



HELSINKI COMMISSION REPORT

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IN BRIEF

Criminal Defamation and "Insult" Laws in the OSCE Region

Numerous international documents, including those adopted by the Organization on Security and Cooperation in Europe (OSCE), establish freedom of expression as a fundamental right. However, the right to free speech is not absolute. Consistent with international law, certain kinds of speech, such as obscenity, may be prohibited or regulated.

When governments do restrict speech, those restrictions must be consistent with their international obligations and commitments; for example, the restrictions must be necessary in a democratic country and proscribed by law.

Criminal defamation and "insult" laws are often defended as necessary to prevent alleged abuses of freedom of expression, but they are not consistent with OSCE norms and their use constitutes an infringement on the fundamental right to free speech. Despite this, criminal defamation and insult laws continue to be abused for political purposes in several OSCE participating States.

Criminal Defamation Laws

All individuals, including public officials, have a legitimate right to protect their reputations if untruthful statements have been made about them. Untrue statements which damage a person's reputation constitute defamation. Oral defamation is known as slander; defamation in writing or other permanent forms such as film is libel. In some instances, criminal codes make

defamation of public officials, the nation, or government organs a discrete offense, as distinct from defamation of a person.

Truthful statements—as well as unverifiable statements of opinion—are not legally actionable as defamation. The European Court of Human Rights has held that public officials must tolerate a greater degree of criticism than private individuals: "The limits of acceptable criticism are accordingly 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 he must consequently display a greater degree of tolerance." (*Lingens v. Austria, Eur. Ct. H.R., 1986*)

Criminal defamation laws are those which establish criminal sanctions for defamation. Those sanctions may include imprisonment, fines, and prohibitions on writing. Individuals convicted of defamation in a criminal proceeding and sentenced to suspended prison terms may be threatened with immediate imprisonment if, for example, they violate an order not to publish.

The existence of a criminal record may also have other social and legal consequences. For example, a criminal record may disqualify someone for seeking an elected office. In a criminal defamation case, state law enforcement agents (po-

lice and prosecutors) act, using taxpayer money, to investigate the alleged defamation and to act on behalf of the alleged victim.

It is sometimes argued that criminal defamation laws are necessary to achieve the legitimate goal of providing the victims of defamation with redress. However, general laws against libel and slander, embodied in civil codes, provide private persons as well as public officials the opportunity to seek redress, including damages, for alleged defamation. In such cases, the plaintiff and defendant stand in court as equals. Accordingly, specific criminal laws prohibiting defamation are unnecessary.

“Insult” Laws

“Insult” laws make offending the “honor and dignity” of public officials (e.g., the President), government offices (e.g., the Constitutional Court), national institutions, and/or the “state” itself punishable. Unlike defamation laws, truth is not a defense to a charge of insult, so insult laws are often used to punish the utterance of truthful statements, as well as opinions, satire, invective, and even humor.

Although insult laws and criminal defamation laws both punish speech, significant differences exist between them. Defamation laws are intended to provide a remedy against false assertions of fact. Truthful statements, as well as opinion, are not actionable. Although the use of civil laws to punish defamation is permissible under international free speech norms, recourse to any insult law, whether embodied in a civil or a criminal code, is inconsistent with international norms.

Their Use Today

At one time, almost all OSCE countries had criminal defamation and insult laws. Over time, many of these laws were invalidated by courts or

fell into disuse. In some OSCE participating States, provisions on defamation were repealed from criminal codes in whole or in part as part of the post-communist reform.

Unfortunately, some criminal codes contained multiple articles punishing defamation and insult. Thus, even when parliaments and courts have acted, they have sometimes failed to remove all legal prohibitions against insult or all criminal sanctions for defamation, allowing criminal defamation and “insult” laws to linger in the criminal codes of some OSCE participating States.

According to a March 2017 comparative study of criminal defamation laws in OSCE participating States commis-

sioned by the OSCE Representative on Freedom of the Media¹, the legal status of criminal defamation and insult laws across OSCE region is mixed. While nearly a dozen states have repealed criminal defamation and insult laws since 2009, the Russian Federation has actually tightened restrictions on free speech through such laws. The study notes problems in Southern Europe (especially Greece, Italy, Portugal and Turkey), Central Europe (especially Hungary), Central Asia, and Azerbaijan, adding that “although occasional convictions of journalists continue to take place in states typically considered strong defenders of media freedom such as Denmark, Germany and Switzerland.”²

Today, insult and criminal defamation laws most often are used to punish criticism of government policies or public officials, to stifle political discussion, and to squelch news and discussion that governments would rather avoid. Political opposition leaders, journalists, and other members of civil society who are perceived as challenges to or irritants of the regime are often systematically targeted by these laws. Public law enforcement funds are rarely used to

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protect the reputations of private individuals; it is the state that takes advantage of criminal defamation laws. Even in countries where these laws have fallen into a long period of disuse, it is not unheard of for an overzealous prosecutor to revive them for seemingly political purposes.

The International Context

The OSCE Representative on Freedom of the Media regularly calls for the repeal of defamation and insult laws and identifies cases where journalists are charged.

In 2002, the OSCE Representative on Freedom of the Media, UN Special Rapporteur on Freedom of Opinion and Expression, and the Organization of American States Special Rapporteur on Freedom of Expression issued a joint statement, saying, “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.”³

In 2010, the same group, with the addition to the Special Rapporteur on Freedom of Expression and Access to Information of the African Commission on Human and People’s Rights, named criminal defamation one of the ten key threats to freedom of expression in the coming decade.⁴

The U.S. Helsinki Commission has long advocated for participating States to abolish criminal defamation laws. At the 2017 OSCE Parliamentary Assembly Annual Session in Minsk, Com-

missioner Rep. Steve Cohen introduced an amendment on criminal defamation to the Third Committee Resolution.

The amendment, which received broad support and was adopted into the resolution, “Recalls the joint recommendations of the OSCE Representative on Freedom of the Media, the UN Special Rapporteur on Freedom of Opinion and Expression, and the Organization of American States Special Rapporteur on Freedom of Expression, that the criminalization of defamation should be abolished, public bodies should not be able to bring defamation actions, truth should always be available as a defense to a charge of defamation, and politicians and public officials should have to tolerate a greater degree of criticism.”⁵

Numerous non-governmental organizations also have taken strong positions against criminal defamation and insult laws. These include Amnesty International; Article 19; the Committee to Protect Journalists; national Helsinki Committees; the International Helsinki Federation; The World Press Freedom Committee; Norwegian Forum for Freedom of Expression; PEN International; Freedom House; and Reporters Sans Frontieres.

The United States Department of State regularly reports, in its annual Country Reports on Human Rights Practices, on cases where criminal defamation or insult laws have been used and, at OSCE meetings, regularly calls for the repeal of such laws.

About the Helsinki Commission

The Commission on Security and Cooperation in Europe, also known as the U.S. Helsinki Commission, is an independent agency of the Federal Government charged with monitoring compliance with the Helsinki Accords and advancing comprehensive security through promotion of human rights, democracy, and economic, environmental and military cooperation in 57 countries. The Commission consists of nine members from the U.S. Senate, nine from the House of Representatives, and one member each from the Departments of State, Defense, and Commerce.

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¹ Scott Griffen and Barbara Trionfi, "Defamation and Insult Laws in the OSCE Region: A Comparative Study," March 2017, <http://www.osce.org/fom/303181?download=true>.

² Ibid.

³ OSCE Representative on Freedom of the Media, "Joint Declarations of the Representatives of Intergovernmental Bodies to Protect Free Media and Expression," 2013, <https://www.osce.org/fom/99558?download=true>.

⁴ Ibid.

⁵ OSCE Parliamentary Assembly, "Minsk Declaration and Resolution Adopted by the OSCE Parliamentary Assembly at the Twenty-Sixth Annual Session," July 2017, <https://www.oscepa.org/documents/all-documents/annual-sessions/2017-minsk/declaration-25/3555-declaration-minsk-eng/file>.