

# FREEDOM OF EXPRESSION AND DEFAMATION



**Tarlach McGonagle**

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

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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**Tarlach McGonagle**

in collaboration with Marie McGonagle  
and Ronan Ó Fathaigh

Edited by Onur Andreotti

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## Executive summary

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

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

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



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

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

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

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1. *Krasulya v. Russia*, § 35

# Introduction

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## BACKGROUND

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

In 2012, the secretariat of the Steering Committee on Media and Information Society (CDMSI) prepared a “Study on the alignment of laws and practices concerning defamation with the relevant case-law of the European Court of Human Rights on freedom of expression, particularly with regard to the principle of proportionality”.<sup>2</sup> The study was itself an update and revision of the working document prepared by the CDMSI’s forerunner, the Steering Committee on the Media and New Communication Services (CDMC), published on 15 March 2006.<sup>3</sup>

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

## STRUCTURE AND SCOPE

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

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

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

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

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

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

## Chapter 1

# Defining and positioning defamation

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### 1.1. FREEDOM OF EXPRESSION

Article 10 of the European Convention on Human Rights (“The Convention”) is the centrepiece of the Council of Europe’s system for the protection of the right to freedom of expression. It reads:

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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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

Article 10 § 1 sets out the right to freedom of expression as a compound right comprising three distinct components: the freedom to hold opinions; the freedom to receive information and ideas; and the freedom to impart information and ideas. Article 10 § 1 also countenances the possibility for states to regulate audiovisual media by means of licensing schemes.

Article 10 § 2 then proceeds to delineate the scope of the core right set out in the preceding paragraph. It does so by enumerating a number of grounds, based on which the right may legitimately be restricted, provided that the restrictions are “prescribed by law” and are “necessary in a democratic society”. It justifies this approach by linking the permissibility of restrictions on the right to freedom of expression to the existence of “duties and responsibilities” that govern its exercise. The scope of those duties and responsibilities varies, depending on the “situation” of the person exercising the right to freedom of expression and on the “technical means” used.<sup>5</sup> The Court has tended to explore the nature and scope of relevant duties and responsibilities not through broad principles, but on a case-by-case basis.

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5. *Fressoz and Roire v. France* [GC], § 52.

It tends to distinguish among different professional occupations, such as journalism, politics, education and military service. The relevance of such distinctions from the perspective of public debate will be explored in section 1.3, below.

Article 10, as interpreted by the Court, provides strong protection to the right to freedom of expression. The Court consistently describes the right as “one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment”.<sup>6</sup> As the Court affirmed in its seminal judgment in *Handyside v. the United Kingdom*, 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’” (§ 49). This principle creates the necessary space for robust, pluralistic public debate in democratic society. Section 1.3 explores the interplay between robust debate and reputational interests because, as the Court has pointed out, “in this field, political invective often spills over into the personal sphere; such are the hazards of politics and the free debate of ideas, which are the guarantees of a democratic society.”<sup>7</sup>

The Court has developed a standard test to determine whether Article 10 of the Convention has been violated. Put simply, whenever it has been established that there has been an interference with the right to freedom of expression, that interference must first of all be prescribed by law (that is it must be adequately accessible and reasonably foreseeable in its consequences). Second, it must pursue a legitimate aim, that is correspond to one of the aims set out in Article 10 § 2. For the purposes of this study, “the protection of the reputation or rights of others” is of central importance. Third, the interference must be necessary in a democratic society, that is, it must correspond to a “pressing social need” and be proportionate to the legitimate aim(s) pursued.

Under the margin of appreciation doctrine, which takes account of how the Convention is interpreted at national level, states are given a certain amount of discretion in how they regulate expression.<sup>8</sup> The extent of this discretion, which is subject to supervision by the Court, varies depending on the nature of the expression in question. Whereas states only have a narrow margin of appreciation in respect of political expression, they enjoy a wider margin of appreciation in respect of public morals, decency and religion. This dichotomy is usually explained by the long-established acceptance of the importance in a democracy of political expression in a broad sense and by the absence of a European consensus on whether/how matters such as public morals, decency and religion should be regulated.

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6. See, for an early authority, *Lingens v. Austria*, § 41, paraphrasing *Handyside v. the United Kingdom*, § 49.

7. *Lopes Gomes da Silva v. Portugal*, § 34; *Kuliš v. Poland*, § 52.

8. Initially developed in the Court’s case law (see, in particular: *Handyside v. the United Kingdom*, §§ 47 to 50), a reference to the doctrine will be enshrined in the Preamble to the European Convention on Human Rights as soon as its Amending Protocol No. 15, CETS No. 213, enters into force (it was opened for signature on 24 June 2013).

When exercising its supervisory function, the Court does not take the place of the national authorities, but reviews the decisions taken by the national authorities pursuant to their margin of appreciation under Article 10 of the Convention. Thus, the Court looks at the expression complained of in the broader circumstances of the case and determines whether the reasons given by the national authorities for the restriction and how they implemented it are “relevant and sufficient” in the context of the interpretation of the Convention. The Court has to “satisfy itself that the national authorities applied standards that were in conformity with the principles embodied in Article 10 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts.”<sup>9</sup>

In examining the particular circumstances of the case, the Court takes the following elements into account: “the position of the applicant, the position of the person against whom his criticism was directed, the subject matter of the publication, characterisation of the contested statement by the domestic courts, the wording used by the applicant, and the penalty imposed on him.”<sup>10</sup> Each of those elements will be discussed below. Lastly, it is also worth noting that the “national margin of appreciation is circumscribed by the interest of democratic society in enabling the press to exercise its vital role of ‘public watchdog’,”<sup>11</sup> a consideration that “weigh[s] heavily” in the balancing exercise.<sup>12</sup>

Besides the margin of appreciation doctrine, three other interpretive principles espoused by the Court are of particular relevance for the right to freedom of expression. These are the practical and effective doctrine, the living instrument doctrine and the positive obligations doctrine. According to the practical and effective doctrine, all rights guaranteed by the Convention must be “practical and effective” and not merely “theoretical or illusory.”<sup>13</sup> Under the “living instrument” doctrine,<sup>14</sup> the Convention is regarded as a “living instrument” that “must be interpreted in the light of present-day conditions.”<sup>15</sup> This doctrine seeks to ensure that the Convention evolves with the times and does not become static or outdated. The positive obligations doctrine implies that it is not always enough for the state to simply refrain from interfering with individuals’ human rights: positive or affirmative action will often be required as well. Thus, notwithstanding the tendency to formulate states’ obligations in negative terms, in order to ensure that the rights enshrined in the Convention are practical and effective, states may have to take positive measures, “even in the sphere of the relations of individuals between themselves.”<sup>16</sup>

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9. *Dichand and Others v. Austria*, § 38; *Karman v. Russia*, § 32; *Grinberg v. Russia*, §§ 26 and 27.

10. *Krasulya v. Russia*, § 35. See also *Karman v. Russia*, § 33; *Jerusalem v. Austria*, § 35; *Fedchenko v. Russia (No. 2)*, § 33.

11. *Chauvy and Others v. France*, § 67.

12. *Colombani and Others v. France*, § 57.

13. *Airey v. Ireland*, § 24.

14. For an overview of the historical development of the “living instrument” doctrine by the European Court of Human Rights, see Mowbray A. (2005), “The creativity of the European Court of Human Rights”, *Human Rights Law Review* Vol. 5, No. 1, pp. 57-79.

15. *Tyler v. the United Kingdom*, § 31; *Matthews v. the United Kingdom [GC]*, § 39.

16. *X and Y v. the Netherlands*, § 23.

## 1.2. DEFINITIONS, PURPOSES, DELIMITATIONS, DISTINCTIONS AND BALANCING EXERCISES

### 1.2.1. Definitions

The text of the Convention does not define the concept of “defamation”, nor has the Court been inclined to do so. The notion lends itself better to definition in national statutory law, although not all jurisdictions have opted to define it. Defamation is essentially a civil wrong (a tort or delict) committed by one individual against another or others, including in some circumstances a “legal person”. The nature of the wrong is the negative effect on, or harm to, a person’s reputation or good name. Reputation is not about self-esteem but rather the esteem in which others hold one. Thus, the act of defamation consists of making a false or untrue statement about another person that tends to damage his/her reputation in the eyes of reasonable members of society. The statement may consist of an allegation, an assertion, a verbal attack or other form of words or action. Such a statement may be made orally or in writing; may take the form of visual images, sounds, gestures and any other method of signifying meaning; may be a statement that is broadcast on the radio or television, or published on the Internet; or may be an electronic communication.

At the heart of defamation, therefore, is reputational damage.<sup>17</sup> A statement in any of the above senses may be hard-hitting or vituperative but it will not amount to defamation if it is in fact true, because a person is only entitled to a reputation that is based on truth. A statement will only amount to defamation if it is a false or untrue statement of fact about another person because only false or untrue allegations or assertions will damage the reputation a person deserves to enjoy among his or her peers or community. In some limited circumstances, a comment that cannot be supported by the underlying facts or is not reasonably based on the underlying facts may also amount to defamation. The Court has teased out these issues, *inter alia* in its judgment in *Reznik v. Russia*, a case arising out of defamation proceedings against the President of the Moscow City Bar:

for an interference with the right to freedom of expression to be proportionate to the legitimate aim of the protection of the reputation of others, the existence of an objective link between the impugned statement and the person suing in defamation is a requisite element. Mere personal conjecture or subjective perception of a publication as defamatory does not suffice to establish that the person was directly affected by the publication. There must be something in the circumstances of a particular case to make the ordinary reader feel that the statement reflected directly on the individual claimant or that he was targeted by the criticism. Those principles also apply in the sphere of television and radio broadcasting (§ 45).

Defamation usually concerns only personal or individual reputation but defamation law may also cover such statements made about “legal persons”, that is to say entities that have a legal status, such as companies and corporations, which enables them to sue or be sued. In some instances, a small group of people, like

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17. For an overview of the Court’s jurisprudence on this topic, see Factsheet – Protection of reputation, available at [http://www.echr.coe.int/Documents/FS\\_Reputation\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Reputation_ENG.pdf).

the board of a company or the governors of an organisation, may sue for defamation, although they are only referred to as a group in circumstances where each of them, even if not named, is reasonably identifiable by others who know them or, more broadly stated, by reasonable members of society. This was the case in *Ruokanen and Others v. Finland*, involving allegations of rape at a party of a local baseball team (discussed further in section 1.2.3, below). In *Reznik v. Russia*, the Court attached importance to the fact that the plaintiffs were not named in the applicant's statements; they were only identifiable through footage selected by the television editor to introduce the live debate in which the applicant participated and through other media. The Court held that the "extent of the applicant's liability in defamation must not go beyond his own words" (§ 45). That the others in question should be reasonable members of society is an attempt to ensure reasonableness when determining what type of expression negatively affects someone's reputation. It seeks to avoid showing undue deference to reputations, at the expense of freedom of expression.

### **1.2.2. Purposes and delimitations**

These key elements of defamation provide useful indicators for determining the purpose of defamation laws, that is to protect the reputations of individuals against injury. It is important to be clear about the purpose of defamation laws: if they are overly broad, they become susceptible to misuse and abuse. The overall purpose of defamation is to protect reputation, to act as a deterrent to unjustified attacks on a person's reputation or good name and to vindicate it when it is unjustly attacked. How exactly the law achieves these aims may differ from one member state to another, but certain principles affirmed by the Court lay out the path for member states to tread.

In this regard, the substance and scope of defamation law is subject to various delimitations so as not to undermine the right to freedom of expression. While everyone has a personal right to their reputation, defamation laws cannot be justified if their purpose or effect is to protect individuals against harm to a reputation that they do not have or do not deserve. Nor can they be justified to protect the "reputations", whether commercial, financial or other, of entities, apart from those that have a "legal person" status, which gives them the right to sue and to be sued. However, in relevant case law, the Court has spelt out key differences between corporate commercial reputation and individual personal reputation, with the latter comprising a moral dimension that can affect individuals' personal dignity.<sup>18</sup> The reputations of businesspersons should also be distinguished from corporate reputations.

ARTICLE 19, a non-governmental organisation (NGO) working for freedom of expression, states that it is not the role of defamation laws either to protect symbols such

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18. *Uj v. Hungary*.



as flags.<sup>19</sup> This specific point does not appear to have featured yet in the case law of the Court in such a way as to give a clear sense of the Court's position. The Court has, however, given some consideration to (the defamation of) ideologies in this respect.<sup>20</sup>

The Court takes the view that defamation laws should be confined to protecting the reputation of living persons and not be used to protect the reputation of deceased persons, except in certain clearly defined and limited circumstances. It also recognises that attacks on the reputation of deceased persons can compound the grief of deceased persons' families, in particular in the immediate aftermath of their death. It has also recognised that in certain circumstances, attacks on the reputation of the deceased can be of such a nature and intensity as to affect or even violate the right to private life of the families of the deceased.<sup>21</sup>

In *Genner v. Austria*, the Court found that the interference with the applicant's right to freedom of expression served a legitimate aim in the sense of Article 10 § 2 of the Convention, that is, "the protection of the reputation or rights of others," namely those of L.P. [a deceased government minister] and the close members of her family – in particular her husband" (§ 41). The Court noted that the impugned statement "was an expression of satisfaction with the sudden death of L.P., the applicant made the day after she had passed away" (ibid., § 45). It found that the timing of the statement "intensified the impact of the words used" (ibid., § 44). The statement was a personal attack on the late minister, which included an expression of satisfaction at her death and "particularly offensive comparisons" with high-ranking Nazi officials (ibid., § 46). It stated that to "express insult on the day after the death of the insulted person contradicts elementary decency and respect to human beings ... and is an attack on the core of personality rights" (ibid., § 45).

Neither should defamation laws be used as a surrogate or "back door" for righting or punishing other wrongs, including, subject to consideration of the scope of Article 8 of the Convention, a surrogate or "back door" for responding to invasions or infringements of privacy. In the case of reputation being regarded as an element of privacy under Article 8, the Court engages in a "balancing exercise" and has introduced safeguards to prevent freedom of expression being undermined (see section 1.2.4, below). Indeed, it is clear from the case law of the Court that safeguards against abuse or misuse of defamation laws are vital.

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19. See ARTICLE 19 (2000), "Defining defamation. Principles on freedom of expression and protection of reputation", *International Standards Series*, London, Principle 2, available at [www.article19.org/data/files/pdfs/standards/definingdefamation.pdf](http://www.article19.org/data/files/pdfs/standards/definingdefamation.pdf), accessed 7 May 2016. As stated in the introduction, these principles are part of ARTICLE 19's International Standards Series and "are based on international law and standards, evolving state practice (as reflected, *inter alia*, in national laws and judgments of national courts), and the general principles of law recognised by the community of nations."

20. By way of analogous case law, see for example *Murat Vural v. Turkey*, § 67, in which the applicant had poured paint over statues of Atatürk. Even in that case, the Court did not consider the nature of the insult to the memory of Atatürk because the "extreme harshness of the punishment imposed on the applicant" already constituted a violation of his right to freedom of expression. See also *Odabaşı and Koçak v. Turkey*, § 14, which concerned a criminal conviction for the defamation of the memory of Atatürk – the Court found that the applicant's freedom of expression had been violated.

21. See, for both of these points, *Editions Plon v. France* and *Hachette Filipacchi Associés v. France*. See also, more recently, *Dzhughashvili v. Russia* and *Genner v. Austria*.

It is also clear that there are other important delimitations to ensure defamation laws are not used to prevent legitimate criticism of officials and public persons or to prevent the exposure of official wrongdoing or corruption. These and other such delimitations are discussed in the sections that follow.

### **1.2.3. Distinctions**

As will be explained in greater detail in section 1.4, the distinction between civil and criminal defamation is crucial from the perspective of freedom of expression, due to the chilling effect of laws that criminalise defamation. While excessive or unpredictable levels of damages (compensation) in civil cases can also have a chilling effect on freedom of expression, the imposition of criminal penalties (fines and/or imprisonment) or the threat of criminal proceedings can have even greater chilling effects.

In *Ruokanen and Others v. Finland*, for instance, which concerned accusations about the rape of a student at a party of a local baseball team, published as a cover story in a magazine, the Court found that the baseball team members' right to the presumption of innocence had been violated (§ 48) and that in the circumstances, criminal sanctions, although only exceptionally compatible with Article 10, were not disproportionate. The accusations had been presented as statements of fact, even though a criminal investigation had not even begun at the time of publication, and the applicants had not taken any steps to verify whether the accusations, which were of a very serious nature, had a basis in fact (*ibid.*, § 47).

In *Europapress Holding d.o.o. v. Croatia*, the Deputy Prime Minister of Croatia was accused of "having made a highly inappropriate joke by pointing a handgun at the journalist E.V. while saying that he would kill her", which the Court described as "reprehensible conduct unbecoming of a politician or senior Government official" (§ 67). The Court held that these allegations "therefore required substantial justification, especially given that they were made in a high circulation weekly magazine" (*ibid.*, § 67). It then went on to explain why it agreed with the domestic courts that the applicant company had failed to sufficiently verify the information prior to publication.

In the case of *Fatullayev v. Azerbaijan*, however, the Court found that while the impugned statements were factual rather than value judgments and may have contained certain exaggerated or provocative assertions, the author had not crossed the limits of journalistic freedom in performing his duty to impart information on matters of general interest. In addition, the Court considered that the prison sentence of two and a half years was "undoubtedly very severe, especially considering that the applicant had already been sued for the exact same statements in the civil proceedings and, as a consequence, had paid a substantial amount in damages" (§ 103). The severity of the penalties imposed meant that the interference with the author's right to freedom of expression was not proportionate and there was therefore a breach of Article 10 (*ibid.*, §§ 101 to 105).

The proportionality or lack of proportionality of the penalties imposed upon criminal conviction for defamation, whether fines, imprisonment, a requirement to retract (for example in the case of a serious academic, as in *Karsai v. Hungary*), is a major consideration and sometimes the decisive one when determining whether there has been a violation of Article 10. These issues will be explained in greater detail in section 1.5, below.

The Court has repeatedly accepted that in view of the margin of appreciation left to states, “a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued”.<sup>22</sup> However, it has also repeatedly pointed out that criminal proceedings for defamation or insult entail the risk of a sanction of imprisonment. It recalls in this connection that “the imposition of a prison sentence for a press offence will be compatible with journalists’ freedom of expression as guaranteed by Article 10 only in exceptional circumstances, notably where other fundamental rights have been impaired, as, for example, in the case of hate speech or incitement to violence”.<sup>23</sup> Although the Court has not unequivocally called for the decriminalisation of defamation, it has repeatedly “further observe[d] that the Parliamentary Assembly of the Council of Europe in its Resolution 1577 (2007) urged those member States which still provide for prison sentences for defamation, even if they are not actually imposed, to abolish them without delay”.<sup>24</sup>

#### **1.2.4. Balancing exercises**

The Convention protects both freedom of expression (Article 10) and privacy (Article 8). The Court has taken the view that the two rights are of equal weight and status. It must verify if a fair balance has been struck by the domestic authorities in protecting two values guaranteed by the Convention.<sup>25</sup> The Court has not always been consistent in this task and has expanded the scope and protection of privacy, for example by including reputation as an aspect of it, and thus in effect attenuating the corresponding scope and protection of freedom of expression in Article 10.<sup>26</sup>

A series of cases beginning in 2004 with *Radio France and Others v. France* and *Chauvy and Others v. France* illustrates this development. In the latter case the Court spoke of “on the one hand, freedom of expression protected by Article 10 and, on the other, the right of persons attacked ... to protect their reputation, a right which is protected by Article 8 of the Convention as part of the right to respect for private life” (§ 70).<sup>27</sup> In *Pfeifer v. Austria*, the Court justified the inclusion of reputation under the privacy rubric by reference to personal identity and psychological integrity (§ 35).

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22. *Lindon, Otchakovsky-Laurens and July v. France* [GC], § 59; *Radio France and Others v. France*, § 40; *Rumyana Ivanova v. Bulgaria*, § 68; and *Ruokanen and Others v. Finland*, § 50.

23. *Cumpănă and Mazăre v. Romania* [GC], § 115; *Ruokanen and Others v. Finland*, § 50.

24. See, for example, *Mariapori v. Finland*, § 69; *Niskasaari and Others v. Finland*, § 77; *Saaristo and Others v. Finland*, § 69; and *Ruokanen and Others v. Finland*, § 50.

25. See, for example, *Chauvy and Others v. France*; *White v. Sweden*, § 20. See also Barendt E. (2009), “Balancing freedom of expression and privacy: the jurisprudence of the Strasbourg Court”, *Journal of Media Law*, Vol. 1, Issue 1.

26. See, for instance, the criticism of the three dissenting judges in *Flux v. Moldova (No. 6)*, § 17, who took the view that the majority judgment (4 to 3 majority) “has thrown the protection of freedom of expression as far back as it possibly could.”

27. For a critique of these and the other cases in which this line of thought was developed, including the Grand Chamber decision in *Lindon, Otchakovsky-Laurens and July v. France*, see McGonagle M. (2009), “Defamation law in Europe – Closing the gap between Reynolds and the ECHR”, *Media and Arts Law Review*, 14, p. 166; Smet S. (2010), “Freedom of expression and the right to reputation: human rights in conflict”, *American University International Law Review* Vol. 26, No. 1, pp. 183-236.

In *Karakó v. Hungary*, the Court revisited that series of cases in which it had recognised reputation as a separate right forming an aspect of privacy, trying to rationalise those decisions and in effect to redirect its approach (§§ 20 to 25). It stated that when a violation of the rights guaranteed in Article 8 is asserted and the alleged interference with those rights originates in an expression to which Article 10 would apply, “the protection granted by the State should be understood as one taking into consideration its obligations under Article 10” (*ibid.*, § 20). The thrust of the judgment suggests that Article 8 would only be engaged if the attack on a person’s reputation “constituted such a serious interference with his private life as to undermine his personal integrity” (*ibid.*, § 23).

The Court has since attempted to further clarify the relationship between freedom of expression and protection of reputation and thereby the relationship between Articles 10 and 8 on this point in its *Axel Springer AG v. Germany* judgment, as follows:

1. The Court reiterates that the right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life ... In order for Article 8 to come into play, however, an attack on a person’s reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life ... The Court has held, moreover, that Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one’s own actions such as, for example, the commission of a criminal offence ...

2. When examining the necessity of an interference in a democratic society in the interests of the “protection of the reputation or rights of others”, the Court may be required to verify whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely, on the one hand, freedom of expression protected by Article 10 and, on the other, the right to respect for private life enshrined in Article 8.<sup>28</sup>

Finally, in this connection, it is worth noting that the Court has accepted that “the reputation of a deceased member of a person’s family may, in certain circumstances, affect that person’s private life and identity, and thus come within the scope of Article 8”.<sup>29</sup> There is, however, limited case law addressing this point or teasing out its practical implications.<sup>30</sup>

### 1.3. PUBLIC DEBATE

The Court has developed a number of general principles concerning freedom of expression that are extremely important for safeguarding public debate, especially concerning the important role of journalism and the media in sustaining public debate. It systematically recalls that the Handyside principles (discussed above) “are of particular importance as far as the press is concerned”, adding that

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28. *Axel Springer AG v. Germany* [GC], §§ 83 and 84. See also *Hachette Filipacchi Associés v. France*, § 43, and *MGN Limited v. the United Kingdom*, § 142.

29. *Putistin v. Ukraine*, § 33.

30. See, for example, *Dzhugashvili v. Russia*.

[w]hilst the press must not overstep the bounds set, *inter alia*, for the “protection of the reputation of others”; it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them.<sup>31</sup>

The Court has held that “freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention” (*Lingens v. Austria*, § 42). Political speech is therefore afforded “privileged protection” under the Convention.<sup>32</sup> Accordingly, there “is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest”.<sup>33</sup> In *TV Vest As & Rogaland Pensjonistparti v. Norway*, a case involving a statutory prohibition on broadcasting political advertisements, the Court held that because of “the privileged position of free political speech under Article 10 of the Convention” (§ 66), there must be “strict scrutiny on the part of the Court and a correspondingly circumscribed national margin of appreciation with regard to the necessity of the restrictions” (*ibid.*, § 64). At the same time, the Court also “stresses” that “journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection.”<sup>34</sup>

The Court has consistently recognised “the pre-eminent role of the press in a State governed by the rule of law”.<sup>35</sup> Press or media freedom is one of the most important safeguards of public debate in democratic society because it “affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders”.<sup>36</sup> The Court has considered the public interest and what that entails in many of the cases heard under Article 10. In *Thorgeir Thorgeirson v. Iceland*, for example, it held that media reporting and comment on matters of public interest are entitled to the same degree of protection as political discussion. The case concerned two articles on police brutality for which the journalist had been convicted and sentenced (fined) in the Icelandic courts.

The Court has further guaranteed media freedom by repeatedly holding that a “general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press’s role of providing information on current events, opinions and ideas”.<sup>37</sup> This formulation has been derived from the Court’s breakthrough finding in its *Jersild* judgment that “the methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. It is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting

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31. *Lingens v. Austria*, § 41.

32. *Nilsen and Johnsen v. Norway* [GC], § 47.

33. *Castells v. Spain*, § 43; for the quote itself see *Wingrove v. the United Kingdom*, § 58.

34. *Fressoz and Roire v. France*, § 52.

35. *Thorgeir Thorgeirson v. Iceland*, § 63.

36. *Lingens v. Austria*, § 42.

37. *Thoma v. Luxembourg*, § 64; *Albert-Engelmann-Gesellschaft mbH v. Austria*, § 32.

should be adopted by journalists”<sup>38</sup> The Court recalled in this connection that Article 10 of the Convention “protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed” (*Jersild v. Denmark*, § 31).

Moreover, it held in the *Jersild* judgment that “[n]ews reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of ‘public watchdog’” (§ 35). Therefore, the “punishment of a journalist for assisting in the dissemination of statements made by another person ... 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” (*ibid.*, § 35).<sup>39</sup>

How a statement is presented or disseminated, or more specifically, the form or forum in which it is made, can be of contextual importance. For instance, the Court has recognised that the reporting of oral statements by the press can reduce or eliminate the possibilities for applicants to reformulate, perfect or retract their statements before publication.<sup>40</sup> Similarly, the Court has found that when remarks are made orally during a press conference, the speaker does not have the “possibility of reformulating, refining or retracting” the remarks before they are made public.<sup>41</sup> It has made the same findings in respect of live radio<sup>42</sup> and television<sup>43</sup> broadcasts.

Taking into account “the essential function the press fulfils in a democratic society”, the Court has found that although “the press must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest”<sup>44</sup>

The Court has often dealt with those “certain bounds” in the context of protecting the reputation and rights of others. It has repeatedly held that the “duties and responsibilities” that govern the right to freedom of expression “are significant when there is a question of attacking the reputation of a named individual and infringing the ‘rights of others’” (*Tønsbergs Blad AS and Haukom v. Norway*, § 89). According to the Court, this means that “special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist depends in particular on the nature and degree of the defamation in question and the extent to which the media can reasonably regard their sources as reliable with respect to the allegations” (*ibid.*, § 89).<sup>45</sup>

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38. *Jersild v. Denmark*, § 31; see also *Bladet Tromsø and Stensaas v. Norway* [GC], § 63.

39. See also *Thoma v. Luxembourg*, § 62.

40. *Nilsen and Johnsen v. Norway*, § 48.

41. *Otegi Mondragon v. Spain*, § 54.

42. *Fuentes Bobo v. Spain*, § 46.

43. *Reznik v. Russia*, § 44.

44. *Bladet Tromsø and Stensaas v. Norway* [GC], § 59.

45. See also *McVicar v. the United Kingdom*, § 84; *Bladet Tromsø and Stensaas v. Norway* [GC], § 66; and *Pedersen and Baadsgaard v. Denmark* [GC], § 78.

The Court sometimes adds that the reliability of the source(s) “must be determined in the light of the situation as it presented itself to ... [the journalist or media] at the material time ... rather than with the benefit of hindsight” (*Bladet Tromsø and Stensaas v. Norway* [GC], § 66).

Nevertheless, the Court has also repeatedly affirmed that “journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation” and that in such cases, “the national margin of appreciation is circumscribed by the interest of democratic society in enabling the press to exercise its vital role of ‘public watchdog’ in imparting information of serious public concern” (*ibid.*, § 59).<sup>46</sup> It likewise covers ironic expressions that do not amount to insults and could not be said to be gratuitously offensive (*Riolo v. Italy*). The exaggeration or the opinion expressed must not, however, “exceed the boundaries of Article 10” (*ibid.*, unofficial translation, § 57).<sup>47</sup> The Court offered further insights into the scope of the notion of recourse to a degree of exaggeration or provocation in *Kuliś v. Poland*, holding:

In the context of a public debate the role of the press as a public watchdog allows journalists to have recourse to a certain degree of exaggeration, provocation or harshness. It is true that, whilst an individual taking part in a public debate on a matter of general concern ... is required not to overstep certain limits as regards – in particular – respect for the reputation and rights of others, he or she is allowed to have recourse to a degree of exaggeration or even provocation, or in other words to make somewhat immoderate statements. (§ 47)<sup>48</sup>

Exaggeration and provocation are typical features of satire, which the Court considers “a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate”,<sup>49</sup> therefore making a contribution to public debate. Relevant case law from the Court acknowledges a variety of forms of satire and contexts in which it is used, including a painting,<sup>50</sup> a mock interview,<sup>51</sup> a political placard<sup>52</sup> and a plaster puppet and sign during a carnival.<sup>53</sup>

In *Tuşalp v. Turkey*, a case in which the applicant had used a satirical style when formulating his strong criticism of the Turkish Prime Minister, the Court elaborated further on what satire could entail, and in particular the role and scope of (permissible) offensive language:

offensive language may fall outside the protection of freedom of expression if it amounts to wanton denigration, for example where the sole intent of the offensive statement is

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46. See also *De Haes and Gijssels v. Belgium*; *Nilsen and Johnsen v. Norway*.

47. See also *Fedchenko v. Russia*; *Fedchenko v. Russia (No. 2)*.

48. Citing *Mamère v. France*, § 25. See also *Dyuldin and Kislov v. Russia*; *Dalban v. Romania* [GC]; and *Lopes Gomes da Silva v. Portugal*.

49. *Vereinigung Bildender Künstler v. Austria*, § 33. See also *Nikowitz and Verlagsgruppe News GmbH v. Austria*; *Eon v. France*; and *Alves da Silva v. Portugal*.

50. *Vereinigung Bildender Künstler v. Austria*.

51. *Nikowitz and Verlagsgruppe News GmbH v. Austria*.

52. *Eon v. France*.

53. *Alves da Silva v. Portugal*.

to insult ... but the use of vulgar phrases in itself is not decisive in the assessment of an offensive expression as it may well serve merely stylistic purposes. For the Court, style constitutes part of communication as a form of expression and is as such protected together with the content of the expression (§ 48).<sup>54</sup>

In *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, which concerned material taken verbatim from an Internet newspaper, the source of which was given, the Court recognised the differences between the printed press and the Internet, but took the view that:

having regard to the role the Internet plays in the context of professional media activities ... and its importance for the exercise of the right to freedom of expression generally ... the absence of a sufficient legal framework at the domestic level allowing journalists to use information obtained from the Internet without fear of incurring sanctions seriously hinders the exercise of the vital function of the press as a “public watchdog” (§ 64).

The Court has held that the press can rely on the contents of official reports, holding that “the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the content of official reports without having to undertake independent research” (*Colombani and Others v. France*, § 65). Otherwise, according to the Court, “the vital public-watchdog role of the press may be undermined” (*ibid.*, § 65). Thus, in *Gorelishvili v. Georgia*, a case arising from the applicant journalist’s assessment of the financial situation of an exiled parliamentarian in light of the latter’s property declaration, the Court found that the journalist was entitled “to rely on the contents of the property declaration – an official document – without having to undertake independent research” (§ 41). In *Gutiérrez Suárez v. Spain*, the matter referred to had been the subject of an investigation before the courts and the Court again found that journalists could not be expected to undertake independent research.

In *Godlevskiy v. Russia*, the Court again recalled that “a distinction needs to be made according to whether the statements emanate from the journalist or are a quotation of others” (§ 45).<sup>55</sup> In this case, the applicant had “relied on publicly available materials from an investigation into the actions of officers from the anti-narcotics unit and on an official medical certificate showing the number of deaths by overdose” (*ibid.*, § 47). The Court found that “the applicant’s publication was a fair comment on a matter of public concern rather than a gratuitous attack on the reputation of named police officers” (*ibid.*, § 47). In *Timpul Info-Magazin and Anghel v. Moldova*, the Moldovan courts and the Moldovan Government had only relied on the part of the article that had made allegations of bribery and had taken it out of context. That allegation had been serious but the article, read in its entirety, had clearly warned that the rumour was unreliable.

In *Dyundin v. Russia*, the Court accepted that “the article contained serious factual allegations against the police and that those allegations were susceptible of proof”

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54. Citing *Skalka v. Poland*, § 34.

55. Citing *Pedersen and Baadsgaard v. Denmark* [GC], § 77, *Thorgeir Thorgeirson v. Iceland*, § 65, and *Jersild v. Denmark*, § 35.



(§ 35).<sup>56</sup> However, it considered that “in the context of the balancing exercise under Article 10, in particular where the reporting by a journalist of statements made by third parties is concerned, the relevant test is not whether the journalist can prove the veracity of the statements but whether a sufficiently accurate and reliable factual basis proportionate to the nature and degree of the allegation can be established” (ibid., § 35).

In *Times Newspapers Ltd v. the United Kingdom (Nos. 1 and 2)*, the Court emphasised the important “secondary” role of the press in relation to maintaining and making available Internet archives:

The Court agrees at the outset with the applicant’s submissions as to the substantial contribution made by Internet archives to preserving and making available news and information. Such archives constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free. The Court therefore considers that, while the primary function of the press in a democracy is to act as a “public watchdog”, it has a valuable secondary role in maintaining and making available to the public archives containing news which has previously been reported (§ 45).<sup>57</sup>

However, as archives relate to past events, member states would have a greater discretion (wider margin of appreciation):

However, the margin of appreciation afforded to States in striking the balance between the competing rights is likely to be greater where news archives of past events, rather than news reporting of current affairs, are concerned. In particular, the duty of the press to act in accordance with the principles of responsible journalism by ensuring the accuracy of historical, rather than perishable, information published is likely to be more stringent in the absence of any urgency in publishing the material (ibid., § 45).

## 1.4. CHILLING EFFECT

It is a central concern of the Court to ensure that any measures taken by national authorities do not have a “chilling effect” on debates on matters of legitimate public interest. A chilling effect may arise, in the words of the Court, where a person engages in “self-censorship”;<sup>58</sup> due to a fear of disproportionate sanctions<sup>59</sup> or a fear of prosecution under overbroad laws.<sup>60</sup> This chilling effect “works to the detriment of society as a whole”.<sup>61</sup>

In order to prevent a chilling effect on debates on matters of legitimate public interest, the Court will apply its highest level of scrutiny, the “most careful scrutiny”, to any measure taken by national authorities that is even “capable” of creating a chilling

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56. In this case there was a lot of documentary evidence to support the allegations. See also *Hrico v. Slovakia* and *Krasulya v. Russia*.

57. See also § 27, and *Węgrzynowski and Smolczewski v. Poland*, § 59.

58. *Vajnai v. Hungary*, § 54.

59. *Cumpănă and Mazăre v. Romania* [GC], § 114.

60. *Altuğ Taner Akçam v. Turkey*, § 68.

61. *Cumpănă and Mazăre v. Romania* [GC], § 114.

effect (*Bladet Tromsø and Stensaas v. Norway*, § 64). More concretely, the Court has stated that the “most careful scrutiny on the part of the Court is called for when ... the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern” (ibid., § 64).<sup>62</sup> The press should not, after all, be hampered in “performing its task as purveyor of information and public watchdog”.<sup>63</sup>

This approach has, for example, led the Court to rule in some cases that prison sentences may not be imposed as a sanction for defamation in the context of a debate on a matter of legitimate public interest, because such a sanction, “by its very nature, will inevitably have a chilling effect”.<sup>64</sup> The Court has been very forthright about the chilling effect of prison sentences as a sanction for criminal defamation. In *Fatullayev v. Azerbaijan*, for example, it observed that:

[i]nvestigative journalists are liable to be inhibited from reporting on matters of general 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. A fear of such a sanction inevitably has a chilling effect on the exercise of journalistic freedom of expression (§ 102).<sup>65</sup>

In the *Independent News and Media* case, that in the words of a dissenting judge “clearly involved a political debate on matters of general interest, an area in which restrictions on the freedom of expression should be interpreted narrowly”, the Court reiterated that “as [a] matter of principle, unpredictably large damages’ awards in libel cases are considered capable of having such an effect [that is, a ‘chilling’ effect] and therefore require the most careful scrutiny”.<sup>66</sup> It added that “[a]ccordingly, and even if, as the Government argued, the assessment of damages in libel cases is inherently complex and uncertain, any such uncertainty must be kept to a minimum” (ibid., § 114).

## 1.5. PROPORTIONALITY

The Court has held that the “nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10” (*Cumpănă and Mazăre v. Romania*, § 111).<sup>67</sup> This principle will be of particular importance where a finding of defamation might be justified, but the sanction imposed is disproportionate. The Court’s “most careful scrutiny” of a chilling effect on media freedom in section 1.4, above, is instructive in this connection (ibid., § 114).

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62. See also *Tønsbergs Blad AS and Haukom v. Norway*, § 88.

63. *Lingens v. Austria*, § 44.

64. *Cumpănă and Mazăre v. Romania* [GC], § 116.

65. See also *Cumpănă and Mazăre v. Romania* [GC], § 113 and *Mahmudov and Agazade v. Azerbaijan*, § 49.

66. *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*, § 114, citing *Bladet Tromsø and Stensaas v. Norway* [GC], § 64.

67. See also *Skalka v. Poland*, § 38.

One of the most important judgments from the Court on this point is the Grand Chamber judgment in the *Cumpăna and Mazăre* case. The Court considered the conviction of two Romanian journalists for defaming a number of public officials. First, the Court held that it was within the Romanian courts' margin of appreciation to have found that the statements, in the form of a cartoon, were defamatory. However, the Court went on to find that the sanctions imposed, namely prison sentences, and orders disqualifying them from working as journalists for one year, were "manifestly disproportionate" (ibid., § 118).

The use of the proportionality test is apparent in *Times Newspapers Ltd v. the United Kingdom (Nos. 1 and 2)*, where the Court followed the national Court of Appeal of England and Wales, finding that in the circumstances, "the requirement to publish an appropriate qualification to an article contained in an Internet archive, where it has been brought to the notice of a newspaper that a libel action has been initiated in respect of that same article published in the written press" did not constitute "a disproportionate interference with the right to freedom of expression" (§ 47).

The Court stated in the *Independent News and Media* case that the essential question was whether "there were adequate and effective domestic safeguards, at first instance and on appeal, against disproportionate awards which assured a reasonable relationship of proportionality between the award and the injury to reputation" (§ 113). The Court found in *MGN Limited v. the United Kingdom* that the high fees charged in such cases were disproportionate and therefore violated the right to freedom of expression (§§ 217 to 219).

## Chapter 2

# Substantive issues

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### 2.1. FACTS AND VALUE JUDGMENTS

Starting in its seminal *Lingens v. Austria* judgment<sup>68</sup> the Court has distinguished between facts and opinions, holding that the requirement that the defendant prove the truth of an allegedly defamatory opinion infringes his/her right to impart ideas as well as the public's right to receive ideas, under Article 10 of the Convention, noting that:

careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof ... As regards value-judgments, this requirement [to prove truth] is impossible of fulfilment and it infringes freedom of opinion itself (*ibid.*, § 46).<sup>69</sup>

Although the distinction seems clear, there is not always a bright shining line separating facts and value judgments in practice. The Court has also, on occasion, obfuscated the distinction, for example in *Karsai v. Hungary*, when it referred to a particular "statement of fact" as being "value-laden" (§§ 32 and 33). The Court has also repeatedly stated that "even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment without any factual basis to support it may be excessive".<sup>70</sup>

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68. See also *Schwabe v. Austria*; *De Haes and Gijssels v. Belgium*, § 47; and *Prager and Oberschlick v. Austria*, § 37, where it was held that there must be a sufficient factual basis for the expression of the opinion.

69. See also the various cases against Russia, including *Fedchenko v. Russia* (Nos. 1 and 2), where the Court found that a civil servant must tolerate more criticism than a private individual and the domestic courts had failed to distinguish between a statement of fact and a value judgment, the truthfulness of which could not be proved. See also *Harlanova v. Latvia*.

70. *Jerusalem v. Austria*, § 43, citing *De Haes and Gijssels v. Belgium*, § 47; *Oberschlick v. Austria* (No. 2), § 33, *Dichand and Others v. Austria*, §§ 42 and 43; *Scharsach and News Verlagsgesellschaft mbH v. Austria*, §§ 40 and 41; *Veraart v. the Netherlands*, § 55.

In *Dichand and Others v. Austria*,<sup>71</sup> the Court held that criticism, even in strong and polemical language, of the strategies and overlap of interests of a politician-lawyer were value judgments, had an adequate factual basis and represented a fair comment on issues of general public interest. The concept of value judgment, as espoused by the Court, is wider than mere comment in that it embraces assessment and analysis of facts as well as opinion. The adequacy of the factual basis for the value judgment is therefore an important consideration, although the weight to be given to it varies depending on the nature of the comment or value judgment.<sup>72</sup>

In *Thorgeirson v. Iceland*, the Court held that although the articles relied heavily on rumours, stories and the statements of others, they related to an important matter of public interest (that is, police brutality) and the journalist should not be required to prove the factual basis for those statements.

In *Fedchenko v. Russia*, given that another newspaper had, with reference to an audit, reported on the matter, the Court held that the authors had a sufficient factual basis for their allegations (opinion). However, in some circumstances, the Court might see the necessity for independent research. For instance, in *Standard Verlagsgesellschaft mbH (No. 2) v. Austria*, where an expert opinion was quoted to make a repeated allegation that Mr Haider, then Regional Governor of Carinthia, deliberately misled the regional government, the Court stated that the newspaper should have examined the expert opinion itself rather than simply relying on a press release from the Socialist Party that had summarised the expert opinion incorrectly.

In *Lopes Gomes da Silva v. Portugal*,<sup>73</sup> a case that concerned an editorial in a newspaper, the Court found that the conviction of a journalist for defamation was a violation of his freedom of expression. It held that there was a factual basis for the comments made in rather trenchant terms about the political beliefs and ideology of a candidate chosen to stand in city council elections. The situation clearly involved a political debate on matters of general interest, the Court said, an area in which restrictions on freedom of expression should be interpreted narrowly. Similarly, in *Hrico v. Slovakia*,<sup>74</sup> which concerned articles criticising a supreme court judge, the Court found that they consisted of value judgments that had a sufficient basis in fact. Were there no factual basis, the opinion could appear excessive, but that was not the case here, the Court observed.

The case law upholding the freedom to publish value judgments ranges from cases where there is a substantial factual basis to those that have little or none. The requirement of supporting facts may vary, therefore, depending on the context. In *Dichand and Others v. Austria*, for example, the Court found a violation of Article 10, even though there was only “a slim factual basis” for one of the value judgments (§ 52). Likewise, in *Chalabi v. France*, the Court found that the case involved value judgments and that the many documents produced showed that at the time the

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71. See also *Oberschlick v. Austria (no .2)*; *Lopes Gomes da Silva v. Portugal*, following *Prager and Oberschlick v. Austria*, § 38 and *Feldek v. Slovakia*, § 86.

72. See *Unabhängige Initiative Informationsvielfalt v. Austria*.

73. See also *Feldek v. Slovakia*, § 86.

74. See also *Fleury v. France*; *Cărlan v. Romania*; and *Laranjeira Marques da Silva v. Portugal*.

article was written the comments in question had not been entirely without factual basis: “the factual basis to the present case had not been inexistent” (unofficial translation, § 44). The Court found in *Cuc Pascu v. Romania*,<sup>75</sup> on the other hand, that there had been no violation of Article 10 in circumstances where, given the lack of factual basis and his position as a journalist, the applicant should have demonstrated the greatest rigour and exercised particular caution before publishing the offending article (unofficial translation, § 33). He had not even verified the content of the article before its publication, even though the information came from a third party. Moreover, as regards the insulting remarks used by the applicant, the Court found that he could not be regarded as having had recourse to “a degree of exaggeration” or “provocation” that was permitted by journalistic freedom (ibid., § 34). Also in *Kuliś v. Poland*, the Court stated that “even where a statement amounts to a value judgment, the proportionality of an interference may depend on whether there exists a sufficient factual basis for the impugned statement, since even a value judgment may be excessive where there is no factual basis to support it” (§ 39).

The question, therefore, is one of proportionality of the interference with freedom of expression, rather than an actual requirement of a (sufficient) factual basis. For instance, the Court would not require a (sufficient) basis of fact in the context of a lively political debate, in light of the observation that:

the distinction between statements of fact and value judgments is of less significance ... where the impugned statement is made in the course of a lively political debate at local level and where elected officials and journalists should enjoy a wide freedom to criticise the actions of a local authority, even where the statements made may lack a clear basis in fact.<sup>76</sup>

It is worth observing also that in relation to any need to actually state or refer to the underlying facts that support an opinion or value judgment, the Court stated in *Feldek v. Slovakia* that it could not “accept the proposition, as a matter of principle, that a value judgment can only be considered as such if it is accompanied by the facts on which that judgment is based” (§ 86). It added that the “necessity of a link between a value judgment and its supporting facts may vary from case to case in accordance with the specific circumstances” (ibid., § 86). This has indeed been borne out in relevant case law, even if the Court has stated that “in essence”, Article 10

leaves it for journalists to decide whether or not it is necessary to reproduce such documents to ensure credibility. It protects journalists’ right to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide “reliable and precise” information in accordance with the ethics of journalism.<sup>77</sup>

In the *Lopes Gomes da Silva v. Portugal* case, the Portuguese national courts had found a newspaper editorial criticising the political views of a lawyer and journalist who was a candidate in the Lisbon city council elections to be defamatory. The Court

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75. See also *Flux v. Moldova* (No. 6), §§ 29 and 30, where the Court was again concerned about journalistic standards.

76. *Lombardo and Others v. Malta*, § 60; *Dyuldin and Kislov v. Russia*, § 49.

77. *Fressoz and Roire v. France*, § 54.

attached “great importance” to the fact that the applicant, who was the manager of the newspaper at the time, reprinted numerous extracts from the electoral candidate’s recent articles alongside the editorial in question. In doing so, the Court found that he “acted in accordance with the rules governing the journalistic profession” (§ 35). It explained further that “while reacting to those articles”, the applicant “allowed readers to form their own opinion by placing the editorial in question alongside the declarations of the person referred to in that editorial” (ibid., § 35).

Similarly, in *Belpietro v. Italy*, the Court found that the placement of a particular photo alongside the article at the heart of the proceedings “contributed towards reinforcing, in the eyes of the readers, the arguments set out in the article, including those that could be regarded as an attack on the public prosecutors’ professional reputations” (unofficial translation, § 59).

In *Salumäki v. Finland*, on the other hand, the use of headlines that made false insinuations that were not supported – and were even contradicted – by the text of the newspaper articles to which they were connected, were considered defamatory by the Finnish national courts. The Court ruled that there had not been a violation of Article 10 as the connection of a famous businessman to a murder (albeit in the form of a question) “amounted to stating, by innuendo, a fact that was highly damaging to the reputation” of the businessman in question (§ 59).

The distinction between facts and value judgments has often featured in cases focusing on satire as well. In *Nikowitz and Verlagsgruppe News GmbH v. Austria*, for example, a case involving satirical article about an Austrian skier purportedly taking pleasure at the news that a rival skier had been injured. The Court concluded that there had been a violation of Article 10 as the remark was a value judgment expressed as a joke and was within the limits of acceptable satirical comment in a democratic society.

## 2.2. SUBJECT OF THE STATEMENT

When the Court reviews a defamation judgment, it takes into account the subject, or target, of an allegedly defamatory statement. Thus, when a publication concerns certain individuals, such as politicians, public officials or public figures, the Court has held that such individuals “should expect to be subject to wider limits of acceptable criticism”.<sup>78</sup> It is possible to distinguish between different categories of subjects/targets of defamation, but one of the underlying considerations for the Court is the public nature of the person’s status and/or role, as will be seen below.

### 2.2.1. Politicians

In its *Lingens v. Austria* judgment, the Court laid down the important principle that the “limits of acceptable criticism” are “wider as regards a politician as such than as regards a private individual” (§ 42). This was because a politician “inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree

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78. For this quote and for a more extensive list of categories than that used in this study, see the factsheet “Protection of reputation”, European Court of Human Rights, Council of Europe.

of tolerance" (ibid., § 42). In later case law, the Court has added that a politician is open to such close scrutiny, *a fortiori* by his/her political opponents.<sup>79</sup> The Court also acknowledged in the *Lingens* case that protection of reputation "extends to politicians too, even when they are not acting in their private capacity; but in such cases the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues" (ibid., § 42).<sup>80</sup>

In *Lopes Gomes da Silva v. Portugal*, the Court restated the principles applicable to politicians, who must display a greater degree of tolerance, particularly when they themselves make public statements that are susceptible of criticism (§ 30 ii).<sup>81</sup> In the same vein, in the *Brasilier v. France* case, the Court deemed it relevant that the plaintiff – a Member of Parliament, Mayor of Paris and Mayor of the Fifth Arrondissement of Paris – was "most certainly a political and media personality" (unofficial translation, § 41). The Court added in *Alves da Silva v. Portugal* that politicians must exhibit a high degree of tolerance of criticism, especially when that criticism takes the form of satire (§ 28). It will be recalled (see section 1.3, above), that the Court regards satire as a form of artistic expression and social commentary that naturally aims to provoke and agitate.

The Court has elucidated the scope of the greater degree of tolerance to be shown by politicians in other case law. The principle applies all the more when allegedly defamatory statements are made in response to statements by politicians that are "clearly intended to be provocative and consequently to arouse strong reactions".<sup>82</sup> In the same case, *Oberschlick v. Austria (No. 2)*, when the applicant journalist described the (then) leader of the Austrian Freedom Party (FPÖ) and Governor of the Austrian Province of Carinthia, Jörg Haider, as an idiot ("Trottel"), the Court found that while polemical, the statement did not amount to "a gratuitous personal attack as the author provided an objectively understandable explanation for them derived from Mr Haider's speech, which was itself provocative" (§ 33). The Court saw both Haider's speech and Oberschlick's reaction as part of the political discussion provoked by the speech.

In *Mladina d.d. Ljubljana v. Slovenia*, the Court found that a journalist's conviction for defamation of a politician amounted to a violation of Article 10, *inter alia* because the article that gave rise to the defamation proceedings and conviction, "matched not only the ... [politician's] provocative comments, but also the style in which he had expressed them" (§ 45). The article was a reaction to a speech given by the politician in question during a parliamentary debate on same-sex marriage. During his speech, which followed his political party's line and "portrayed homosexuals as a generally undesirable sector of the population", the politician imitated a homosexual man using specific gestures that, in the opinion of the Court, "may be regarded as ridicule promoting negative stereotypes" (ibid., § 44).

In *Tammer v. Estonia*, a journalist was convicted for insulting a female political advisor who had had an affair with a former prime minister and had his child,

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79. *Pakdemirli v. Turkey*, § 45.

80. See also *Oberschlick v. Austria*, §§ 57 to 59, and *Oberschlick v. Austria (No. 2)*, § 29.

81. Citing also *Oberschlick v. Austria (No. 2)*, § 29. See also *Pakdemirli v. Turkey*, § 45; *Eon v. France*.

82. *Oberschlick v. Austria (No. 2)*, § 31.



which, according to the journalist, caused the break-up of his marriage; later, she abandoned the child. The Court found that this concerned her private life, not her political conduct and therefore there was no breach of Article 10. She was no longer a political figure, it had not been established that there was any public interest and besides, only a small fine had been imposed on the journalist. In contrast, in *Malisiewicz-Gašior v. Poland*, defamation of a politician in the context of a heated political debate presented no justification for the imposition of a prison sentence, which must have had “a chilling effect” on the freedom of expression in public debate in general (§ 68).<sup>83</sup>

### **2.2.2. Heads of state and government**

Historically, a number of Council of Europe member states have sought to protect a head of state’s reputation through special laws, and increased penalties, for allegedly defamatory statements targeting a head of state. For instance, in *Colombani and Others v. France*, the Court considered a French insult law that criminalised statements including “defamatory remarks” concerning a foreign head of state, but unlike criminal defamation laws, the defence of justification was not available. The Court ruled that the “inability to plead justification was a measure that went beyond what was required to protect a person’s reputation and rights, even when that person was a head of State or government” (§ 66). This was because:

the effect of a prosecution under section 36 of the Act of 29 July 1881 is to confer a special legal status on heads of State, shielding them from criticism solely on account of their function or status, irrespective of whether the criticism is warranted. That, in its view, amounts to conferring on foreign heads of State a special privilege that cannot be reconciled with modern practice and political conceptions. Whatever the obvious interest which every State has in maintaining friendly relations based on trust with the leaders of other States, such a privilege exceeds what is necessary for that objective to be attained (*ibid.*, § 68).

Since its *Colombani* judgment, the Court has re-affirmed its position on the matter and consolidated it, first by adding that the principle applies, *a fortiori*, to such legislation that is subject to the discretionary interpretation of a judge.<sup>84</sup> It has also consolidated its position by stating in its *Artun and Güvener v. Turkey* judgment that its *Colombani* finding, which concerned foreign heads of state:

applies *a fortiori* concerning a State’s interest in protecting the reputation of its own head of state: such interest could not justify conferring on the latter a privilege or special protection regarding other people’s right to inform or to express opinions about him. To think differently would not be reconcilable with modern political practice and ideas (unofficial translation, § 31).<sup>85</sup>

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83. See Barendt E. (2009), “Balancing freedom of expression and privacy: the jurisprudence of the Strasbourg Court”, *Journal of Media Law* Vol. 1, Issue 1, p. 67, where he also discusses *Karhuvaara and Iltalehti v. Finland*.

84. *Pakdemirli v. Turkey*, § 52.

85. Citing *Colombani and Others v. France*, § 68 and *Pakdemirli v. Turkey*, § 52.

The Court relied on similar reasoning in *Otegi Mondragon v. Spain*, when it held that:

the fact that the King occupies a neutral position in political debate and acts as an arbitrator and a symbol of State unity should not shield him from all criticism in the exercise of his official duties or – as in the instant case – in his capacity as representative of the State which he symbolises, in particular from persons who challenge in a legitimate manner the constitutional structures of the State, including the monarchy (§ 56).

The central focus in *Otegi Mondragon v. Spain* was a legislative provision “which affords the Head of State a greater degree of protection than other persons (protected by the ordinary law on insults) or institutions (such as the government and Parliament) with regard to the disclosure of information or opinions concerning them, and which lays down heavier penalties for insulting statements” (§ 55). The Court reiterated its earlier finding in its *Colombani* judgment that “providing increased protection by means of a special law on insults will not, as a rule, be in keeping with the spirit of the Convention” (*ibid.*, § 55).<sup>86</sup>

The Court tends to take a similar approach to government leaders, that is, prime ministers and ministers. The case *Tuşalp v. Turkey* concerned civil sanctions against the applicant for having defamed the Turkish Prime Minister, Recep Tayyip Erdoğan, whom the Court classed as “a very high-ranking politician” (§ 45). In *Axel Springer AG v. Germany (No. 2)*, the Court described the (former) position of Gerhard Schröder as Chancellor of Germany as “one of the highest political offices in the Federal Republic of Germany”, which meant that he had to show a “much greater degree of tolerance than a private individual” (§ 67). In *Turhan v. Turkey*, the Court observed that the impugned remarks were value judgments concerning a minister, that is, “a public figure in respect of whom the limits of acceptable criticism are wider than for a private individual” (§ 25). The nature and status of a political office can therefore be said to be extremely important from the perspective of proportionality.

The Court has had occasion to consider whether there is a posthumous right to reputation. The grandson of Josef Stalin took a case to Strasbourg that centred on the questions whether: (i) his grandfather’s right to reputation had been violated by two publications and (ii) the applicant’s own right to respect for his private and family life were at stake in the case (*Dzhugashvili v. Russia*). The applicant was denied *locus standi* in respect of the first claim because the rights in question are non-transferrable (*ibid.*, §§ 24 and 25). The Court distinguished “between defamatory attacks on private persons, whose reputation as part and parcel of their families’ reputation remains within the scope of Article 8, and legitimate criticism of public figures who, by taking up leadership roles, expose themselves to outside scrutiny” (*ibid.*, § 30).<sup>87</sup> In doing so, it described Stalin as “a world-famed public figure” (*ibid.*, § 29). The Court underscored the importance of freedom of expression for ensuring the quest for historical truth (*ibid.*, § 33),<sup>88</sup> noting that “that historical events of great importance which affected the destinies of multitudes of people, as well as the

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86. See also *Eon v. France*, § 55.

87. The Court thereby distinguished its judgment from the *Putistin v. Ukraine* case, which concerned a private individual (discussed above).

88. See also *Chauvy and Others v. France*, § 69.

historical figures involved therein and responsible for them, inevitably remain open to public historical scrutiny and criticism, as they present a matter of general interest for society” (ibid., § 32). Stressing the “exceptional public interest and importance” in the events under discussion, the Court found that “the historic role of the applicant’s ancestor called for a higher degree of tolerance to public scrutiny and criticism of his personality and his deeds” (ibid., § 35).

### **2.2.3. Government and public authorities**

As established by the Court in *Castells v. Spain*, the “limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician” (§ 46). This is because in a “democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion” (ibid., § 46).

Importantly, with regard to criminal prosecutions by a government, the Court held 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” (unofficial translation, ibid., §46).

Apart from the above focus on the government (that is, the executive branch of a state), the principles of close scrutiny and wider limits of permissible criticism also apply *mutatis mutandis* to other branches of government (broadly defined) and public authorities. As noted by the Court in its *Vides Aizsardzibas Klubs v. Latvia* judgment, “public authorities, in principle, lay themselves open to constant scrutiny by citizens, and, subject to good faith, everyone has to be able to draw the public’s attention to situations that they consider unlawful” (unofficial translation, § 46).

Similarly, in *Dyuldin and Kislov v. Russia*, the Court found a violation of Article 10 when a newspaper was ordered to pay damages to members of a regional government, following the publication of an open letter criticising the regional authority. The Court noted that the letter had not named any of the government officials who had sued, and held that “a fundamental requirement of the law of defamation is that in order to give rise to a cause of action the defamatory statement must refer to a particular person” (§ 43). The Court reasoned that if:

all State officials were allowed to sue in defamation in connection with any statement critical of administration of State affairs, even in situations where the official was not referred to by name or in an otherwise identifiable manner, journalists would be inundated with lawsuits. Not only would that result in an excessive and disproportionate burden being placed on the media, straining their resources and involving them in endless litigation, it would also inevitably have a chilling effect on the press in the performance of its task of purveyor of information and public watchdog (ibid., § 43).<sup>89</sup>

In this and other cases, the Court has downplayed the significance of the distinction between statements of fact and value judgments “where elected officials and

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89. See also *Radio Twist a.s. v. Slovakia*, § 53.

journalists should enjoy a wide freedom to criticise the actions of a local authority, even where the statements made may lack a clear basis in fact” (ibid., § 49; see section 2.1, above).

#### **2.2.4. Public officials**

The Court held in *Janowski v. Poland*, a case involving insults directed at municipal guards, and in a number of its subsequent judgments, such as *Nikula v. Finland*, involving insults directed at a prosecutor, that:

civil servants acting in an official capacity are, like politicians, subject to the wider limits of acceptable criticism. Admittedly those limits may in some circumstances be wider with regard to civil servants exercising their powers than in relation to private individuals. However, it cannot be said that civil servants knowingly lay themselves open to close scrutiny of their every word and deed to the extent to which politicians do and should therefore be treated on an equal footing with the latter when it comes to the criticism of their actions.<sup>90</sup>

A complicating factor involved in determining the limits of acceptable criticism towards civil servants is added to by the Court’s consideration that “it may be necessary to protect public servants from offensive, abusive and defamatory attacks which are calculated to affect them in the performance of their duties and to damage public confidence in them and the office they hold”.<sup>91</sup>

Wider limits of acceptable criticism may apply to some types of civil servants, but not to others, depending on the nature of their functions and responsibilities. In *Lešník v. Slovakia*, for instance, the civil servants in question were public prosecutors, “whose task it is to contribute to the proper administration of justice” and which makes them “part of the judicial machinery in the broader sense of this term” (§ 54). The Court held that for that reason, it is “in the general interest that they, like judicial officers, should enjoy public confidence” and that it “may therefore be necessary for the State to protect them from accusations that are unfounded” (ibid., § 54).

In *Busuioc v. Moldova*, the Court declined to follow the line of reasoning in its *Janowski* and *Nikula* judgments, *inter alia* because “the complainants in issue were neither law-enforcement officers nor prosecutors; it would go too far to extend the *Janowski* principle to all persons who are employed by the State or by State-owned companies” (§ 64).

A concrete illustration of the complicated nature of this calculation is provided by the *Pedersen and Baadsgaard v. Denmark* case. The Court held in that case that:

although the Chief Superintendent was subject to wider limits of acceptable criticism than a private individual, being a public official, a senior police officer and leader of the police team which had carried out an admittedly controversial criminal investigation,

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90. *Janowski v. Poland*, § 33; see also *Nikula v. Finland*, § 48; *Lešník v. Slovakia*, § 53; and *Mariapori v. Finland*, § 56.

91. *Busuioc v. Moldova*, § 64, following (and adapting) *Janowski v. Poland*, § 33. See also *Lešník v. Slovakia*, § 53.

he could not be treated on an equal footing with politicians when it came to public discussion of his actions. All the less so, as the allegation exceeded the notion of “criticism of the Chief Superintendent’s performance as head of the investigation in the specific case” ... and amounted to an accusation that he had committed a serious criminal act. Thus, it inevitably not only prejudiced public confidence in him, but also disregarded his right to be presumed innocent until proved guilty according to law (§ 80).

As mentioned above, in some cases, the nature of the function (for instance, senior or high-profile) discharged by a public official can point to the level of criticism that is deemed permissible. In *De Carolis and France Televisions v. France*, the Saudi prince who was the plaintiff in the defamation proceedings was deemed to occupy an eminent position within the Kingdom of Saudi Arabia, having successively held several official functions that were relevant to the subject of the programme at the centre of the defamation proceedings (§ 52). What mattered in the eyes of the Court was that it concerned a civil servant acting as a public figure exercising official functions. However, in other cases, such as *Nilsen and Johnsen v. Norway*, the Court disagreed that, “on the strength of his activity as a Government appointed expert Mr Bratholm could be compared to a politician who had to display a greater degree of tolerance” (§ 52). It took the view that “it was rather what he did beyond this function, by his participation in public debate”, which was relevant in the case (*ibid.*, § 52).

In *Fedchenko v. Russia (No. 2)*, the article at the centre of the case was critical of problems in the regional educational system and mentioned specific figures and gave the surnames of senior officials. This naturally rendered the individuals in question identifiable, but the Court did not see that as a problem. The Court observed that “effective criticism is impossible without reference to specific figures and persons” (§ 59). It went on to spell out the importance for public debate of the ability to identify relevant individuals. It reasoned:

Holding otherwise would mean extinguishing the essence of the right to public debate over matters of public concern and turn it into a purely fictitious concept. In the present case the plaintiff held the position of the most senior official in the regional educational system. A public debate on the state of the educational system in the region is hardly conceivable without mentioning the name of its most senior official (*ibid.*, § 59).

### **2.2.5. Judges**

Bearing in mind the principles described in the previous sub-section, judges represent a particular category of civil servants or public officials, owing to “the special role of the judiciary in society”, as described by the Court in its *Prager and Oberschlick v. Austria* judgment (§ 34).<sup>92</sup> The Court maintained that:

[a]s the guarantor of justice, a fundamental value in a law-governed State ... [the judiciary] must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore prove necessary to protect such confidence against destructive attacks that are essentially unfounded, especially in view of the fact that judges who have been criticised are subject to a duty of discretion that precludes them from replying” (§ 34).

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92. See also *De Haes and Gijssels v. Belgium*, § 37.

Nevertheless, as the Court also pointed out, it remains the case that the press is “one of the means by which politicians and public opinion can verify that judges are discharging their heavy responsibilities in a manner that is in conformity with the aim which is the basis of the task entrusted to them” (ibid., § 34).

### **2.2.6. Public figures and private individuals**

The underlying logic of the public role of persons in official positions or in politics has also been extended by the Court to apply to persons who are active in public life in different ways. A key consideration for the Court remains whether an individual has sought publicity or engaged in public debate. In such scenarios, the individual can be expected to tolerate public scrutiny and criticism. By way of illustration, the Court held in *Kuliš v. Poland* that the “limits of critical comment are wider if a public figure is involved, as he inevitably and knowingly exposes himself to public scrutiny and must therefore display a particularly high degree of tolerance” (§ 47). The limits of permissible criticism are, however, generally speaking not as wide as for politicians. The Court has held in that respect that: “[w]hereas the limits of permissible criticism are narrower in relation to a private citizen than in relation to politicians, private individuals lay themselves open to scrutiny when they enter the arena of public debate and then have to show a higher degree of tolerance”<sup>93</sup>

Thus, in *Brunet-Lecomte and Lyon Mag’ v. France*, the Court found that a teacher should be regarded as a public figure, not only by reason of the public nature of his profession, but also because of the publicity he sought for some of his ideas and beliefs. The Court observed that:

at the material time, T. was very active as a lecturer, in particular in the Lyon area, as shown by not only the contested articles, but also many documents included in the evidence and adduced before the Court. It follows that while T. cannot be compared to a public figure in light of his sole occupation as a teacher, he nonetheless exposed himself to press criticism through the publicity he chose to give to some of his ideas and beliefs, and can perhaps therefore expect close scrutiny of his comments (unofficial translation, § 46).

Similarly, in *Karman v. Russia*, the plaintiff in the defamation proceedings was the editor-in-chief of a newspaper who had organised a public gathering at which he spoke about his ideas and thereby “courted popular support” for them (§ 35). The District Court noted that he “actively participated in the public life of the town” (ibid., § 35). These considerations prompted the Court to find that “[s]ince he was active in this manner in the public domain, he should have had a higher degree of tolerance to criticism” (ibid., § 35).

Other factors taken into consideration by the Court include the public interest in the person and his/her activities, whether s/he holds any official positions and his/her right to (and reasonable expectation of) privacy. In *Von Hannover v. Germany*, the Court found that the situation did not come “within the sphere of any political or public debate because the published photos and accompanying commentaries relate exclusively to details of the applicant’s private life” (§ 64). Although the

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93. *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft m.b.H. v. Austria* (No. 3), § 39.

applicant, Princess Caroline of Monaco, “represents the ruling family at certain cultural or charitable events ... she does not exercise any function within or on behalf of the State of Monaco or any of its institutions” (ibid., § 62).

More generally, in *Von Hannover v. Germany (No. 2)*, the Court has synthesised the criteria it uses when balancing the right to freedom of speech against the right to private life as follows: contribution to a debate of general interest; how well known the person concerned is and the subject of the report; prior conduct of the person concerned; content, form and consequences of the publication; circumstances in which the photos were taken (§§ 108 to 113). These criteria have been synthesised from other case law, for example *Axel Springer AG v. Germany*, where the Court held that the fact that a famous person actively seeks the limelight can lead to a reduced expectation of privacy on his part. The person in the Axel Springer case was an actor, but this reasoning would also apply to famous persons from other walks of life, such as sporting figures and entertainment celebrities.<sup>94</sup>

In the *Colaço Mestre* case, the public interest prevailed as the focus of the publication was solely the public activities of the aggrieved party – his activities as chairman of a football club and president of a football league, and not his private life.<sup>95</sup> But even where the information published does not directly concern the public activities of a public figure (or relate exclusively to his private life), as in *Tønsbergs Blad AS and Haukom v. Norway*, “a possible failure of a public figure to observe laws and regulations aimed at protecting serious public interests, even in the private sphere, may in certain circumstances constitute a matter of legitimate public interest” (§ 87).

Further, in *Bergens Tidende and Others v. Norway*, the Court held that even in a case where the press is “attacking the reputation of private individuals” (§ 53), it could not find that “the undoubted interest of Dr R. in protecting his professional reputation was sufficient to outweigh the important public interest in the freedom of the press to impart information on matters of legitimate public concern” (ibid., § 60).<sup>96</sup>

### **2.2.7. Corporations**

The principles established by the Court in *Lingens v. Austria* have been very influential in delineating the scope of permissible criticism in respect of various types of actors. These principles, which underscore the importance of public debate in a democratic society, have also been applied to corporations as early as 1989, in the Court’s *Markt Intern* judgment:

In a market economy an undertaking which seeks to set up a business inevitably exposes itself to close scrutiny of its practices by its competitors. Its commercial strategy and the manner in which it honours its commitments may give rise to criticism on the part of consumers and the specialised press. In order to carry out this task, the specialised press must be able to disclose facts which could be of interest to its readers and thereby contribute to the openness of business activities.<sup>97</sup>

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94. See, for example, *Hachette Filipacchi Associés (ICI PARIS) v. France*, § 52 and *Sapan v. Turkey*, § 34.

95. *Colaço Mestre and SIC – Sociedade Independente de Comunicação, S.A. v. Portugal*.

96. See also *Kanellopoulou v. Greece*, § 38.

97. *Markt intern Verlag GmbH and Klaus Beermann v. Germany*, § 35.

The Court held in its *Steel and Morris v. the United Kingdom* judgment that “large public companies inevitably and knowingly lay themselves open to close scrutiny of their acts and, as in the case of the businessmen and women who manage them, the limits of acceptable criticism are wider in the case of such companies” (§ 94). The case arose out of the sentencing of environmental activists to pay damages for having defamed McDonald’s in a campaign against the corporation.

In a similar vein, the Court had earlier held in *Fayed v. the United Kingdom* that “the limits of acceptable criticism are wider with regard to businessmen actively involved in the affairs of large public companies than with regard to private individuals” (§ 75). It continued by stating that persons “who fall into the former category of businessmen inevitably and knowingly lay themselves open to close scrutiny of their acts, not only by the press but also and above all by bodies representing the public interest” (ibid., § 75).

The Court has also accepted that the protection of a company’s reputation “and thus ‘the reputation or rights of others’” may be considered a legitimate aim for the purposes of Article 10 § 2.<sup>98</sup> According to the Court, “in addition to the public interest in open debate about business practices, there is a competing interest in protecting the commercial success and viability of companies, for the benefit of shareholders and employees, but also for the wider economic good”.<sup>99</sup> For these reasons, the state “enjoys a margin of appreciation as to the means it provides under domestic law to enable a company to challenge the truth, and limit the damage, of allegations which risk harming its reputation” (ibid., § 94).

In *Ujv. Hungary*, the Court considered a defamation prosecution initiated by a state-owned corporation after the applicant journalist had described a particular type of wine produced by the corporation as “shit”. The Court held that “the impugned criminal charges were pressed by a company which undisputedly has a right to defend itself against defamatory allegations” (§ 22). However, the Court did hold that there is a difference between the commercial reputational interests of a company and the reputation of an individual concerning his or her social status. Whereas the latter might have repercussions on one’s dignity, for the Court interests of commercial reputation are devoid of that moral dimension. In the instant application, the reputational interest at stake is that of a State-owned corporation; it is thus a commercial one without relevance to moral character (ibid., § 22).<sup>100</sup>

Another principle relating to the limits of permissible criticism in public debate has also been applied analogously to corporations, namely if a corporation is crude or provocative in its own advertising, subsequent criticism in a similarly crude or provocative style may be condoned. In *Kuliś and Różycki v. Poland*, a case in which a satirical cartoon had referred to eating “muck” in connection with the plaintiff food company’s potato crisps, the Court held:

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98. *Tierbefreier e.V. v. Germany*, § 49.

99. *Steel and Morris v. the United Kingdom*, § 94. See also *Kuliś and Różycki v. Poland*, § 35.

100. See also *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, § 84.



The wording employed by the applicants had been exaggerated; however, they were reacting to slogans used in the plaintiff's advertising campaign which also displayed a lack of sensitivity and understanding for the age and vulnerability of the intended consumers of their product, namely children. The Court thus considers that the style of the applicants' expression was motivated by the type of slogans to which they were reacting and, taking into account its context, did not overstep the boundaries permissible to a free press (§ 39).

The Court distinguishes between different types of corporations, for instance in terms of the nature of their ownership (that is, state-owned or private) and their size. The Court found in *Timpul Info-Magazin and Anghel v. Moldova* that the corporation was "not a large company similar to that in *Steel and Morris*" and "should therefore enjoy a comparatively increased protection of its reputation" (§ 34). The Court then stated that "when a private company decides to participate in transactions in which considerable public funds are involved, it voluntarily exposes itself to an increased scrutiny by public opinion. In particular, if there are allegations that such transactions were detrimental to public finances, a company must accept criticism by the public" (*ibid.*, § 34).

### **2.2.8. Groups**

In its *Giniewski v. France* judgment, the Court upheld the legitimacy of the aim of the challenged interference with the applicant's right to freedom of expression, which it summarised as being "to protect a group of persons from defamation *on account of their membership of a specific religion*" (author's emphasis, § 40). The Court held that this aim corresponded to the protection of "the reputation or rights of others" (Article 10 § 2 of the Convention). Crucially, the focus was on defamation of (a group of) persons, not religions, as such. A group – necessarily comprising a body of individuals – may have reputational interests, whereas a religion (seen as a creed rather than a group) does not. In its *Garaudy v. France* decision, the Court described Holocaust denial as "one of the most serious forms of racial defamation of Jews and of incitement to hatred of them", thereby denying the impugned expression Convention protection pursuant to Article 17.<sup>101</sup>

### **2.2.9. Institutions**

The Court has also had to consider the reputational interests of bodies or institutions such as universities, which requires the fair balancing of the right to freedom of expression (or more specifically, debate about the organisation of university life) with those reputational interests. Again, the Court has applied *mutatis mutandis* its reasoning in the Lingens case, for instance in *Kharlamov v. Russia*, where it found that "the protection of the University's authority is a mere institutional interest of the University, that is, a consideration not necessarily of the same strength as 'the protection of the reputation or rights of others' within the meaning of Article 10 § 2" (§ 29).

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101. *Garaudy v. France*.

The ability to openly criticise universities, even when that criticism has a negative impact on their reputational interests, is part and parcel of academic freedom, the importance of which has been underlined by the Court in other case law. In *Sorguç v. Turkey*, for instance, the applicant had, drawing on his own experiences, criticised a university system of appointments and promotions, which he claimed had led to academically inadequate candidates being successful. The Court pointed out in its judgment that academic freedom “comprises the academics’ freedom to express freely their opinion about the institution or system in which they work and freedom to distribute knowledge and truth without restriction” (§ 35). It considered that the Court of Cassation of Turkey had not convincingly established that there was pressing social need for “putting the protection of the personality rights of an unnamed individual above the applicant’s right to freedom of expression and the general interest in promoting this freedom where issues of public interest are concerned” (ibid., § 36).

### **2.2.10. Associations**

In *Jerusalem v. Austria*, a case concerning the alleged defamation of two associations by a municipal councillor, the Court considered the limits of acceptable criticism for associations which, it pointed out, “lay themselves open to scrutiny when they enter the arena of public debate” (§ 38). The Court observed that the associations in question were “active in a field of public concern, namely drug policy” (ibid., § 39). It observed further that:

[t]hey participated in public discussions on this matter and, as the Government conceded, cooperated with a political party. Since the associations were active in this manner in the public domain, they ought to have shown a higher degree of tolerance to criticism when opponents considered their aims as well ... the means employed in that debate” (ibid., § 39).

Building on and refining these observations in *Paturel v. France*, a case concerning the alleged defamation of a sect, the Court recalled:

the associations lay themselves open to close scrutiny when they enter the arena of public debate and, as soon as they are active in the public domain, they have to show a higher degree of tolerance to opponents’ criticism of their aims and to the arguments advanced in the debate ... In this case, UNADFI is an association working in a field of public concern, namely sectarian practices and organisations. It participates in public debates, since its very purpose is to inform the public about sects, as well as work on prevention and provide assistance for victims. No one contests that the association actively carries out its statutory activities (unofficial translation, § 46).

## **2.3. WHO IS LIABLE?**

An important issue in defamation law is the question of who is liable for defamatory statements. For instance, should individual editors and journalists be liable as well as the media organisation or publisher? Should those who are only technically involved in an electronic publication be liable when they are not the author, editor or publisher? Should a newspaper be liable for readers’ letters? Should a broadcaster be liable for guests’ contributions, or should a website be liable for users’ comments?

Questions about who is liable are generally determined at the member state level either by designation of editors-in-chief as the persons liable or the adoption of a defence such as “innocent publication” for those only technically involved in electronic publications.

Importantly, the Court has held as a matter of principle that:

News reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of “public watchdog”... 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.<sup>102</sup>

This is a very important principle because it allows journalists to report on controversial opinions without the fear that those opinions will be imputed to them.<sup>103</sup> The Court stated in its *Reznik* judgment that “the extent of the applicant’s liability in defamation must not go beyond his own words and he may not be held responsible for statements or allegations made by others, be it a television editor or journalists” (§ 45). The case concerned statements made by the applicant while participating in a live television debate, without being aware of “any footage that the editor had chosen to use as an introduction to the debate” (*ibid.*, § 45).

In the same vein, the Court has found that, depending on the circumstances, a requirement for editors to distance themselves from the texts of authors that they publish may not be justified.<sup>104</sup> However, it has explained:

It is true that, since he contributes to providing a medium for the expression of opinions by the authors he publishes, the editor not only participates fully in their freedom of expression, but also shares their “duties and responsibilities”. Provided that the requirements of paragraph 2 are respected, Article 10 does not therefore exclude that an editor, even without personally subscribing to the opinions expressed, may be sanctioned for having published a text in which an author neglected his “duties and responsibilities” (unofficial translation, *ibid.*, § 47).<sup>105</sup>

It would seem that, as a matter of principle, the Court has held that newspapers should not be liable for content submitted by readers or contributors. For example, in *Lindon, Otchakovsky-Laurens and July v. France*, the Court considered the conviction of a newspaper’s director following the newspaper publishing a petition signed by 97 writers criticising a defamation conviction, and which reproduced the passages of the novel that had been found to be defamatory by that court and “challenged that characterisation” (§ 66).

The Court held that the newspaper director’s conviction was consistent with Article 10, holding that “it does not appear unreasonable to consider that the ... [director] overstepped the limits of permissible ‘provocation’ by reproducing ... [the defamatory]

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102. *Jersild v. Denmark*, § 35.

103. See also *Thoma v. Luxembourg*, § 64.

104. *Orban and Others v. France*, § 50; *Thoma v. Luxembourg*, § 64.

105. Citing, *inter alia* *Sürek v. Turkey (No. 1)* [GC], § 63 and *Öztürk v. Turkey* [GC], § 49.

passages” and that “the Court considers that, within the limits indicated above, the reasoning of the Court of Appeal is consonant with its own findings that the impugned writings were not merely value judgments but also allegations of fact ... and that the Court of Appeal had made an acceptable assessment of the facts in reaching its conclusion that the writings were not sufficiently dispassionate” (ibid., § 66).

Turning to the matter of liability for third-party comments, the Court has also considered the issue of whether an online news portal is liable for defamatory comments (some of which amounted to hate speech, according to the Court) posted by users in response to an article that it published on its website, in *Delfi AS v. Estonia*. Notwithstanding the existence and implementation of a filtering system and a notice-and-takedown system, the Court found that the applicant company was liable for the comments, *inter alia* due to its duties and responsibilities with regard to hateful content posted in response to its own content.

In its Delfi judgment, the Court identified a number of specific aspects of freedom of expression in terms of protagonists playing an intermediary role on the Internet, as being relevant for the concrete assessment of the interference in question: “the context of the comments, the measures applied by the applicant company in order to prevent or remove defamatory comments, the liability of the actual authors of the comments as an alternative to the intermediary’s liability, and the consequences of the domestic proceedings for the applicant company” (§ 142; see also § 143). In subsequent case law, the Court has held that these criteria (as modified) are also relevant for assessing the proportionality of an interference with the right to freedom of expression in similar circumstances (“free of the pivotal element of hate speech”<sup>106</sup> in the Delfi judgment).

In *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, the Court described the applicants (Internet service providers) as “protagonists of the free electronic media” (§ 88) and showed an awareness of the implications of imposing liability for third-party comments on Internet portals. It held that such liability “may have foreseeable negative consequences on the comment environment of an Internet portal, for example by impelling it to close the commenting space altogether”, which “may have, directly or indirectly, a chilling effect on the freedom of expression on the Internet” (ibid., § 86).

## 2.4. DEFENCES

### 2.4.1. Truth

Truth is a defence to a defamation action in that if the facts are true and can be proven to be true to the satisfaction of a court, there is no basis for holding the speaker liable, and freedom of expression prevails. This stems from the fact that a person is entitled only to a reputation based on truth, not to a good reputation that is based on falsehood and therefore undeserved. Generally, it is not sufficient for the speaker to believe that what s/he published is true; it is necessary to be able to prove

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106. *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, § 70.

it. Accuracy as to the facts and reporting the facts is therefore key.<sup>107</sup> However, for journalists in particular, it is not always possible while a story is breaking to be wholly accurate, and therefore some leeway is required. The Court recognises that “news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest”.<sup>108</sup> Journalistic practices can build in fact-checking processes and journalists can be encouraged to ensure access to sources and documents that can provide evidence in court if an allegation of defamation arises. The defence relates only to facts, as it is only facts that can be proven true or false. As discussed above, comments and value judgments are not susceptible of proof.

### **2.4.2. Good faith**

Good faith (or *bonne foi*) is an element of a number of defences applicable in defamation cases. It is an element of a fair comment defence and a reasonable publication or qualified privilege defence, for instance. In the case of journalists, the presence or absence of good faith may be ascertained by references to the facts and circumstances of the case and/or by reference to journalistic codes of ethics. The Court endorses the important role of the media in a democracy and has elaborated many facets of media rights. It also speaks in terms of media tasks, referring regularly to the “duties and responsibilities” explicitly mentioned in Article 10 § 2. It accepts the place of journalistic ethics in maintaining standards, expects and exhorts journalists to adhere to journalistic ethics and on occasion makes direct reference to specific journalistic codes of standards and practice.

The Court has occasionally referred to the notion and requirements of so-called “responsible journalism” although its use of the term has proved controversial.<sup>109</sup> It has consistently endorsed the media role and supported responsible or “good faith” journalism and has explained its growing emphasis on adherence to journalistic ethics and codes of practice as follows:

These considerations play a particularly important role nowadays, given the influence wielded by the media in contemporary society: not only do they inform, they can also suggest by the way in which they present the information how it is to be assessed. In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance.<sup>110</sup>

The Court has expressly stated that it will not second-guess journalists,<sup>111</sup> and has largely refrained from laying down rules for responsible journalism. It has said that the methods of objective and balanced reporting may vary considerably, depending, among other things, on the media in question. However, in determining whether a restriction on a journalist was necessary and proportionate, it will look at all the facts of the case, including the publication in question and the circumstances in which it

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107. See, for example, the importance of accuracy in *Bergens Tidende and Others v. Norway*.

108. *Observer and Guardian v. the United Kingdom*, § 60.

109. See the Joint Dissenting Opinion of Judges Sajó and Tsotsoria in *Rusu v. Romania*.

110. *Stoll v. Switzerland* [GC], § 104.

111. *Jersild v. Denmark*, § 31.

was written.<sup>112</sup> Thus, it may look at the potential impact of the medium concerned, the manner in which a broadcast programme was prepared, its contents, the context in which it was broadcast and the purpose of the programme.<sup>113</sup>

In *Bergens Tidende and Others v. Norway*, too, the Court held that the complaints of dissatisfied patients, although expressed in graphic and strong terms, were essentially correct and accurately recorded by the newspaper. Reading the articles as a whole, the Court did not find that the statements were excessive or misleading, and held unanimously that the damages award against the newspaper in the Norwegian courts constituted a breach of the newspaper's right to freedom of expression. In an important statement, the Court said that:

[b]y reason of the "duties and responsibilities" inherent in the exercise of freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (§ 53).

The Court thus recognises a zone of activity within which journalists are the decision makers in accordance with the ethics of journalism and where the standard required is that they act in good faith in pursuit of the aims of providing accurate and reliable information for the public.

### **2.4.3. Fair comment**

The defence available in respect of the expression of opinions, convictions, comments and value judgments is one of fair comment, sometimes also referred to, *inter alia* as honest opinion. The defence differs from that of truth as truth relates only to facts. The Court clarified in early cases such as *Lingens v. Austria* that expressions consisting merely of opinions, comment or value judgments should not be subject to a requirement to prove them true because they are not fact-based. However, depending on the circumstances – as illustrated above – it may be necessary to some extent to show that the underlying facts are true. The Court accords a certain degree of latitude to the media to rely on official and authorised or reputable documents without having to conduct their own independent research but that latitude is not without limits. In this regard, the good faith of journalists and media, and their adherence to journalistic standards and practice, may be relevant.

The purpose of a fair comment defence is essentially to give the widest scope possible for the freedom of expression in relation to opinions and to allow for comment on a wide range of public as opposed to private matters. Allowing wide scope for comment can contribute greatly to public debate. A fair comment defence will generally relate only to comment on matters of public interest and not private matters.<sup>114</sup> Comment on matters of private or family life may fall outside the scope of a fair comment defence and may even engage the Article 8 right to privacy, as discussed above.

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112. *Lopes Gomes Da Silva v. Portugal*, § 32.

113. *Jersild v. Denmark*, § 31.

114. See, for example, *Thorgeir Thorgeirson v. Iceland*, discussed above.

#### **2.4.4. Privilege and reasonable publication**

There are a number of defences to defamation that are essentially public interest defences. These include defences of absolute and qualified privilege and defences of reasonable publication on matters of public interest. Absolute, or unconditional, privilege usually attaches to fair and accurate reports of the proceedings or decisions of national and international parliaments, courts and other specified public organisations. Qualified, or conditional, privilege, on the other hand, attaches to fair and accurate reports of lawful public proceedings or events, or of official or other public documents, registers, etc. A defence of qualified privilege is conditional and may be lost by proof that the publication was motivated by malice. In some situations it may be subject to the provision of an explanation or clarification, where, for example, something defamatory has been stated at a public meeting and although reported accurately, it becomes clear that the allegation or inference was false. A defence of reasonable publication on matters of public interest is available in situations where information is published in good faith in the belief that it was in the public interest to publish it and reasonable steps were taken in the pre-publication and publication stages to verify the information and, where appropriate, to give the person it concerns an opportunity to put forward his/her position. As these are all defences, it is for the defendant to plead and prove them.

These defences take account of the role of the media in informing the public and satisfying the public's right to know. They operate on the basis that the media cannot always achieve absolute accuracy and that in some instances, although journalistic standards were adhered to, a defence of truth would not be possible. Such defences begin from the premise that freedom of expression and freedom of the media are the central values and should prevail unless it can be shown that there were serious shortfalls or lacunae in the journalistic approach or decision making in relation to the publication of a particular story or information, particularly one that would inform or contribute to public debate on a matter of public interest. In essence, the publication must be in good faith and for the purpose of discussion of a subject of public interest. The defences thus provide some incentive to the media to publish important if controversial or risky stories, while at the same time encouraging careful research and practices in journalism. If they take reasonable care in the preparation, investigation and publishing decisions regarding a story and are not negligent (that is, in breach of their duty of care to the public they serve and to any individuals who are the subject matter of the story), then they can expect that a defence of reasonable publication will be available to them.

## Chapter 3

# Procedural and remedial issues

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### 3.1. PROCEDURAL SAFEGUARDS

Pre-trial, trial and even appellate procedures in defamation actions can affect positively or negatively both freedom of expression and protection of reputation. Thus, the Court has recognised that certain procedural safeguards are necessary.

Pre-trial measures such as injunctions, which are a form of prior restraint, require particular safeguards. The purpose injunctions serve in defamation law is to prevent publication in the first instance, or to prevent repetition of material already published. Given the importance of freedom of expression and the far-reaching effects of any form of prior restraint, they should be used and available for use only in exceptional and very limited circumstances. National courts must be circumspect to ensure that the granting of an injunction does not unnecessarily interfere with the right to freedom of expression. Permanent injunctions should rarely, if ever, be granted in defamation cases because of the serious impact on freedom of expression. Injunctions and the procedural safeguards that should govern them are considered in greater detail in section 3.2.6, below.

Procedural safeguards are required also to guard against unwarranted or inordinate delays in the court process, which can have a negative impact on freedom of expression by rendering it stale, and which can also mean that a defamed person's reputation is not vindicated in a timely manner.<sup>115</sup> The Court has also commented on the importance of an appropriate limitation period in balancing the rights to freedom of expression and reputation, in *Times Newspapers Ltd. v. the United Kingdom (Nos. 1 and 2)*, where it referred to the role of appropriate limitation periods in ensuring that "those who are defamed move quickly to protect their reputations in order that newspapers sued for libel are able to defend claims unhindered by the passage of time and the loss of notes and fading of memories that such passage of time inevitably entails" (§ 46).

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<sup>115</sup> See, for example, *Observer and Guardian v. the United Kingdom*, § 60 and *Cumhuriyet Vakfi and Others v. Turkey*, § 66.



Also, by way of example, the Court has recognised in the case of jury trials for defamation, the need for appropriate directions for juries to enable them to decide the factual issues and, where relevant, assess compensation. In *Tolstoy Miloslavsky v. the United Kingdom*, the Court generally supported the domestic Court of Appeal's attempts to ensure that damages awards were proportionate but held that an award of £1.5 million was so disproportionately large as to constitute a violation of the applicant's right to freedom of expression under Article 10 of the Convention. It found, however, that this case was distinguishable from the Independent News and Media case in that in the latter, the judge had given the jury concrete indications as to the level of damages to be awarded and the degree of appellate review of the award was more "robust", as the test of proportionality had been used by the Irish Supreme Court (§§ 128 and 129).

### **3.1.1. Burden of proof/Presumption of falsity**

The issue of the burden of proof in relation to facts – as opposed to comments or value judgments (see above) – falling on the defendant in defamation cases, the presumption being that the facts published are false unless or until the defendant can prove them true, has been addressed by the Court in the context of both civil and criminal defamation. The rationale behind such a presumption in national laws is that it is the defendant who has published the material complained of as being defamatory, and it is incumbent upon him/her to have verified the facts before publishing. It is thus the defendant who is required to prove they were at least substantially true, rather than the person whose reputation has potentially been wronged by the publication of untrue facts about him/her.

In the context of civil defamation the Court, in *McVicar v. the United Kingdom*, examined the standard of proof required of defendants in defamation proceedings. The Court held that a requirement to prove that allegations made in a newspaper article were "substantially true on the balance of probabilities" was a justified restriction on freedom of expression, in the interests of the protection of the reputation and rights of plaintiffs (§ 87).

However, in the later case of *Steel and Morris v. the United Kingdom*, when the Court reviewed the burden of proof placed on two campaigners who had distributed leaflets critical of the McDonald's corporation, the Court found a violation of Article 10. The Court noted that "[a]s a result of the law as it stood in England and Wales, the applicants had the choice either to withdraw the leaflet and apologise to McDonald's, or bear the burden of proving, without legal aid, the truth of the allegations contained in it" (§ 95). The Court was very critical of the "enormity and complexity of that undertaking" (ibid., § 95) and concluded that the correct balance between the parties' conflicting needs had not been struck (see section 3.1.3, below).

Also, in the context of criminal defamation, the Court held in *Rumyana Ivanova v. Bulgaria*, that "a requirement for defendants in defamation proceedings to prove to a reasonable standard that the allegations made by them were substantially true does not, as such, contravene the Convention" (§ 39).

However, the Court stated in *Kasabova v. Bulgaria* that the presumption of falsity "could be seen as unduly inhibiting the publication of material whose truth may be

difficult to establish in a court of law, for instance because of the lack of admissible evidence or the expense involved" (§ 61). The Court insisted that it found it necessary to emphasise that "the reversal of the burden of proof operated by that presumption makes it particularly important for the courts to examine the evidence adduced by the defendant very carefully, so as not to render it impossible for him or her to reverse it and make out the defence of truth" (§ 62).

The distinction between facts and value judgments, as discussed at length in section 2.1 above, is very relevant in the context of the burden of proof in defamation cases. According to the Court's settled case law, a distinction has to be drawn between statements of fact and value judgments because the truth of the latter is not susceptible of proof. When national legislation or national courts fail to make such a distinction and in consequence, there is a requirement to prove the truth of value judgments, as in *Gorelishvili v. Georgia*, "[s]uch an indiscriminate approach to the assessment of speech is, in the eyes of the Court, *per se* incompatible with freedom of opinion, a fundamental element of Article 10 of the Convention" (§ 38).<sup>116</sup> Similarly, the Court held in *Dalban v. Romania* that it would be "unacceptable for a journalist to be debarred from expressing critical value judgments unless he or she could prove their truth" (§ 49).

Notably, in *Bozhkov v. Bulgaria*, the Court reiterated that "if the national courts apply an overly rigorous approach to the assessment of journalists' professional conduct, the latter could be unduly deterred from discharging their function of keeping the public informed. The courts must therefore take into account the likely impact of their rulings not only on the individual cases before them but also on the media in general" (§ 51).

### **3.1.2. Standard of proof**

As noted above in section 3.1.1, the Court has held that a requirement in a civil action for defamation to prove that allegations made in a newspaper article were "substantially true on the balance of probabilities" was a justified restriction on freedom of expression.<sup>117</sup> The Court has also addressed on a number of occasions the standard of proof required in respect of particular subject matter, for instance where allegations of possible criminal conduct are made in the press. In *Kasabova v. Bulgaria*, the Court considered a domestic court decision in which it was held that the only way of corroborating the allegation that someone had committed a criminal offence was to show that s/he stood convicted of it. The Court held that "[w]hile a final conviction in principle amounts to incontrovertible proof that a person has committed an offence, to circumscribe in such a way the manner of proving allegations of criminal conduct in the context of a libel case is plainly unreasonable, even if account must be taken, as required under Article 6 § 2, of that person's presumed innocence" (§ 62). This is because

[a]llegations in the press cannot be put on an equal footing with those made in criminal proceedings ... Nor can the courts hearing a libel case expect libel defendants to act like

116. See also *Grinberg v. Russia*, §§ 29 and 30, and *Fedchenko v. Russia*, §§ 36 and 37.

117. *McVicar v. the United Kingdom*, § 87.

public prosecutors, or make their fate dependent on whether the prosecuting authorities choose to pursue criminal charges against, and manage to secure the conviction of, the person against whom they have made allegations (ibid., § 62).

Addressing the same topic, the Court has held that

the degree of precision for establishing the well-foundedness of a criminal charge by a competent court can hardly be compared to that which ought to be observed by a journalist when expressing his opinion on a matter of public concern, in particular when expressing his opinion in the form of a value judgment.<sup>118</sup>

### **3.1.3. Legal aid / Equality of arms**

The issue of the absence of legal aid in defamation cases and its implications for procedural fairness arose in *Steel and Morris v. the United Kingdom*, where the Court found that in the circumstances of the case, given the “enormity and complexity” of meeting the requisite burden of proof without the benefit of legal aid, the national courts had not struck the correct balance “between the need to protect the applicants’ rights to freedom of expression and the need to protect McDonald’s rights and reputation” (§ 95). The Court held that the “more general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities, and the possible ‘chilling’ effect on others are also important factors to be considered in this context, bearing in mind the legitimate and important role that campaign groups can play in stimulating public discussion” (ibid., § 95).

In contrast, in the earlier case of *McVicar v. the United Kingdom*, the Court held that, in the specific circumstances of the case, the absence of legal aid did not constitute a violation of the Convention. The applicant, a journalist, was well-educated and would have been well able to represent himself before the court (§ 53).

### **3.1.4. Access to the courts**

Access to the courts is a right of everyone subject only to the rules of due process and the orderly administration of justice. In respect of defamation actions, an absolute privilege normally attaches to the workings of the courts and accurate reports of their proceedings. Thus, in *Erla Hlynisdóttir v. Iceland (No. 3)*, the Court found that “the rendering of an indictment in a media coverage after it has been read out at a trial hearing is a kind of situation where there may be special grounds for dispensing the press from its ordinary obligation to verify factual statements that are defamatory of private individuals” (§ 73).

### **3.1.5. Parliamentary privilege**

Parliamentary privilege is a safeguard for procedures and proceedings in parliament. Its purpose is to ensure that freedom of expression in the houses of parliament can

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<sup>118</sup> *Scharsach and News Verlagsgesellschaft mbH v. Austria*, § 43, following *Unabhängige Initiative Informationsvielfalt v. Austria*, § 46.

proceed freely in the public interest without the constant fear or threat of defamation actions. It is an absolute privilege and a privilege that is usually extended (in qualified form) to reports of parliamentary debates. The Court found in *A. v. the United Kingdom* that an immunity attaching to statements made in the course of parliamentary debates in the legislative chambers and designed to protect the interests of parliament as a whole, as opposed to those of individual parliamentarians, was compatible with the Convention (§§ 84 and 85).

However, in *Cordova v. Italy (No. 1)*, the Court held that “the lack of any clear connection with a parliamentary activity requires it to adopt a narrow interpretation of the concept of proportionality between the aim sought to be achieved and the means employed” (§ 63). In any case, parliamentary immunity does not extend to activities that are not related to parliamentary responsibilities, such as statements in a television broadcast<sup>119</sup> or the publication of a letter in a newspaper; nor does it relieve an editor of the duty to examine such a letter for potentially defamatory content (especially given the senator who wrote the letter had previously been convicted for defamation).<sup>120</sup>

## 3.2. CIVIL MEASURES AND REMEDIES

The Court has built up a considerable amount of case law and principles in relation to civil measures and remedies in response to defamation. Excessive or disproportionate damages in civil actions have been found to have a “chilling effect” on freedom of expression and are therefore a cause for concern. Thus, measures such as the encouragement of directions to juries and the prevalent application of the proportionality test aim to prevent such awards. The availability of a range of civil remedies as alternatives to damages in appropriate cases, such as apologies or correction orders, can help to provide a proportionate response to defamation and, where fast-track or low-cost measures are also available, can enable a person’s reputation to be vindicated in a more timely fashion. The role of extra-judicial bodies, such as press councils, can play a valuable role in achieving proportionality and timeliness also, as has been noted by the Court in cases such as *Stoll v. Switzerland*.

### 3.2.1. Civil damages

In *Tolstoy Miloslavsky v. the United Kingdom*, the Court held that “under the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered” (§ 49). In that case, the sum awarded was three times the size of the highest libel award previously made in England. The Court found that the applicant’s right to freedom of expression had been violated, having regard to the size of the award for damages, “in conjunction with the lack of adequate and effective safeguards at the relevant time against a disproportionately large award” (§ 51).

Notwithstanding the “substantial sum” awarded as damages in the Independent News and Media case, the Court found that the applicant’s right to freedom of expression had not been violated. The libel was described as “serious and grave”

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119. *Keller v. Hungary*, p. 12 of decision.

120. *Belpietro v. Italy*, § 58.

and, in contrast to the Tolstoy Miloslavsky case, the Court held that, having regard to “the measure of appellate control, and the margin of appreciation accorded to a State in this context”, it had not been demonstrated that there were “ineffective or inadequate safeguards against a disproportionate award of the jury in the present case” (§§ 129 and 132).

Other considerations regarding the proportionality of damages and fines have included whether they include “success fees” for the legal teams;<sup>121</sup> whether the amount of compensation payable is “such as to threaten the economic foundations of the applicant company in any way”<sup>122</sup> or could even lead to the closure of a media outlet. In *Timput Info-Magazin and Anghel v. Moldova*, the severity of the fine led to the closure of the newspaper. Although the Court considered the seriousness of the fine to be irrelevant to the outcome of the case, it took note of “its chilling effect on the applicant newspaper, and that its imposition was capable of discouraging open discussion of matters of public concern’ ... by silencing a dissenting voice altogether” (§ 39).

In *Paturel v. France*, a case concerning the alleged defamation of a sect, the Court found that the applicant author’s right to freedom of expression had been violated, estimating that even though the damages to be paid by the applicant were limited to one “symbolic Franc”, “the fine, although relatively modest, when taken together with the cost of publishing a statement in two newspapers and the irrecoverable costs awarded to the civil party, did not seem justified in view of the circumstances” (unofficial translation, § 49). Even more emphatically, the Court described the damages of one symbolic Franc in *Brasilier v. France* as “the most moderate possible”, but nevertheless found that that, of itself, was insufficient to justify the interference with the applicant’s right to freedom of expression (§ 43).<sup>123</sup> It found the interference to be disproportionate due to the chilling effect on freedom of expression and concluded that Article 10 had been violated.

The proportionality of civil damages is not only gauged in monetary terms. In *Reznik v. Russia*, the Court held that: “[a]lthough the penalty of 20 Russian roubles was negligible in pecuniary terms, the institution of defamation proceedings against the President of the Moscow City Bar in the context of the present case was capable of having a chilling effect on his freedom of expression” (§ 50). Here it was the importance of freedom of expression for the person holding such an important position as President of the Moscow Bar that was at stake.

### **3.2.2. Apology**

In *Smolorz v. Poland*, when the Court was considering the proportionality of the sanctions imposed on a journalist for defamation, it took into account the fact that the journalist was forced to publicly apologise: “what matters is not the minor nature of the penalty imposed on the applicant, but the very fact that he was required to apologise publicly for his comments” (unofficial translation, § 42). The case concerned

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121. *MGN Limited v. the United Kingdom*, § 218.

122. *Błaja News Sp. z o. o. v. Poland*, § 71.

123. See also *Desjardin v. France*, § 51.

the criticism of an architect's work in a mocking tone as part of a public debate on the urban architecture of Katowice, past and present (ibid. § 41). The Court found that Article 10 had been violated as the language of the article did not go beyond the limits of permissible criticism.

### **3.2.3. Right of reply**

The Court has held that "as an important element of freedom of expression", the right of reply falls within the scope of Article 10.<sup>124</sup> The Court puts this down to "the need to be able to contest untruthful information, but also to ensure a plurality of opinions, especially in matters of general interest such as literary and political debate" (ibid., pp. 6-7 of decision).

In *Ediciones Tiempo S.A. v. Spain*, the former European Commission for Human Rights refuted the suggestion that the judicially enforced insertion of the aggrieved individual's reply was a disproportionate interference with the publication's right to freedom of expression. The commission pointed out that the publishing house was not obliged to modify the content of the impugned article and moreover, it was allowed to republish its version of the facts alongside the aggrieved individual's reply.

The case *Melnychuk v. Ukraine* involved a newspaper's refusal to publish the applicant's reply to a critical review of a book written by the applicant. The newspaper maintained that it had refused to publish the reply on the basis that it contained "obscene and abusive remarks" about the reviewer, that its reasoning had been communicated to the applicant and that he had declined the invitation to edit his reply accordingly (p. 2). The Court declared the application inadmissible and recalled that the right to freedom of expression does not confer on individuals or organisations "an unfettered right of access to the media in order to put forward opinions" (ibid., p. 6). It then noted that "as a general principle, newspapers and other privately owned media must be free to exercise editorial discretion in deciding whether to publish articles, comments and letters submitted by private individuals" (ibid., p. 6). It acknowledged that, against this background, "exceptional circumstances" may nevertheless arise "in which a newspaper may legitimately be required to publish, for example, a retraction, an apology or a judgment in a defamation case" (ibid., p. 6). Situations such as these may create a positive obligation "for the State to ensure an individual's freedom of expression in such media" (ibid., p. 6). The Court concluded by reiterating the general, basic obligation of the state to ensure, in any event, that "a denial of access to the media is not an arbitrary and disproportionate interference with an individual's freedom of expression, and that any such denial can be challenged before the competent domestic authorities" (ibid., p. 7).<sup>125</sup>

### **3.2.4. Retraction or rectification**

In *Karsai v. Hungary*, the Court considered the nature and severity of the sanction imposed on the applicant in order to assess the proportionality of the interference.

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124. *Melnychuk v. Ukraine*, p. 6 of decision.

125. See also *Flux v. Moldova* (No. 6).

It held that “the measure imposed on the applicant, namely, the duty to retract in a matter which affects his professional credibility as a historian, is capable of producing a chilling effect” (§ 36). It also stressed that “the rectification of a statement of fact ordered by a national court in itself attracts the application of the protection guaranteed by Article 10 of the Convention” (ibid., § 36). This was the case even though civil law and not criminal sanctions were at issue.

### **3.2.5. Court-ordered publication**

In *Giniewski v. France*, the Court considered an order “to publish a notice of the ruling in a national newspaper at his own expense” (§ 55). The Court held that while “the publication of such a notice does not in principle appear to constitute an excessive restriction on freedom of expression ... in the instant case the fact that it mentioned the criminal offence of defamation undoubtedly had a deterrent effect and the sanction thus imposed appears disproportionate in view of the importance and interest of the debate in which the applicant legitimately sought to take part” (ibid., § 55).

### **3.2.6. Injunctions**

On prior restraint generally, the Court has stated that Article 10 “does not in terms prohibit the imposition of prior restraints on publication, as such” (*Observer and Guardian v. the United Kingdom*, § 60). However, “the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court” (ibid., § 60). As already cited above, “[t]his is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest” (ibid., § 60).

#### **a. Interim injunctions**

The Court applied the same reasoning in *Cumhuriyet Vakfi and Others v. Turkey*, affirming that Article 10 does not prohibit interim injunctions, even where they entail prior restraints on publication (§ 61). However, because of the threat that interim injunctions pose to freedom of expression, the “most careful scrutiny” to which they should be subjected by the Court ought to include “a close examination of the procedural safeguards embedded in the system to prevent arbitrary encroachments upon the freedom of expression” (ibid., § 61).

The envisaged procedural safeguards include:

(a) scope of the interim injunction:

[t]he Court takes note, in the first place, of the sheer scope of the interim injunction imposed by the domestic court, particularly as regards its second prong, which set out in very general and unqualified terms that the applicants could not publish any news whatsoever that might be subject to the court proceedings. The Court considers that there is lack of clarity as to what material could and could not be published under the interim injunction ... The Court considers it quite possible that this lack of certainty may have also had a general chilling effect on the reporting of these matters at a period of intense political debate regarding the Presidential elections, thereby affecting not only *Cumhuriyet* as the measure’s direct addressee but all media outlets in the country (ibid., §§ 62 and 63).

(b) duration of the injunction:

[the Court noted that] [t]he restriction on the applicants' freedom of expression was, therefore, made unduly onerous by reason of the unexplained delays in the procedure ... and the failure to limit the impugned measure to a reasonable period of time. The Court emphasises that what is required here is not the setting of strict time-limits for interim injunctions with absolute certainty, which is neither attainable nor desirable in view of the excessive rigidity it would entail. There must, nevertheless, be rules and safeguards available to ensure that an interim injunction does not extend beyond a reasonable period commensurate with its rationale and amount to an abusive practice (*ibid.*, § 66).

(c) reasoning for the interim injunction:

[a]nother procedural problem tainting the interim injunction decision in question was the failure of the domestic court to provide any reasoning for its decision, either when granting the injunction or when refusing the ensuing request for it to be lifted ... the failure of the Ankara Civil Court of First Instance to provide relevant and sufficient reasons to justify its interim injunction decision stripped the applicants of the procedural protection that they were entitled to enjoy by virtue of their rights under Article 10 (*ibid.*, §§ 67 and 68).

In the particular circumstances of the *Tierbefreier e.V. v. Germany* case, the Court found that the civil injunction, which prevented the further dissemination of specified footage and which was subject to review, should there be a change in the relevant circumstances, was part of a fair balance struck by the national courts between the applicant association's right to freedom of expression and the company's reputational interests. It accepted the domestic courts' finding that "the applicant association remained fully entitled to express its criticism on animal experiments in other, even one-sided ways" (§ 58).

## **b. Permanent injunctions**

The Court found a violation of Article 10 in *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft m.b.H. (No. 3) v. Austria*, a case concerning a permanent injunction issued against a magazine that "prohibited the publication of Mrs G.'s picture in connection with reporting on Mrs G. and Mr R. as 'Bonnie and Clyde' on the ground that this could give the impression to the readers of the magazine that Mrs G. as 'Bonnie' had been involved in the criminal offences of Mr R." (§ 46). The Court found that the nature of the reporting was not misleading and that the Austrian courts had overstepped their margin of appreciation.

Similarly, in *News Verlags GmbH & Co.KG v. Austria*, the Court found that "the absolute prohibition on the publication of B.'s picture went further than was necessary to protect B. against defamation or against violation of the presumption of innocence" (§ 59). This was because, as the Vienna Court of Appeal had stated, "it was not the publication of B.'s picture in itself but its combination with comments which were insulting and contrary to the presumption of innocence that violated B.'s legitimate interests" (*ibid.*, § 57). The Court therefore concluded that there was "no reasonable relationship of proportionality between the injunctions as formulated by the Vienna Court of Appeal and the legitimate aims pursued" (*ibid.*, § 59).



### **3.2.7. Search and seizure**

In *Goussev and Marenk v. Finland*, the Court held that “the somewhat contradictory decisions indicate that it was not clear as to the circumstances in which the police could seize material which was potentially defamatory during a search which was being carried out for the purposes of finding evidence of another suspected crime and in that regard the legal situation did not provide the foreseeability required by Article 10” (§ 54). In *Saint-Paul Luxembourg S.A. v. Luxembourg*, the Court found, *inter alia* a violation of Article 10 due to the overbroad and therefore disproportionate nature of a search-and-seizure operation at the registered office of the applicant company, which was designed to identify the author of a newspaper article that was allegedly defamatory of a social worker (§ 62).

### **3.3. CRIMINAL SANCTIONS**

Criminal sanctions are imposed in some countries for defamation. The Court has not ruled that criminal sanctions as such are automatically a breach of Article 10 but they can be of serious concern to the Court. The amounts of fines or severity of the punishment are subjected to very careful examination and scrutiny. The very fact of a criminal conviction, even where the penalties imposed for it are light, can be very detrimental as it imposes a criminal record on the person concerned, which in turn can have far-reaching personal and/or professional consequences. It can thus engender great disquiet on the part of the Court and may be found to be disproportionate. Another important consideration on the part of the Court is where defamatory statements or allegations have the effect or potential effect of undermining the presumption of innocence (as guaranteed by Article 6 § 2 of the Convention). In such instances, it is more likely to accept the need for criminal sanctions, even severe ones. In *Ruokanen and Others v. Finland*, for instance (discussed above), it found that the presumption of innocence was undermined and that in the circumstances criminal sanctions, although only exceptionally compatible with Article 10, were not disproportionate.

On sanctions imposed generally for defamation, the Court has held that the “nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10”.<sup>126</sup> On sanctions on the press in particular, the Court held in *Bladet Tromsø and Stensaas v. Norway* that the “most careful scrutiny on the part of the Court is called for when ... the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern” (§ 64). Similarly, in *Cumpănă and Mazăre v. Romania*, the Court held that it “must also exercise the utmost caution where the measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in the discussion of matters of legitimate public concern” (§ 111).

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126. *Cumpănă and Mazăre v. Romania* [GC], § 111. See also *Skalka v. Poland*, § 38.

In *Flinkkilä and Others v. Finland*, involving privacy issues arising from reporting on an incident leading to the conviction of a high-level public servant, the Court found a breach of Article 10. It held that there was a clear public interest, that the incident had already been widely publicised in the media, and repeating it did not necessarily cause the same amount of damage and suffering, thus the sanctions (fines and damages) were excessive (§ 56).<sup>127</sup>

While the Court is reluctant to find substantive rules of defamation to violate Article 10, it has been particularly forthright in applying “strict scrutiny”, “most careful scrutiny” and “utmost caution” to sanctions imposed for defamation. On a number of occasions, the Court has even found there to be no justification whatsoever for states having imposed prison sentences in “classic” cases of defamation on matters of public interest.

### **3.3.1. Criminal convictions**

The Court has said that the use of criminal law to punish defamation does not, in principle, violate Article 10. In *Lindon, Otchakovsky-Laurens and July v. France*, the Court stated that “in 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” (§ 59).

However, in *Raichinov v. Bulgaria*, the Court laid down exceptions for the use of criminal law to punish defamation, stating:

It is true that the possibility of recurring to criminal proceedings in order to protect a person’s reputation or pursue another legitimate aim under paragraph 2 of Article 10 cannot be seen as automatically contravening that provision, as in certain grave cases – for instance in the case of speech inciting to violence – that may prove to be a proportionate response. However, 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 (§ 50).

In *Kanellopoulou v. Greece*, a case involving the alleged defamation of a medical doctor by one of his former patients, whose surgery had gone badly wrong, the Court stated very candidly that it felt that civil law remedies would have been sufficient to protect the reputation of the doctor (if indeed the applicant were to have been found to have defamed him) (§ 38). As mentioned above, the Court has similarly held that “the dominant position which those in power occupy makes it necessary for them to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the alleged criticisms of their adversaries”.<sup>128</sup>

### **3.3.2. Criminal fines**

In assessing the proportionality of criminal fines, the Court insists that a number of considerations are to be taken into account: (a) the individual means of the

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127. See also *Hrico v. Slovakia* and *Krasulya v. Russia*, § 44.

128. *Kuliš v. Poland*, § 45; see also *Ceylan v. Turkey* [GC], § 34.

defendant, such as that person's salary; (b) the average salary in the member state; and (c) the costs of the trial. For example, in *Kasabova v. Bulgaria*, the Court held that "the overall sum which the applicant was required to pay was a far more important factor in terms of the potential chilling effect of the proceedings on her and other journalists" (§ 71). The four fines imposed on the applicant were "considerable" compared to her salary when taken alone, but the Court stated that the fines should not be viewed in isolation, but together with the damages and costs awarded to the complainants. The total sum, which was "the equivalent of almost seventy minimum monthly salaries ... and of more than thirtyfive monthly salaries of the applicant, was payable by her alone" (*ibid.*, § 71). Moreover, the Court took into account the "evidence submitted by the applicant shows that she struggled for years to pay it in full" (*ibid.*, § 71).

In *Scharsach and News Verlagsgesellschaft mbH v. Austria*, the Court found that even though the first applicant's (suspended) fine "was in the lower range of possible penalties and was suspended for a three-year probationary period, it was a sentence under criminal law, registered in the first applicant's criminal record" (§ 32).

### **3.3.3. Prison sentences**

In *Cumpănă and Mazăre v. Romania*, the Court held that "the circumstances of the instant case – a classic case of defamation of an individual in the context of a debate on a matter of legitimate public interest – present no justification whatsoever for the imposition of a prison sentence. Such a sanction, by its very nature, will inevitably have a chilling effect" (§ 116). The Court has also used the same formula in *Mariapori v. Finland*, another "classic case of defamation of an individual in the context of a debate on an important matter of legitimate public interest", concerning the actions of the tax authorities (§ 68).

This rule followed from the principle stated in the *Cumpănă and Mazăre* case that:

[a]lthough sentencing is in principle a matter for the national courts, the Court considers that the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence (§ 115).

This finding concerning prison sentences for a "press offence" has been reiterated and applied many times, for example in respect of "political speech" generally.<sup>129</sup>

As noted in the *Cumpănă and Mazăre* case, the Court has emphasised the chilling effect the fear of sanctions creates, holding that "[t]he chilling effect that the fear of such sanctions has on the exercise of journalistic freedom of expression is evident ... This effect, which works to the detriment of society as a whole, is likewise a factor which goes to the proportionality, and thus the justification, of the sanctions imposed on the present applicants" (§ 114).

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129. *Otegi Mondragon v. France*, § 59.

## a. Pardoned prison sentences

In *Cumpănă and Mazăre v. Romania*, two journalists received seven-month prison sentences for defamation, but never served these sentences, as they were pardoned by the Romanian President. Nevertheless, the Court held:

Such a sanction, by its very nature, will inevitably have a chilling effect, and the fact that the applicants did not serve their prison sentence does not alter that conclusion, seeing that the individual pardons they received are measures subject to the discretionary power of the President of Romania; furthermore, while such an act of clemency dispenses convicted persons from having to serve their sentence, it does not expunge their conviction (§ 116).

## b. Suspended and conditional prison sentences

In *Marchenko v. Ukraine*, a school teacher had received a suspended one-year prison sentence for defaming an education board official, meaning that if no further defamation offences were committed during the one-year period, no sentence would be served. The Court held that “[s]uch a sanction, by its very nature, will inevitably have a chilling effect on public discussion, and the notion that the applicant’s sentence was in fact suspended does not alter that conclusion particularly as the conviction itself was not expunged” (§ 52).

In *Mariapori v. Finland*, a four-month conditional prison sentence for defamation was imposed, meaning that if no further defamation offences were committed during the four-month period, no prison sentence would be served. Nevertheless, the Court again pointed to the inevitability that such a sanction, by its very nature, will have a chilling effect on public debate. It added that the “fact that the applicant’s prison sentence was conditional and that she did not in fact serve it does not alter that conclusion” (§ 68). In *Şener v. Turkey*, “the Istanbul State Security Court suspended the imposition of a final sentence on the applicant on condition that she did not commit any further offence as an editor within three years of its decision” (§ 46). The decision in question therefore did not remove the applicant’s “status as a ‘victim’” (*ibid.*, § 46). The Court found that, “[o]n the contrary, the 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” (*ibid.*, § 46). The Court applied essentially the same reasoning in *Krasulya v. Russia* (§ 44).

In *Otegi Mondragon v. Spain*, a one-year prison sentence imposed on a politician for insulting the Spanish King, which was stayed for three years, was held to violate Article 10. The Court again stated that “[s]uch a sanction, by its very nature, will inevitably have a chilling effect, notwithstanding the fact that enforcement of the applicant’s sentence was stayed. While that fact may have eased the applicant’s situation, it did not erase his conviction or the long-term effects of any criminal record” (§ 60).

### c. Article 46: immediate release orders

Article 46 of the Convention on the binding force and execution of judgments provides that:

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

In *Fatullayev v. Azerbaijan*, after concluding that “the circumstances of the instant case disclose[d] no justification for the imposition of a prison sentence on the applicant” (§ 103), the Court exercised its seldom-used power under Article 46 of the Convention to order the immediate release of the applicant. It held that “having regard to the particular circumstances of the case and the urgent need to put an end to the violations of Article 10 of the Convention, the Court considers that, as one of the means to discharge its obligation under Article 46 of the Convention, the respondent State shall secure the applicant’s immediate release” (ibid., § 177). The judgment was delivered in April 2010 and the Azerbaijan Supreme Court ruled in November 2010 that the applicant should be released.<sup>130</sup>

#### **3.3.4. Professional and other consequences**

The Court has ruled that journalists should not be deprived of their ability to practise as journalists due to a conviction for defamation, where the defamatory statement concerns a matter of public interest. In the *Cumpănă and Mazăre* case, the Court held “an order disqualifying them from exercising [the right to practise as journalists] ... was particularly inappropriate in the instant case and was not justified by the nature of the offences for which the applicants had been held criminally liable” (§ 117).

In other cases, the Court has also considered the (professional) consequences of a criminal conviction for applicants. Thus, in *Ceylan v. Turkey*, it was relevant to the Court’s finding of a violation of Article 10 that the applicant – as a result of his conviction – lost his position as president of a workers’ union, “as well as a number of political and civil rights” (§ 37). The Court, in finding a violation of Article 10 in *Murat Vural v. Turkey*, dwelt on the fact that because the applicant was imprisoned for over 13 years, he had been unable to vote for over 11 years (§ 66).

In *Salumäki v. Finland*, on the other hand, the fact that the conviction was not entered on the applicant’s criminal record<sup>131</sup> proved influential in the Court’s finding that the sanction was “reasonable” and that Article 10 had not been violated (§§ 61 and 63). That finding would appear to be at odds with the Court’s settled case law, which points to the chilling effect caused by the mere fact of a criminal conviction: “what matters is that the journalist was convicted” at all.<sup>132</sup>

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130. Committee of Ministers Secretariat, “Communication from the government in the case of *Fatullayev v. Azerbaijan* (Application No. 40984/07)”, DH-DD(2010)604, 29 November 2010.

131. In accordance with domestic law, this was because the sanction imposed was limited to a fine.

132. *Jersild v. Denmark*, § 35.

# Conclusions

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In navigating the wide and sometimes choppy waters that are the Court's case law dealing with defamation, it is important to try to keep a sense of direction and purpose. The main compass for the navigational challenge is the Court's continued strong support for democratic values, freedom of expression, public debate and the important role of journalists and the media in realising these aims.

Of central importance here are the objectives of preventing a chilling effect and ensuring proportionality in measures to protect reputations and in measures for remedies and sanctions when reputational interests have been violated. Criminal sanctions clearly have a chilling effect on freedom of expression and public debate, and should be used with great restraint, according to the Court, but onerous civil remedies can have a chilling effect as well. The importance of public debate should be a constant and central consideration when assessing whether there has been a violation of Article 10 of the Convention in respect of attacks on reputations.

The following elements are taken into account and governed by free speech and proportionality principles: "the position of the applicant, the position of the person against whom his criticism was directed, the subject matter of the publication, characterisation of the contested statement by the domestic courts, the wording used by the applicant, and the penalty imposed on him".<sup>133</sup>

It is also important to recall distinctions between facts and value judgments, and that the substance and form of expressions are covered by Article 10; their contribution to public debate should be the benchmark, according to the Court.

Ring-fencing what defamation means can be a useful way of pre-empting the misuse or abuse of overbroad terms or laws, to the detriment of freedom of expression. For instance, the Court has clarified conditions and a test for protection of reputation under Article 8, which include the seriousness of the attack on personal reputation, the prior conduct of the target of an allegedly defamatory expression and the fair balancing of values protected by the Convention.

The Court's case law on defamation in an online environment – where specific features of particular Internet-based services are relevant, is not yet settled. The Court is still mapping its way through legal issues arising from Internet intermediary liability, online archives, user-generated comments, etc. Duties and responsibilities and legal liability are facing new levels of complexity, but existing principles should continue to provide necessary guidance.

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133. *Krasulya v. Russia*, § 35



# Case law

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- A. v. the United Kingdom*, No. 35373/97, ECHR 2002-X.
- Airey v. Ireland*, 9 October 1979, Series A No. 32.
- Albert-Engelmann-Gesellschaft mbH v. Austria*, No. 46389/99, 19 January 2006.
- Alves da Silva v. Portugal*, No. 41665/07, 20 October 2009.
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- Axel Springer AG v. Germany* [GC], No. 39954/08, 7 February 2012.
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- Bergens Tidende and Others v. Norway*, No. 26132/95, ECHR 2000-IV.
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- Bozhkov v. Bulgaria*, No. 3316/04, 19 April 2011.
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## The authors

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**Tarlach McGonagle** is a senior researcher and lecturer at the Institute for Information Law (IViR), Faculty of Law, University of Amsterdam and a senior researcher at the School of Human Rights Research in the Netherlands. He regularly writes expert reports on freedom of expression, media law and policy and journalism for various branches of the Council of Europe, the OSCE, other IGOs and NGOs. He was Rapporteur of the Council of Europe's Committee of Experts on protection of journalism and safety of journalists (2014-15) and is currently a member of the Council of Europe's Committee of Experts on media pluralism and transparency of media ownership. He is a member of the Euromedia Research Group.

**Marie McGonagle**, formerly of the National University of Ireland, Galway, has published widely in the areas of Media and Communications Law.

**Ronan Ó Fathaigh** is a researcher at the Institute for Information Law (IViR), University of Amsterdam, and specialises in the area of freedom of expression.

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