of Human Rights and Refugees - MHRR - and other institutions with responsibilities in this area) and right-holders representatives (media actors and CSOs), to integrate a human rights-based approach in their work.

The action builds on past and current Council of Europe (CoE) activities in the area of Freedom of Access to Information/ Media and Freedom of Expression in BiH, including a pilot project funded by SIDA and implemented in 2019/2020.

The objective of this project will be achieved through three inter-connected components focusing on: freedom of expression; freedom of access to information, and capacity building of MHRR.

Prepared within the Project Enhancing Institutional Capacities on Freedom of Expression and Information in Bosnia and Herzegovina (EFEx) by Peter Noorlander, Council of Europe Consultant.
The Steering Committee on Media and Information Society (CDMSI) took note of the study at its 27th Plenary Session in June 2025.

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Contents

INTRODUCTION

There can be no democracy without freedom of expression and without free and pluralist media. Freedom of expression[1] is one of the essential foundations of democracy. The media protection is necessary due to the "watchdog" role that they play in democratic society, holding those in positions of power accountable, contributing to public debate on matters of general interest, and realising the public's right to receive information from a variety of sources and reflecting a diverse range of opinions. The right to freedom of expression protects political speech, discussion on matters of public importance, artistic expression, information of a commercial nature, and entertainment such as music. It covers "speech", whether spoken, in writing, online, or in broadcast, as well as other expressive acts, such as performances, protest, art, erecting public sculptures as a form of protest, even the wearing of particular clothes.[2] Importantly, its protection extends to information, ideas, and opinions that many people may disagree with or even find offensive. The European Court of Human Rights (the Court) has emphasised:

> "Freedom of expression … 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'".[3]

The media play an important role in democratic society, exercising their right to freedom of expression in order to fulfil the public's right to receive information and ideas on matters of general interest.

Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion regarding 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 which prevails throughout the European Convention of Human Rights.[4]

Despite its fundamental importance, freedom of expression is not an absolute right: when necessary in a democratic society, it may be subject to restrictions or penalties prescribed by law. Restrictions may be

1. European Convention on Human Rights, Article 10(1): 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.
2. For a discussion on the applicability of Article 10 along with examples, see European Court of Human Rights, (2022), *Guide on Article 10 of the European Convention on Human Rights*, p. 12.
3. *Handyside v. the United Kingdom*, Application No. 5493/72, judgment of 7 December 1976, paragraph 49.
4. *Lingens v. Austria*, Application No. 9815/82, judgment of 8 July 1986, paragraph 42.

imposed only for the protection of the legitimate aims listed in paragraph 2 of Article 10:

- to protect 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.

Restrictions or penalties may be prescribed under civil law, administrative law, or criminal law. Due to the harsh nature of criminal law, which may result in imprisonment or other severe sanctions, States are required to resort to criminal law sparingly. The requirement of 'necessity' means that restrictions may be imposed only when there is a pressing social need to do so, for which relevant and sufficient reasons are given.[5]

This guide provides an overview of the human rights standards applicable to the imposition of criminal sanctions on the exercise of the right to freedom of expression. It is aimed at legislators, civil society, civil servants, media, and other policymaker stakeholders, providing a user-friendly and accessible overview of standards developed through the judgments of the European Court of Human Rights as well as the policy guidance issued by the Council of Europe bodies such as the Committee of Ministers, the Parliamentary Assembly, and the European Commission for Democracy through Law (known as the "Venice Commission").[6]

This guide first sets out the main risks associated with the use of criminal law to sanction particular forms of expression and the overarching principles as developed by Council of Europe bodies to mitigate against those risks. It then focuses on five areas of law in particular:

- the use of criminal law against hate speech;
- the use of criminal law to protect reputation, through defamation and insult laws;
- the use of criminal law to restrict the publication of confidential information;
- the use of criminal law to combat terrorist propaganda; and
- the criminalisation of "disinformation" (often mentionned as "fake news").[7]

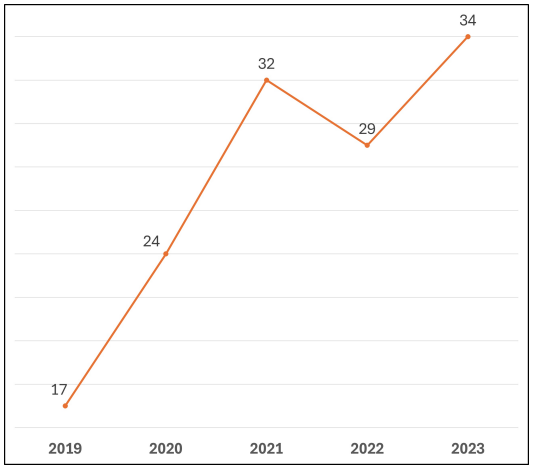
Finally, this Guide will set out the role of the Council of Europe in supporting domestic institutions and civil society organisations in promoting the right to freedom of expression in line with the European standards.

5. This is a central tenet of the European Court of Human Rights case law under Article 10. ECtHR, (2022), *Guide on Article 10 of the European Convention on Human Rights*, p. 23.
6. Occasional reference is also made to standards developed by other intergovernmental human rights bodies, under the United Nations human rights system.
7. This Guide is not intended to cover all possible areas of criminalisation of expression, which would include copyright violations, the regulation of pornography including combating child pornography, so-called "cybercrimes" such as the use of ransomware, the theft of personal data, online harassment, and cyber-bullying, to name but a few topics. However, the "general principles" set out in this Guide apply to those topics, too.

I
THE DANGERS OF USING CRIMINAL SANCTIONS TO RESTRICT FREEDOM OF EXPRESSION

Democratic society requires that certain forms of behaviour are criminalised. This includes violent offences such as murder, battery, and assault, as well as offences such as theft and fraud. It also includes behaviour that involves the exercise of the right to freedom of expression. For example, serious hate speech and incitement to violence should be criminalised. The use of the criminal law to restrict such extremely harmful forms of speech is uncontroversial in the European human rights system. Article 17 of the European Convention on Human Rights (the Convention) excludes any use of the right to freedom of expression that could destruct the rights protected under the Article 10.[8]

However, the use of the criminal law to restrict other, less societally harmful forms of speech implies risks for the protection of human rights. In particular, it entails silencing unpopular, controversial, critical, or dissenting voices in society. That would go against the fundamental value of pluralism that is inherent in the right to freedom of expression, and against the tenets of democratic society. In this regard, it is concerning that, according to data gathered by the Council of Europe platform on safety of journalists,[9] instances of detention and imprisonment of journalists have risen sharply since 2019.



1.1 RISKS AND DIRECT IMPACT ON INDIVIDUALS AND "PUBLIC WATCHDOGS"

Through its case law, the European Court of Human Rights has identified numerous risks caused by the disproportionate use of criminal law that restricted freedom of expression, not only for the individuals involved in these cases but also for the society. For individuals, the obvious risk concerns the sanction imposed. The deprivation of liberty, through detention and imprisonment, and the imposition of heavy fines are a clear burden to the individual who receives such a sentence. Because of the role of media, NGOs,

8. Article 17 of the Convention (Prohibition of abuse of rights) states: "Nothing in [the] Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein…"
9. Platform to promote the protection of journalism and safety of journalists: *https://fom.coe.int/en/accueil*.

and human rights defenders in democratic society, as they hold those in power to account, the Court has particularly highlighted the impact of sanctions on so-called "public watchdogs".[10]

Investigative journalists are liable to be inhibited from reporting on matters of general public interest (...) if they run the risk, as one of the standard sanctions imposable for unjustified attacks on the reputation of private individuals, of being sentenced to imprisonment or to a prohibition on the exercise of their profession. The chilling effect that the fear of such sanctions has on the exercise of journalistic freedom of expression is evident.[11]

The Court has held that even light financial sanctions, as little as €1, or the imposition of suspended sentences, can have a serious impact on the exercise of the right to freedom of expression. In the case of suspended sentences, this is because the sentence hangs over an individual's head like the Sword of Damocles: a journalist who has received a suspended sentence will steer clear of reporting on controversial issues for fear of falling foul of the law. The Court has remarked, in relation to such cases, that a "conditional suspended sentence had the effect of restricting the applicant's work as an editor and reducing her ability to offer the public views which have their place in a public debate whose existence cannot be denied".[12] Thus, a suspended sentence "by its very nature, will inevitably have a chilling effect".[13]

In *Brasilier v. France*, the Court emphasised the negative impact of even a "symbolic" fine:

> Although the sentence for the "symbolic franc" is as moderate as possible, the Court considers that this cannot be sufficient, in itself, to justify the interference with the applicant's right of expression.[14]

The Court was particularly mindful that such "an attack on freedom of expression may risk having a dissuasive effect on the exercise of the same right."[15]

In several cases involving the media, the Court has emphasised that the very criminal nature of a sanction is such that even a minor penalty is to be regarded as a serious matter.[16] The Court has also pointed out "the lasting, stigmatising and discouraging repercussions that any entry in the criminal record could have on the way of working of media professionals, particularly journalists."[17] This has been echoed by others. For example, the High Level Panel of Experts on Media Freedom has warned that a criminal record may result in the imposition of visa restrictions, potentially making it impossible to travel to certain countries.[18]

The availability of a presidential pardon, or the possibility that imprisonment may be converted to a fine, does not expunge the criminal conviction.[19] In *Artun and Güvener v. Turkey*, the Court pointed out, in relation to a sentence of imprisonment that had been converted to a fine, that "[a]lthough such acts of clemency certainly aim to alleviate the applicants' situation, they do not erase their conviction".[20]

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10. As highlighted in cases such as *The Sunday Times v. the United Kingdom (no. 2)*, Application No. 13166/87, judgment of 26 November 1991, paragraph 50 ; *Animal Defenders International v. the United Kingdom [GC]*, Application No. 48876/08, judgment of 22 April 2013, paragraph 103 ; *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina [GC]*, Application No. 17224/11, judgment of 27 June 2017, paragraph 86 ; *Taner Kılıç v. Turkey (no. 2)*, Application No. 208/18, judgment of 31 Mai 2022, paragraph 147 ; *Magyar Helsinki Bizottság v. Hungary [GC]*, Application No. 18030/11, judgment of 8 November 2016, paragraphs 159 and 166.
11. *Cumpănă and Mazăre v. Romania*, Application No. 33348/96, judgment of 17 December 2004, paragraphs 113-114.
12. *Şener v. Turkey*, Application No. 26680/95, judgment of 18 July 2000, paragraph 46.
13. *Otegi Mondragon v. Spain*, Application No. 2034/07, judgment of 15 March 2011, paragraph 60.
14. *Brasilier v. France*, Application No. 71343/01, judgment of 11 April 2006, paragraph 43.
15. *Ibid*.
16. *Stoll v. Switzerland [GC]*, Application No. 69698/01, judgment of 10 December 2007, paragraph 154; Haldimann and Others v. Switzerland, Application No. 21830/09, judgment of 24 February 2015, paragraph 67.
17. *Artun and Güvener v. Turkey*, Application No. 75510/01, judgment of 26 June 2007, paragraph 33.
18. High Level Panel of Experts on Media Freedom, (2020), *Report on Providing Safe Refuge to Journalists at Risk*, paragraph 12.
19. *Cumpănă and Mazăre v. Romania [GC]*, Application No. 33348/96, judgment of 17 December 2004, paragraph 116.
20. *Artun and Güvener v. Turkey*, Application No. 75510/01, judgment of 26 June 2007, paragraph 33.

Even the mere threat of prosecution and criminal sanction has a negative impact on the exercise of the right to freedom of expression.

The Court further notes the chilling effect that the fear of sanction has on the exercise of freedom of expression, even in the event of an eventual acquittal, considering the likelihood of such fear discouraging one from making similar statements in the future.[21]

In the case of *Altuğ Taner Akçam v. Turkey*, the Court highlighted the negative impact on freedom of expression of the institution of a criminal investigation, and of the real risk of being investigated for the crime of "denigrating Turkishness" on the basis of broadly drafted legislation whose interpretation by the national courts was unclear.

The European Court of Human Rights has recognised the impact of criminal sanctions on members of professions for whom the exercise of free speech is crucial, including not just members of the media or other public watchdogs but also lawyers. In the case of *Nikula v. Finland*, the Court held that the defamation conviction of a lawyer for strident criticism of a public prosecutor in criminal proceedings had a chilling effect on the duty of lawyers to defend their clients' interests.[22]

1.2 THE "CHILLING EFFECT" ON SOCIETY AT LARGE

In one of the first freedom of expression cases before it, the Court recognised that criminal sanctions have a negative impact not only on individual journalists, but on the entire journalistic community and even on society at large. In the case of *Lingens v. Austria*, the Court held:

> The penalty imposed on the author … amounted to a kind of censure, which would be likely to discourage him from making criticisms of that kind again in future … In the context of political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog.[23]

In *Heinisch v. Germany*, the Court similarly ruled that the imposition of a heavy criminal sanction on a whistleblower in a nursing home would "not only [have] negative repercussions on the applicant's career but it could also have a serious chilling effect on other employees [across] the nursing service sector. This chilling effect works to the detriment of society as a whole."[24]

The more serious the sanction, the greater the chilling effect and the impact it has on society as a whole. In *Şahin Alpay v. Turkey*, the Court noted:

> [P]re-trial detention of anyone expressing critical views produces a range of adverse effects, both for the detainees themselves and for society as a whole, since the imposition of a measure entailing deprivation of liberty, as in the present case, will inevitably have a chilling effect on freedom of expression by intimidating civil society and silencing dissenting voices.[25]

The Court emphasised that this is the case "even when the detainee is subsequently acquitted".[26] The Venice Commission has warned, when advising on a law that criminalised insulting the President, that

21. *Altuğ Taner Akçam v. Turkey*, Application No. 27520/07, judgment of 25 October 2011, paragraph 68.
22. *Nikula v. Finland*, Application No. 28274/08, judgment of 21 July 2011, paragraph 54. In *Pais Pires de Lima v. Portugal*, Application No. 70465/12, 12 February 2019, paragraph 67, the Court noted that such sanctions could have a detrimental effect on the entire profession.
23. *Lingens v. Austria*, Application No. 9815/82, judgment of 8 July 1986, paragraph 44.
24. *Nikula v. Finland*, Application No. 28274/08, judgment of 21 July 2011, paragraph 91.
25. *Şahin Alpay v. Turkey*, Application No. 16538/17, judgment of 20 March 2018, paragraph 182.
26. *Ibid*.

"prison sentences … are very likely to create a chilling effect on society as a whole and cannot be considered proportionate to the legitimate aim pursued."[27]

The Committee of Ministers has called on States to have due regard to the "chilling effect" of criminal law sanctions:

> [C]riminal sanctions have a greater chilling effect than (...) civil sanctions. Thus, the dominant position of State institutions requires the authorities to show restraint in resorting to criminal proceedings. A chilling effect on freedom of expression can arise not only from any sanction, disproportionate or not, but also the fear of sanction, even in the event of an eventual acquittal, considering the likelihood of such fear discouraging one from making similar statements in the future.[28]

KEY TAKEAWAYS:

- Democratic society requires that certain forms of behaviour are criminalised. However, the use of the criminal law to restrict speech, and in particular, less societally harmful forms of speech, implies risks for the protection of human rights. In particular, it entails silencing unpopular, controversial, critical, or dissenting voices in society. That would go against the fundamental value of pluralism that is inherent in the right to freedom of expression, and against the tenets of democratic society.
- Through its case law, the European Court of Human Rights has identified numerous risks caused by the disproportionate use of criminal law to restrict freedom of expression, for the individuals involved in these cases but also to society at large.
- Because of the role of media, NGOs, and human rights defenders in democratic society, as they hold those in power to account, the Court has particularly highlighted the impact of sanctions on so-called "public watchdogs".
- The Court has held that even light financial sanctions, as little as €1, or the imposition of suspended sentences, can have a serious impact on the exercise of the right to freedom of expression.

27. Venice Commission, *Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey*, adopted 11-12 March 2016, paragraph 68.
28. *Recommendation CM/Rec(2016)4 on the protection of journalism and safety of journalists and other media actors*, adopted 13 April 2016, paragraph 34.

II
GENERAL COUNCIL OF EUROPE STANDARDS ON THE USE OF CRIMINAL LAW TO SANCTION THE FREEDOM OF EXPRESSION

Any restrictions that are placed on freedom of expression, whether through criminal, civil, administrative law or otherwise, must meet the so-called "three-part test":

(1) restrictions must be "prescribed by law";

(2) restrictions must pursue a legitimate aim;

(3) restrictions must be "necessary in a democratic society" in pursuit of that legitimate aim.

This test is to be applied strictly with regard to any restrictions:

> Freedom of expression, as enshrined in Article 10, is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established.[29]

In order to be effective, this test must be applied at every stage: by lawmakers when legislation is proposed or debated in parliament; by public officials such as police officers or media regulators when they apply a regulatory restriction in practice, and by courts when they are called upon to decide a case that involves restrictions placed on the right to freedom of expression.[30]

To mitigate against the risks associated with the use of criminal sanctions against the exercise of the right to freedom of expression, the Court has elaborated the following requirements, rooted in the general "three-part test" referred to above (but not to be confused with it):

1. States should exercise restraint in the use of criminal law;
2. any criminal laws that restrict freedom of expression should be drafted in clear and unambiguous language;
3. the use of criminal laws should not disproportionately restrict the exercise of the right to freedom of expression

Failure to abide by any of these requirements means that the law in question, or its use in a particular case, violates the right to freedom of expression as protected under Article 10 of the Convention.

29. *Observer and Guardian v. the United Kingdom*, Application No. 13585/88, judgment 26 November 1991, paragraph 59.
30. As a matter of public international law, the obligations imposed on States by the European Convention on Human Rights apply to all State bodies. For example, as will be elaborated below, the European Court of Human Rights has been critical of legislation that allows for restrictions to be imposed on freedom of expression when this has not been drafted in clear and unambiguous language.

2.1 RESTRAINT

The European Court of Human Rights has frequently reiterated the following statement:

> [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.[31]

This statement was first made in the case of *Castells v. Spain*, which concerned the institution of criminal defamation proceedings and a subsequent prison sentence for a member of the Spanish Senate who had criticised government policy. It is rooted in the "necessity" limb of the three-part test and has since been repeated in dozens of other cases.

The Court has also emphasised that criminal measures should only be resorted to where States act "in their capacity as guarantors of public order".[32] Similarly rooted in the "necessity" limb, this goes back to one of the main theoretical underpinnings of the use of criminal law in society: it should be used only to protect public order and to safeguard society against particularly harmful conduct and forms of behaviour. When reasonable and less restrictive alternatives are available under civil or administrative law, the State should prioritise using these measures.[33]

> [G]iven the chilling effect that legislation criminalising particular types of expression has on freedom of expression and public debate, States should exercise restraint in applying such legislation, where it exists. States should be guided in this regard by the European Court of Human Rights finding that the imposition of a prison sentence for a press offence is only permissible in exceptional circumstances, notably where other fundamental rights have been seriously impaired, for example, in the case of hate speech or incitement to violence.[34]

2.2 CLEAR AND UNAMBIGUOUS LANGUAGE

The "prescribed by law" limb of the three-part test requires that restrictions on the right to freedom of expression must be drafted in clear and unambiguous language.

> A norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[35]

The Court has recognised that it is impossible to formulate the law with pin-sharp precision and absolute certainty, and that to a certain degree, laws will be worded in general language.[36] The Court has also recognised that laws can sometimes be difficult to interpret, and that it may be necessary to take legal advice to assess the consequences of a given action. This is particularly so for members of the media who can be expected, because of their professional background, to proceed with a degree of caution.[37]

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31. *Castells v. Spain*, Application No. 11798/85, judgment of 23 April 1992, paragraph 46.
32. *Ibid*.
33. *Amorim Giestas and Jesus Costa Bordalo v. Portugal*, Application No. 37840/10, judgment of 3 April 2014, paragraph 36; *Cumpănă and Mazăre v. Romania*, Application No. 33348/96, judgment of 17 December 2004, paragraphs 113-115.
34. *Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors*, adopted on 13 April 2016.
35. *Sunday Times v. the United Kingdom*, Application No. 6538/74, judgment of 26 April 1979, paragraph 49.
36. *Ibid*.; *Perinçek v. Switzerland [GC]*, Application No. 27510/08, judgment of 15 October 2015, paragraph 131; *Lindon, Otchakovsky-Laurens and July v. France [GC]*, Application nos. 21279/02, 36448/02, judgment of 22 October 2007, paragraph 41.
37. *Chauvy and Others v. France*, Application No. 64915/01, judgment of 29 June 2004, paragraphs 43-45.

But because of the severe consequences that can flow from the use of criminal law, the Court has however urged States that the scope of any criminal offences must be very clearly and precisely defined. For example, in the case of *Savva Terentyev v. Russia*, the Court held that this is a requirement in order to avoid a broad and potentially politically influenced use of prosecutorial discretion, which would result in selective and potentially discriminatory enforcement of the criminal law.[38] The case of *Karastelev and others v. Russia* provides another example of disproportionately broad prosecutorial discretion: the Court held that the prosecutors' wide power to issue warnings, cautions, and orders under anti-extremism law failed the Article 10 requirement of foreseeability.[39]

In *Semir Güzel v. Turkey*, the Court held that legislation that created a blanket prohibition on the use by political parties of any language other than Turkish and which included a requirement not to "remain indifferent to such actions and acts when committed by others" failed the requirement of foreseeability: "the Court finds [the law] to be far from precise as to what type of inaction could form a basis for criminal prosecution and to whom it would apply".[40]

In a case concerning a judicial officer who had been relocated through disciplinary sanction, the Court has warned that certain terms may be open to different interpretations and could potentially fall foul of the requirement of foreseeability: "terms … such as 'dignity' and 'honour of the profession', and 'dignity and personal esteem' are general and allow multiple interpretations."[41]

2.3 PROPORTIONALITY: CRIMINAL LAW TO BE USED APPROPRIATELY AND WITHOUT EXCESS

The third requirement posed by the European Court of Human Rights in relation to the use of criminal law to sanction expression is rooted in the second and third limbs of the three-part test: criminal law restrictions must be used appropriately and without excess in pursuit of a legitimate aim.[42]

The Court has made it clear that States are allowed to use the criminal law to impose sanctions on freedom of expression. However, when they do so, States must act "appropriately and without excess".[43]

In considering the criterion of "without excess", the Court pays particular attention to the severity of a criminal penalty. It has repeatedly stated that a prison sentence for offences committed through the exercise of freedom of expression (sometimes referred to in short as "press offences", going back to a pre-social media era when print ruled and journalists were the only ones who could reach large audiences) is permissible only in exceptional circumstances.[44]

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38. *Savva Terentyev v. Russia*, Application No. 10692/09, judgment of 28 August 2018, paragraph 85.
39. *Karastelev and others v. Russia*, Application no. 16435/10, judgment of 6 October 2020. See also *Selahattin Demirtaş v. Turkey (no. 2) [GC]*, Application No. 14305/17, judgment of 22 December 2020, paragraph 280.
40. *Semir Güzel v. Turkey*, Application No. 29483/09, judgment of 13 September 2016, paragraphs 35-39.
41. *Eminağaoğlu v. Turkey*, Application No. 76521/12, judgment of 9 March 2021.
42. Legitimate aims for the restriction of freedom of expression under Article 10, paragraph 2, of the Convention:
    - The protection of national security, territorial integrity or public safety
    - The prevention of disorder or crime
    - The protection of health or morals
    - The protection of the reputation or rights of others
    - Preventing the disclosure of information received in confidence
    - Maintaining the authority and impartiality of the judiciary.
43. *Castells v. Spain*, Application No. 11798/85, judgment of 23 April 1992, paragraph 46; see also *Incal v. Turkey*, Application No. 22678/93, judgment of 9 June 1998, paragraph 54.
44. For example, *Cumpănă and Mazăre v. Romania*, Application No. 33348/96, judgment of 17 December 2004; *Ruokanen and Others v. Finland*, Application No. 45130/06, judgment of 6 April 2010, paragraph 50; *Balaskas v. Greece*, Application No. 73087/17, judgment of 5 November 2020, paragraph 51.

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.[45]

In cases where the Court has identified abuse of criminal law sanctions, and in particular imprisonment, it has ordered the immediate release of those concerned. In the case of *Fatullayev v. Azerbaijan*, the Court described a 30-month prison sentence imposed on a journalist as "grossly disproportionate to any legitimate aims invoked" and instructed the State to "secure the applicant's immediate release".[46]

The Committee of Ministers has warned of the disproportionate use of criminal law in its *Recommendation CM/Rec(2016)4 of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors*, stating:

> Actual misuse, abuse or threatened use of different types of legislation to prevent contributions to public debate, including defamation, anti-terrorism, national security, public order, hate speech, blasphemy and memory laws can prove effective as means of intimidating and silencing journalists and other media actors reporting on matters of public interest.[47]

KEY TAKEAWAYS:

- Any restrictions that are placed on freedom of expression, whether through criminal, civil, administrative law or otherwise, must meet the so-called "three-part test":
  (1) restrictions must be "prescribed by law";
  (2) restrictions must pursue a legitimate aim;
  (3) restrictions must be "necessary in a democratic society" in pursuit of that legitimate aim.
- To mitigate against the risks associated with the use of criminal sanctions against the exercise of the right to freedom of expression, the Court has elaborated the following requirements, rooted in the general "three-part test" referred to above (but not to be confused with it):
  (1) States should exercise restraint in the use of criminal law;
  (2) any criminal laws that restrict freedom of expression should be drafted in clear and unambiguous language;
  (3) the use of criminal laws should not disproportionately restrict the exercise of the right to freedom of expression.
- Failure to abide by any of these requirements means that the law in question, or its use in a particular case, violates the right to freedom of expression as protected under Article 10 of the European Convention on Human Rights.

45. *Cumpănă and Mazăre v. Romania*, Application No. 33348/96, judgment of 17 December 2004, paragraph 115.
46. *Fatullayev v. Azerbaijan*, Application No. 40984/07, judgment of 22 April 2010, paragraphs 130 and 177.
47. *Recommendation CM/Rec(2016)4 on the protection of journalism and safety of journalists and other media actors*, adopted 13 April 2016.

III
CRIMINALISATION OF HATE SPEECH

International human rights law requires that severe forms of hate speech should be criminalised. The International Covenant on Civil and Political Rights requires States to prohibit propaganda for war, as well as advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.[48] Similarly, the International Convention on the Elimination of All Forms of Racial Discrimination requires States to criminalise "all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin".[49]

In recent years, the European Court of Human Rights has emphasised the need for States to take action not only against racist, nationalist, ethnic, or other forms of hate speech that have historically been used to undermine the rights of minorities, but also to take action against hate speech that targets sexual minorities or gender-based hate speech. For example, in the case of *Beizaras and Levickas v. Lithuania*, which concerned homophobic online threats, the Court emphasised that States must respond to hate speech based on any discriminatory attitude.[50]

The need to combat gender-based hate speech is emphasised in the Istanbul Convention on preventing and combating violence against women, which states:

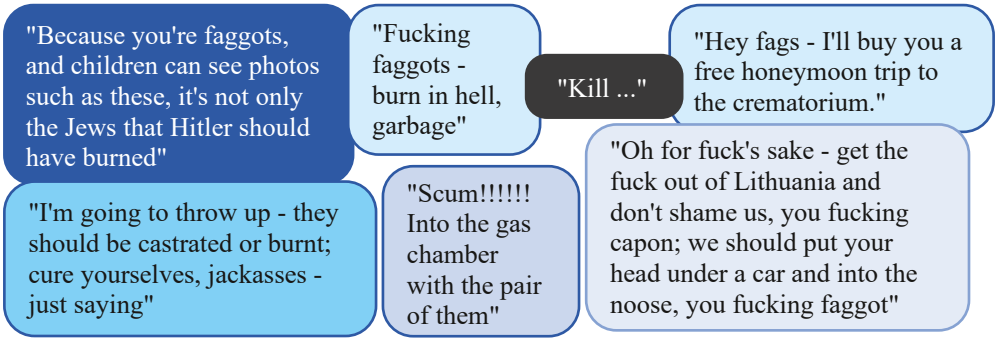
> Parties shall take the necessary legislative or other measures to ensure that any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction.[51]

For all hate speech cases, the Court has emphasised that "where acts that constitute serious offences are directed against a person's physical or mental integrity, only efficient criminal-law mechanisms can ensure adequate protection and serve as a deterrent factor". The Court emphasised that criminal law measures are "required with respect to direct verbal assaults and physical threats motivated by

48. International Covenant on Civil and Political Rights, adopted by General Assembly resolution 2200A (XXI), 16 December 1966, Article 20, and ratified by all Council of Europe member States.
49. International Convention on the Elimination of All Forms of Racial Discrimination, adopted by UN General Assembly resolution 2106 (XX), 21 December 1965, and ratified by all Council of Europe member States.
50. *Beizaras and Levickas v. Lithuania*, Application No. 41288/15, judgment of 14 January 2020.
51. *Council of Europe Convention on preventing and combating violence against women and domestic violence*, 11 May 2011, CETS No. 210, Article 40.

discriminatory attitude" (emphasis added).[52] The need for States to act arises from Articles 8 and 14 of the Convention which, taken together, confer a right to enjoy respect for one's private life without discrimination. In the case of *Oganezova v. Armenia*, the Court found that a sustained and aggressive homophobic campaign against the applicant, which included hate speech, rose to such a level of severity that it constituted inhuman or degrading treatment and triggered Article 3 of the Convention.[53] The Court reiterated that attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population constitute hate speech and must be combated, including through use of the criminal law: "undisguised calls for violence [require] protection by criminal law".[54]

It can be difficult for State authorities to know where to draw the line. In *Beizaras and Levickas v. Lithuania*, the Court held that any one of the following statements, which had been posted as comments on Facebook, should have been "taken seriously" by the authorities:



The Court emphasised that the comments had gone viral and reached a large audience, and that the case concerned "undisguised calls for attacks on the applicants' physical and mental integrity … which require protection by the criminal law".[55]

However, not all forms of hate speech are as serious as this. In fact, it is arguable that in modern European society, there is a deplorably large amount of "low level" hate speech which cumulatively does great harm to the fabric of society, but which, taken individually, does not rise to the level of seriousness that would warrant a criminal sanction.[56] States should resort to criminal law sanctions to combat serious forms of hate speech, but they must use other methods to combat less severe forms of hate speech; importantly, they must also tackle the root causes of hate speech.

Combating hate speech should not be seen as being somehow in contradiction with the promotion of the right to freedom of expression. The UN Special Rapporteur on Freedom of Expression has pointed out that:

> freedom of expression, the rights to equality and life and the obligation of non-discrimination are mutually reinforcing; human rights law permits [S]tates and companies to focus on protecting and promoting the speech of all, especially those whose rights are often at risk, while also addressing the public and private discrimination that undermines the enjoyment of all rights.[57]

It must be noted that context is extremely important. States must act against hate discourse directed against historically oppressed or marginalised communities, but at the same time allowances need to be made when it comes to political speech, particularly when exercised by politicians in heated political

52. *Beizaras and Levickas v. Lithuania*, Application No. 41288/15, judgment of 14 January 2020, paragraphs 106-116.
53. *Oganezova v. Armenia*, Application Nos. 71367/12 and 72961/12, judgment of 17 May 2022.
54. *Ibid.*, paragraph 120.
55. *Beizaras and Levickas v. Lithuania*, Application No. 41288/15, judgment of 14 January 2020, paragraph 128.
56. As reported by, amongst others, the UN Special Rapporteur on Freedom of Expression, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression: Hate speech*, Doc. No. A/74/486, 9 October 2019.
57. *Ibid.*, paragraph 4.

debate. Hate speech laws (or, as will be discussed in the next section, defamation laws) should never be used to clamp down on opposition or other voices critical of those who are in positions of power. The Court's judgments in *Beizaras and Levickas v. Lithuania* and *Oganezova v. Armenia* are clear examples of a failure of the authorities to act in protection of marginalised communities. These judgments can be contrasted with the Court's judgments in cases such as *Stomakhin v. Russia*, which concerned the applicant's hate speech conviction for articles he had written on the armed conflict in Chechnya. In this case, the Court criticised the authorities for failing to balance freedom of expression against the need to protect against hate speech and emphasised the need for States to exercise caution in when and how to use hate speech laws.[58] Similarly, in *Tagiyev and Huseynov v. Azerbaijan*, which concerned a religious hate speech conviction in relation to an article comparing Western and Eastern values, the Court criticised the authorities for having failed to balance the applicants' right to impart to the public their views on religion against the right of religious people to respect for their beliefs.[59] In *Fatullayev v. Azerbaijan*, the Court criticised the apparently politically-motivated use of hate speech laws to imprison a well-known critic of the government:

> The mere fact that he discussed the social and economic situation in regions populated by an ethnic minority and voiced an opinion about possible political tension in those regions cannot be regarded as incitement to ethnic hostility. Although the relevant passages may have contained certain categorical and acerbic opinions and a certain degree of exaggeration (...) they contained no hate speech and could not be said to encourage inter-ethnic violence or to disparage any ethnic group in any way.[60]

> [I]t is vitally important that the domestic authorities adopt a cautious approach in determining the scope of "hate speech" crimes and strictly construe the relevant legal provisions in order to avoid excessive interference under the guise of action taken against "hate speech", where such charges are brought for a mere criticism of the Government, State institutions and their policies and practices.[61]

It is also important that the media should enjoy the freedom to report on hatred and intolerance and to choose their reporting techniques, styles and mediums, subject to the proviso that they strive to provide the public with accurate and reliable information.[62] This can include interviews with individuals to expose, analyse and explain discriminatory or hateful attitudes; journalists should not be held liable for reporting such views so long as the journalists or media concerned do not themselves promote hatred.[63] The Court has held:

> "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".[64]

Building on the Court's case-law, the Council of Europe has further developed standards that provide guidance on measures that can be taken to combat hate speech, including the drafting of laws and regulations. In 2022, the Committee of Ministers issued the *Recommendation CM/Rec(2022)16 of the Committee of Ministers to member States on combating hate speech*. This emphasises that, in order to effectively prevent and combat hate speech, "it is crucial to identify and understand its root causes and wider

58. *Stomakhin v. Russia*, Application no. 52273/07, judgment of 9 May 2018.
59. *Tagiyev and Huseynov v. Azerbaijan*, Application No. 13274/08, judgment of 5 December 2019.
60. *Fatullayev v. Azerbaijan*, Application No. 40984/07, judgment of 22 April 2010, paragraph 126.
61. *Stomakhin v. Russia*, Application no. 52273/07, judgment of 9 May 2018, paragraph 117.
62. *Recommendation CM/Rec(2022)16 of the Committee of Ministers to member States on combating hate speech*, adopted 20 May 2022, paragraph 38.
63. *Jersild v. Denmark*, Application No. 15890/89, judgment of 23 September 1994.
64. *Ibid.*, paragraph 35.

societal context, as well as its various expressions and different impacts on those targeted". Any measures taken should be carefully targeted and proportionate to the level of severity of its expression. Serious forms of hate speech require a criminal law response, but other manifestations call for a civil or administrative law response or should be dealt with through education and awareness raising; counter-speech and other countermeasures; measures fostering intercultural dialogue and understanding, including via the media and social media; and relevant educational, information-sharing and awareness-raising activities.

The Committee of Ministers has identified several categories of hate speech as requiring a criminal law response:

(1) public incitement to commit genocide, crimes against humanity or war crimes;

(2) public incitement to hatred, violence or discrimination;

(3) racist, xenophobic, sexist and LGBTI-phobic threats;

(4) racist, xenophobic, sexist and LGBTI-phobic public insults under conditions such as those set out specifically for online insults in the Additional Protocol to the Cybercrime Convention;[65]

(5) public denial, trivialisation and condoning of genocide, crimes against humanity or war crimes; and

(6) intentional dissemination of material that contains such expressions of hate speech (listed in a-e above) including ideas based on racial superiority or hatred.

Beyond these categories, the Committee of Ministers recommends that in determining whether a criminal law response is required States should take into account the following:

- the content of the expression;
- the political and social context at the time of the expression;
- the intent of the speaker;
- the speaker's role and status in society;
- how the expression is disseminated or amplified;
- the capacity of the expression to lead to harmful consequences, including the imminence of such consequences;
- the nature and size of the audience, and the characteristics of the targeted group.[66]

KEY TAKEAWAYS:

- International human rights law requires that severe forms of hate speech should be criminalised (for example, the International Covenant on Civil and Political Rights requires States to prohibit propaganda for war, as well as advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence).
- It must be noted that the context is extremely important. States must act against hate discourse directed against historically oppressed or marginalised communities, but at the same time allowances need to be made when it comes to political speech.
- Building on the Court's case-law, the Council of Europe has further developed standards that provide guidance on measures that can be taken to combat hate speech, including the

65. *Additional Protocol to the Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems*, 28 January 2003, ETS No. 189, Articles 3-6 on the dissemination of racist and xenophobic material; racist and xenophobic motivated threats; racist and xenophobic motivated insults; and the denial, gross minimisation, approval or justification of genocide or crimes against humanity.
66. *Recommendation CM/Rec(2022)16 of the Committee of Ministers to member States on combating hate speech*, adopted on 20 May 2022.

drafting of laws and regulations. In 2022, the Committee of Ministers issued *Recommendation CM/Rec(2022)16 on combating hate speech*. This emphasises that, in order to effectively prevent and combat hate speech, "it is crucial to identify and understand its root causes and wider societal context, as well as its various expressions and different impacts on those targeted".

- Any measures taken should be carefully targeted and proportionate to the level of severity of its expression. Serious forms of hate speech require a criminal law response, but other manifestations call for a civil or administrative law response or should be dealt with through education and awareness raising; counter-speech and other countermeasures; measures fostering intercultural dialogue and understanding, including via the media and social media; and relevant educational, information-sharing and awareness-raising activities.

IV
CRIMINALISATION OF DEFAMATION AND INSULT

The criminalisation of defamation and insult laws is a recurrent theme in international freedom of expression discourse. Defamation laws are often used by those in positions of power who wish to silence their critics.[67] Historically, criminal defamation and insult laws were introduced as an alternative to duelling; and seen in a historical perspective it is certainly preferable for disputes involving alleged attacks on someone's reputation to be settled through the use of criminal law than with swords or pistols. However, in modern society, civil defamation laws provide a less restrictive alternative to the use of criminal defamation laws in all but the most serious of cases. Defamation can also be handled through alternative dispute resolution mechanisms, such as media self-regulatory bodies.

Whilst Article 8 of the Convention imposes a duty on states to take legislative steps to protect against serious attacks on reputation,[68] it requires that the least restrictive measure available is used. The Court has not ruled out the use of criminal defamation law,[69] but in view of the general requirement that States should show restraint in resorting to criminal proceedings,[70] it has recommended that States should resort to other types of measures, such as civil and disciplinary remedies. In particular, "the assessment of the proportionality of an interference with the rights protected thereby will in many cases depend on whether the authorities could have resorted to means other than a criminal penalty, such as civil and disciplinary remedies".[71]

> [T]he conviction of the applicants to criminal fines, accompanied by damages, was manifestly disproportionate, especially since … the … Civil Code provides a specific remedy for the protection of honour and reputation.[72]

67. Most of the freedom of expression cases considered by the European Court of Human Rights concern defamation.
68. E.g. *A. v. Norway*, Application No. 28070/06, judgment of 9 April 2009.
69. It has stated that "[i]n view of the margin of appreciation left to Contracting States by Article 10 of the Convention, a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued." *Radio France and Others v. France*, Application No. 53984/00, judgment of 30 March 2004, paragraph 40 ; *Lindon, Otchakovsky-Laurens and July v. France [GC]*, Application nos. 21279/02, 36448/02, judgment of 22 October 2007, paragraph 59.
70. Referred to above. See also *Morice v. France [GC]*, Application No. 29369/10, judgment of 23 April 2015, paragraph 176 ; *De Carolis and France Télévisions v. France*, Application No. 29313/10, judgment of 21 January 2016, paragraph 44; *Otegi Mondragon v. Spain*, Application No. 2034/07, judgment of 15 March 2011, paragraph 58; *Incal v. Turkey*, Application No. 22678/93, judgment of 9 June 1998, paragraph 54; *Öztürk v. Turkey [GC]*, Application No. 22479/93, judgment of 28 September 1999, paragraph 66.
71. *Raichinov v. Bulgaria*, Application No. 47579/99, judgment of 20 April 2006, paragraph 50. See also *Ceylan v. Turkey [GC]*, Application No. 23556/94,judgment of 8 July 1999, paragraph 34.
72. *Amorim Giestas and Jesus Costa Bordalo v. Portugal*, Application No. 37840/10, judgmen of 3 April 2014, paragraph 36. See also *Veiga Cardoso v. Portugal*, Application No. 48979/19, judgent of 16 January 2024, paragraph 19; *Patrício Monteiro Telo de Abreu v. Portugal*, Application No. 42713/15, judgment of 7 June 2022, paragraph 46.

When the criminal law is used in response to defamation cases, this must never result in imprisonment.[73] In *Cumpana and Mazare v. Romania*, which concerned the seven month prison sentence for defamation of journalists who had written an article accusing public officials of corruption, the Court emphasised that prison is never an appropriate sentence.[74] In cases where the Court has upheld criminal defamation convictions, it has pointed out that the sanctions were modest and proportionate. For example, in *Tammer v. Estonia*, the Court specifically noted "the limited amount of the fine imposed" in upholding the conviction (the fine in question was 10 times the daily minimum wage).[75]

But the Court has equally pointed out that even a minimal fine of €1 is still a fine, and a criminal conviction has serious consequences for the individual concerned. Even the imposition of a suspended sentence can have a serious impact on the exercise of the right to freedom of expression.[76] In the case of *De Carolis and France Télévisions v. France*, which concerned the conviction of a television company for defamation for a report that had implicated a Saudi prince in the terrorist attacks of 11 September 2001, the Court emphasised that despite the minimal fine imposed, the conviction was still a serious matter:

> [E]ven when the sanction is the most moderate possible, such as a conviction accompanied by an exemption from punishment on the criminal level and the requirement to pay only a "symbolic euro" for damages, this nonetheless constitutes a criminal sanction. A lower sanction cannot be sufficient, in itself, to justify the interference with the applicant's right of expression. An attack on freedom of expression may have a dissuasive effect on the exercise of this freedom and this is not diminished by the relatively moderate nature of the fine; what matters is that the applicants were convicted.[77]

The Court has frequently been critical of the disproportionate and excessive use of criminal defamation laws. In *Amorim Giestas and Jesus Costa Bordalo v. Portugal*, which concerned the defamation conviction of a journalist and a newspaper editor for an article in which they had expressed suspicions that the donation of furniture from a local Court to a municipal association had benefited public officials, the Court held that the use of the criminal law had been disproportionate, particularly when the civil code provided an adequate remedy.[78]

The Court has also been very critical at the use of criminal defamation laws to silence independent or political opposition voices in society. In one of its very first defamation judgments, *Lingens v. Austria*, the Court held that a criminal sanction for defamation "is liable to hamper the press in performing its task as purveyor of information and public watchdog".[79] In *Castells v. Spain*, which concerned the defamation conviction of a politician, the Court stated that "the pre-eminent role of the press in a State governed by the rule of law must not be forgotten" and went on to issue its oft-repeated dictum that, "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."[80] The case *Otegi Mondragon v. Spain*, also concerned the defamation conviction of a politician.[81]

The Parliamentary Assembly of the Council of Europe has stated its strong concern about the potential abuse of criminal defamation laws. Building on the jurisprudence of the European Court of Human Rights,

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73. In some countries, hate speech laws criminalise racially motivated insults or defamatory remarks. Insofar as this can be seen as part of defamation law, these would be the only class of defamation law cases where imprisonment may be imposed.
74. *Cumpana and Mazare v. Romania*, Application No. 33348/96, judgment of 17 December 2004, paragraph 115.
75. *Tammer v. Estonia*, Application No. 41205/98, judgment of 6 February 2001, paragraph 69.
76. As discussed in Section 2 of this Guide.
77. Application No. 29313/10, 21 January 2016, para. 63; See also *Morice v. France [GC]*, Application No. 29369/10, judgment of 23 April 2015, paragraph 176.
78. *Amorim Giestas and Jesus Costa Bordalo v. Portugal*, Application No. 37840/10, judgment of 3 April 2014, paragraph 36.
79. *Lingens v. Austria*, Application No. 9815/82, judgment of 8 July 1986, paragraph 44.
80. *Castells v. Spain*, Application No. 11798/85, judgment of 23 April 1992, paragraphs 43 and 46; as also discussed in Section 3 of this Guide.
81. Otegi Mondragon v. Spain, Application No. 2034/07, judgment of 15 March 2011, paragraph 50.

its Resolution 1577(2007) stipulates that States which retain criminal defamation laws on their statute books should replace these laws with suitably drafted civil defamation laws. Pending this process of "decriminalisation", the Parliamentary Assembly has urged that criminal defamation laws must, at a minimum, provide for a defence of truth and a public interest defence.

> The Assembly … urges member States to apply these laws with the utmost restraint since they can seriously infringe freedom of expression. For this reason, the Assembly insists that there be procedural safeguards enabling anyone charged with defamation to substantiate their statements in order to absolve themselves of possible criminal responsibility. In addition, statements or allegations which are made in the public interest, even if they prove to be inaccurate, should not be punishable provided that they were made without knowledge of their inaccuracy, without intention to cause harm, and their truthfulness was checked with proper diligence.[82]

Furthermore, the Parliamentary Assembly has stated that "prison sentences for defamation should be abolished without further delay"; and it has urged those States where prison sentences are still available on paper but not imposed in practice to reform the applicable laws "so as not to give any excuse, however unjustified, to those countries which continue to impose them, thus provoking a corrosion of fundamental freedoms."[83]

The Special Mandates for Freedom of Expression at the United Nations (UN), the Organization for Security and Cooperation in Europe (OSCE), the Organization of American States (OAS) and the African Union (AU), have repeatedly called for the decriminalisation of defamation laws, pointed out their significant chilling effect and their disproportionality for the protection of reputations.[84] In its 2022 Report "The 'misuse' of the judicial system to attack freedom of expression", UNESCO has expressed concern that:

> Libel, defamation and insult provisions and their application have been strengthened, including through their integration in new legislation on cybersecurity, anti-terrorism or aimed at countering disinformation or hate speech, characterised by vague definitions that facilitate their abusive use. This situation has allowed for the suppression of speech against public officials.[85]

The UN Human Rights Council has also urged States to repeal or revise criminal defamation laws.[86]

KEY TAKEAWAYS:

- Defamation laws are often used by those in positions of power who wish to silence their critics.
- The Court has not ruled out the use of criminal defamation law, but in view of the general requirement that States should show restraint in resorting to criminal proceedings, it has recommended that States should resort to other types of measures, such as civil and disciplinary remedies: "the assessment of the proportionality of an interference with the rights protected thereby will in many cases depend on whether the authorities could have

82. Parliamentary Assembly, *Resolution 1577 (2007), Towards decriminalisation of defamation*, adopted on 4 October 2007.
83. Ibid. The Court has referred to Resolution 1577(2007) in several cases, including *Mariapori v. Finland*, Application No. 37751/07, judgment of 6 July 2010, paragraph 69 ; *Niskasaari and Others v. Finland*, Application No. 37520/07, judgment of 6 July 2010, paragraph 77; *Saaristo and Others v. Finland*, Application No. 184/06, judgment of 12 October 2010, paragraph 69; *Długołęcki v. Poland*, Application No. 23806/03, judgment of 24 February 2009, paragraph 47; *Ruokanen and Others v. Finland*, Application No. 45130/06, judgment of 6 April 2010, paragraph 50.
84. For example, in their *2021 Joint Declaration on Politicians and Public Officials and Freedom of Expression*.
85. UNESCO, *The "misuse" of the judicial system to attack freedom of expression*, CI-2022/WTR/4. 2022, p. 11.
86. For example, UN Human Rights Council, *Resolution on the safety of journalists*, A/HRC/RES/51/9 (2022), adopted on 6 October 2022; UN Human Rights Council, *Resolution on the safety of journalists*, A/HRC/RES/45/18 (2020), adopted on 6 October 2020.

resorted to means other than a criminal penalty, such as civil and disciplinary remedies".

- Civil defamation laws provide a less restrictive alternative to the use of criminal defamation laws in all but the most serious of cases. Defamation can also be handled through alternative dispute resolution mechanisms, such as media self-regulatory bodies.
- In addition, the Court has emphasised that, when the criminal law is used in response to defamation cases, this must never result in imprisonment. In *Cumpana and Mazare v. Romania*, which concerned the seven month prison sentence for defamation of journalists who had written an article accusing public officials of corruption, the Court emphasised that prison is never an appropriate sentence.
- The Court has equally pointed out that even a minimal fine of €1 is still a fine, and a criminal conviction has serious consequences for the individual concerned.

V
CRIMINALISATION OF THE DISSEMINATION OF CONFIDENTIAL INFORMATION

"Confidential" information can concern information that is private in nature, information of a commercial nature, information that concerns State secrets, or information concerning investigations and proceedings in judicial investigations and proceedings. Human rights law allows for the criminalisation of the "leaking" or publishing of these types of information, subject to the general requirements of restraint, clarity in law, and proportionality outlined in Section 3 of this Guide.

The Court has considered several cases that have concerned the dissemination of confidential information through the media, either in the form of material "leaked" to journalists or by journalists using subterfuge and undercover methods. In each of these cases, the Court has stated that the public interest nature of the information concerned is of paramount importance. This balance is different, however, depending on whether the information is of a private confidential quality, covered under Article 8, or constitutes a State secret or information of a similar nature. In the case of the latter, the Court has emphasised the public interest nature of the information:

> Press freedom assumes even greater importance in circumstances in which State activities and decisions escape democratic or judicial scrutiny on account of their confidential or secret nature. The conviction of a journalist for disclosing information considered to be confidential or secret may discourage those working in the media from informing the public on matters of public interest. As a result, the press may no longer be able to play its vital role as "public watchdog" and the ability of the press to provide accurate and reliable information may be adversely affected.[87]

In the case of the former, where the information is of a private confidential nature, the Court has emphasised that States are under a duty to take steps to safeguard the right to respect for private life and must balance this against the requirements of freedom of expression.

The Court has also emphasised that the way in which journalists have obtained information, the veracity of that information, and the conduct of the journalists – including whether or not they broke any laws in obtaining the information – are relevant considerations.[88] However, it is important to note that none

87. *Stoll v. Switzerland [GC]*, Application No. 69698/01, judgment of 10 December 2007, paragraph 39, and reaffirming *Goodwin v. United Kingdom*, Application No. 17488/90, judgment of 27 March 1996, paragraph 39.
88. See the Court's discussion of the case law in *Alpha Doryforiki Tileorasi Anonymi Etairia v. Greece*, Application No. 72562/10, judgment of 22 February 2018, paragraphs 59-69.

of these considerations are decisive in and of themselves; rather they contribute to an overall picture which Courts and other national authorities must take into account.[89]

5.1 PROTECTING THE SECRECY OF CRIMINAL INVESTIGATIONS

In the case of *Bédat v. Switzerland*, the Court considered the conviction of a journalist for an article concerning criminal proceedings against a motorist who has driven his car into a group of pedestrians, killing three and injuring eight.[90] The article was accompanied by photographs of letters the accused had sent to the investigating judge, as well as a summary of statements by the wife and doctor of the accused. Much of this information was covered by the secrecy of criminal investigations, and the journalist was fined 4,000 Swiss francs.

Holding that the conviction did not violate the right to freedom of expression, the Court considered that the information in question was highly personal in nature, some of it medical. The Court stated that this kind of material deserves "the highest level of protection under Article 8".[91] The Court also took note of research that indicated that the disclosure of information covered by the secrecy of judicial investigations is a criminal offence in all Council of Europe member States; that the accused was not a public figure; and that the penalty imposed was proportionate (the fine had in fact been paid by the journalist's employer).[92]

5.2 PROTECTING CONFIDENTIAL STATE DOCUMENTS

The case of *Stoll v. Switzerland* concerned a journalist who had been fined for publishing a confidential report of the Swiss Ambassador to the United States relating to the strategy to be adopted by the Swiss Government in the negotiations between, among others, the World Jewish Congress and Swiss banks regarding compensation due to Holocaust victims.[93] The Grand Chamber of the Court held that in principle, the right to freedom of expression protected the publication of confidential material, when publication serves the public interest. However, it considered that the disclosure of the extracts from the Ambassador's report had been liable to have negative repercussions on the negotiations in which Switzerland was engaged, particularly because of the highly sensationalist way in which the articles accompanying the disclosure had been written. Therefore, considering the relatively light fine that had been imposed, the Court did not find that the sentence violated the journalist's right to freedom of expression.

The case of *Martin and others v. France*[94] concerned the conviction of journalists for having published a draft official report on the mismanagement of funds which, as an unpublished document, was confidential. The Court held that the report was of clear public interest and the journalists' conviction violated their right to freedom of expression:

> [T]he articles in question contained information mainly on the management of public funds by some local politicians and public officials. This was definitely a topic of general interest to the local community, on which the applicants had the right to inform the public through the press [and] the local population had the right to be informed. [T]he role of investigative journalists is precisely to inform and alert the public to undesirable phenomena in society as soon as relevant information comes into their possession.[95]

89. *Ibid.*, paragraph 60.
90. *Bédat v. Switzerland*, Application No. 56925/08, judgment of 29 March 2016.
91. *Ibid.*, paragraph 76.
92. *Ibid.*, paragraphs 76-82 and the case law discussed therein.
93. *Stoll v. Switzerland*, Application No. 69698/01, judgment of 10 December 2007.
94. *Martin and others v. France*, Application No. 30002/08, judgment of 12 April 2012.
95. *Martin and others v. France*, Application No. 30002/08, judgment of 12 April 2012, paragraphs 79 and 80.

5.3 JOURNALISTS SOLICITING "LEAKED" INFORMATION

In *Dammann v. Switzerland*, a journalist had been convicted for having obtained from an employee in the State prosecutor's office, in breach of official secrets law, information about previous convictions of individuals who had been arrested for robbery.[96] Whilst he did not publish the information, he showed the list he was sent to a police officer and was subsequently prosecuted and fined. The Court held that this conviction violated the right to freedom of expression. While in principle data relating to a suspect's criminal record merited protection, some of the information could have been obtained through the public domain and no damage had been done to the rights of the persons concerned. Furthermore, the Court emphasised that what mattered was not whether the penalty imposed on the journalist had been harsh, but that he had been convicted at all: this "constituted a kind of censorship tending to encourage him not to engage in research activities, inherent to his profession, with a view to preparing and supporting a press article on a current subject" and "risks dissuading journalists from contributing to the public discussion of issues that concern the life of the community."[97] The Court reiterated that restrictions such as this are "likely to hinder the press in carrying out its task of information and control".[98]

KEY TAKEAWAYS:

- "Confidential" information can concern information that is private in nature, information of a commercial nature, information that concerns state secrets, or information concerning investigations and proceedings in judicial investigations and proceedings. Human rights law allows for the criminalisation of the "leaking" or publishing of these types of information, subject to the general requirements of restraint, clarity in law, and proportionality outlined in Section 3 of this Guide.
- However, the Court has stated that the public interest nature of the information concerned is of paramount importance.

96. *Dammann v. Switzerland*, Application No. 77551/01, judgment of 25 April 2006.
97. *Ibid.*, paragraph 57.
98. *Ibid.*

VI
CRIMINALISATION OF SPEECH ENDANGERING NATIONAL SECURITY AND PUBLIC ORDER

The protection of national security and public order is unambiguously accepted as being a legitimate area for the use of criminal law. However, because the sanctions available under national security laws tend to be severe, the European Court has warned that laws that restrict freedom of expression on national security grounds must lay down clear and precise definitions, so as to safeguard against abuse.[99] The requirements of restraint, clarity of the law, and proportionality in how the law is used set out in Section 3 are particularly important in relation to national security cases.

The Court has warned against disproportionate use of national security laws, including in some cases where it was not clear whether any national security interests were at stake. For example, in *Rotaru v. Romania*, the Court noted that it had "doubts as to the relevance to national security of the information" and found a violation of the applicant's rights.[100] The Court has warned against the use of national security laws even in situations of armed conflict. While it emphasised that the media should not be used as a mouthpiece for advocates of violence, it also held that States "cannot, with reference to the protection of territorial integrity or national security or the prevention of crime or disorder, restrict the right of the public to be informed by bringing the weight of the criminal law to bear on the media."[101] Similarly, in *Selahattin Demirtaş v. Turkey (No. 2)*, the Court held that concrete evidence is required showing a link between the exercise of freedom of expression and membership of an armed terrorist organisation.[102]

In the case of *Gapoņenko v. Latvia*, which concerned the arrest and detention of an alleged "Kremlin propagandist" for a series of Facebook posts in which he spoke of NATO, language policy in Latvia, and the Russian minority in Latvia, with accusations that the NATO presence in Latvia was to intimidate Russophones, and threats of nuclear war on Latvian territory, the Court emphasised that:

> One of the principal characteristics of democracy is the possibility it offers of resolving problems through public debate, and that any measures taken should seek to protect the democratic order from the threats to it, and every effort must be made to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness.[103]

99. See, for example, *Klass and others v. Germany*, Application No. 5029/71, judgment of 6 September 1978.
100. *Rotaru v. Romania*, Application No. 28341/95, judgment of 4 May 2000, paragraph 53.
101. *Erdogdu and Ince v. Turkey*, Application Nos. 25067/94 and 25068/94, judgment of 8 July 1999, paragraph 54.
102. *Selahattin Demirtaş v. Turkey (no. 2)*, Application No. 14305/17, judgment of 22 December 2020, paragraph 280.
103. *Gapoņenko v. Latvia*, (dec.), Application No. 30237/18, judgment of 23 May 2023 (dec), paragraph 42.

The Court went on to state that:

> Criticism of governments and publication of information regarded by a country's leaders as endangering national interests should not, as a rule, attract criminal charges for particularly serious offences such as belonging to or assisting a terrorist organisation, attempting to overthrow the government or the constitutional order or disseminating terrorist propaganda.[104]

Cases such as these mean that States cannot merely tick the box "national security" or "public order" to legitimise the use of sanctions. While States are left a certain margin of appreciation with regard to national security cases, the Court has held that it must be established whether the disclosure of information is capable of causing "considerable damage" to national security.[105]

The Court has also warned against the abuse of national security laws. For example, in *Faruk Temel v. Turkey*, the Court found a violation of the right to freedom of expression where the chairman of a legal political party had been convicted for criticising the United States' intervention in Iraq, the solitary confinement of the leader of a terrorist organisation, and had criticised the disappearance of persons taken into police custody.[106] The Court emphasised that the applicant had spoken as a member of an opposition political party, presenting his party's views on topical matters of general interest, and that he had not incited others to violence, armed resistance, or uprising.[107] In *Fatullayev v. Azerbaijan*, the Court found that the domestic courts "arbitrarily applied the criminal provisions on terrorism in the present case", and emphasised that "[s]uch arbitrary interference with the freedom of expression, which is one of the fundamental freedoms serving as the foundation of a democratic society, should not take place in a State governed by the rule of law."[108]

KEY TAKEAWAYS:

- The protection of national security and public order is unambiguously accepted as being a legitimate area for the use of criminal law. However, because the sanctions available under national security laws tend to be severe, the European Court of Human Rights has warned that laws that restrict freedom of expression on national security grounds must lay down clear and precise definitions, so as to safeguard against abuse. The requirements of restraint, clarity of the law, and proportionality in how the law is used set out in Section 3 are particularly important in relation to national security cases.
- The Court has warned against disproportionate use of national security laws, including in some cases where it was not clear whether any national security interests were at stake, even in situations of armed conflict.
- This would mean that States cannot merely tick the box "national security" or "public order" to legitimise the use of sanctions. While States are left a certain margin of appreciation with regard to national security cases, the Court has held that it must be established whether the disclosure of information is capable of causing "considerable damage" to national security.

104. *Ibid*. The Court found upon close examination of the facts that the arrest and detention of the applicant did not violate his right to freedom of expression.
105. See, for example, *Gîrleanu v. Romania*, Application No. 50376/09, judgment of 26 June 2018, paragraph 89, and the cases discussed therein.
106. *Faruk Temel v. Turkey*, Application No. 16853/05, judgment of 1 February 2011.
107. *Ibid*., paragraphs 58-64.
108. *Fatullayev v. Azerbaijan*, Application No. 40984/07, judgment of 22 April 2010, paragraph 124.

VII
CRIMINALISATION OF PUBLISHING "DISINFORMATION"

While the problem of so-called "disinformation"[109] is a matter of common concern and subject of much debate among policy makers, European human rights law has consistently held that the broad criminalisation of any information that may be labelled as such is neither proportionate nor likely to be an effective response.[110]

While the European Court of Human Rights has not heard any "disinformation" cases as such, it has heard several cases in which States had sanctioned the media and others for publishing information the truth of which could not be established. The Court has urged restraint in the criminalisation of any such publications. In *Salov v Ukraine*, which concerned a leaflet which falsely attributed several statements to a presidential candidate, the Court emphasised:

> Article 10 does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information may not be truthful. To suggest otherwise would deprive persons of the right to express their views and opinions about statements made in the mass media and would thus place an unreasonable restriction on freedom of expression.[111]

It held that the conviction of the individual concerned violated the right to freedom of expression because there was no evidence that he had intentionally tried to deceive other voters or impeded their ability to vote.

The Court has also emphasised the importance of free and open debate on matters of science and health. In *Hertel v. Switzerland*, which concerned a scientist who had pointed out potential health risks relating to the cooking of food in microwave ovens, the Court held:

> It matters little that his opinion is a minority one and may appear to be devoid of merit since, in a sphere in which it is unlikely that any certainty exists, it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas.[112]

109. Use of the term "fake news" is advised against; the European Audiovisual Observatory argues that it is a politicised term used by some to single out news organisations whose coverage they disagree with. A high-level expert group on fake news and online disinformation set up by the European Commission has endorsed this approach, suggesting instead use of the term "disinformation". See Cabrera Blázquez F.J., Cappello M., Talavera Milla J., Valais S., (2022), User empowerment against disinformation online, European Audiovisual Observatory, Strasbourg, available at: *https://rm.coe.int/iris-plus-2022en3-user-empowerment-against-disinformation/1680a963c4*.
110. It should be noted that there are many laws that already address spreading untrue information, such as defamation laws and consumer protection laws. This section is not concerned with these laws but discusses what in popular discourse is loosely referred to as 'fake news' or 'disinformation'.
111. *Salov v. Ukraine*, Application No. 65518/01, judgment of 6 September 2005, paragraph 113.
112. *Hertel v. Switzerland*, Application No. 25181/94, judgment of 25 August 1998, paragraph 50.

The only scenario in which disinformation can be criminalised is when its publication results in a clear risk to national security, public order, or another legitimate interest mentioned in Article 10(2), and the use of criminal law is a necessary and proportionate response. For example, in *Gapoņenko v. Latvia* the Court held that the arrest and detention of an individual accused of spreading propaganda was a necessary response in light of the tense security situation in the country.[113] There is also a clear nexus between disinformation and hate speech; in fact, spreading disinformation has been shown to be a key tool for the incitement of hatred.[114] In such cases, disinformation can be criminalised, not because it is false but because of the hatred to which it incites.

The Venice Commission has warned that strict measures against disinformation can lead to censorship and constraints on legitimate content. In an urgent Joint Opinion on draft amendments to the Penal Code of Türkiye concerning "False or Misleading Information", it has pointed out that criminalisation is deeply problematic: "History is filled with examples of regimes that apply criminal provisions to quash dissent and criticism, including against journalists and human rights defenders."[115] The Venice Commission has also endorsed the Special Mandates' Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda,[116] which states that "general prohibitions on the dissemination of information based on vague and ambiguous ideas, including "false news" or "non-objective information", are incompatible with international standards for restrictions on freedom of expression (…) and should be abolished".[117]

The Council of Europe Committee of Ministers has recognised that disinformation undermines trust in the media and threatens the reliability of information that feeds public debate and enables democracy. However, rather than criminalising disinformation it has emphasised measures such as promoting quality journalism, providing support for fact-checking, the importance of user empowerment, and platform-design solutions.[118]

KEY TAKEAWAYS:

- While the problem of so-called "disinformation" is a matter of common concern and subject of much debate among policy makers, European human rights law has consistently held that the broad criminalisation of any information that may be labelled as such is neither proportionate nor likely to be an effective response.
- The only scenario in which disinformation can be criminalised is when its publication results in a clear risk to national security, public order, or another legitimate interest mentioned in Article 10(2), and the use of criminal law is a necessary and proportionate response.

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113. *Gapoņenko v. Latvia (dec.)*, Application No. 30237/18, judgment of 23 May 2023.
114. As noted by amongst others, in the *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, A/HRC/47/25, 2021, paragraphs 22-29.
115. Venice Commission, *Opinion no. 1102 / 2022*, 7 October 2022, p. 11 (citing with approval the analysis of former UN Special Rapporteur on Freedom of Expression David Kay, Speech Police: The Global Struggle to Govern the Internet. Columbia Global Reports, 3 June 2019, p. 94).
116. United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe Representative on Freedom of the Media, the Organization of American States Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights Special Rapporteur on Freedom of Expression and Access to Information, *Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda*, (FOM.GAL/3/17), 3 March 2017.
117. Venice Commission, *Joint Report of the Venice Commission and of the Directorate of Information Society and Action against Crime of the Directorate General of Human Rights and Rule of Law (DGI), on Digital Technologies and Elections*, CDL-AD(2019)016, paragraph 90.
118. *Recommendation CM/Rec(2022)4 on promoting a favourable environment for quality journalism in the digital age*, adopted on 17 March 2022; *Recommendation CM/Rec(2022)12 on electoral communication and media coverage of election campaigns*, adopted on 6 April 2022. In December 2023, the Council of Europe Steering Committee for Media and Information Society adopted a Guidance Note which suggests various practical steps that States should take to counter the spread of online mis- and disinformation through fact-checking and platform design solutions in a human rights compliant manner. *Guidance Note on countering the spread of online mis- and disinformation through fact-checking and platform design solutions in a human rights compliant manner*, adopted by the Steering Committee for Media and Information Society (CDMSI) at its 24th meeting, 29 November-1st December 2023.

- The Venice Commission has warned that strict measures against disinformation can lead to censorship and constraints on legitimate content.
- The Council of Europe Committee of Ministers has recognised that disinformation undermines trust in the media and threatens the reliability of information that feeds public debate and enables democracy. However, rather than criminalising disinformation it has emphasised measures such as promoting quality journalism, providing support for fact-checking, the importance of user empowerment, and platform-design solutions.

VIII
THE ROLE OF THE COUNCIL OF EUROPE IN SUPPORTING DOMESTIC INSTITUTIONS AND CIVIL SOCIETY ORGANISATIONS

The Council of Europe's mission is to promote and protect human rights, democracy, and the rule of law across its member States[119]. Key pillars of its work include safeguarding and promoting human rights; strengthening democratic institutions and practices; promoting the rule of law; building a cohesive and inclusive society; and promoting cultural cooperation.

The promotion of respect for the right to freedom of expression cuts across several of these pillars and is focused on ensuring the right balance between respect for freedom of expression and the enjoyment of other human rights. To this end, the Council of Europe sets standards, monitor compliance with them and work with States and civil society to improve their implementation at the domestic level.

This work is of particular importance in light of the dynamic and ongoing changes in the media landscape, which have brought about radical changes to the nature of "publishing" and the meaning of "media". In today's media landscape, an individual 'influencer' publishing through social media platforms can reach millions, whilst some newspapers have a reach of only several hundred, turning on its head traditional notions of media regulation. As recognised by the Court:

> User-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression […]. Alongside these benefits, certain dangers may also arise. Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available online.[120]

These dangers call for new self-regulatory, co-regulatory and regulatory models covering new media, new actors and new challenges. Through the Court's case-law and standard setting promoted by the Steering Committee on Media and Information Society Freedom of Expression, under the overall responsibility of the Committee of Ministers, the Council of Europe guides Member States in discharging their obligation to refrain from violating the right to freedom of expression and other human rights in the digital environment. They also have a positive obligation to protect human rights and to create a safe and

119. The Council of Europe is the continent's leading human rights organisation. It comprises 46 member States, including all members of the European Union. All Council of Europe member States have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member States.

120. *Delfi AS v. Estonia [GC]*, Application no. 64569/09, judgment of 16 June 2015.

enabling environment for everyone to participate in public debate and to express opinions and ideas without fear, including those that offend, shock, or disturb State officials or any sector of the population.[121]

Through its co-operation programmes, the Council of Europe offers demand-driven technical assistance to domestic institutions and civil society organisations to improve their capacities in implementing the existing standards on freedom of expression and media, with the overarching objective of ensuring that freedom of expression is preserved, promoted, and exercised responsibly. Expertise, the basis of co-operation projects' added value, comes from relevant services in the entire Organisation. Project implementation can involve needs assessments, policy, and legal expertise, capacity-building of a wide range of domestic institutions and actors, awareness-raising and peer-to-peer reviews.

121. *Recommendation CM/Rec(2018)2 of the Committee of Ministers to Member States on the roles and responsibilities of internet intermediaries*.

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