

# Ending the Chilling Effect



The Representative on  
Freedom of the Media

Working to Repeal Criminal Libel and Insult Laws







REPRESENTATIVE ON FREEDOM OF THE MEDIA

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Criminal Libel and Insult Laws

Proceedings of the  
Round Table “What Can Be Done to  
Decriminalize Libel and Repeal Insult Laws”  
*Paris, 24-25 November 2003*

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Vienna 2004

On the cover is a drawing entitled *Des Schreibers Hand (The Writer's Hand)* by the German author and Nobel Prize laureate (1999) Günter Grass. He has kindly let our Office use this as a label for publications of the OSCE Representative on Freedom of the Media.

The drawing was created in the context of Grass's novel *Das Treffen in Telgte*, dealing with literary authors at the time of the Thirty Years War.

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The views expressed in this publication represent those of the authors and contributors and do not necessarily reflect the official position of the OSCE Representative on Freedom of the Media.

Cover photo: Heribert Corn, Vienna

Design: WerkstattKrystianBieniek, Vienna

# Contents

Miklos Haraszti		
<i>Preface</i>		<i>9</i>
<b>Opening Remarks</b>		
Robert Menard		
<b>Democracies Must Set an Example</b>		<b>13</b>
Christophe Poiriel		
<b>The Council of Europe: Freedom of Expression Must Prevail</b>		<b>15</b>
Freimut Duve		
<b>Let Us Work Together to Get Criminal Libel Laws Abolished</b>		<b>19</b>
<b>I. An Overview of Criminal Defamation and Libel in the OSCE Region</b>		
Toby Mendel		
<b>The Case against Criminal Defamation Laws</b>		<b>25</b>
Milena Milotinova		
<b>Bulgaria: Recent Developments in Defamation and Insult Laws</b>		<b>34</b>
Hanna Vuokko		
<b>Patterns and Trends in Media Harassment in the OSCE Region</b>		<b>38</b>

Vesna Alaburic		
	<b>Croatia: The Chilling Effect of Civil Libel Laws</b>	<b>42</b>
Zurab Adeishvili		
	<b>Georgia: Even Dormant Libel Laws Can Exert a Chilling Effect</b>	<b>45</b>
Andrey Bastuniets		
	<b>Belarus: Constitutional Court Finds Criminal Libel “Essential”</b>	<b>47</b>
Elmar Huseynov		
	<b>Azerbaijan: Trying Times for Investigative Journalists</b>	<b>49</b>
Alexander Kashumov		
	<b>Bulgaria: Defamation and the Urban-Rural Divide</b>	<b>51</b>
	<b>Discussion</b>	<b>55</b>

## **II. Insult Laws: An Insult to Freedom of the Press**

Claude Moisy		
	<b>Repealing Insult Laws is a Prerequisite for Democracy</b>	<b>61</b>
Ronald Koven		
	<b>How Dangerous Archaic Insult Laws Can Be</b>	<b>63</b>
Oleg Panfilov		
	<b>Resisting Limits on the Press and Media in Putin’s Russia</b>	<b>66</b>

Martine Ostrovsky	
<b>The French Press Law of 1881:     Another Negative Example</b>	<b>69</b>
Elvira Mezhennaya	
<b>Fighting Persecution and Intimidation     in the Russian Federation: A True Case</b>	<b>72</b>
Slobodan Reljic	
<b>Serbia and Montenegro: Without Independent     Media Democracy Remains a Fiction</b>	<b>75</b>
Rozlana Taukina	
<b>Kazakhstan: Increasing Pressure     on the Critical Media</b>	<b>76</b>
Fatos Lubonja	
<b>Albania: Using Civil Suits     to Discourage Criticism</b>	<b>78</b>
Alexei Simonov	
<b>One Case That Contradicts the Rest</b>	<b>80</b>
<b>Discussion</b>	<b>81</b>
<b>Recommendations</b>	<b>86</b>
<b>Background Paper</b>	
Jane E. Kirtley	
<b>Criminal Defamation:         An “Instrument of Destruction”</b>	<b>89</b>
<b>Authors and Contributors</b>	<b>102</b>



Miklos Haraszti  
*Preface*

Although the Office of the Representative on Freedom of the Media was already working towards the decriminalization of libel and insult laws before I was elected Representative in March 2004, I wish to express my full support for this endeavour and to congratulate my predecessor Mr. Freimut Duve on his timely response to this growing problem.

I would like to continue this campaign and bring it to a new level by providing it with some new tools. One of these is a database of all existing libel and insult laws in the OSCE region which can be used to encourage OSCE participating States to amend their legislation.

The road to improved libel legislation will be a long one, but the logical first step of the campaign should be to “**de-prisonize**” libel and insult laws. Punishing libel with a prison sentence is a disproportionate measure – an obsolete overreaction – in the 21st Century.

The next logical step is to fully “**de-criminalize**” libel, an act that should help make way for a more civilized and appropriate response through civil code provisions. Insult laws that give special protection to high-ranking politicians and civil servants also have no place in a modern democratic society and must be repealed in all their forms.

De-criminalization of libel is our intermediate aim, but not our final goal. In our experience, we have seen that high fines can exert a chilling effect on journalists just as great as prison sentences. If we are to create an environment that

allows the media to exercise their corrective function and encourages critical thinking, many provisions in civil codes will also need to be made less harsh. In this case, we could say a “**de-harshening**” is needed.

Of course, libel and insult laws are not the only provisions of law that can be severely misused to hinder or even prevent journalists from exercising their profession. Purging all provisions that have a restricting effect on the press may seem a Utopian dream, but I firmly believe we will see some remarkable progress at least in “de-prisonizing” libel in OSCE participating States in the immediate future.

# Opening Remarks



Robert Menard  
**Democracies Must Set an Example**

I want to thank you for coming in such large numbers and to thank Charles Henri d'Aragon, Director of the *Centre d'Accueil de la Presse Etrangère* (the Foreign Press Centre), whose premises we are using today, as often in the past. To begin, I should like to stress the importance of this conference with the OSCE, first of all because the questions of libel and the penalties for libel are part of our day-to-day work at Reporters Without Borders. We are often called upon to intervene on behalf of journalists who have been jailed for libel or so heavily fined that the penalty is likely to trigger the complete shutdown of the media outlet involved. For these reasons, as far as we are concerned, there is nothing theoretical about libel. It is an everyday problem. You know this too, because you are grappling with the same problem. This is not an academic discussion, but a practical one. The objective of this Round Table is to establish a position that will help us move free expression forward.

Now I wish to say a few words about the direction we at Reporters Without Borders think we should be going. We favour complete decriminalization of libel. Libel should come under civil law and be struck out of criminal law. If that were the case, the only redress for this type of offence would be compensation. We want to see an end to prison sentences, even those that are suspended. In this direction, we should also discuss another issue: the large size of fines, a problem that also arises even in our democracies. In some cases, judges are

tempted to set very high fines, so high that they can threaten the survival of the media. And this is not acceptable.

Second, our discussion today will focus on insult laws. In our opinion, these laws are completely outdated. They still exist on the law books, however, despite the progress our democracies have made. How can we accept that people in power, whether heads of state or elected officials, have the right, by virtue of their position, to demand the imposition of a penalty just because they have been insulted? We believe that cases of this nature should not even be covered by civil law. Insult laws are a “throwback” to the time when there were kings in France! I think such laws should be eliminated completely from the landscape.

Now, you may say that libel and insult laws are no longer applied in many European countries, even if they do still exist on the books. However, when authorities say in effect, “Don’t worry, you know no one goes to jail these days for libel and that no elected official today would sue someone for an insult, so why all this debate?” can we really accept that answer? I don’t think so. In my opinion, we cannot accept that argument for two reasons: First, I believe democracies must set an example. Second, the mere existence of these laws in the law codes of democratic countries is systematically misused by countries that are not democratic as an excuse for not reforming their libel laws.

Christophe Poirel  
**The Council of Europe:  
Freedom of Expression Must Prevail**

First, I wish to thank Robert Menard and Mr. Duve for having invited me to take the floor here. In my introduction, I would like to recall that the European Court of Human Rights has underlined, on many occasions, that the freedom of expression and information guaranteed by Article 10 in the European Convention of Human Rights applies, in fact, not only to information and ideas that are favourably received, or regarded as inoffensive, or as a matter of indifference, but also to those that may offend, shock or disturb the State, or any sector of the population. The European Court expressly says that these are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society.

In some of the cases presented to it, the Court has found that libel rulings in national courts were contrary to Article 10. In fact, the Court has been very tolerant in regard to media reporting whenever severe sentences resulted from their criticism of public authorities or representatives of State. We must say that sometimes even in Europe today, some public institutions still enjoy special protection against insult or libel, and that those who represent such institutions are sometimes tempted to hide behind such protection as a way of eliminating criticism.

Thus, the first answer to the question raised in the title of our Round Table is that public institutions and those who represent public institutions because of their dominant position in society must accept a higher level of criticism than private

individuals. In a modern democracy, public authorities must be open-minded to criticism.

A draft statement to assert, or reassert, these and other principles concerning free expression and freedom of political debate in the media is currently being prepared at the level of the Council of Europe, and we hope that the Committee of Ministers will adopt this statement at the beginning of 2004. The draft statement specifically addresses these concerns. We see that in fact some national legislation or verdicts do not comply with what the European Court recommends, especially laws that punish libel with a prison sentence. Clearly, this is not acceptable.

Now I would like to come back to something Robert Menard said concerning the decriminalization of libel. I agree with what he said and share his opinion. It is absolutely true that it is important to decriminalize those offences, but we should not forget that sentencing journalists to pay disproportionately large fines or compensation is also a big problem. In some European countries, as I am sure you remember, experience has shown that this type of civil action can also be an obstacle to the freedom of information. In fact, large fines are often used as a way to drive the media into bankruptcy.

Our experience with the member countries of the Council of Europe shows us that another answer to the question in the title of our Round Table today is that we should also provide information and training for national judges on the case law of the European Court so they will be able to apply the major principles that the Court has developed. Some judges in national courts are simply not aware of the case law and for that reason hand down very severe sentences in libel cases. For some years now we have made a big effort to provide training for the judges in new member countries. We have, for exam-

ple, organized training seminars for judges in Ukraine and Serbia and Montenegro. Nevertheless, a lot remains to be done in the field of training.

We believe that freedom of expression must prevail over legislation on libel and insult. There is no doubt about this, but, of course, that freedom should be carried out in a responsible manner. There must be a proper balance between freedom of expression and the responsible practice of this freedom. This is clearly expressed in Article 10 of the European Convention on Human Rights. The guarantee offered to journalists in Article 10 concerning reporting on issues of general interest is subordinate to the condition that they must act in good faith to supply true and accurate information, and they must uphold and respect the journalists' code of ethics. Now we have to make journalists, chief editors and media owners aware of the need to do their investigation work and reporting in compliance with the professional rules and code of ethics of journalism in order to limit, as much as possible, the risk of being sued for libel. When I talk about developing awareness, I am also thinking about training journalists, and when I talk about professional standards, I am also thinking about a code of conduct and about establishing press councils similar to those that exist in some European countries already.

This awareness among the media should go hand in hand with parallel efforts among public authorities. Due to a lack of knowledge or experience, there is a tendency in some countries to seek solutions to the problems of media ethics in legislation, especially in the field of libel. But, of course, attempts to legislate ethics can limit the freedom of expression. We must make public authorities aware of this danger, but I should say that the Council of Europe is already doing this, thanks to its training programmes in various countries.

In conclusion, I would like to wish you very fruitful discussions. I hope they will lead to very practical recommendations that the Council of Europe can adopt and implement. We would be very interested to see the conclusions [of this meeting] go beyond those that came out of the regional conference on libel we organized in October 2002 in Strasbourg.

Please allow me now to welcome Mr. Duve on behalf of the Council of Europe and to congratulate him on the very precious work he has done in favour of freedom of expression and freedom of the media in Europe – especially on the issues of libel and insult we are looking at today. In fact, without Mr. Duve, many of the violations that have occurred would never have been denounced, and so it is with a lot of gratitude that I wish him all the best for the future.

Freimut Duve  
**Let Us Work Together to Have  
Criminal Libel Laws Abolished**

I would like to welcome you all to our meeting here today, which has been organized by Reporters Without Borders and the Office of the OSCE Representative on Freedom of the Media to talk about libel and insult laws and about what can be done to decriminalize libel and repeal insult laws. We have brought several victims of criminal libel prosecution to Paris, as well as lawyers and experts on this subject, to discuss the current state of affairs and what we can do to change it in the future.

Over the years, the existence of criminal libel legislation and the so-called insult laws in the majority of OSCE-participating States has hampered the work of the media by putting undue pressure on journalists who investigated issues such as corruption, especially when it involved government officials.

Criminal libel laws are also used to protect high-ranking civil servants and politicians from criticism in countries where specific insult laws do not exist. These laws offer undue protection for senior officials. For example, some of our participating States have laws that make it a crime to “insult” the dignity of the Head of State, the Speaker of Parliament, the Prime Minister, or other high officials.

Criminal libel and insult legislation is also part of the criminal code in Western European countries. Although these laws are rarely if ever used, their mere existence provides the less developed democracies among the OSCE participating States with a convenient excuse for imposing incarceration on journalists as a penalty for libel.

Whenever I cite a case to the *east* of Vienna, I am immediately reminded that criminal libel also exists to the *west* of Vienna, and that it is irrelevant that the law is not frequently used. As a diplomat from a Central Asian country once put it: “Maybe they will use their criminal libel legislation tomorrow. We are using it today.”

In the excellent background paper on criminal defamation that we have distributed to you today, Professor Jane E. Kirtley from the University of Minnesota writes that criminal libel is

inimical to democracy because it strangles dissent and debate, punishing legitimate criticism of government officials and institutions. Too often, it serves no other purpose than to provide government and government officials with the power, through intimidation or post-publication sanctions, to discourage journalists, scholars, politicians and ordinary citizens from expressing critical views that might be deemed offensive, insulting or defamatory.

It is clear that the problem is the existence of criminal defamation. It is equally clear that the solution is decriminalising libel. The only question is, “How do we proceed from here?”

I believe that there is no one road to the abolition of criminal libel but that several parallel approaches could be used to silence once and for all this “instrument of destruction” of press freedom, as Professor Kirtley calls it.

First, all of us – international governmental and non-governmental organizations, journalists’ associations and the media itself – should start lobbying legislatures to introduce proposals and measures that would decriminalize libel. When authorities say in effect, “Oh, we don’t use those libel laws anymore,” we should not accept that argument as an appropriate answer. If libel laws are not being used any longer anyway, then why not abolish them and make it impossible to

incarcerate or fine a journalist under some criminal libel provision at any time in the future?

Second, we should make sure that governments join us in this lobbying effort, and that they themselves advance proposals to repeal criminal libel laws. We should also encourage politicians and officials to set an example by demonstrating a much higher level of tolerance to criticism than is often the case today. When a public persona is being criticized in the media, even unfairly, that does not justify taking journalists to court for criminal libel. The rule here should be very clear: “If you can’t stand the heat, get out of the kitchen.”

Third, we should encourage judicial bodies in countries where criminal defamation still exists to refrain from imposing prison sentences, including suspended ones.

I also want to encourage the donor countries that fund projects in many of our participating States to consider the attitude of the country concerned towards criminal defamation in their funding strategies.

We will not solve the problem of criminal defamation in a day or two, or even in a year or two. But let us start working together so that one day we can finally proclaim that the OSCE has become a family of not only *declared* democracies but also *actual* democracies, where freedom of expression is no longer curtailed by outdated and restrictive laws that prevent the media from doing what it does best: acting as society’s watchdog.



# **I. An Overview of Criminal Defamation and Libel in the OSCE Region**



Toby Mendel

## The Case against Criminal Defamation Laws

Criminal defamation laws present a particularly thorny problem for freedom of expression campaigners. On the one hand, they clearly represent an unacceptable restriction on freedom of expression and cause serious chilling effects in many countries where such laws are not only oppressive in and of themselves, but also roundly abused. On the other hand, these laws remain in place in almost every OSCE Member State, and in some cases they have even survived constitutional challenges. Furthermore, even international human rights bodies have failed to take sufficiently decisive action against these laws. I should start with a terminological note. I prefer to use the generic English term *defamation* rather than the legal terms *libel* or *insult*. In English law, defamation refers to the undermining of someone's reputation, and that is what these laws are all about. It therefore seems to me that defamation is a more appropriate, and more general, term than *libel*, which refers to a defamatory statement in permanent form (as opposed to an oral defamation), or *insult*, which is not generally found in common law countries, but which, in many European countries, refers to a statement of opinion (as opposed to a factual allegation).

Let me first outline from a legal perspective some of the problems with criminal defamation laws. The most serious problem is the risk of a criminal sanction being applied for the peaceful exercise of the right to freedom of expression. The risk of imprisonment, a definite possibility upon being convicted

for criminal defamation in most jurisdictions, obviously poses a serious chilling effect on freedom of expression, even if this extreme sanction is rarely imposed. Suspended sentences, which come into effect if the crime is repeated, are particularly insidious as they serve as an ongoing threat, limiting the freedom of expression of those over whom they hang. Nevertheless, this form of sanction attracts far less international condemnation than actual prison sentences.

A range of other criminal-type sanctions has also been applied for breaches of criminal defamation rules, including suspension of the right to practice journalism, being barred from participating in a particular form of media, such as the broadcast media, and excessive fines. In addition, in most countries, simply having a criminal record can serve as an unwanted and sometimes quite unpleasant form of sanction.

A second legal problem with many criminal defamation laws is that, despite their criminal nature, they do not require mental guilt for conviction. A fundamental principle of criminal law, which has very few exceptions, all of which are problematical, is that no one may be found guilty simply for a wrongful act in the absence of mental guilt, known as *mens rea*. In the context of criminal defamation, this should normally imply an intention to cause harm to the reputation of the party claiming to be defamed. In relation to a statement of fact, this additionally requires either proof of *knowledge of falsity*, or, at least, *reckless disregard* of whether or not the statement was false. Few criminal defamation laws respect these fundamental legal standards.

A third, closely-related problem, is that few criminal defamation laws place the burden of proving all the elements of the offence on the party who claims to have been defamed. This placement of onus flows from the fundamental tenet that the accused shall be presumed innocent until proven guilty,

and it is highly anomalous that this principle is frequently disregarded or *not* respected in the criminal defamation context. In relation to defamation, this onus should require the party who brings the case to prove that the statement made was false and that the accused had the requisite mental element of *mens rea*, as discussed above.

A fourth problem with many criminal defamation laws is that they provide special protection for public officials. Such protection may take a variety of forms, including the involvement of public prosecutors in court cases, higher penalties for defaming certain officials, or different standards as to what constitutes defamation in relation to these officials. All of these special provisions obviously run counter to the principle that officials should tolerate more, not less, criticism, a principle that has repeatedly been endorsed by international courts and other standard-setting bodies.

It may be noted that, were these problems to be addressed and criminal defamation laws relatively sanitized, there would probably be little interest in making use of them. In other words, if the most obvious problems with criminal defamation laws were addressed, they would likely fall into disuse.

Let me turn now to the apparently anomalous situation described above whereby, despite the problems just noted, criminal defamation laws have remained in place in almost all OSCE participating States. Perhaps one of the reasons for this is the ongoing influence of the historical development of criminal defamation laws, which date from a time when the evils of defamation and public disorder were closely related. In the UK, for example, criminal defamation dates from the 1275 Statute of Westminster, which established the offence of *Scandalum Magnatum*, providing that

... from henceforth none be so hardy to tell or publish any false news or tales, whereby discord or occasion of discord

or slander may grow between the king and his people or the great men of the realm.

The purpose of *Scandalum Magnatum* seems to have been mainly to promote peaceful means of redress in a society characterized by constant threats to public order. Holdsworth, in *A History of English Law*, notes that the purpose of these statutes was, “not so much to guard the reputation of the magnates, as to safeguard the peace of the kingdom,” adding, “this was no vain fear at a time when the offended great one was only too ready to resort to arms to redress a fancied injury.” The Supreme Court of Canada has amplified this noting that, “in a society dominated by extremely powerful landowners, [defamatory statements] could threaten the security of the state.”

It is obviously time to draw a clear line under the confusion between defamation laws and laws designed to protect public order or security. The risk of even minor disorder – such as a fight – resulting from defamatory statements is relatively remote in modern times, and the risk of serious disorder is almost unimaginable. Equally important, most modern States have at their disposal a range of laws more appropriately tailored to deal with public-order concerns, making it totally unnecessary to use defamation laws for this purpose. I note that many of these other laws are also problematical from a freedom-of-expression perspective, but that is not our concern here.

Finally, let me address the question of international standards in this area. Although, as noted above, international human rights bodies have not done enough to combat the evils of criminal defamation, there exists a growing body of authoritative legal standards which suggests that criminal defamation laws on their own, or at least the imposition of criminal sanctions, are contrary to the guarantee of freedom of expression.

International guarantees of freedom of expression, like almost all constitutional guarantees, do allow for some restrictions on this fundamental right, but only when these meet certain conditions, including that they are necessary in a democratic society. Necessity implies that there is a pressing social need for the restriction and that the restriction is proportionate. This latter implies, at a minimum, that the least intrusive measures available for effectively addressing the problem must be employed, as opposed to any measures which more seriously limit the right to freedom of expression.

The experience of countries around the world where criminal defamation laws no longer exist or have fallen into disuse demonstrates clearly that civil defamation laws, along with a variety of self-regulatory and other remedies, suffice perfectly as a means for addressing the problem of harm to reputation. Therefore, given that civil defamation laws are clearly less intrusive than criminal defamation laws, criminal defamation laws cannot be justified, since they represent a restriction on freedom of expression.

This view is reflected in a number of statements on this matter by authoritative international bodies. None of the quasi-judicial bodies responsible for human rights at the UN, or in the three regional systems for the protection of human rights in Africa, the Americas and Europe – with the exception of the European Court of Human Rights (more about this below) – have had an opportunity to deal with the issue of criminal defamation in the context of a contentious case. The UN Human Rights Committee, the body responsible for overseeing the implementation of the International Covenant on Civil and Political Rights, however, has repeatedly expressed its concern about criminal defamation in the context of its consideration of regular country reports.

The Inter-American Court of Human Rights has recently agreed to hear the case of Mauricio Herrera Ulloa, a Costa Rican journalist who was convicted of criminal defamation by his national courts. And in October 2000, the Inter-American Commission on Human Rights adopted a *Declaration of Principles on Freedom of Expression*. Paragraph 10 of this Declaration states among other things:

[T]he protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.

The UN Special *Rapporteur* on Freedom of Opinion and Expression has stated unconditionally that imprisonment is not a legitimate sanction for defamation. Furthermore, in his Report in 2000, and again in 2001, the Special *Rapporteur* called on States to repeal all criminal defamation laws in favour of civil defamation laws. Every year, the Commission on Human Rights, in its resolution on freedom of expression, notes its concern with "the abuse of legal provisions on criminal libel."

The three special international mandates for promoting freedom of expression – the UN Special *Rapporteur*, the OSCE Representative on Freedom of the Media and the Organization of American States Special *Rapporteur* on Freedom of Expression – have met each year since 1999 under the auspices of ARTICLE 19 and each year they issue a Joint Declaration addressing various freedom-of-expression issues. In their Joint Declaration of November 1999, and again in December 2002, they called on States to repeal their criminal defamation laws. According to the 2002 statement,

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be

abolished and replaced, where necessary, with appropriate civil defamation laws.

These standards are encapsulated in the July 2000 ARTICLE 19 publication, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, a set of principles on how to balance the right to freedom of expression and the need to protect reputations. These principles have been endorsed by the three special international mandates noted above, as well as by a large number of other organisations and individuals. Principle 4(a) states categorically:

All criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws. Steps should be taken, in those States which still have criminal defamation laws in place, to progressively implement this Principle.

The European Court of Human Rights has never actually ruled out criminal defamation, and, in fact, in a small number of cases, the Court has allowed criminal defamation convictions. Nonetheless, the Court has clearly recognized that there are serious problems with criminal defamation, and has frequently reiterated the following statement, including in the context of defamation cases:

[T]he dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.

Indeed, the European Court has stated that criminal measures should only be adopted where States act “in their capacity as guarantors of public order.” In my view, it is significant that in those cases which involved convictions for defamation the

Court referred to the application of criminal measures only as a means of maintaining public order, and not as a means of protecting reputations. I have already made my views on the use of defamation as a public order mechanism known.

In any case, the European Court of Human Rights has made it clear that disproportionate sanctions, even of a civil nature, violate Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In holding that a high civil defamation award represented a breach of the right to freedom of expression, the Court stated clearly:

[U]nder the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered.

The possibility of imprisonment for defamation is a very severe penalty, and the European Court of Human Rights has never upheld a prison sentence for defamation. Indeed, it has specifically stated in relation to criminal penalties for defamation that such measures should only be adopted where they are “...intended to react *appropriately and without excess* to defamatory accusations devoid of foundation or formulated in bad faith.” [*Emphasis added.*]

Although on occasion the Court has upheld criminal defamation convictions, in these cases it has been at pains to point out that the sanctions were modest and hence met the requirement of proportionality. For example, in *Tammer v. Estonia*, the Court specifically noted “the limited amount of the fine imposed” in upholding the conviction; the fine in that case was ten times the daily minimum wage.

From the decisions cited above, we can conclude with some confidence that criminal sanctions for defamation are contrary to international law. Furthermore, there is a growing

body of increasingly authoritative legal standard-setting that argues that criminal defamation laws by their very nature, regardless of the particular penalty applied, represent a breach of the right to freedom of expression. There are good reasons for this. The public order rationale for criminal defamation laws is no longer relevant. Most criminal defamation laws have serious legal flaws, and they exert an unacceptable chilling effect on freedom of expression. It is high time that States around the world repealed their criminal defamation laws, replacing them, where necessary, with appropriate civil defamation laws.

Milena Milotinova

## **Bulgaria: Recent Developments in Defamation and Insult Laws**

Let me speak not only in my capacity as a parliamentarian, but also in my capacity as a journalist. Before I was elected to the National Assembly of Bulgaria in 2001, I was a journalist for 13 years with Bulgarian National Television.

I would like to describe briefly the situation in Bulgaria. The Penal Code of the Republic of Bulgaria states that an insult has occurred whenever “a person makes a remark or does something that degrades the honour or dignity of another person in that person’s presence.”

Defamation has occurred whenever “a person makes a false and disgracing circumstance about another person public or ascribes a crime to another person.”

In my country, it is possible to sentence not only a journalist for libel, but also a Member of Parliament. In fact, we are facing this situation in my electoral region. We have a Member of Parliament who has been sentenced three times for libel and required to pay compensation to the injured persons. As you can see, this libel law makes no distinction between journalists, politicians, or ordinary people.

Since the year 2000, when the Criminal Code was last revised, criminal prosecution for acts of insult and defamation has undergone some substantial changes. The acts in question are no longer punished with a prison term, a “penal sanction of deprivation of liberty,” but by a fine, “a pecuniary penalty,” and “public censure.”

The size of the fine varies according to various circumstances surrounding the offence. Thus, according to the law, if an insult is

- 1) inflicted in public;
- 2) circulated by means of a printed paper or in another manner;
- 3) inflicted on an official or a government representative in the course of, or in connection with, the performance of public service or a function thereof; or
- 4) inflicted by an official or by a government representative in the course of, or in connection with, the performance of public service or function thereof,

the amount of the fine may be increased in view of the higher degree of public danger, *viz.* to a “fine of 3,000 *leva*, or exceeding that amount, but not exceeding 10,000 *leva* and public censure.”

In the case of an act of defamation, a more severe penalty, *viz.* a “fine of 5,000 *leva*, or exceeding that amount, but not exceeding 15,000 *leva* and public censure,” is provided for an act that was committed under the circumstances described in Items 1-4 above, but with the addition of an additional aggravating circumstance: “as well as for defamation which has resulted in grave consequences.”

Under the Code, if the insulted party responded immediately with a counter insult, the court may exempt both parties from punishment.

What the laws on acts of insult and defamation have in common is the presumption that the allegations made are untrue. For this reason, the legislator has made certain defences available to the person charged with defamation. The accused may not be punished, if it can be proved that the “disgracing circumstances” made public or the “ascribed crimes” are true.

In 1997, the description of a new criminal offence was inserted into the same section of the law. This act is defined as follows:

Any person who shall make public by means of printed papers or in any other manner, any data, circumstances, or allegations regarding another person, based on information that has been illegally obtained from the archives of the Ministry of Interior, will be liable to a fine of 5,000 leva, or exceeding that amount, but not to exceed 20,000 leva.

Like the other two, this offence is also related to the circulation of information, but in this specific case, it is irrelevant whether the information is true or not. Disclosing information that was illegally obtained from the archives of the Ministry of Interior is sufficient to warrant criminal prosecution. Naturally, in the spirit of the revisions of this Section that were introduced in 2000, this act is now punishable only by a “pecuniary penalty,” a fine.

The provision of the Penal Code providing for an exemption from criminal liability and the imposition of an administrative sanction was also amended in 2000. According to the revised version, it is now mandatory for the court to hold a person of full legal age exempt from criminal liability. Formerly, the exemption was at the discretion of the prosecuting magistracy or the court. The mandatory punishment is now “a fine of 500 leva, or exceeding that amount, but not exceeding 1,000 leva,” provided there is simultaneous fulfilment of three further conditions:

- (a) a penal sanction of deprivation of liberty for a term not exceeding two years or another less severe penal sanction is provided for the offence, provided the offence was perpetrated intentionally, or deprivation of liberty for a term not exceeding three years or another less severe penal sanction, if the offence was perpetrated through negligence;

- (b) the accused has not been convicted of a criminal offence at public law and has not been exempted from criminal liability according to the procedure established by this Section;
- (c) the property damage caused by the criminal offence has been remedied.

In such cases, criminal liability is not incurred.

Last but not least, it should be noted that the Bulgarian penal code states that criminal proceedings for the acts of insult and defamation may be initiated only if the injured party has filed a lawsuit. Essentially, this rule approximates criminal liability to civil liability, thus preventing investigating or prosecuting authorities from exerting pressure on or threatening journalists who practice their profession in good faith.

Because we are facing hundreds of court cases in my country, the debate on decriminalizing libel is still going on. The problem is how to find the right balance between freedom of expression, as guaranteed by the Bulgarian Constitution, the Radio and Television Act, and related legislation, and the rights of people who feel they have been offended or negatively affected by an article or a report.

Bulgaria, like some of the other countries that have already begun this process, should start a debate on drawing up a code of ethics, a code of ethics designated by the journalists themselves. This code should not be framed by the legislature or drawn up by politicians, but hammered out by the journalists themselves so that they will respect it. A number of NGOs in the media sector are now competing for a Phare project aimed at supporting the creation of a code of ethics for the media in Bulgaria.

Many countries have press councils people can appeal to when they feel they have been unfairly treated, and I think a press council can offer a very good forum for regulating such problems.

Hanna Vuokko  
**Patterns and Trends in Media  
Harassment in the OSCE Region**

I would like to share with you some views from the perspective of someone who works in the Office of the OSCE Representative on Freedom of the Media. For more than four years now, I have been looking at legal issues throughout the OSCE region and specifically at the situation in Central Asia. By now, I think we can see some patterns and trends emerging in the OSCE region.

First of all, we are seeing much less physical harassment, but much more legal harassment. Don't get me wrong! Journalists are still being harassed in various ways. They are still being threatened; they are still being beaten up. There's a lot of this going on. However, much of the action has moved towards the court. Of course, it is better for disputes to be dealt with in the courts than for journalists to be beaten up, but when harassment is intentional and carried out through the courts, it is actually much harder to tackle and much harder to criticize.

Now we are getting into legal issues, technical issues and country-specific issues. We have to talk about appeals, about whether the judiciary is independent, and, of course, at the bottom of it all, the law. Everything depends on the legal situation. Many of the lawsuits we are seeing now make use of insult laws, criminal libel, or civil libel. Now, when you as a journalist have one libel case against you, you are going to spend a lot of time and energy dealing with it. But when you have five cases against you, or when you have two dozen cases against you, you are not going to be able to conduct any more business as usual.

Unfortunately, we are seeing many cases like this in the OSCE region. We see many media representatives that have multiple cases against them. We even see media representatives with dozens of libel suits against them. One example is *Moya Stolitsa*, a newspaper in Kyrgyzstan, which had to close down earlier this year.

Now, I specifically used the word *harassment*. How do we know that what we are seeing is harassment? Of course, governments deny that harassment is taking place. According to them, whatever is happening is not politically motivated, and individuals are perfectly free to sue the media if they feel they have been insulted. According to the authorities, it's the journalists who are incompetent, and the media are often pursuing an agenda of harassment towards the politicians they are criticizing.

After four years, however, I think we can see some patterns. We are able to recognize some names in the countries we work with, in fact, a handful of names. Several names we hear over and over again. The media involved are always non-State media, often ones we have dealt with before. They have often been in trouble before; they have received threats; their offices have been vandalized; and they have experienced personal violence. In the end, quite a few of these newspapers, or journals, or radio and TV stations have had to close down because they simply could not pay their fines.

As we heard today in the opening statements, fines and "compensation" have skyrocketed. But even if the fines have remained at a decent level, when you as a journalist have two dozen cases against you, at some point you will not be able to handle the burden any longer.

So what can we do? The OSCE Representative on the Freedom of the Media has raised this issue again and again over the past several years. We raised this issue when we were dealing

with individual cases. We also raised it when we were working to get media legislation in the region changed. Invariably the response we get is “But why should we change our laws when nobody else has?” Libel laws are still on the books in almost all of Western Europe and throughout the entire OSCE region. Even if they are not in common use, the mere existence of these laws makes it very hard for us to argue that Armenia or Croatia, for example, should get rid of criminal libel when Ireland is just beginning to amend its media legislation. According to recent proposals, criminal libel would remain on the books even if it is not commonly used. It would remain on the books “just in case – for the worst case scenarios,” but that is enough. As long as criminal libel is on the books, it is a threat. At least, Ireland will probably get rid of its insult laws, and that’s a good start.

Many other States, however, are keeping their libel and insult laws. These are archaic provisions, but they are still on the books, and they can still be used. Perhaps laziness is at fault. Perhaps legislators cannot be bothered to get rid of old laws that aren’t being used. Perhaps the lawmakers aren’t even aware that these laws are still there on the books, since they haven’t been used for such a long time. Nevertheless, their existence is all it takes. It gives offenders in this area an excuse. As long as these laws are on the books in the West, they serve as a precedent, as an example. They can always be revived and used again – and they will always have a chilling effect on critical writers.

Over the past few years, we have seen several attempts to improve the situation in regard to libel laws. We have seen some attempts to put a ceiling on the fines. We have seen some attempts to bring filing fees into line with the amount of compensation so that when injured parties ask for high compen-

sation, they have to pay high filing fees before their cases are even brought to court. We have also seen some attempts to decriminalize libel. The common denominator of all these attempts, however, is that they fail. What is ultimately needed is the political will to get something done, and if anyone here has a magic formula for that, please let us know.

Vesna Alaburic

## Croatia: The Chilling Effect of Civil Libel Laws

First, I would like to stress an important point. Five years ago, when I attended a conference on libel in Croatia, I was surprised to learn that in general the countries in transition have much more liberal laws than the so-called old democratic countries do. As long as criminal libel laws still exist in Germany, France, or any other western country, pressuring the countries in transition to decriminalize libel seems neither fair nor impartial. In my opinion, Croatia's laws are more democratic than the German criminal code – at least on the surface. To single out Croatia as a fair target for a campaign that aims at repealing criminal libel and other such laws is simply not fair.

Second, what is our real goal behind the decriminalization of libel? As Mr. Duve said earlier, the argument for decriminalization is that while civil libel law offers the same protection for a person's dignity and reputation as criminal libel law, it also has a less chilling effect on freedom of expression. Therefore, our aim can only be to have libel laws enacted that exert the least possible chilling effect.

I hope we all agree that journalists should be personally responsible for their work. That raises another question: Does civil libel law really have less of a chilling effect than criminal libel? In my opinion, the answer is clearly "No."

First, in many countries, criminal proceedings for libel are initiated with a private lawsuit. In such proceedings, the *prosecutor* and the *accused* correspond to the *plaintiff* and the *defendant* in civil proceedings.

Second, according to the Civil Code in Croatia and some other countries, the injured party generally sues the employer whose employee caused the injury. Employees are sued directly only if they caused intentional damage or injury. According to the Civil Code, the plaintiff sues a publisher who pays compensation for the damage done by a journalist employed by the publisher's newspaper or magazine. Thus, in civil libel proceedings in Croatia and the other Balkan countries which once were part of the former People's Republic of Yugoslavia, with the exception of Bosnia and Herzegovina, the defendants are always publishers.

If we decriminalize libel and agree that journalists should somehow be responsible for the information they publish, then there is only one way to do this, and that is to publicly accept the civil responsibility, or co-responsibility, with the authors of published information. What would the consequences be?

First of all, journalists would be the only employees in Croatia and the other countries of ex-Yugoslavia, again except for Bosnia, who would be responsible for damages whether they were intentionally caused or not. Doctors, judges, politicians and all others are held responsible for damages only when they are caused intentionally. Only journalists would be held responsible on a different basis. Would a law like that offer journalists and the freedom of the media more or less protection? Clearly, that is only a rhetorical question.

Secondly, politicians and many other public figures in Croatia and ex-Yugoslavia regard journalists as ignorant and unprofessional. These people think journalists should be held in check and disciplined by laws and legal proceedings. Many of these politicians have tried to promote very high compensation for non-material damages as a way for doing just that.

Compensation of this nature would have a very strong chilling effect on journalists, particularly when we keep in mind that in most of these countries no journalists have been imprisoned for criminal defamation.

Only two weeks ago, at a conference held in Opatija, Croatia, a journalist from Bosnia and Herzegovina said, “I would really prefer to go to jail for three months rather than be sentenced to pay a fine of 100,000 euros.” From a journalist’s point of view, the question is, “What is really better for journalists and the freedom of the media?”

In my opinion, the campaign to decriminalize libel should be conducted in all European countries, not only in the countries in transition. Today, we have heard that this campaign should be launched throughout the OSCE region. We should examine the specific legal system and situation of each country very carefully. After all, we don’t want to replace bad laws with even worse ones.

Now to recapitulate what I think is necessary. First, we should campaign for the decriminalization of insult. Second, we should make it clear that imprisonment is truly an inappropriate sanction. Third, we should insist that the ceiling on fines for criminal defamation is very low. And fourth, defamation laws should be changed so that they will conform to the malicious intent rule Toby Mendel told us about earlier today.

In fact, I welcome the campaign to decriminalize libel because I think with that campaign, we in Croatia will be able to change our criminal defamation law. Today, according to journalists in my country, one can be imprisoned for having an opinion and for publishing true information, as well as for spreading other peoples’ ideas and information through interviews and reports.

Zurab Adeishvili  
**Georgia: Even Dormant Libel Laws  
Can Exert a Chilling Effect**

First of all, I would like to say that the peaceful transition in Georgia was only possible because our population enjoys freedom of speech. At the same time, however, I must emphasize that many provisions of Georgian legislation do not meet international standards and that there have been many court decisions which exerted a chilling effect on the press. Nevertheless, we do enjoy a certain degree of freedom of the media, thanks to a lack of administrative resources in those state institutions that should act to intimidate the media or limit freedom of speech.

As in many other post-Soviet countries, the criminal code in Georgia has special provisions on libel and insult. In 1999 when the new criminal code was discussed, there were big debates on whether to abolish insult laws and decriminalize libel. One of the main arguments the State commission on reform used against doing so was that libel and insult laws continue to exist in the legislation of many western democracies. Finally, however, we succeeded in reaching an agreement that abolished insult and severely limited the libel regulations in the criminal code. Most importantly, the Georgian criminal code no longer foresees imprisonment for libel crimes, but only fines and “corrective labour.”

According to recent changes in Georgian legislation, a statement can be considered as libellous only if it is false, if it is made intentionally and if it accuses the injured party of committing a crime. Defamation is only punishable as a criminal act if these conditions have been met. All other cases are

regarded as ordinary civil defamation. The law provides a special legal procedure for this kind of an offence. Charges can only be brought by the person affected by the libellous statement, but not by a state prosecutor. There is no pre-trial investigation, and usually no prosecutor participates in the court hearings, except in rare cases when the injured party requests that a prosecutor attend. The burden of proof rests on the injured party, and the journalist enjoys the principle of presumption of innocence. For these reasons, it is very difficult to win a criminal libel case in Georgia. That is why our public figures prefer to make use of the other options in Georgian legislation and launch civil suits in the civil courts.

Although we have libel laws in our penal code, no journalist has ever been sentenced under these provisions, and no cases are pending in the courts. In the past, there were some attempts to sue journalists for libel, but all of those cases were later settled between the parties involved out of court.

That is all I wanted to say about libel laws in Georgia. We haven't had any insult cases since 1999, when insult was abolished in Georgian law. In 1998, however, there was a court case, and a person was sentenced to two years in prison for insulting the President of Georgia, Eduard Shevardnadze. (I still call Shevardnadze "President", because he was our president when I was born. He was our president for over 30 years, and we are still in the habit of calling him "President.") Fortunately, that court decision was later commuted to a term of probation for one year. So all in all, we have had only one insult case in Georgia – and no cases for libel.

Even though the libel laws that exist in the Georgian criminal code are not used, I am convinced they can still have a chilling effect on the freedom of the media. Therefore, I hope that our next parliament will abolish these laws and that libel will be fully decriminalized in Georgia.

Andrey Bastuniets  
**Belarus: Constitutional Court  
Finds Criminal Libel “Essential”**

In the Belarusian Criminal Code we have five articles concerning libel and insult, two general articles and several additional articles designed to protect the President and other high officials. The two general articles stipulate two years of imprisonment, but libel against the President can be punished by a prison term of up to five years. Last year, three journalists were sentenced for insulting and defaming President Lukashenka, and one other case is still pending.

The Belarusian Association of Journalists has launched a campaign to repeal the three criminal code articles related to libel against the president and high officials, and has petitioned the Constitutional Court. The Court’s decision of 8 August 2003 is quite interesting. First of all, the Court ruled that it was essential to protect the activities of public institutions and officials, and stated that libel articles had been introduced into the Criminal Code for that reason. Secondly, the Constitutional Court of Belarus referred to the existence of such laws in Poland, Lithuania, Latvia, Spain and Germany to justify not only the existence of libel articles in the Belarusian Criminal Code but also the length of the prison terms and the size of the fines for this offence.

The Constitutional Court also stated that the courts in Belarus were allowed to interpret the law in various ways, depending on the case. It decided to do away in practice with those cases in which public officials had been criticized, but not libelled. Cases of this nature should be avoided, and criticism of

this kind should not be considered a crime. Therefore, in such cases, the sanctions should be reduced, and a recent lawsuit against a newspaper, has, in fact, been conducted in light of these decisions.

Now, I would like to add that we in the Belarusian Association of Journalists are in favour of decriminalizing the three articles I referred to. In fact, we believe the civil code should be applied, but, as we have already heard here today, sanctions should not be disproportionate to the offence, and many questions remain in regard to fines or compensation for moral damage. Suing a journalist can occur on two levels. Therefore, it is really essential to set a ceiling, a maximum level, on sanctions or penalties, especially on monetary fines.

Elmar Huseynov  
**Azerbaijan: Trying Times for  
Investigative Journalists**

Unfortunately, I also represent a country where democracy and freedom of speech are not doing very well. In 1992, censorship was officially abolished, but even before that, we had no problems with censorship, because publications that could have caused problems simply were not published.

According to the criminal code in Azerbaijan there are three types of sanctions related to our discussion today: libel, insult and insult against the Head of State. In practice, these three articles are often used to sue journalists. Therefore, what I am saying is not merely theoretical. In 1999, I myself was sent to prison. I was sentenced to a six-month term, but thanks to public pressure, I was released after only 30 days. In the following years, many journalists were sentenced for libel, but fortunately, no one was sent to prison again because the authorities had decided to apply lighter sentences, i.e., fines. However, the problem remains because the size of the fines has grown continually. In many cases, the media have not been able to pay the fines and have gone bankrupt. Some of these cases have been rather bizarre. In one case, the judge asked a journalist if he had any assets. The journalist replied, "Yes, I have a table, a Louis Quatorze table." In the end, the court gave his table to some civil servants as compensation. This is the situation we have in my country.

Now, concerning defamation, something must be said very clearly. I do not know of any case in Azerbaijan when an ordinary citizen would turn to the courts. This has nothing to

do with the rights and the freedom of the citizens. In fact, in nearly all defamation cases, action is taken by state officials or members of various powerful groups. Journalists are always faced with charges when they try to investigate corruption, which is so widespread in Azerbaijan that it is difficult to see the border between power and corruption. When I was arrested and sentenced, I hadn't done anything criminal. Nevertheless, as I mentioned already, the judge sentenced me to jail for six months. And when I complained and said that his decision did not comply with the law, he answered in effect, "Yes, that's true, but this is the decision our authorities have taken." As you can see, we cannot say that the courts or the judges in Azerbaijan are truly independent.

Now you ask whether western States should change their libel and defamation laws. Well, the former speaker and I believe the existence of such articles in western legal codes gives the respective authorities in our countries a pretext for manipulating such lawsuits. In fact, they use European examples in their suits and claim that since articles against libel and defamation are used in European countries they can also be applied in our situation, but this is not the case. In our countries, these laws are only used to stop journalists from trying to criticize high officials. For that reason, I would like to remind any participants at this conference who think this issue is only legalistic and theoretical that there is no separation of power in some of our countries. And, when there is no separation of power between the executive and legislative branches of government, authorities can use their monopoly on power and legislation to crush the freedom of speech.

Alexander Kashumov  
**Bulgaria: Defamation and  
the Urban-Rural Divide**

When we speak about problems related to defamation in Bulgaria, it is worthwhile to examine first the problems related to the law, second, the practice of the law, and third, the related laws and practices.

First, we should consider the issue in its specific context. Like some of the other countries in Southeast Europe, Bulgaria has a relatively high level of corruption. Moreover, in a country where the judicial system is not equipped to combat corruption effectively, public opinion and therefore public awareness of what is happening within the government remain the only means for fighting corruption. This situation makes the question of freedom of expression and freedom of information perhaps even more important in countries like ours than it is in healthy, traditional democracies.

In this situation, free expression necessarily goes hand in hand with the free flow of information, especially from sources within the government. Another peculiarity in our country is that rural journalists are at a higher risk of being sued for defamation – and receive more severe penalties than journalists in the capital city. In fact, journalists in the capital are actually in a much better position. There the courts are more reluctant to decide in favour of politicians and officials, and they are more familiar with human rights standards such as the European Convention on Human Rights. At the same time, the central media that journalists in Sofia work for are stronger, richer and more influential. Public officials also bear

this in mind and are more cautious about initiating defamation cases. As a result of this gap between Sofia and the rest of the country, there is considerable fear that the actions of public figures outside Sofia are less transparent and less subject to the natural prevention of corruption that often accompanies a culture of openness.

As Ms. Milotinoва has already mentioned, after the law was changed in the year 2000, defamation was no longer prosecuted *ex officio*, and prison terms were replaced by fines. However, this sanction is very serious. The fines range from 500 to 1500 euros in cases of insult and from 1,500 to 3,500 euros in cases of spreading untrue information. What is particularly bad is that defamation against public officials is still subject to even graver sanctions, or fines of up to 7,500 euros, an exorbitant amount, especially for journalists in rural areas, where incomes are usually quite low. The current average salary in Bulgaria is a bit more than 100 euros per month. Even the minimum fine is still quite high for most journalists. Furthermore, it is very uncommon for a court to reduce this amount.

Our situation in regard to fines is similar to Croatia's, as Vesna Alaburic has described it. Some journalists in Bulgaria say they would prefer to risk imprisonment, because prior to the year 2000 that penalty was nearly always suspended to probation. By contrast, when the penalty is a fine, it is *never* suspended. Thus, it seems preferable to be sentenced to a heavier penalty that is suspended, than to receive a lighter sanction that is *always* put into effect. Another important element is the possibility of combining criminal charges and civil claims for damages in the same proceedings, a typical situation in the countries in this region. If convicted, the journalist must pay twice, once to the state and again to the injured party. This possibility tempts petitioners to seek both at the same time.

The seriousness of these problems is supported by the fact that the number of law-suits against journalists for defamation did not decrease after the Penal Code was changed in 2000. According to a survey conducted by the Bulgarian Helsinki Committee, in 2001 there were 115 cases pending in Bulgaria. In March 2003, that number had swollen to 131 cases, the majority of them for criminal libel (70), a number that had also increased in comparison with that for 2001 (60). What is even more worrying, 42 per cent of the cases had been initiated by public officials. In addition, there were separate cases brought by politicians and businessmen.

Penalizing the defamation of public officials with graver sanctions is clearly contrary to the standards of Article 10 of the European Convention on Human Rights, but it helps to explain the great number of such cases, as I said earlier. The possibility of combining criminal sanctions and civil claims for compensation in the same case may provide an additional incentive to file such suits. The outcome is that corruption and wrongdoing by public officials is likely to remain hidden because of the chilling effect of these sanctions.

Sometimes, court practices contribute to the problem. Some of the important defences that are recognized by the European Court of Human Rights are not clearly stated by the law and consequently are not followed by the courts. Thus, standards such as balancing interests, the goodwill defence, proportionality of the restriction to the intended protection, the sufficiency and relevance of the restriction, etc. are not readily applied. Whether this happens because of deficiencies in the law, or the lack of good precedents, or the stubborn persistence of the old mentality, many judges in defamation cases continue to take the position that their job is to find out whether or not the defendant has committed an offence rather

than to ask themselves whether the act in question should be regarded as a criminal offence and what defences would be suitable. In other words, the judges do not approach such cases with the understanding that here is a dispute about a restriction of a basic freedom, but rather from the position that they must pronounce judgement in a case of criminal behavior. When this is the case, it is easy to imagine why such judges are not inclined to balance conflicting interests. This way of thinking must be understood if things are to change.

The last point deals with related laws and practices. The Bulgarian Parliament has proposed a draft amendment to the Penal Code, which would impose graver penalties on anyone who divulges state secrets. This matter is very closely linked to the issue of the transparency of public officials' actions, and, as Mr. Duve pointed out this morning, this is what the whole problem is about. Public officials' actions can be protected either by defamation laws or by State secrets laws, and why not? There is a broad definition of what constitutes State secrets in the Protection of Classified Information Act, but there is no precise list of the interests protected by that exemption. Therefore, public officials can achieve nearly the same benefits and protect their own interests just as well with this law as with the defamation law. This is again a question of a responsibility that should bind everyone, not just the officers in charge of protecting state secrets. Although in this case the information that is made known or circulated is not necessarily untrue, the sanctions imposed are much more severe than in defamation cases where an outright lie may have been circulated. Moreover, in many defamation cases, the problem is to prove that the information was true. Even when a defamation law is a relatively good one, one still has the problem of putting it in line with all the other possible restrictions on the same right.

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## Discussion

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**Toby Mendel:** I am always loath to disagree with Vesna for various reasons, but mostly because I respect her. Nevertheless, I have to object to the first point she made about how it is unfair for us to put pressure on Croatia when we are not doing it to other countries as well. I can never agree to that as a matter of principle. I think it is a very dangerous when anyone is accused of being unfair for promoting human rights. It is never fair to argue that just because someone else is abusing human rights, it's OK for others to do it, too. For me, this is a fundamental objection to the kind of excuses some governments make, as we have heard today, when they say in effect, "Oh, yes, we have an oppressive law, but that's all right because Germany has it, and France has it, too." A breach of human rights is never justifiable, but it is always justifiable for us to criticize it.

**Vesna Alaburic:** Well, I like Toby, and I always agree with him. I agree with what he said now, too, but perhaps he misunderstood me. After all, English is not my native language and perhaps I didn't make my point clearly. Of course, I agree that Croatia should be pressured to change its legislation, if there are problems with freedom of expression there. What I really wanted to say is that the Croatian government and other governments as well will listen to and respect the campaign much more, if it is addressed to all countries – to Germany as well as Croatia. That's all I meant.

**Toby Mendel:** Vesna, I think all of us here agree that this specific issue should be addressed across the board throughout the

OSCE region. That's why we invited experts from all the OSCE states and not just from those that are east of Vienna.

**Milena Milotinova:** I just want to add a detail that we have overlooked during the debate, namely, the duration of court proceedings in some countries. In Bulgaria, and, I believe, in many other countries, court cases often last for more than five years. In that case, even if the legal framework is perfectly all right, extremely slow court proceedings can exert another form of pressure that can affect both sides – the journalist as well as the injured party. When a court case drags on for years, journalists start thinking, “What am I supposed to write? What am I forbidden to write?” This kind of self-questioning is the ultimate form of censorship. On the other hand, when injured parties have to wait for five to eight years for their reputations to be restored, that's also not fair. When court proceedings last that long, freedom of expression remains an elusive goal.

**Vesna Alaburic:** I would just like to say that sometimes long, drawn-out court proceedings can actually help the media, and, in fact, this has sometimes been the case in Croatia. We have had some cases that started more than ten years ago. In the meantime, the plaintiffs in some of those cases have found themselves accused in The Hague, or in Croatian courts, or even in jail. Ten years ago, it was nearly impossible for media defendants to prove that the information they had published was true, but now some of these cases have become easy to win just because times have changed and with them the situation of the media.

**Zurab Adeishvili:** I agree with Vesna that slow proceedings can sometimes help the media. We had a similar case in Geor-

gia. A very powerful person was putting pressure on the court, but after three years he resigned, and now the media has won. I think long court cases in some of our countries usually help the media and don't necessarily violate freedom of expression.

**Milena Milotinova:** Perhaps for countries like yours, slow proceedings are not a problem, but in countries like Bulgaria, where both the courts and the journalists are truly independent, lengthy court cases are a very problematic issue. When I talk to journalists in Bulgaria, they tell me that they really suffer under long court proceedings.

**Toby Mendel:** I am a little uncomfortable with this discussion about court delays and how long, drawn-out proceedings can help the media. In my view, justice should always work rapidly. If no defamation has been committed, the media outlet should be acquitted quickly. However, if defamation *has* been committed, under standards that we consider appropriate, that is, under just laws, then the media should receive a suitable penalty, and the defamed persons should have their reputations restored. Here, I would like to mention that one of the remedies we at ARTICLE 19 are promoting is self-regulation, whereby the media revises its statement and prints an apology or a correction. It seems to us this goes very quickly to the heart of the matter. When something is said or published that is factually incorrect, correcting it quickly limits the amount of harm done to the greatest extent possible. Therefore, this is the kind of remedy we should promote. Dealing rapidly with these matters, under the right structures, is in principle the best solution.



## **II. Insult Laws: An Insult to Freedom of the Press**



Claude Moisy  
**Repealing Insult Laws  
is a Prerequisite for Democracy**

My name is Claude Moisy. I am a member of the board of *Reporters sans Frontières*, Reporters Without Borders. I have been a journalist all my life and this in many countries around the world. During the discussion this morning, we discovered that things were not as easy as we thought and that decriminalizing libel was not enough to solve all the problems. We heard this morning about some instances where, following decriminalization of libel, the situation for the press got even worse, because whereas prison sentences were often suspended, the enormous fines that replaced them are almost never suspended and can put many media companies out of business.

The problem with the other aspect of our agenda today, the insult laws protecting heads of State and other public officials, is simpler. It seems that people defending press freedom are nearly unanimous in recommending the removal of all the insult laws. Everyone seems to agree on that solution.

You all know that the main argument put forth for the abolishment of insult laws is a basic principle of democracy. Insult laws are an inheritance from the past, from the times of absolute power. When the power-holder was purported to have received his power from God as a divine right, he could not be subject to the same laws and the same scrutiny as other mortals. Insult laws provide “extraordinary” protection to the people in power, in comparison with the protection granted ordinary citizens by libel laws. Therefore, eliminating these laws is a question of democracy, of strengthening basic human rights.

Concerning prison terms for libel (and this is even truer for insult laws), we said this morning that although most of the western democracies that still have these laws on their books no longer apply them, they are still dangerous. Their existence is used as an excuse by other, less liberal regimes to argue, "Well, why shouldn't we have those laws in our penal codes when France, Germany, and other countries, still have them in theirs?" That is why it is essential for these laws to disappear from the law books of the western countries.

There is another strong argument for eliminating insult laws. Prosecuting journalists for antagonizing powerful people constitutes one of the greatest obstacles to democratic dialogue and public debate. Preventing journalists from working freely means that ordinary citizens cannot scrutinize the people in power and that there is no need for these to observe transparency in their conduct of public affairs. Those who have received their power from the people, and exert their power in the name of the people, must be held accountable to their people. Any country that aspires to democracy, or pretends it wants to be more democratic, must eliminate insult laws because they give excessive protection to those in power and therefore represent an obstacle to open public debate.

I do not need to quote here at any length the different decisions that have been taken or the terms used by the European Court of Human Rights in the area of defamation of public officials, but permit me to point out that the Court has stated on many occasions that power-holders should, in fact, be subjected to even more public scrutiny, than private people. Rather than enjoying greater protection through insult laws, power-holders should have less protection than normal citizens.

Ronald Koven

## How Dangerous Archaic Insult Laws Can Be

My friend Toby Mendel from ARTICLE 19 has been questioning the definition of the expression *insult laws*. The World Press Freedom Committee publication, *Insult Laws: An Insult to Press Freedom* defines insult laws as laws that

give special protection from so-called insult, offence, outrage, contempt or disrespect to the chief of state and other officials – high and low – public institutions or bodies, like the parliament, the police or the armed forces, the symbols of the state, like the flag, or the coat of arms, and the state or nation themselves...

Insult laws make it a crime to offend the “honour and dignity” of public officials, state offices and national institutions.

That is what I mean when I talk about insult laws. I should also mention the famous statement that was made by a judge of the US Supreme Court discussing obscenity, who said, “I can’t define it, but I know what it is when I see it.” I think the same thing applies, to some extent, to insult laws.

Before I go any further, I would like to thank Freimut Duve for all the work he has done in the field of criminal defamation and insult laws. Over the years he was in office, he was always at the vanguard of those fighting these laws. He never hesitated to speak out against them. We have not always agreed on everything, but on that point, may he be greatly thanked and may his successor pick up his banner and fight just as hard as he has to eliminate such laws.

It is not Utopian to think that such laws can be eliminated in the OSCE area or anywhere else for that matter. A wide

variety of countries in different parts of the world have recognized that these laws are no longer justified and should be removed from the books. Nevertheless, such laws continue to exist in Western European democracies, and even if they are constrained by democratic traditions, they still provide states elsewhere that wish to maintain and, in many cases, use such laws with a convenient excuse to do so.

Although there is a distinction between criminal defamation and insult laws, in most countries that distinction is greatly blurred in practice because a criminal defamation charge is generally brought by a public prosecutor, and a public prosecutor does not act on behalf of private individuals, but of public officials. Thus, while it is perfectly true that the distinction between these two types of law is merely a grey line, they can be defined separately.

Let me give you an example of how the existence of such laws can be harmful – even in France. In 1996, the [then] Iraqi president Saddam Hussein took a very prominent journalist, Jean Daniel of the *Nouvel Observateur*, to court for having offended him. Saddam Hussein’s lawyers brought the case as if Hussein were a private person, but the French judges said in effect, “No, Saddam Hussein has no right to sue in a French court as a private person because he is a chief of state, and as a chief of state he is protected under the provisions of the French Press Law of 1881, which specifically protects heads of state. He should sue under the special protection afforded to a chief of state.”

Fortunately, Saddam Hussein’s lawyers did not pursue that invitation, but in effect the judges were saying, “Although that law is no longer in general use, we invite you to avail yourself of it.” I hope this shows you how dangerous it can be to keep such legislation on the books, even in countries with

democratic traditions where such laws have not been used for a long time.

I think it is no coincidence that the French presidents who vowed they would never use the 1881 law to protect themselves failed to seek its revocation. They wanted to keep it in place like a sword of Damocles that could always be used if they felt they had been truly offended. And it was always up to them to decide what constituted a true offence.

What needs to be done now is to conduct an intensive campaign not only in countries where these laws exist and are applied, but also in countries where they seem to be only an anachronistic appendix with no practical uses. But as we all know, an appendix can always become infected and kill you. These laws must be eliminated, not only where they are regularly used but also where they are not applied but serve as a convenient excuse for other states. I hope we will make that point very strongly in our recommendations.

Oleg Panfilov

## **Resisting Limits on the Press and the Media in Putin's Russia**

Since I am not a legal expert, I will start by telling you a story, a Soviet story that has something to do with what we are discussing today. A Soviet citizen and an American come to Paris to look for freedom of speech. The American says, "I am a free man; I can go to the White House and say, 'President Ronald Reagan is stupid.'" Then the Soviet citizen says, "Me, too, anytime I want to I can walk straight into the Kremlin – and say, 'That Reagan is an idiot.'" "

Today, journalists in the Russian Federation are afraid to tell jokes like that about members of the Government or other powerful State officials, because in many cases they have been sued for similar remarks. In fact, the social and political situation in the Russian Federation has greatly changed. These changes date back to September 2000, when Vladimir Putin signed a 36-page document called "The Doctrine Concerning the Security or Safety of Information." This is neither a legal document, nor a bill, nor a law. It is, in fact, a programme containing the new President's information policy. The criminal code of the Russian Federation has always had an article on libel and insult, but that article was not used with much enthusiasm until this document was signed. Today, journalists are being brought to court much more frequently, and legal action has increased dramatically in the past few years. According to the information collected by our organization, the Center for Journalists in Extreme Situations, there were 19 lawsuits filed in 2000, 19 in 2001, 31 in 2002, and, in the first half of 2003

alone, more than 20 legal actions were brought against journalists. In our opinion, there is a political will behind all this, and we understand clearly what is happening in the Russian Federation today. Under President Putin's administration, journalists are being persecuted, and that is something new. In his time, Yeltsin never harmed journalists directly, in contrast to Putin, who, in fact, sues not only Russian journalists but also French ones.

Now I would like to say a few words about our attempts to resist this situation. Our Center is organizing seminars where we try to inform journalists about what they can do to resist. We try to help them understand their profession better and how their profession has changed. Unfortunately, most of the journalists in the Russian Federation are still Soviet journalists. They have worked for the Soviet press for so many years that they are stamped with the Soviet pattern and adhere to a Soviet way of thinking that dates back to the Soviet era. This is why we decided to address our efforts towards young journalists, those under 30, who have not been marked by the Soviet model and are more open to what we tell them. We prepared a manual for them in the Russian language, which can be found on our website. In fact, it is a programme that includes a lot of ideas from Reporters Without Borders.

I think it is very important to tell journalists in The Russian Federation how they can resist. For example, once when a Russian journalist was charged with libel, we invited a *Times* correspondent to attend the actual proceedings and write an article about the case. After his article was published, the libel charges were dropped. The article had an impact, although not directly on the judge. It put pressure on the administration, and, after all, a judge is part of the administration, so the article did have an impact on the decision. There are other ways,

other possibilities. We are trying to make this clear to journalists by organizing seminars not only in the Russian Federation but also throughout the CIS region. You have already heard from our colleagues from Belarus and Azerbaijan, and a statement will also be given by a colleague from Kazakhstan. I think we can safely say that the Soviet frame of mind will continue to exist for quite some time – and that Soviet jokes will be around a while longer, too.

Martine Ostrovsky  
**The French Press Law of 1881:  
Another Negative Example**

Although France is a country with an old democratic tradition, it does not provide a good example in regard to libel and insult laws. As Claude Moisy said earlier, abolishing jail sentences does not necessarily mean that all the laws that affect freedom of the press have been decriminalized. That is only the first step. We still have a lot of work to bring our laws in line with democratic standards.

In this area, the European Court of Human Rights (ECHR) has shown us the path to follow. In applying Article 10 of the European Convention, the ECHR says clearly that freedom of expression is valid not only for news or ideas that are welcome or seen as inoffensive or neutral but also for news or ideas that disturb and shock, as these are required by tolerance and pluralism, and no democratic society can exist without them. The assertion that free expression is valid for all ideas – even those that may shock, offend or disturb – is truly a guarantee of freedom of expression. Of course, free expression in this extreme form is one of the luxuries we enjoy in our western democracies. Most OSCE participating States have yet not reached this point since freedom of expression is often still quite limited there. However, there is one area on which we can all agree: the offences we call *insults* in English, or *offences* to heads of State or foreign governments, or *contempt of* or *insult to foreign diplomats* should be removed from the books.

In France, defamation against people in authority or civil servants comes under defamation or libel. Hence, there is no specific rule for civil servants or public figures. The only difference is that the fine may be higher in cases of defamation against these persons.

But there is a problem in France in relation to insults to heads of State, foreign States and governments, as well as to outrage to foreign diplomats. It is shocking that these specific laws exist. They represent a survival of what used to be called the crime of *lèse-majesté* in the time of the monarchy. In other words, this offence was a verbal attack on, or insult to the king. This law, which is very specific to the French system, denies a journalist who is being prosecuted by the head of State or a foreign head of State the right to claim a defence that is known in French law as *the defence of truth*, the journalist's right to prove that what was written is true.

In 2002, the European Court found against France in connection with the daily *Le Monde*, which had been sentenced by French courts after it had carried an article about the King of Morocco's entourage. The article, which was based on a report in the *Geopolitical Drug Observatory*, said that some people in the King of Morocco's entourage had been linked to drug trafficking. According to Article 36 of the French Press Law of 1881, this statement constituted an offence, or rather an insult, to a foreign head of State. Since a journalist has no right to publish such information, the head of a foreign State benefits from special treatment. Since no one is allowed to displease a foreign head of State, a journalist who is accused of such an offence is not even permitted to publish the evidence that would prove that his assertion was true and correct.

The insult to the French head of State is a similar offence, but this article, Article 26, has not been applied since 1976

when President Giscard d'Estaing said, "I will no longer prosecute journalists for the offence of insulting heads of State." Although no subsequent president has used or applied this article, it still exists. Thus, if one of our presidents decides one day that he would like to use this article, he can use it, or abuse it as he sees fit. Therefore, let us be watchful and on guard: Many battles have been fought, but the war is not over yet.

Currently, there is a debate in the French parliament on a law that is designed to fight crime by providing more resources to the executive branch. The bill currently under discussion includes the removal of Articles 36 and 37, which cover insults to heads of State, foreign diplomats and foreign heads of States and governments. The bill does not, of course, mention insult to the French head of State. The European Court has looked at the need to bring our law into line with the European Convention for the Protection of Human Rights and Fundamental Freedoms by abolishing a number of offences that have previously led to judgements against France by the European Court. In France, we are moving ahead, but not of our own accord.

This is the point we have reached. We shall see in the future whether we can go any further in repealing these laws, which are indeed archaic and must disappear.

Elvira Mezhenaya

## **Fighting Persecution and Intimidation in the Russian Federation: A True Case**

Let me say a few words about my case. I am General Manager of the TV channel *Yaroslav 1* in the Russian Federation. We have had an extremely bad relationship with the authorities because we kept looking into corruption cases. Obviously, a some individuals in the regional administration did not wish for anything to be published that would be seen as criticizing them. I was charged for libel. The court proceedings lasted a whole year. My case was heard by a judge working under the supervision of the Ministry of Domestic Affairs. There were many irregularities throughout the proceedings: Witnesses were put under pressure, or interrogated to say things that were not true or things they didn't want to say. I was questioned, too. I was placed under an arrest warrant and could have been arrested anywhere in the Russian Federation no matter where I travelled, or, for that matter, even abroad, if Interpol had been contacted. My telephone conversations were tapped, and my personal affairs were searched.

My own belief is that this prosecution was started only to frighten me as a journalist and probably other journalists as well. It was a measure of intimidation, if you will, and as such it was very successful. Once again, in my view, this is not a question of polemics: No country that claims to be a democracy should ever have an article referring to defamation in its criminal code. Now this point leads me to another subject and that is protection.

How can we protect ourselves? With hindsight, I find that the experiences of that year turned out to be very positive for me. They gave me lessons to learn, I gained experience, and I found out what was going on in the journalist community. There were, in fact, three journalists who had been bribed to give false testimonies. Naturally, money has terrible power. What do we need in order to counteract this kind of persecution? First of all, we need highly educated journalists. It is important for a TV channel to be famous and to maintain a flawless reputation. In this way, you end up gaining a lot of people on your side.

Second, it is essential that your company finances are fully straight-forward, clear and transparent. This also gives you protection. Otherwise, you can easily be caught by the authorities, and this is their ultimate goal. We had to prove that we had committed no misdeeds and that all of our actions were completely honest.

Now you must remember that when orders come down from the top administration in our region, the entire hierarchy must follow those instructions, and this is the case all the way down to the courts and the police, since all of these bodies are dependent upon the central administration for their budgets. Therefore, there are many threats and many links at all levels throughout the hierarchy. In fact, there are so many links that there is no way to see them all.

In conclusion, let me add that when you win this kind of battle, it is a source of great joy, and it gives you tremendous self-assurance. In Russian, we say that when you've beaten one enemy, you gain two, but if you back down from your enemy, you will be destroyed. What's important is to tell the truth, to be certain about it, to be self-assured about it, to be fully transparent, to disclose all the necessary information and to make sure you have skilled legal advisors. Fortunately, we

had all these factors on our side. In addition, we had the support of the Association of Independent Journalists. We received support throughout the litigation, and finally I was awarded compensation for moral damages, and my case ended successfully. I wish all of you here similar good luck.

In closing, I would like to emphasize that there should be no insult laws in our legislation, and any measures regarding defamation should only come under civil law. After all, the main job of a journalist is to tell the truth.

Slobodan Reljic

## **Serbia and Montenegro: Without Independent Media Democracy Remains a Fiction**

I would like to share something with you that might seem to be a paradox: Now, after the democratic changes that took place in my country in October 2000, we are facing an explosion of libel cases, filed by politicians against the media and journalists. A few months ago, Ambassador Maurizio Massari, Head of the OSCE Mission in Serbia and Montenegro, said there were already more than 220 on-going libel cases against journalists. I am sure you will all agree that this is not a very healthy environment for free and independent media to function in.

Another paradox is that the demands for financial compensation for moral damage inflicted by alleged defamation are very large. For example, the editor-in-chief of a small newspaper in Serbia is being sued for 60 million dinars in compensation, an amount that is 2,000 times his average monthly income. That represents 167 years of work for that man! Just for a comparison, a soldier who was drafted against his will and lost a leg in the fighting, was recently awarded a state compensation of 200,000 dinars – less than 3,000 euros!

Libel cases are a permanent threat to media survival. Decriminalization of libel would not solve all our problems, but it would be a really important step forward, and it would give the media a bit of space for independence. Without independent media, democracy is only a fiction. Journalists living under the kind of pressure I have described here are, in fact, working under a very specific kind of censorship, and this is a threat to any public debate.

Rozlana Taukina

## **Kazakhstan: Increasing Pressure on the Critical Media**

I would like to briefly describe the pressure that is being employed against the media in my country, Kazakhstan, which is considered to be one of the most advanced in our region in terms of democratic reforms. Nevertheless, during the recent past, my country has taken several steps backwards. In the past 12 years of democracy, we have “achieved” four versions of a media law. Three previous laws have been voted on and adopted, but with every new “reform” the law has become more restrictive, and the media have been more strictly regulated. Each successive law provides for even tighter controls on the media, and all of that has taken place in a country where the media are anyway loyal to the government.

Misusing libel and insult laws is another practice the government uses to put pressure on critical media. Recently, the head of the regional department of the Ministry of Information, Zhasaral Kuanyshalin in Aktubinsk, sued the local newspaper *Diapazon* for an article he thought insulted the Kazakh nation. He won the case, and each of the authors of that article had to pay a fine of 25,000 *tenge* for “moral damage.” Since then, *Diapazon* has been constantly subjected to different kinds of pressure by the local authorities. In the past several years, there were also lawsuits against the independent newspapers *Assandi Times* and *Vremya Po*, as well as the internet newspaper *Navigator*. This year, for example, there were 20 lawsuits against journalists. The situation is really serious: journalists are jailed and sentenced to pay incredibly high fines (equiva-

lent to as much as 30 years of income). Clearly, libel law should be decriminalized.

I would like to make a plea to all of you here. In December 2003, a dreadful media law is likely to be adopted by our parliament. This law promises to smother and silence the media in our country even more effectively than the previous ones. We believe that once this law is adopted, it will force the media to reveal all of their sources of information, a measure, which, of course, is extremely detrimental for journalists. In addition, the new law will equate reporting on corruption with defamation, which is under the criminal code. This means that we, the country's journalists, will no longer be able to investigate corruption. Perhaps we can do something here to publish more information about this draft and stop this bill from being adopted. This law will certainly not be compliant with international standards, and it threatens to destroy the last remnants of free press in our country.\*

\* Editors' note: This draft media law was rejected by President Nursultan Nazarbayev on 22 April 2004.

Fatos Lubonja

## **Albania: Using Civil Suits to Discourage Criticism**

My case was a little different and a bit more complicated. Several previous speakers have described their cases today, but in their cases, there were always two players: the government, or the government officials on one side, and the media and the journalists on the other. In my case, there is a third player: the owner of the journal I wrote for, who just happens to be one of the richest persons in the country.

I was a columnist on the Albanian daily *Shekulli*. Even before my libel suit, I had a difficult relationship with Koço Kokëdhima, the owner of the newspaper I worked for and, as I said, one of the richest people in the country, probably because I wrote critical articles on the links between political, financial and media power in my country, or what I call the “Berlusconi syndrome.”

On 15 February 2003, I wrote an article against the war in Iraq, entitled “The War in Iraq and the Albanian Politicians,” in which I attacked the Albanian Prime Minister’s policy of supporting the United States on this issue. The article was not published. I was then told by my editor-in-chief that the owner of the newspaper had ordered him not to publish it “because it was against our big friend, the United States.” I had my reasons to believe that the argument that my article was anti-American was just a pretext. My publisher didn’t like it because it criticized the Prime Minister with whom he had a very close business relationship. As a response against this act of censorship, I sent an email all over the world explaining the

real reasons behind the case, and then my email was published by another newspaper. A few days later, *Shekulli* published my article on the war in Iraq – without my permission.

On 10 April 2003, Koço Kokëdhima filed a civil lawsuit against me. I was accused of three “libellous statements” I had made in that published email: that my article had been censored, that the owner of the newspaper, Koço Kokëdhima, had personally been behind the censorship and that Kokëdhima had relations with the government and was enhancing his business with government money.

I was sentenced to pay something like \$80,000 to Koço Kokëdhima as “moral and material compensation.” This amount is approximately ten times more than I would have earned working for his newspaper in three to four years, considering that my salary was less than \$10,000 dollars per year.

Alexei Simonov

## One Case That Contradicts the Rest

I would like to tell you about a very vivid case in the Russian Federation that in my opinion, however, contradicts many of the things said in this room today.

Several years ago, a journalist approached our organization, the *Glasnost Defence Foundation*, to ask for help. He had been sentenced to a prison term of three years, but he had fled (or was fleeing). He had managed to get hold of some of the papers from the court, including the paper accusing him and the court decision, and submitted them to us. To our surprise, the papers contained a number of legal mistakes. In fact, the papers showed that totally illegal methods had been used. We applied to a higher court, protested this court decision and won.

Later, we started reading the articles that had led to the accusations against the journalist. We realized with hindsight that this man was a professional “reputation killer.” His newspaper had clearly been invented with the intention of conducting a blatant smear campaign, targeting one of the candidates competing in an election. That was all absolutely evident from what we read.

This experience leads me to confirm what Vesna Alaburic said earlier. It is a very complicated thing to protect journalists these days, because sometimes you must first read what they have written. You must know why they were accused of libel or defamation.

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## Discussion

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**Claude Moisy:** I am quite ignorant about the situation in the Russian Federation outside of Moscow and St. Petersburg. I would like to ask Mr. Panfilov if the situation of journalists there is any different. Are journalists more likely to be threatened or harassed in some regions than in others?

**Oleg Panfilov:** There are two types of journalists in the Russian Federation today: journalists in Moscow and all the others, including journalists in St. Petersburg. First of all, the journalists in Moscow have a much higher income, with salaries ranging between two to three thousand US dollars a month. In the rest of the Russian Federation, the average income for journalists is around \$60 a month.

Another specific feature of the Moscow journalists is that they are relatively well protected, simply because the offices of international institutions and foreign embassies are located in Moscow. Thus, it is much easier to make a lot of noise in Moscow and be heard internationally than it is in the provinces. Unfortunately, a lot of human rights organizations have very little information on what is happening outside Moscow. I would say 80 or perhaps even 90 per cent of all the conflicts and disputes linked to journalism and the media occur in the provinces. Nobody knows what happens to journalists there. They are subjected to strong pressure from local authorities who have their origins in the old Soviet *nomenklatura*. Since Putin's arrival, this *nomenklatura* has taken over (again). Virtually all lawsuits against journalists end with a verdict against the journalists – with very rare exceptions.

**Freimut Duve:** Throughout the years, the Office of the Representative on Freedom of the Media has followed the fate of

a number of journalists who were investigating and revealing corruption, particularly in the provinces of the Russian Federation. For over two years, I followed the case of Olga Kitova, a correspondent for the regional newspaper *Belgorodskaya Pravda*. After she had published a number of stories on the miscarriage of justice in Belgorod and on some questionable privatization activities, she was actively harassed, both physically and mentally, by the local police and prosecutor. On two occasions she was arrested. She suffered several breakdowns and was treated for high blood pressure.

Then she was charged under five articles of the criminal code of the Russian Federation. She was also charged with libel, and in December 2001, she was convicted by the Belgorod court and sentenced to a two-and-a-half year suspended prison term. The Supreme Court of the Russian Federation, to which she appealed, cut her sentence down to two years. Her case is probably one of the most horrible cases we have ever seen of the harassment of a journalist within the Russian Federation. She is not the only one who has stood up to local chieftains, but the attacks against her were exceptionally brutal. On several occasions, she also received death threats, but she has never succumbed to pressure.

I defended Olga Kitova throughout her ordeal and met her on several occasions in Moscow. She is a very brave woman, and I have enormous respect for her professionalism and courage. I raised her case with the authorities of the Russian Federation at all possible official levels, from the Office of the President, to the Ambassador, to the OSCE. I intervened on her behalf with the Foreign and Interior Ministries, with the Supreme Court and with the *Duma*. We succeeded in bringing her case into the limelight, but in the end we were not really able to help her. But without people like Olga, corruption, already deeply rooted in the Russian Federation, would engulf the country completely. Thanks to her and her colleagues, that has not happened yet.

**Claude Moisy:** At this stage, I would like to ask the audience a question. What do you think the OSCE, Reporters Without Borders, ARTICLE 19, and the World Press Freedom Committee could do? What else can we do to make sure that insult laws are removed from the books in our countries? What can we do to eliminate these laws that dictators use to prevent journalists from doing their job? What else do you think we can do? Doesn't anyone want to speak up? Does this mean that everything is all right in your countries? No? Now I see some reactions.

**Toby Mendel:** Several people have already pointed out that insult laws, especially those in Europe, are particularly unacceptable as a matter of law. First of all, the European Court has said that public officials, as a matter of law, are entitled to less protection from insult laws, laws that are designed to protect reputations. Secondly, if you have been charged with insulting the head of a government and the truth is not an allowable defence, that is clearly a violation of Article 10. Now here we have a legal framework, a legal basis for what we are trying to achieve. It seems to me that there is a great void in terms of trying to ensure compliance with the European Convention, and that the primary responsibility lies with the Council of Europe and the Council of Ministers of the Council of Europe, both of which are charged with ensuring compliance with the European Convention on Human Rights.

Now there may be several ways to achieve compliance, and we can discuss them here. There might also be a role for the OSCE. After all there is a recommendation by the Council of Europe on the right to information, which tries to provide a framework for encouraging participating States to adopt freedom of information laws. Therefore, we could start by asking why there can't be a formal recommendation that participating States abolish laws that violate the European Convention.

Now I would like to touch just briefly on a general question. There are two ways to get laws changed. One is through litigation and one is through advocacy directed at the legislative branch of government. I think on this issue we should actively pursue both possibilities. Clearly, there is a wide range of ways advocacy could be pursued. ARTICLE 19 has always been very interested in litigation, but we find it is incredibly difficult to get funding for litigation work, probably because it does not fit easily into the parameters of the funding organizations. After all, such cases often last longer than a year. I think the funding problem has definitely limited our ability to be effective in this area. We are talking about doing some joint litigation work with Alexander Kashumov right now, although we do not have any funding for it. We are going to do it anyway, but we can't do much without adequate funding. I think this is also something we need to think about. It is always easy to get funding for advocacy work and for campaigning, but, it is very, very difficult, for some reason, to get funding for litigation, although litigation and advocacy could work in tandem, and this should be articulated as a strategy.

**Freimut Duve:** Now I would like to use this opportunity to inform you about the *Veronica Guerin Legal Defense Fund*, which will provide support to journalists who are being prosecuted in OSCE participating States. The Fund is named after the Irish journalist Veronica Guerin, who covered organized crime for Ireland's *Sunday Independent*. Guerin was killed on 26 June 1996. The purpose of this Fund, which is supported through donations from OSCE participating States, human rights organizations and individuals, is to assist reporters in need by providing appropriate legal defence. Relevant cases involving journalists will be referred to the Fund by OSCE field offices and by *bona fide* non-governmental organizations.

## **Recommendations**

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# Libel and Insult Laws: What More Can Be Done to Decriminalize Libel and Repeal Insult Laws ?



*24-25 November 2003, Paris*

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## Recommendations

The participants at the Round Table on Libel and Insult Laws, organised by the Office of the OSCE Representative on Freedom of the Media and Reporters Without Borders and held in Paris on 24-25 November 2003 discussed existing libel legislation in OSCE participating States. They took into account international standards relating to freedom of expression, including Article 19 of the United Nations Universal Declaration of Human Rights and shared standards and commitments of OSCE participating States. They focused on decriminalizing libel and repealing insult laws that provide undue protection for public officials.

They agreed that over-use or misuse of libel and insult laws to protect the authorities or silence the media were clear violations of the rights to free expression and information and should be condemned.

The participants approved the following recommendations to governments/officials, legislatures, judicial bodies and funding agencies in OSCE participating States:

### **To governments/officials:**

- Governments should support decriminalization of libel and the repeal of so-called insult laws, particularly to the extent that they provide special protection for the “honour and dignity” of public officials.
- The party claiming to have been defamed should bear the onus of bringing a defamation suit at all stages of the proceedings; public prosecutors should play no role in this process.
- Public officials, including senior government officers, should be open to more public scrutiny and criticism. They should exercise restraint in filing suits for defamation against the media and should never do so with a view to punishing the media.

### **To legislatures:**

- Criminal libel and defamation laws should be repealed and replaced, where necessary, with appropriate civil laws.
- In cases where they are retained, the presumption of innocence should be applied.
- So-called insult laws, particularly those that provide undue protection for public officials, should be repealed.
- Civil defamation laws should be amended, as necessary, to conform to the following principles:
  - only physical or legal persons should be allowed to institute defamation suits, not public or governmental bodies;
  - State symbols and other objects (such as flags, religious symbols) should not be protected by defamation laws;
  - proof of truth should be a complete defence in a defamation case;
  - in cases involving statements on matters of public interest, defamation defendants should benefit from a

defence of reasonable publication where, in all the circumstances, it was reasonable to disseminate the statement, even if it later proves to be inaccurate; and

- reasonable ceilings should be introduced for defamation penalties, based on the current economic situation in each country.

### **To judicial bodies:**

- The scope of what is considered to be defamatory should be interpreted narrowly and, to the extent possible, restricted to statements of fact and not opinions.
- Where libel is still a criminal offence, the presumption of innocence should be applied so that the party bringing the case has to prove all of the elements of the offence, including that the statements are false, that they were made with knowledge of falsity or reckless disregard for the truth and that they were made with an intention to cause harm.
- Where libel is still a criminal offence, courts should refrain from imposing prison sentences, including suspended ones.
- Non-pecuniary remedies, including self-regulatory remedies, should, to the extent that they redress the harm done, be preferred over financial penalties.
- Any financial penalties should be proportionate, taking into account any self-regulatory or non-pecuniary remedies, and refer to demonstrable damages only, not punitive damages.
- Defamation laws should not be used to bankrupt the media.

### **To funding agencies:**

- Funding agencies, in providing aid to OSCE participating States, must take into account the attitude of regimes that crack down on freedom of expression, notably through the misuse of libel.

Jane E. Kirtley  
*Background Paper*

## **Criminal Defamation: An “Instrument of Destruction”**

Freedom of expression is regarded as a fundamental right in democratic society. The right of the press to report and comment on matters of public concern is essential to create and maintain an informed electorate.

However, it is often said that freedom of expression is not absolute. No individual or media organization has the right to knowingly publish false and damaging statements about another individual without consequence. Individuals whose reputations have been harmed as a result of such publications should have the right to redress through the civil courts.

Criminal libel, by contrast, is an unfortunate and outdated legacy of autocratic, totalitarian, or colonial states and has no place in any society that claims to support the concept of freedom of expression. It is inimical to democracy because it strangles dissent and debate, punishing legitimate criticism of government officials and institutions. Too often it serves no other purpose than to provide government and government officials with the power, through intimidation or post-publication sanctions, to discourage journalists, scholars, politicians and ordinary citizens from expressing critical views that might be deemed offensive, insulting, or defamatory. Although the rights of private individuals to protect their reputations may appear superficially more compelling, even in those cases, providing appropriate monetary damage awards to compensate for actual losses suffered is more than sufficient to address the interests at stake.

**Historical Overview.** The roots of modern criminal libel law can be traced to the Roman Empire, where libel could be punished by death.<sup>1</sup> By the 13th century, an English statute, *De Scandalis Magnatum* (1275, 3 Edw. 1, Stat. West. Prim. C. 34), threatened those who “[told] or publish[ed] any false News or Tales” with imprisonment. The infamous Court of Star Chamber developed common law criminal libel rules in 1488, contemporaneously with the development of the printing press. Although originally intended primarily to protect the monarchy or the aristocracy from criticism or insult, criminal libel laws also applied to non-political defamatory statements about private persons.<sup>2</sup> Common law libel rules remained in place in England for well into the 19th century, and were, in turn, enforced in the American colonies.

Meanwhile, in Europe, laws such as the French press law of 1881 created criminal penalties for harming the reputation of an individual, as well as for insulting the president, the judiciary, or others within government. Many countries following the civil code model adopted similar statutes.<sup>3</sup>

The rationale supporting criminal libel seems counter-intuitive to modern sensibilities. At its heart, criminal libel was believed to be an essential weapon to avert breaches of the peace, by duelling or vigilantism, by those who sought satisfaction for affronts to their honour or dignity. “Defamation, either real or supposed, is the cause of most of those combats which no laws have yet been able to suppress.”<sup>4</sup>

Duelling no longer seems a realistic threat, yet most countries retain criminal libel laws on their books under a variety of pretexts. For example, in Germany, criminal defamation laws have been defended as necessary to protect the individual’s right to dignity as guaranteed by the Basic Law of the German Constitution.<sup>5</sup> Portugal has argued that the State has a duty to

protect the reputation of the individual, and that criminal law is an appropriate tool for doing so.<sup>6</sup>

In the totalitarian states of the former Soviet Union, criminal libel was utilized as a tool to quash counter-revolutionary activities. More recently, it has been justified as necessary to protect nascent democracies from damaging criticism that would encourage “popular distrust, apathy, and non-participation in the political process.”<sup>7</sup>

Whatever justifications might exist for allowing criminal sanctions for false and defamatory statements about individuals, there is no justification whatsoever for imposing them when the institutions of government are the targets of censure or ridicule. A government that is criticized, whether “fairly” or not, is not diminished, but strengthened.<sup>8</sup>

***The United States Experience.*** The trial of printer John Peter Zenger was the most famous criminal libel prosecution in colonial America. Zenger had printed issues of the *New York Weekly Journal* that criticized the colonial governor for removing a

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- 1 Yanchukova, Elena, “Criminal Defamation and Insult Laws: An Infringement on the Freedom of Expression in European and Post-Communist Jurisdictions,” 41 *Colum. J. Transnat’l L.* 861 (2003).
  - 2 See, e.g., *De Libellis Famosis*, 5 Coke 125a, 77 Eng. Rep. 250, 251, cited in MLRC Bulletin, “Criminalizing Speech About Reputation: The Legacy of Criminal Libel in the U.S. After Sullivan and Garrison,” at 1 (March 2003).
  - 3 See Yanchukova, supra note 1, at 863.
  - 4 Livingston, Edward, “A System of Penal Law for the State of Louisiana,” (1833), cited in *Garrison v. Louisiana*, 379 U.S. 64, at 68 (1964).
  - 5 See Quint, Peter E., “Free Speech and Private Law in German Constitutional Theory,” 48 *Md. L. Rev.* 247 at 295 (1989), cited in Yanchukova, supra note 1, at 869.
  - 6 *Case of Lopes Gomes Da Silva v. Portugal*, Eur. Ct. H.R. Sept. 28, 2000, cited in Yanchukova, supra note 1, at 869.
  - 7 See Foster, Frances H., “Information and the Problem of Democracy: The Russian Experience,” 44 *Am. J. Comp. L.* 243 at 253-256 (1996), cited in Yanchukova, supra note 1, at 870.
  - 8 See, e.g. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

chief justice who had ruled against him. The jury, urged on by Zenger's lawyer, Andrew Hamilton, disregarded the presiding judge's admonition that the truth of an assertion was no defence against the charge, and acquitted Zenger.

After independence, the Sedition Act of 1798 made it a federal crime to publish false, scandalous and malicious writings about the government, Congress, or the President. Although the Act expired in 1801, it was not until 1964, in *New York Times v. Sullivan*, that the Supreme Court of the United States declared that seditious libel was incompatible with the U.S. Constitution's guarantees of freedom of speech and of the press.<sup>9</sup> As Justice William Brennan wrote, the need for citizens to be informed in a democratic nation is based on

a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.<sup>10</sup>

Yet in the same term, the high court declined to rule that all criminal defamation statutes were necessarily unconstitutional. In *Garrison v. Louisiana*,<sup>11</sup> the Supreme Court struck down the Louisiana criminal libel statute because it limited the use of truth as a defence, and did not require that actual malice – knowledge of falsity, or reckless disregard for the truth – be demonstrated, as required in civil cases by *Sullivan*. Justice Brennan, again writing for the Court, acknowledged, however, that “different interests may be involved where purely private libels, totally unrelated to public affairs, are concerned.”<sup>12</sup> Accordingly, the individual states remained free to retain or enact criminal libel laws as long as the statutes conformed to these constitutional requirements.

In the decades following *Garrison*, 16 states, and the District of Columbia, repealed their criminal libel statutes.<sup>13</sup>

Courts in other states subsequently struck down the laws on constitutional or other grounds. As a result, only 17 of the 50 states have retained criminal libel statutes. In most of those jurisdictions, the laws are either limited to private libels, or remain “on the books,” but are effectively dormant.<sup>14</sup> The Media Law Resource Centre reported that five criminal libel cases were filed in the United States in the year 2000, as compared to 14.5 million criminal cases of all types filed in state courts in that same year, representing only .00003 per cent of the cases filed.<sup>15</sup>

Nevertheless, in a few of the states, criminal libel prosecutions remain a possibility, and as recently as 2002, both the publisher and the editor of an alternative newspaper, *The New Observer*, were convicted of criminal defamation after publishing articles that alleged that the Mayor of Kansas City, who was running for re-election, lived outside the county in violation of the Kansas law. Both journalists were ordered to pay \$3,500 in fines and sentenced to one year of unsupervised probation, with sentences suspended, pending appeal.<sup>16</sup>

***The European Experience.*** The laws of all Western European countries include some type of defamation or insult provision, but these vary widely in their scope and application. The criminal laws, which may carry sanctions ranging from fines to imprisonment for periods of up to six years, also differ from the

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9 Id.

10 Id. at 270.

11 379 U.S. 64 (1964).

12 Id. at 72, n. 8.

13 *MLRC Bulletin*, supra note 2, at 12.

14 Id. at 15.

15 *MLRC Bulletin*, supra note 2, at 36.

16 *Kansas v. Carson*, No. 01-CR-301 (Kansas Dist. Ct. Wyandotte County July 17, 2002) (unreported).

American approach in that they generally do not consider truth to be an absolute defence in defamation cases.

In the United Kingdom, although the crime of libel remains “on the books,” it is rarely prosecuted, in part because procedural rules require private plaintiffs to obtain the leave of a High Court Judge before proceeding.<sup>17</sup> Civil law libel actions continue to provide a remedy for aggrieved individuals.

Similarly, in Denmark, Norway, the Netherlands and Sweden, criminal defamation laws are almost never invoked against the press, whereas in Austria, Spain, Greece and Turkey, such laws are still frequently used.<sup>18</sup> Although France, Germany and Italy have also retained their criminal defamation laws, they are usually interpreted narrowly.<sup>19</sup>

***Article 10 and the European Court for Human Rights (ECHR).***

Under Article 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (the “Convention”), freedom of expression is protected as a universal although not absolute, right. According to the Article,

[e]veryone 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...

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.

The ECHR hears appeals when it is claimed that judgments rendered by the courts of nations that are signatories to the Convention have infringed upon rights guaranteed by the Convention. Applicants must first exhaust all domestic judicial remedies and file complaints within specified time limits. Although the ECHR does not have the power to annul or alter decisions of domestic courts, it may award “just satisfaction”, including remission of fines, and/or legal costs, to the applicant.<sup>20</sup> The Court’s rulings are binding on all member States.

To determine whether an “interference” or infringement has occurred, the ECHR utilizes a test that asks the following three questions: Is it prescribed by law? Does it serve a legitimate purpose? Is it necessary in a democratic society? Because the Court has effectively overturned criminal libel convictions on several occasions, this treaty has profoundly affected the application of criminal libel statutes in the 45 countries which, as members of the Council of Europe, have ratified the Convention.

The following cases provide a few examples:

*Lingens v. Austria*<sup>21</sup> overturned a criminal defamation conviction of the publisher of an Austrian magazine that had carried an article on the then Chancellor of Austria. The ECHR ruled that politicians, who “inevitably and knowingly” open themselves to scrutiny by journalists and the public, must accept harsher criticism, and noted further that the burden of proof lay with the defamed person, not the speaker. It cautioned

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17 See, Feigelson, Jeremy and Bierbauer, Erik, “Criminal Defamation: International Reforms Advance Against a Global Danger” at 117 (2002) (available at <<http://216.147.196.167/projects/feigelson.pdf>>).

18 See Yanchukova, *supra* note 1, at 871-875.

19 *Id.*

20 Korzenik, David and Houck, Mona, “An American Lawyer’s Comparative Introduction to the Developing Law of the European Court of Human Rights in Libel Cases,” at 42, *MLRC Bulletin* (September 2003).

21 103 Eur. Ct. H.R. (Ser. A); 8 Eur. H.R. 407 (1986).

that convictions like *Lingens*' had "a chilling effect" on the press and discouraged the press from practicing its role as public watchdog.

*Castells v. Spain*<sup>22</sup> was an insult law case, but one that was nevertheless important. In reviewing the conviction of a Spanish senator who had accused the government of shielding policemen who had murdered Basque separatists, the ECHR found that the limits of permissible criticism were even wider for the government than for politicians.

*Dalban v. Romania*<sup>23</sup> found that the conviction of the publisher of a magazine that had carried articles on a fraud committed by the chief executive of a state-owned agricultural company had violated Article 10, because even though the reports "did not correspond to reality," they were concerned with a matter of public interest and therefore fulfilled an essential function of the press in a democratic society.

The ECHR, however, does not invariably rule in the applicants' favour. Other decisions have indicated, for example, that judges need not tolerate the same degree of criticism as members of the government or political figures.<sup>24</sup> Nevertheless, it is fair to say that, the rulings of the ECHR have generally "cemented the principle that journalists have wide latitude to report on public officials and matters of public concern."<sup>25</sup>

***The Eastern European/Central Asian Experience.*** The post-Communist nations of Eastern and Central Europe and Asia present a different situation. Although a few countries, such as Croatia, Moldova and Ukraine, have abolished their criminal defamation laws, most of the former Communist bloc countries have retained these statutes on the books, and in some nations, the penalties are more severely enforced today than they were during the Soviet era. In her excellent overview of

the subject, Elena Yanchukova catalogues the status of criminal defamation in these countries.<sup>26</sup>

She characterizes several countries somewhat diplomatically as having shown “less progress” toward freedom of speech, including Belarus, Azerbaijan, Uzbekistan, Kazakhstan, the Kyrgyz Republic, Tajikistan, and Turkmenistan, all of which have prosecuted and convicted a number of journalists of criminal libel in recent years. Yanchukova identifies the Russian Federation, Armenia, Albania and Romania as countries where criminal libel prosecutions have been brought, or are pending, and adds that in the Federal Republic of Yugoslavia, prosecution of criminal libel continues to “encourage” self-censorship. She further notes that nearly all of the countries in the region identified by Freedom House as having a “free press” (Bulgaria, Estonia, Hungary, the Czech Republic, Poland, Latvia, Lithuania, Slovakia and Slovenia), have retained criminal code provisions covering libel or insult, or both. Although these provisions are “not frequently invoked,” they nevertheless encourage self-censorship.<sup>27</sup>

Yanchukova suggests that one of the best ways for these countries to develop into full-fledged democracies would be for them to sign and follow existing human rights treaties and conventions. She notes that Poland, Slovenia, the Slovak Republic, Bulgaria and the Czech Republic, all designated as nations with a “free press,” had ratified the Convention between 1991 and 1994, whereas other countries, such as Armenia, Azerbaijan, the Russian Federation and Ukraine, that ratified the Convention later, remain only “partly free.”

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22 236 Eur. Ct. H.R. (Ser. A) (1992).

23 No. 28114/95 (1999), <<http://www.echr.coe.int/Eng/Judgments.htm>>.

24 See, e.g., *Barfod v. Denmark*, 149 Eur. Ct. H.R. (Ser. A) (1989).

25 See Feigelson, *supra* note 16, at 119, and cases cited therein.

26 See Yanchukova, *supra* note 1, at 883-891.

27 *Id.* at 889-890.

Ratification of the Convention, however, would admittedly be only a first step. As noted previously, the ECHR has not always ruled that criminal libel convictions violate Article 10. The Convention, and, in turn, the ECHR, struggle to balance the competing interests of subsidiarity and universality – to respect and accommodate legitimate national interests and differences, while establishing uniform and universal human rights standards for all signatories.<sup>28</sup>

***The Death Knell for Criminal Libel?*** Professor Herbert Wechsler of Columbia Law School in New York, who was later to argue the case of *The New York Times v. Sullivan* in the U.S. Supreme Court, once initiated a project to produce a Model Penal Code for the American Law Institute, acting as its Chief Reporter. In a comment to the draft, he wrote,

It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security. . . . It seems evident that personal calumny falls in neither of these classes in the USA, that it is therefore inappropriate for penal control, and that this probably accounts for the paucity of prosecutions and the near desuetude of private criminal libel legislation in this country.<sup>29</sup>

Why, then, do libel laws persist, resisting repeal or judicial dissolution? As described earlier in this paper, criminal libel law was rooted in authoritarianism and autocracy, in intolerance of dissent, and in distrust of public opinion. It was justified as a way of keeping the masses in their place and under control, by suppressing information about rulers that might incite unrest or rebellion. Alternately, it was seen as “a peaceful alternative to the duel and other violent forms of self-help.”<sup>30</sup>

But as democracies matured, criminal libel seemed to be less relevant, and to make less sense in our modern world. The United States Supreme Court and the ECHR have both opined that truth should be considered a defense in criminal libel cases. If that is so, then the efficacy of criminal libel statutes in preventing breaches of the peace is seriously undermined, and the traditional justification for their existence has been effectively erased. As a result, criminal prosecutions have evolved into little more than a surrogate for civil libel suits. Yet as many authors have suggested, criminal proceedings are not an appropriate forum for redressing damage to reputation, because they aim at retribution rather than compensation to the victim.<sup>31</sup> Compensation is most readily and appropriately provided through civil litigation.

The sanctions that flow from criminal prosecutions – fines and imprisonment – constitute a profound threat to freedom of expression and to the free flow of information. Journalists who fear this type of retribution will be inclined to engage in self-censorship, which, in turn, discourages the public debate on political issues that is the lifeblood of any democracy.

This, of course, is exactly what governments in jurisdictions that continue to retain and utilize criminal libel want to effect. A review of several recent cases is illustrative:

**Russian Federation.** On 7 October 2003, the Kalininsky District Court in Chelyabinsk upheld the conviction on criminal defamation of the journalist German Galkin as well as the sentence of one year in a labour camp. In a case eerily remi-

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28 See Korzenik, *supra* note 19, at 44.

29 Model Penal Code, Tent. Draft No. 13, 1961, §§ 250.7, Comments, at 44, cited in *MLRC Bulletin*, *supra* note 2, at 8.

30 *MLRC Bulletin*, *supra* note 2, at 31.

31 See, e.g., ABA-Africa Law Council, “Analysis of the Law of Defamation for the Republic of Algeria” at 10 (July 24, 2002).

niscent of that of the American colonist John Peter Zenger, Galkin was the publisher of a newspaper that had allegedly libelled a deputy governor. Galkin, however, was not listed as the author and denied having written the articles.<sup>32</sup>

**Belarus.** Journalists Mikola Markevich and Pavel Mazheika were convicted of libelling President Aleksandr Lukashenko in June 2002 shortly before the elections and of publishing the statement of an unregistered civic organization. They were sentenced to corrective labour for terms of two-and-a-half and two years, respectively, which were subsequently reduced to terms of one year each. Another journalist, Viktor Ivanshkevich, was similarly convicted and sentenced, also for libelling the President in an article that accused Lukashenko of corruption.<sup>33</sup>

**Azerbaijan.** Both Rovshan Kabirli and Yashar Agazade were convicted of criminally libelling President Heydar Aliyev's brother and sentenced, in May 2003, to five months in prison. Although they were later granted amnesty and released, they retain the status of convicted criminals.<sup>34</sup>

As James Ottaway and Leonard Marks have written, "Democratic leaders get just as upset over unflattering press reports as dictators do."<sup>35</sup> The common thread that runs through these cases, and others like them throughout Europe, Asia and even the United States, is that elected officials are unwilling to tolerate criticism, and will use the force of law to suppress it.

**Conclusion.** In his concurring opinion in the criminal libel case, *Garrison v. Louisiana*, U.S. Supreme Court Justice William O. Douglas lamented that the Bill of Rights in the U.S. Constitution was in danger of being "constantly watered down" through the majority's attempt to "balance" the absolute language of the First Amendment<sup>36</sup> "and what judges think is needed for a well-ordered society."<sup>37</sup> Particularly pernicious, he

suggested, was the toleration of criminal libel actions brought by government officials, which inevitably resulted in anyone who “outraged the sentiments of the dominant party” being “deemed a libeler.”<sup>38</sup>

Douglas reminded his colleagues that the contemporary common law doctrine of seditious libel was the creation of the infamous Court of Star Chamber. He concluded, “It is disquieting to know that one of its instruments of destruction is abroad in the land today.”<sup>39</sup>

Douglas was *not* exaggerating. Criminal libel is nothing less than an “instrument of destruction.” It is an instrument used to destroy discussion, debate and dissent, and as such, it has no place in any society that calls itself a democracy.

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32 Committee to Protect Journalists, “2003 news alert: Federal court upholds journalist’s conviction” (Oct. 7, 2003).

33 Committee to Protect Journalists, “2003 news alert: Court amends imprisoned journalist’s sentence” (March 7, 2003).

34 Committee to Protect Journalists, “2003 news alert: Independent journalists convicted for libelling president’s brother” (May 22, 2003).

35 Weldon, Ruth, *Insult Laws: An Insult to Press Freedom*, at 4 (World Press Freedom Committee, 2000).

36 “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .” U.S. Const. amend. I.

37 379 U.S. 64 at 81-82 (1964).

38 *Id.* at 82.

39 *Id.*

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