



BRIEFING NOTE
On

International and Comparative Defamation Standards

by

ARTICLE 19
Global Campaign for Free Expression

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This Briefing Note provides an overview of pertinent international freedom of information standards that directly relate to defamation. It draws on international and comparative jurisprudence, as well as authoritative standard-setting statements by international bodies. Frequent references are made to cases decided by the European Court of Human Rights, because of its detailed jurisprudence regarding the balance between defamation, or protecting reputations, and the right to freedom of expression. Reference is also made, however, to the jurisprudence of the United Nations Human Rights Committee (Human Rights Committee) and to prominent national jurisprudence.

The set of principles developed and expounded by ARTICLE 19 in its publication, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputations*¹ (*Defining Defamation*), serve as a frame of reference for the Briefing Note as a whole. Adopted by a renowned set of experts on defamation law from around the world, these principles have, among other things, been endorsed by the three official mandates on freedom of expression, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression.²

¹ London: ARTICLE 19, 2000.

² Joint Declaration of 30 November 2000. See also, UN Doc. E/CN.4/2001/64, 13 February 2001, para. 48. Available at:

I. The Fundamental Status of Freedom of Expression

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. Article 19 of the *Universal Declaration on Human Rights* (UDHR),³ a United Nations General Assembly resolution, guarantees the right to freedom of expression in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.

The *International Covenant on Civil and Political Rights* (ICCPR)⁴ elaborates on many rights included in the UDHR, imposing formal legal obligations on State Parties to respect its provisions. Article 19 of the ICCPR guarantees the right to freedom of expression in terms very similar to those found at Article 19 of the UDHR.

Freedom of expression is also protected in all three regional human rights treaties, at Article 10 of the *European Convention on Human Rights* (ECHR),⁵ at Article 13 of the *American Convention on Human Rights*⁶ and at Article 9 of the *African Charter on Human and Peoples' Rights*.⁷

The guarantee of freedom of expression applies to all forms of expression, not only those which fit in with majority viewpoints and perspectives. The European Court of Human Rights has repeatedly stated:

Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man ... it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.⁸

International law permits limited restrictions on the right to freedom of expression in order to protect various interests, including reputation. The parameters of such restrictions are provided for in Article 19 of the ICCPR, which states:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

- (a) For respect of the rights or reputations of others;

<http://www.unhchr.ch/huricane/huricane.nsf/view01/EFE58839B169CC09C12569AB002D02C0?opendocument>.

³ UN General Assembly Resolution 217A(III), adopted 10 December 1948.

⁴ UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.

⁵ Adopted 4 November 1950, in force 3 September 1953.

⁶ Adopted 22 November 1969, in force 18 July 1978.

⁷ Adopted 26 June 1981, in force 21 October 1986.

⁸ *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Any restriction on the right to freedom of expression must meet a strict three-part test. This test, which has been confirmed by the Human Rights Committee,⁹ requires that any restriction must be (1) provided by law, (2) for the purpose of safeguarding a legitimate interest (including, as noted, protecting the reputations of others), and (3) necessary to secure this interest.

Article 19(3) of the ICCPR provides an exclusive list of aims in pursuit of which the exercise of the right to freedom of expression may be restricted for purposes of the second part of this test. In virtually all defamation cases before international courts, the “protection of the reputation or rights of others” has been invoked to justify defamation laws. Thus, it should be borne in mind that any laws that penalise ‘insult’ or ‘giving offence’ without linking this to the honour and dignity of the offended party will fail the ‘legitimate aim’ test.

The third part of the test implies, in particular, that in order for a restriction to be deemed necessary, it must restrict freedom of expression as little as possible, it must be carefully designed to achieve the objective in question and it should not be arbitrary, unfair or based on irrational considerations. Vague or broadly defined restrictions, even if they satisfy the “provided by law” criterion, are unacceptable because they go beyond what is strictly required to protect the legitimate interest.

II. Criminal Defamation

There is a strong and growing body of law in support of the principle that criminal defamation is itself a breach of the right to freedom of expression. The Human Rights Committee, for example, has repeatedly expressed concern, in the context of its consideration of regular country reports, about the possibility of custodial sanctions for defamation.¹⁰

The UN Special Rapporteur on Freedom of Opinion and Expression has stated unconditionally that imprisonment is not a legitimate sanction for defamation. In his 1999 Report to the UN Commission on Human Rights, he stated:

Sanctions for defamation should not be so large as to exert a chilling effect on freedom of opinion and expression and the right to seek, receive and impart information; penal sanctions, in particular imprisonment, should never be applied.¹¹

In his Report in 2000, and again in 2001, the Special Rapporteur went even further, calling on States to repeal all criminal defamation laws in favour of civil defamation

⁹ For example, in *Laptsevich v. Belarus*, 20 March 2000, Communication No. 780/1997.

¹⁰ For example, in relation to Iceland and Jordan (1994), Tunisia and Morocco (1995), Mauritius (1996), Iraq (1997), Zimbabwe (1998), and Cameroon, Mexico, Morocco, Norway and Romania (1999).

¹¹ *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1999/64, 29 January 1999, para. 28.

laws.¹² Every year, the Commission on Human Rights, in its resolution on freedom of expression, notes its concern with “abuse of legal provisions on defamation and criminal libel”.¹³

The three special international mandates for promoting freedom of expression – the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – have met each year since 1999 and each year they have issued a joint Declaration addressing various freedom of expression issues. In their joint Declarations of November 1999, November 2000 and again in December 2002, they called on States to repeal their criminal defamation laws. The 2002 statement read:

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.¹⁴

While the European Court of Human Rights has never actually ruled out criminal defamation, it clearly recognises that there are serious problems with it. It has frequently reiterated the following statement, including in 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.¹⁵

These standards are encapsulated in Principle 4(a) of *Defining Defamation*, which states:

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.

It may be noted that countries around the world have taken steps to formally abolish criminal defamation laws – recent examples include Argentina, Sri Lanka and Ghana – while in many more countries these laws have effectively become obsolete, reflecting their undemocratic nature. In the UK, for example, there has been no public prosecution

¹² See *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 52 and *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2001/64, 26 January 2001.

¹³ See, for example, Resolution 2003/42, 23 April 2003, para. 3(a).

¹⁴ Joint Declaration of 10 December 2002.

¹⁵ *Castells v. Spain*, 23 April 1992, para 46.

It should also be noted that 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: “The 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.” Adopted at the 108th Regular Session, 19 October 2000.

for criminal defamation since the 1970s and all recent private prosecutions have been refused permission to proceed or otherwise blocked.

A key problem with criminal defamation laws is that a breach may lead to a harsh sanction, such as a custodial sentence or another form of harsh sanction, such as a suspension of the right to practise journalism or a significant fine. Suspended sentences, common in some countries, also exert a significant chilling effect as a subsequent breach within the prescribed period means that the sentence will be imposed.

Even where these are not applied, the problem remains, since the severe nature of these sanctions means they cast a long shadow. It is now well-established that unduly harsh penalties, of themselves, represent a breach of the right to freedom of expression even if the circumstances justify some sanction. In the very first defamation case before it, the European Court of Human Rights considered that,

the penalty imposed on the author ... amounted to a kind of censure, which would be likely to discourage him from making criticisms of that kind again in future ... In the context of political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog.¹⁶

The Court has specifically held that a disproportionate sanction, even of a civil nature, is an abuse of the right to freedom of expression. In holding that a high civil defamation award represented a breach of the right to freedom of expression, the Court stated: “[U]nder the Convention, an award of damages for defamation must bear a reasonable relationship of proportionality to the injury to reputation suffered.”¹⁷

International jurisprudence has consistently emphasized the overriding importance of the guarantee of freedom of expression, resulting in a narrow interpretation of the legitimate scope of restrictions and sanctions. The “chilling” effect which disproportionate sanctions, or even the threat of such sanctions, may have upon the free flow of information and ideas must be taken into account when assessing the legitimacy of restrictions.

Imprisonment for defamation is a very severe penalty and the European Court 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]¹⁸

¹⁶ *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, para. 44.

¹⁷ *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, Application No.18139/91, para.49.

¹⁸ *Castells v. Spain*, 23 April 1992, Application No. 11798/85, para.46.

Although 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”¹⁹ in upholding the conviction; the fine in that case was 10 times the daily minimum wage.

As noted above, the legitimacy of custodial sanctions for expression-related matters, including for defamation, has repeatedly been called into question by UN bodies, including the Human Rights Committee. The clear view of both international jurisprudence and of the international bodies that have considered the matter is that the imposition of custodial sanctions through criminal defamation laws is disproportionate and unnecessary to protect individual reputations, particularly when alternative measures – including apologies, corrections and the use of the right of reply – can effectively address any harm to reputation without exerting a chilling effect on freedom of expression.

III. Civil Defamation

III.1 Who May Sue in Defamation

The danger of giving public bodies the right to sue their critics for defamation has been widely noted. The Human Rights Committee stated, in its observations on Mexico’s periodic report, that it “deplores the existence of the offence of ‘defamation of the state’” and called for its abolition.²⁰ In *Derbyshire County Council v. Times Newspapers Ltd.*, the House of Lords ruled that the common law does not allow a local authority to maintain an action for damages for libel. As an elected body, it “should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.”²¹ The Indian Supreme Court followed *Derbyshire*’s lead in *Rajgopal v. State of Tamil Nadu*, finding that “the Government, local authority and other organs and institutions exercising governmental power” cannot bring a defamation suit.²² A similar position has been taken in the United States, Zimbabwe and South Africa.²³ While the European Court of Human Rights has not entirely ruled out defamation suits by governments, it appears to have limited such suits to situations which threaten public order, implying governments cannot sue in defamation simply to protect their honour.²⁴

The rationale for restricting the ability of elected bodies to sue is threefold. First, criticism of government is vital to the success of a democracy and defamation suits

¹⁹ 6 February 2001, para. 69. See also *Constantinescu v. Romania*, 21 March 2000.

²⁰ U.N. International Covenant on Civil and Political Rights, *Concluding Observations of the Human Rights Committee: Mexico*, U.N. Document CCPR/C/79/Add. 109, 27 July 1999, para.14.

²¹ [1993] 1 All ER 1011, p. 1017.

²² (1994) 6 Supreme Court Cases 632, p. 650.

²³ In *City of Chicago v. Tribune Co.*, 307 Ill 595 (1923), p. 601, the Illinois Supreme Court ruled a city could not sue a newspaper for defamation. It said, “no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence.”

²⁴ *Castells v. Spain*, 23 April 1992, 14 EHRR 445, para. 46.

inhibit free debate about vital matters of public concern. *Derbyshire* emphasised this point when distinguishing the plaintiff county council from private corporations.²⁵ Second, defamation laws are designed to protect reputations. Courts have held that elected bodies should not be entitled to sue in defamation because any reputation they might have would belong to the public as a whole, which on balance benefits from uninhibited criticism. In any case, elected bodies regularly change membership so, as the *Derbyshire* court noted, “it is difficult to say the local authority as such has any reputation of its own.”²⁶ Finally, the government has ample ability to defend itself from harsh criticism by other means, for example by responding directly to any allegations. Allowing public bodies to sue is, therefore, an inappropriate use of taxpayers money, one which may well be open to abuse by governments intolerant of criticism.²⁷

Courts have extended the *Derbyshire* holding to public bodies which are not elected. State-owned corporations, for example, have failed to win standing in at least two important cases. In *Die Spoorbond v. South African Railways*, a South African court ruled that the national railway could not sue for defamation. The court acknowledged that corporations can sue for defamation but could recall no instances of the Crown suing for injury to its reputation: “Had such a right existed, one would have expected to find reports of cases in which it had been claimed.”²⁸ About 50 years later, the Supreme Court of Zimbabwe ruled that the State-run Post and Telecommunications Corporation could not sue in defamation. Relying heavily on *Die Spoorbond*, it found that while some “artificial persons” may sue for defamation, organs of the State may not. It denied the right to sue to “those artificial persons which are part of the governance of the country”,²⁹ as determined by the body’s degree of organisational and financial autonomy, whether it provides essential public services and the effect of stifling criticism of it.³⁰

III.2 Public Officials

The European Court of Human Rights has been very clear on the matter of public officials and defamation: they are required to tolerate more, not less, criticism, in part because of the public interest in open debate about public figures and institutions. In its very first defamation case, the Court emphasised that:

The limits of acceptable criticism are ... wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance.³¹

²⁵ Note 21, p. 1017.

²⁶ *Ibid.*, p. 1020.

²⁷ *Die Spoorbond and Anor. v. South African Railways* [1946] AD 999, pp. 1012-1013.

²⁸ *Ibid.*, p. 1008.

²⁹ *Posts and Telecommunications Corporation v. Modus Publications (Private) Ltd.*, (1997), Judgment No S.C. 199/97, p. 9.

³⁰ *Ibid.*, pp. 14-15.

³¹ *Lingens v. Austria*, note 16, para. 42.

The Court has affirmed this principle in several cases and it has become a fundamental tenet of its caselaw.³² The principle is not limited to criticism of politicians acting in their public capacity but also covers matters of public interest relating to private or business interests. Indeed, the principle also applies to public officials and to public servants, at least in relation to statements on matters of public interest.³³

III.3 Facts vs. Opinions

It is clear that defamation law needs to distinguish between statements of fact and value judgments. This is because the existence of facts can be demonstrated, whereas the truth of a value judgment is not susceptible of proof. As the European Court of Human Rights has noted, it follows that: “The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right to [freedom of expression].”³⁴

In the United States, it is now well-established that opinions in relation to matters of public concern are not actionable, that is to say, they receive full constitutional protection. Two types of statements receive this type of protection: those which “do not contain a provably false factual connotation” and those which “cannot reasonably [be] interpreted as stating actual facts”.³⁵ The latter category is to protect statements which may appear to state facts but which are really simply rhetorical devices, such as satire. Although this may appear to provide a very high level of protection to statements of opinion, the UK House of Lords recently approached this standard, stating in *obiter*: “The true test is whether the opinion, however exaggerated, obstinate or prejudiced, was honestly held by the person expressing it”.³⁶

III.4 Burden of Proof of Truth

Principle 7(b) of *Defining Defamation* states: “In cases involving statements on matters of public concern, the plaintiff should bear the burden of proving the falsity of any statements or imputations of fact alleged to be defamatory.” This re-states the general principle developed by constitutional courts, including the US Supreme Court, which has made it clear that placing the burden of proof with the defendant will have a significant chilling effect on the right to freedom of expression. According to that Court:

Allowance of the defence of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defence as an adequate safeguard have recognised the difficulties of adducing legal proof that the alleged libel was true in all its factual particulars. ... Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of

³² See, for example, *Lopes Gomez da Silva v. Portugal*, 28 September 2000, Application No. 37698/97, para. 30; *Wabl v. Austria*, 21 March 2000, Application No. 24773/94, para. 42; and *Oberschlick v. Austria*, 23 May 1991, Application No. 11662/85, para. 59.

³³ See *Janowski v. Poland*, 21 January 1999, Application No. 25716/94, para. 33. See also *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88.

³⁴ *Dichand and others v. Austria*, 26 February 2002, Application No. 29271/95, para. 42.

³⁵ *Milkovich v. Lorain Journal*, 497 US 1 (1990), p. 20.

³⁶ *Reynolds v. Times Newspapers Ltd and others*, [1999] 4 All ER 609.

doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone'.³⁷

The European Court of Human Rights has agreed that, particularly where a journalist is reporting from reliable sources in accordance with professional standards, it will be unfair to require them to prove the truth of their statements.³⁸ This is particularly so where the publication concerns a matter of public concern.

III.5 Defence of Reasonable Publication

It is now widely recognised that in certain circumstances even false, defamatory statements of fact should be protected against liability. A rule of strict liability for all false statements is particularly unfair for the media, which are under a duty to satisfy the public's right to know where matters of public concern are involved and often cannot wait until they are sure that every fact alleged is true before they publish or broadcast a story. Even the best journalists make honest mistakes and to leave them open to punishment for every false allegation would be to undermine the public interest in receiving timely information. The nature of the news media is such that stories have to be published when they are topical, particularly when they concern matters of public interest. As the European Court of Human Rights has noted:

[N]ews is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.³⁹

A more appropriate balance between the right to freedom of expression and reputations is to protect those who have acted reasonably in publishing a statement on a matter of public concern, while allowing plaintiffs to sue those who have not, what might be termed the defence of reasonable publication. For the media, acting in accordance with accepted professional standards should normally satisfy the reasonableness test. This has been confirmed by the European Court, which has stated that the press should be allowed to publish stories that are in the public interest subject to the proviso that "they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism."⁴⁰

III.6 Exemptions from Liability

Certain statements should never attract liability for defamation. This applies, for example, to statements made in legislative assemblies or in the course of judicial proceedings, or reports of official statements or reports quoting from the findings of official reports.

With regard to statements made in legislative assemblies, the European Court of Human Rights has recognised that, "[the] aim of the immunity accorded to members of the ... legislature [is] to allow such members to engage in meaningful debate and to represent their constituents on matters of public interest without having to restrict their

³⁷ *New York Times Co. v. Sullivan*, 376 US 254 (1964), p. 279.

³⁸ See, for example, *Colombani v. France*, 25 June 2002, Application No. 51279/99, para. 65.

³⁹ *The Sunday Times v. the United Kingdom (No. 2)*, 24 October 1991, Application No. 13166/87, para. 51.

⁴⁰ *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999, Application No. 21980/93, para 65.

observations or edit their opinions because of the danger of being amenable to a court or other such authority.”⁴¹ Thus, because freedom of parliamentary debate is the every essence of modern-day democracies, statements made in parliament may justifiably attract absolute immunity.⁴² Similarly, the Court has held that statements made in the course of judicial proceedings should enjoy a similarly high degree of protection.⁴³

Fair and accurate reports of these protected statements, for example in the media or published by others, should also be protected. It is of the greatest public interest that these statements be made widely available.⁴⁴

III.7 Disproportionate Sanctions

Unduly harsh sanctions, even for statements found to be defamatory, breach the guarantee of freedom of expression. As the European Court of Human Rights has explained, any sanction imposed for defamation must bear a “reasonable relationship of proportionality to the injury to reputation suffered” and this should be specified in national defamation laws.⁴⁵

One aspect of this requirement is that less intrusive remedies, and in particular non-pecuniary remedies such as appropriate rules on the right to reply, should be prioritised over pecuniary remedies.⁴⁶ Another aspect is that any remedies already provided, for example on a voluntary or self-regulatory basis, should be taken into account in assessing court-awarded damages. To the extent that remedies already provided have mitigated the harm done, this should result in a corresponding lessening of any pecuniary damages.

In addition, ARTICLE 19 takes the position that limits should be set on the level of pecuniary damages, particularly non-material harm and exemplary or punitive damages. Regarding the former, some jurisdictions, such as the UK, have put in place procedural mechanisms, such as allowing judges to overrule jury awards, to prevent unduly high damage payments. ARTICLE 19 advocates overall limits on such awards. Furthermore, we are of the view that exemplary damages should be awarded, if at all, only in the very most extreme cases.⁴⁷

III.8 Fair Proceedings

The conduct of defamation proceedings can raise serious questions under Article 6 of the ECHR, which guarantees fairness in both civil and criminal proceedings. This means, among other things, that defamation defendants should be given adequate time to prepare

⁴¹ *A. v. the United Kingdom*, 17 December 2002, Application No. 35373/97, quoting with approval the admissibility decision of the European Commission of Human Rights in *Young v. Ireland*, 17 January 1996, Application No. 25646/94.

⁴² See also *Jerusalem v. Austria*, 27 February 2001, Application No. 26958/95, para. 36.

⁴³ *Nikula v. Finland*, 21 March 2002, Application No. 31611/96, para. 55.

⁴⁴ *Defining Defamation*, note 1, Principle 11.

⁴⁵ *Ibid.*, para. 49.

⁴⁶ See, for example, *Ediciones Tiempo S.A. v. Spain*, 12 July 1989, Application No. 13010/87 (European Commission of Human Rights).

⁴⁷ See *Defining Defamation*, note 1, Principle 15.

their defence, that proceedings should be open to the public and that, in criminal cases, a defendant must be presumed innocent until proven guilty.

III.9 Legal Aid

In the case of *McVicar v. the UK*,⁴⁸ the applicant complained that the limited legal assistance he had received in defending himself in a defamation case had effectively denied him a fair trial. In its assessment of the complaint, the European Court of Human Rights made the following statement, despite the absence of an explicit guarantee in Article 6 for legal aid in civil cases:

Article 6 § 1 may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for effective access to court, either because legal representation is rendered compulsory, or by reason of the complexity of the procedure or of the case.⁴⁹

However:

Article 6 § 1 leaves to the State a free choice of the means to be used in guaranteeing litigants a right of effective access to court. The question whether or not that Article requires the provision of legal representation to an individual litigant will depend upon the specific circumstances of the case and, in particular, upon whether the individual would be able to present his case properly and satisfactorily without the assistance of a lawyer.⁵⁰

In that case, the Court considered that the defendant was a well educated journalist, that the issues at trial had not been particularly complex and that, up to the commencement of the actual proceedings, the applicant did have legal representation.⁵¹ Therefore, it did not find a violation of the right to a fair trial. However, it is implicit in the Court's findings that had the trial been more complex or had the applicant not enjoyed legal assistance before the trial, it may have found a violation.⁵²

III.10 Protecting Confidential Sources

The European Court of Human Rights has recognised, as a matter of fundamental principle, that defendants in defamation cases should not suffer any detriment simply for failing to reveal confidential sources of information.⁵³ In *Goodwin v. the United Kingdom*, it stated:

Protection of journalistic sources is one of the basic conditions for press freedom as is reflected in the laws and professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-

⁴⁸ *McVicar v. the United Kingdom*, 7 May 2002, Application No. 46311/99.

⁴⁹ *Ibid.*, para. 47.

⁵⁰ *Ibid.*, para. 48.

⁵¹ *Ibid.*, para. 60.

⁵² An important case on the same issue is currently pending before the Court. See *Steel and Morris v. the United Kingdom*, partial admissibility decision of 22 October 2002, Application No. 68416/01.

⁵³ *De Haes and Gijssels v. Belgium*, 24 February 1997, Application No. 19983/92, paras. 55 and 58.

watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potential chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 unless it is justified by an overriding requirement in the public interest.⁵⁴

The importance of this principle in defamation cases has been confirmed in a recent Recommendation by the Committee of Ministers of the Council of Europe, which specifies: “In legal proceedings against a journalist on grounds of an alleged infringement of the honour or reputation of a person, authorities ... may not require for that purpose the disclosure of information identifying a source by the journalist.”⁵⁵

Thus, while there may be cases where mandatory disclosure of confidential sources is justified, for example for the defence of a person accused of a criminal offence, this can never be justified in the context of a defamation case.

IV. Right of Reply

The right of reply is a highly disputed area of media law. Some see it as a low-cost, low-threshold alternative to expensive lawsuits for defamation for individuals whose rights have been harmed by the publication of incorrect factual statements about them; others regard it as an impermissible interference with editorial independence.

The right of reply should be clearly distinguished from a right of correction, also referred to as refutation or rectification. The latter is limited to pointing out erroneous information published earlier, with an obligation on the publication itself to correct the mistaken material. A right of reply, on the other hand, requires the publication to grant space to an individual⁵⁶ whose rights have been harmed by a publication based on erroneous facts, to ‘set the record straight’.

Because of its intrusive nature, in the United States a mandatory right to reply with regard to the print media has been struck down on the grounds that it is an unconstitutional interference with the First Amendment right to free speech. In *Miami Herald Publishing Co. v Tornillo*, the Supreme Court held:

[A mandatory right of reply] fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials - whether fair or unfair - constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised

⁵⁴ *Goodwin v. the United Kingdom*, 27 March 1996, Application No. 17488/90, para. 39.

⁵⁵ Recommendation No. R (2000) 7 of the Committee of Ministers to Member States on the right of journalists not to disclose their sources of information, adopted on 8 March 2000, Principle 4.

⁵⁶ In our view, public bodies should never be accorded a right of reply. The same reasons for refusing to allow such bodies to sue in defamation, set out above, apply to the right of reply.

consistent with First Amendment guarantees of a free press as they have evolved to this time.⁵⁷

On the other hand, the *American Convention on Human Rights*,⁵⁸ covering the entire continent, requires States to introduce a right of reply⁵⁹ and in Europe, many countries guarantee some form of a right of reply in law.⁶⁰ However, it has been recognised that a legally enforceable right of reply constitutes a restriction on freedom of expression as it interferes with editorial decision-making.⁶¹ As such, it must meet the strict three-part test set out above and a number of minimum requirements should apply.

ARTICLE 19, together with other advocates of freedom of expression and media freedom, suggests that a right of reply should be voluntary rather than prescribed by law. In either case, certain conditions should apply, namely:⁶²

- (a) A reply should only be available to respond to a breach of a legal right, not to comment on opinions that the reader/viewer doesn't like or that present the reader/viewer in a negative light.
- (b) The reply should receive similar, but not necessarily identical prominence to the original article.
- (c) The media should not be required to carry a reply unless it is proportionate in length to the original article/broadcast.
- (d) The media should not be required to carry a reply which is abusive or illegal.
- (e) A reply should not be used to introduce new issues or to comment on correct facts.

⁵⁷ 418 U.S. 241 (1974), p. 258.

⁵⁸ OAS Treaty Series No. 36, adopted 22 November 1969, entered into force 18 July 1978.

⁵⁹ *Ibid.*, Article 14.

⁶⁰ This is the case, for example, in France, Germany, Norway, Spain and Austria.

⁶¹ See *Ediciones Tiempo S.A. v. Spain*, 12 July 1989, Application No. 13010/87 (European Commission of Human Rights).

⁶² See also the conditions elaborated in Resolution (74)26, note **Error! Bookmark not defined.**