



DEFAMATION

Aware of the potential chilling effect of overprotective defamation laws on freedom of expression and public debate, the Council of Europe promotes decriminalisation of defamation and provides guidance to its member states to ensure proportionality of defamation laws and their application with regard to human rights.

The case-law of the European Court of Human Rights serves as an important reference point for assessing the risks of human rights violations that are inherent in the structure and content of national defamation laws.

Brief overview of the Council of Europe guidelines and activities addressing the issue of defamation in relation to freedom of expression

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DEFAMATION

Assessing challenges

In its **Declaration on freedom of political debate in the media**, adopted on 12 February 2004, the Committee of Ministers of the Council of Europe laid down the basic framework of principles to protect the freedom of expression guaranteed by Article 10 of the European Convention on Human Rights (ECHR) when the state, public institutions and political figures are involved in media's coverage of political debate.

Promoting decriminalisation of defamation

The Parliamentary Assembly of the Council of Europe (PACE) further affirmed its determination to stand for the decriminalisation of defamation in its **Resolution 1577 Towards decriminalisation of defamation (2007)** and the corresponding **Recommendation 1814 (2007)**.

PACE called on the Council of Europe's member states to abolish prison sentences for defamation without delay, to guarantee that there is no misuse of criminal prosecution for defamation and to safeguard the independence of prosecutors in these cases, to define the concept of defamation more precisely in their legislation so as to avoid an arbitrary application of the law, and to ensure that civil law provides effective protection of the dignity of persons affected by defamation.

Secondly, PACE called on the member states to set reasonable and proportionate maximum amounts for awards for damages and interest in defamation cases so that the viability of a defendant media organ is not placed at risk, and to provide appropriate legal guarantees against awards for damages and interest that are disproportionate to the actual injury.

In Resolution no. 2035 on the **Protection of the safety of journalists and of media freedom in Europe** (2015) and the follow-up Resolution no. 2141 on **Attacks against journalists and media freedom in Europe** (2017) PACE paid close attention to steps already taken and steps that still need to be taken within the member states towards decriminalisation of defamation and compliance with the ECHR standards.

Identifying risks and defining standards

Acting upon the aforementioned instruments of the Committee of Ministers and PACE, the Steering Committee on Media and Information Society (CDMSI) worked on a number of prominent issues that are of particular importance in light of the European Court of Human Rights' (ECtHR) case-law.

The Council of Europe thus undertook through its Committee, named at the time the Steering Committee on Media and New Communication Services (CDMC), now named CDMSI, to draft a report on the **Examination of**

the alignment of the laws on defamation with the relevant case-law of the European Court of Human Rights, including the issue of decriminalisation of defamation (2005). This study aimed to highlight the main issues and the benchmark principles that can be drawn from the ECtHR case-law regarding defamation proceedings and freedom of expression. The study also took stock of the state of defamation laws in the member states of the Council of Europe and showed that the majority of states still criminalise defamation.

As a follow-up, the **"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"** (2012) was prepared. This study built upon the previous work and focused on the principle of proportionality in light of the most recent case-law of the ECtHR.

The analysis of the ECtHR case-law in respect of defamation was taken a step further with the recent Council of Europe publication of the study on **"Freedom of expression and defamation. A study of the case-law of the European Court of Human Rights"** (2016) by Tarlach McGonagle in collaboration with Marie McGonagle and Ronan Ó Fathaigh. This study focuses on issues that the ECtHR has identified with regard to the definition of defamation, type and proportionality of sanctions, and the available defences in defamation cases. The study also addressed the issue of the potential chilling effect that overprotective defamation laws might have on freedom of expression.

Addressing the issue of "libel tourism"

In light of the Council of Europe's previous commitments, the Committee of Ministers adopted on 4 July 2012 its **Declaration on the Desirability of International Standards dealing with Forum Shopping in respect of Defamation ("Libel Tourism")**. In the Declaration, the Committee of Ministers of the Council of Europe stated that "libel tourism is a form of "forum shopping" when a complainant files a complaint with the court thought most likely to provide a favourable judgment (including in default cases) and where it is easy to sue". It has been stressed that the prevention of libel tourism should be part of the reform of the legislation on libel/defamation in member states in order to strike a fair balance between the competing rights of freedom of expression (Article 10 ECHR) and the right to respect for private and family life (Article 8 ECHR). It has also been underlined that "libel tourism" is a serious threat to freedom of expression and information.

As a reaction to the threat posed by the "libel tourism" phenomenon, further work is foreseen on studying liability and jurisdictional issues in the application of national defamation laws in Council of Europe member states, possibly laying a basis for a standard setting instrument on this issue.