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Decriminalization of Defamation in the Context of Free Speech: A European Perspective

By Andrei Richter

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Project Brief

This publication is within the project entitled "**Media Reform to Enhance Freedom of Expression in Lebanon**", implemented by Maharat Foundation, Legal Agenda and the Media and Journalism Research Center (MJRC) with the support of the Delegation of the European Union to Lebanon.

The project aims at enhancing Freedom of Expression in Lebanon through the promotion of media law reform as a priority on the national agenda and improvement of the environment for media coverage on the transparency and accountability of elections process.

The project supports the publication of background papers produced by Maharat Foundation on the local Lebanese context and by MJRC on the European standards and best fit recommendations for Lebanon.

The papers cover 6 main themes:
Protection of journalists and their sources, Associations of journalists, Decriminalization, Incentives, Innovation, and Regulation, co-regulation and self-regulation opportunities for the media.

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Media and Journalism Research Center (MJRC)

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Maharat Foundation

Maharat Foundation is a women-led freedom of expression organization based in Beirut dedicated to campaigns grounded in research and strengthening connections between journalists, academics, and policy makers.
It advances and enables freedom of expression, quality information debate and advocates for information integrity online and offline. Maharat promotes innovation and engages the journalistic community and change agents within Lebanon and the wider, MENA region to promote inclusive narratives and debates and to counter misinformation, disinformation, and harmful content.

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1. Introduction

A report recently published by the international NGO Human Rights Watch (HRW), "There is a Price to Pay"[1] elaborates how Lebanon's criminal defamation laws have been used against journalists, activists, and other citizens who wrote about corruption by public officials, reported misconduct by security agencies, criticized the current political and economic situation or exposed abuse against vulnerable populations.

Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which Lebanon ratified in 1972, provides that "everyone shall have the right to freedom of expression." Still, the ICCPR allows national law to introduce certain restrictions to this freedom in the pursuit of protection of "reputations of others," "but these shall only be such as are provided by law and are necessary" for the aim.[2] Moreover, Article 17 of the ICCPR states that no one shall be subjected to "unlawful attacks on his honor and reputation."

The Constitution of Lebanon (Art. 13) guarantees, "within the scope of the law," freedom of opinion, expression through speech and writing, and the freedom of the press.[3]

The Lebanese Penal Code limits, through the provisions of defamation, slander (tham) and libel (qadh) (Articles 383 to 389), the freedom to criticize civil servants and public bodies.[4] It specifically criminalizes defamation against public officials with imprisonment for up to one year. It also authorizes imprisonment for up to two years for insulting the national president, foreign heads of state and ambassadors, the national flag and national emblem. Similar norms are provided by the national Publications Law (1962) and the latest draft Media Law (2022).[5]

[1] Human Rights Watch. (2019)."There is a Price to Pay": The Criminalization of Peaceful Speech in Lebanon https://www.hrw.org/report/2019/11/15/there-price-pay/criminalization-peaceful-speech-lebanon. (in English or العربية)
[2] International Covenant on Civil and Political Rights (1966), Article 19, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights
[3] Constitution of Lebanon (in English), https://www.constituteproject.org/constitution/Lebanon_2004
[4] See: https://www.ilo.org/dyn/natlex/natlex4.listResults?p_lang=en&p_country=LBN&p_count=115&p_classification=01.04&p_classcount=3
[5] UNESCO. (2023). Towards media law reform in Lebanon, https://www.unesco.org/en/articles/towards-media-law-reform-lebanon?hub=776; UNESCO. (2022). Analysis of the July 2021 Draft Media Law prepared by the Parliament of Lebanon. Author: Toby Mendel. pp. 29-30. https://articles.unesco.org/sites/default/files/medias/fichiers/2023/05/Analysis%20of%20Draft%20Lebanon%20Media%20Law-En_Sept2022.pdf

In its concluding observations on Lebanon's latest, third periodic review on 2018, May 9, the UN Human Rights Committee expressed concern about "the criminalization of defamation, insult, criticism of public officials and blasphemy, which can be punished with imprisonment." It recommended that Lebanon decriminalizes insult and criticism of public officials, as well as considers the complete decriminalization of defamation and, "in any case, countenance the application of criminal law only in the most serious cases", keeping in mind that imprisonment is never an appropriate penalty for defamation.[6]

The European Union Election Observation Mission at the Parliamentary Elections in Lebanon on May 15, 2022 also recommended to "suppress imprisonment penalties for defamation, libel."[7]

Hallin and Mancini (2004) claim that at the current stage of world history "national differentiation of media systems is clearly diminishing."[8] They provide examples of European Union countries where this trend is particularly evident. Such convergence of media systems is apparently based on growing uniformity of regulation. Key regulatory parameters of media activity, such as limits of governmental interference, protection of privacy, as well as the right of reply, protection of children and support of European content in broadcasting are uniform in the EU.

This harmonization trend is also apparent in other regional and international communities.[9] It means that international agreements have a particularly important role to play. Indeed, modern principles and concepts of media regulation are typically implemented in international conventions on human rights. These agreements reflect the current scholarly debate as much as a political compromise that can be achieved in relation to the scope of civil and political rights, their importance, aim and implementation.

This review intends to explore the main international trends related to the use of criminal defamation legislation and its impact on journalists and media freedom, as well as the best practices in Europe.

[6] United Nations Human Rights Committee. (2018). Concluding observations on the third periodic report of Lebanon.http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhst0EqMtyqQ%2BAVhHZipQtX7YClXY%2BNLLw9Rz7B7DByyyVaC60%2Bln%2BtiD%2F0TvvppjSXeM3q43F5g5aAG58UffTRjtRD4JA%2BK9D9FANv2759gxx.
[7] European Union Election Observation Mission Lebanon 2022. EU EOM Lebanon 2022 Final report., https://www.eeas.europa.eu/eom-lebanon-2022/eu-eom-lebanon-2022-final-report_en?s=4575
[8] Daniel Hallin & Paolo Mancini. (2004). Comparing Media Systems: Three Models of Media and Politics. Cambridge: Cambridge University Press.DOI: https://doi.org/10.1017/CBO9780511790867 p. 13.
[9] See: UNESCO. (2023). A Steady Path Forward: UNESCO 2022 Report on Public Access to Information (SDG 16.10.2). Paris: UNESCO. https://unesdoc.unesco.org/ark:/48223/pf0000385479, p. 37.

2. Balancing freedom of the media and protection of reputation: International and European standards

Our starting point is that freedom of the media is "a systemic concept, which implies that with the technical facilities to do so, individuals can circulate their thoughts and opinions among a number of people that is sufficiently large to satisfy their desire to take part in public dialogue and have a say in politics and decisions on matters of public interest."[10] It also means that individuals can circulate and obtain information on current affairs without hindrance.

Freedom of the media is part of the rights of freedom of expression and freedom of information. In fact, some researchers believe that "freedom of the media" is an alternative term for "freedom of expression."[11] Like freedom of expression, freedom of the media is not absolute. The need to protect it is not "a cast-iron defense" of journalists: like everyone, they should obey "the ordinary criminal law." On the other hand, a violation of the law by media professionals in the line of duty should not be considered without taking into account the need to protect media freedom.

Article 17 of the ICCPR affords protection to personal honor and reputation. It relates to both a negative obligation of the state to abstain from arbitrary interference in the exercise of the right to private and family life and a positive obligation to ensure effective respect for private life, in particular the right to protection of one's reputation. The right to protection of one's reputation is usually considered in Europe as part of the right to respect for private life. The UN member states are under an obligation to provide adequate legislation to that end. Provision must also be made for everyone to be able to effectively protect themselves against any unlawful attacks that do occur and to have an effective remedy against those responsible.[12]

While the media must act as a public watchdog, there is a natural tension between, on the one hand, the public interest in openness and transparency and, on the other hand, the interest in the protection of reputation. Yet, the structure of these two conflicting provisions is such as to permit a proportionality-based approach to be taken to reconcile the protected rights.

[10] Andrei Richter. (2020). Threats to freedom of the press. In M. Monshipouri (Ed.), Why Human Rights Still Matter in Contemporary Global Affairs. London: Routledge. DOI: https://doi.org/10.4324/9781003022909
[11] Andrea Calderado, & Alina Dobreva. (2013). Framing and Measuring Media Pluralism and Media Freedom Across Social and Political Contexts. In European Union Competencies in Respect of Media Pluralism and Media Freedom. Robert Schuman Centre for Advanced Studies. RSCAS Policy Paper 2013/01. Fiesole, Italy: European University Institute.
[12] General comment No. 16: Article 17 (Right to privacy), U.N. Human Rights Committee, 32nd session, 1988, para 11, see: https://www.ohchr.org/en/treaty-bodies/ccpr/general-comments

In the past years, a significant consensus has emerged among intergovernmental organizations on the interplay between the fundamental human rights on the use of freedom of expression and on protection of one's honor and reputation. In defamation cases the protection of one's reputation must be weighed against the wider public interest in ensuring that people are able to speak and write freely, uninhibited by the prospect of being sued for damages should they be mistaken or misinformed.

This proportionality-based approach is achieved through the provision of paragraph 3 of Article 19 ICCPR that prescribes any restrictions on freedom of expression to meet the requirements of:

a) **Legality**: the restriction has to be "prescribed by law." The law has to be adequately accessible and foreseeable, that is, "formulated with sufficient precision to enable the citizen to regulate his conduct."[13] There must be "a measure of legal protection in domestic law against arbitrary interference by public authorities with the rights safeguarded by the Convention."[14]

b) **Legitimacy**: the restriction has to pursue a legitimate aim. The exhaustive list of such legitimate aims is provided in Article 19(3) ICCPR.

c) **Necessity** in a democratic society: the restriction has to respond to "a clear, pressing and specific social need"[15] and be "proportionate to the legitimate aim pursued."[16]

2.1. UN Human Rights Committee

The UN Human Rights Committee (UNHRC), the body of independent experts that monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR) by its States parties, provides general comments which interpret the meaning of the human rights listed in the ICCPR.

Adopted in 2011, General Comment No 34 (GC34) interprets the practice of implementation of Article 19 of the ICCPR in the national law and policy.

[13] ECtHR, Sunday Times v. United Kingdom, Application No. 6538/74, 26 April 1979, par. 49
[14] ECtHR, Malone v. the United Kingdom, Application No. 8691/79, 2 August 1984, par. 67.
[15] ECtHR, Vajnai v. Hungary, Application No. 33629/06, 8 July 2008, par. 51.
[16] ECtHR, Parti Nationaliste Basque – Organisation Régionale d'Iparralde v. France, Application No. 71251/01, 7 September 2007, par. 45. See also, General Comment 34 on Article 19: Freedoms of opinion and expression, Human Rights Committee (2011), paras. 22 and 34.

Based on the considerations made during the periodic reports submitted by the United Kingdom, Italy, North Macedonia, and Kuwait, the UN Human Rights Committee said in the document, that all states "should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty."[17]

The UNHRC said that:

"defamation laws must be crafted with care to ensure that they comply with paragraph 3 [of Article 19 ICCPR], and that they do not serve, in practice, to stifle freedom of expression. All such laws, in particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification. At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice. In any event, a public interest in the subject matter of the criticism should be recognized as a defence. Care should be taken by States parties to avoid excessively punitive measures and penalties... It is impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously – such a practice has a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others."[18]

There is also a General Comment on article 17 of the ICCPR (GC17), adopted in 1988. Unfortunately, it does not shed light as to the limits of "effective remedy against those responsible" for defamation.[19]

2.2. International rapporteurs

Representatives of regional intergovernmental bodies, namely the United Nations (UN) Special Rapporteur on the Protection and Promotion of Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, have been even more straightforward in their opposition to criminal defamation laws.

[17] General comment No. 34: Article 19: Freedoms of opinion and expression, U.N. Human Rights Committee, 102nd session, 29 July 2011, para 47, www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf
[18] OSCE. (2016). Press release: Criminal defamation laws protecting foreign heads of states undermine media's role as public watchdog, OSCE Representative says, issuing recommendations. https://www.osce.org/fom/246556
[19] General comment No. 16: Article 17 (Right to privacy), U.N. Human Rights Committee, 32nd session, 1988, para 11, see: https://www.ohchr.org/en/treaty-bodies/ccpr/general-comments

Year after year they have insisted that states should "abolish any criminal defamation laws and replace them, where necessary, with appropriate civil defamation laws,"[20] as well as "repeal any defamation or lèse-majesté laws which provide special protection to or provide for greater penalties for statements directed at heads of State or government, politicians or officials."[21]

In 2002, they stated, "Criminal defamation is not a justifiable restriction on freedom of expression."[22] In 2010, they declared criminal defamation one of the ten key threats to freedom of expression in the coming decade.[23]

There are also specific cases when the intergovernmental organizations join forces against criminalization of defamation in particular jurisdictions.

2.3. OSCE Representative on Freedom of the Media

The OSCE Representative on Freedom of the Media (RFOM) observes media-related developments in all 57 OSCE participating states. She/he provides early warning on violations of freedom of expression and media freedom, and promotes full compliance with the OSCE media freedom commitments.

"To promote the abolition of all criminal defamation laws" has been "a strong position and consistent policy of the RFOM Office ever since it was established in 1998."[25] In the words of the first RFOM, Freimut Duve, the aim is to be able to "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." He made this statement in 2003 when his Office held a conference entitled, "What Can Be Done to Decriminalize Libel and Repeal Insult Laws."[26]

[20] OSCE. (2021). 2021 Joint Declaration on Politicians and Public Officials and Freedom of Expression. https://www.osce.org/files/f/documents/9/4/501697_0.pdf
[21] OSCE. (2021). Joint Declaration..., cit.
[22] OSCE. (2002). Joint Declaration by 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. https://www.osce.org/files/f/documents/8/f/39838.pdf
[23] Joint Declaration on Media Independence and Diversity in the Digital Age, 2 May 2018, https://www.osce.org/files/f/documents/1/e/379351.pdf; OSCE. (2010). Tenth Anniversary Joint Declaration: Ten Key Challenges to Freedom of Expression in the Next Decade. https://www.osce.org/files/f/documents/d/e/41439.pdf
[24] Joint UN, OSCE, CoE and EU in BiH statement regarding the Republika Srpska Criminal Code amendments re-criminalizing defamation, Sarajevo, 20 July 2023, https://www.osce.org/mission-to-bosnia-and-herzegovina/548938
[25] OSCE Representative on Freedom of the Media. (2016). Communiqué No.5/2016. Communique by the OSCE Representative on Freedom of the Media on criminal defamation laws protecting foreign heads of state. 14 June. https://www.osce.org/files/f/documents/3/3/246521.pdf
[26] Freimut Duve. (2004). Let Us Work Together to Get Criminal Libel Laws Abolished. In A. Karlsreiter and H. Vuokko (Eds.). (2004). Ending the Chilling Effect: Working to Repeal 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. Vienna: OSCE: Office of the Representative on Freedom of the Media, p. 21, https://www.osce.org/files/f/documents/2/3/13573.pdf

A modern set of maxims, reflecting the RFOM position, was expressed in a special 2016 Communique. It underlined that "media freedom and pluralism depend on the freedom of journalists to report on and criticize all, including the … public officials. Not only do the press and other media have the task of imparting such information and ideas, the public also has a right to receive them. Were it otherwise, the media would be unable to play its vital role of 'public watchdog.'"[27]

The Representative made statements that: "criminal defamation provisions protecting heads of foreign states infringe on the media's right to report on issues of public interest."[28]

"While heads of state, including heads of foreign states, are certainly entitled to have their reputation protected, the requirements of that protection have to be weighed against the interests of open discussion of political issues. Therefore, exceptions to the right to freedom of expression must be interpreted narrowly. To confer a special legal status on public figures, shielding them from criticism solely because of their function or status and irrespective of whether the criticism is warranted, provides them with a special privilege that cannot be reconciled with democratic practice."[29]

2.4. Venice Commission of the Council of Europe

The European Commission for Democracy through Law, better known as the Venice Commission as it meets in Venice, is the Council of Europe's advisory body on constitutional matters. The role of the Venice Commission is to provide legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law.

The Venice Commission in a number of its opinions for different states recommends an abolishment of imprisonment as a sanction for defamation.[30]

[27] OSCE Representative on Freedom of the Media. (2016). Communiqué No.5/2016…, cit.
[28] OSCE Representative on Freedom of the Media. (2016). Criminal defamation laws protecting foreign heads of states undermine media's role as public watchdog, OSCE Representative says, issuing recommendations. Press release, 14 June. https://www.osce.org/fom/246556
[29] OSCE Representative on the Freedom of the Media. (2016) Communiqué No.5/2016…, cit. .
[30] These opinions include, European Commission for Democracy through Law (Venice Commission), Opinion on the Legislation Pertaining to the Protection against Defamation of the Republic of Azerbaijan, 14 October 2013, CDL-AD(2013)024, §40 and §57, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)024-e; European Commission for Democracy through Law (Venice Commission), Opinion on the legislation on defamation of Italy, CDL-AD(2013)038, §29 and §59, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)038-e; Opinion on Media Legislation (Act CLXXXV on Media Services and on the Mass Media, Act CIV on the Freedom of the Press, and the Legislation on Taxation of Advertisement Revenues of Mass Media) of Hungary, 22 June 2015, CDL-AD(2015)015, §38, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)015-e.

In its 2016 opinion on some provisions of the Criminal Code of Türkiye, the Commission concluded that the only solution to avoid further violations of the freedom of expression in the country is "to completely repeal" the provisions on defamation of the president.[31]

In its Opinion on the legislation pertaining to the protection against defamation of the Republic of Azerbaijan, the Venice Commission indicated that if the criminal provision on "discreditation or humiliation of the honour and dignity of the Head of the Azerbaijani State" was maintained, imprisonment as a sanction should be confined to exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in cases of hate speech or incitement to violence.[32]

[31] European Commission for Democracy through Law (Venice Commission). (2016). Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey, 15 March 2016, CDL-AD(2016)002, §126, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)002-e.
[32] European Commission for Democracy through Law (Venice Commission), Opinion the Legislation Pertaining to the Protection against Defamation of the Republic of Azerbaijan, 14 October 2013, CDL-AD(2013)024, §50 and §51, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)024-e.

3. Case law of the European Court of Human Rights

3.1. General approach

The European Court of Human Rights (ECtHR) has very rich case law on the interpretation and application of Article 10 ("Freedom of Expression") of the European Convention on Human Rights.[33] What exactly does the Court say about criminal defamation?

It should be noted that the ECtHR has never upheld a prison sentence for defamation. In the very few cases when it has upheld criminal defamation convictions, the ECtHR pointed out that the sanctions were modest and hence met the requirement of proportionality.[34]

In multiple cases the ECtHR refers to the danger of a "chilling effect", and its impact when it finds interference with media and journalists unjustified.

In Kaperzyski v. Poland the ECtHR emphasized that it

"must exercise caution when the measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in a discussion of matters of legitimate public concern .... The chilling effect that the fear of criminal sanctions has on the exercise of journalistic freedom of expression is evident. ... This effect, which works to the detriment of society as a whole, is likewise a factor which goes to the proportionality, and thus the justification, of the sanctions imposed on media professionals."[35]

In the judgment on Cumpana and Mazare v. Romania, the ECtHR held that a "classic case of defamation of an individual in the context of a debate on a matter of legitimate public interest presents no justification whatsoever for the imposition of a prison sentence."[36]

[33] Article 10 ("Freedom of expression") stipulates:
"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." See: Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, ECHR), Rome, 4.XI.1950, https://www.echr.coe.int/documents/d/echr/convention_ENG.
[34] Toby Mendel. (2004). Criminal defamation and libel in the OSCE region. In A. Karlsreiter and H. Vuokko (Eds.), OSCE Representative on Freedom of the Media: Ending the Chilling Effect: Working to Repeal 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, p. 32.
[35] ECtHR , Kaperzyski v. Poland, 3 April 2012, Case No. 43206/07.
[36] No. 33348/96, 17 December 2004, para. 106.

Since the Cumpana case, the ECtHR on several occasions held that whenever the defamatory statements concern a matter of public interest, prison sentences for defamation cannot be justified under freedom of expression.[37] Dirk Voorhoof, the most prominent author on the interpretation of freedom of expression by the ECtHR, notes in this regard, "This rule against prison sentences includes pardoned, suspended, or conditional sentences, effectively removing from European legislatures and courts the ability to impose such sentences in defamation cases to be situated in public debate or political expression."[38]

The ECtHR jurisprudence traditionally follows the logic that freedom of expression prevails in cases of insult or defamation of heads of state, presidents or high-ranking politicians.

For example, it has repeatedly assessed the relevant provisions of the Criminal Code of Türkiye.[39] There were a number of criminal cases opened in the country following the declaration of the state of emergency after the attempted military coup in 2016, whereas the ECtHR saw no evidence demonstrating that the criminal proceedings against the applicants to the ECtHR were indeed linked to the necessities of the emergency rule. In those cases, it found violations of Article 10 of the ECHR due to the failure by Türkiye to meet the requirement of "necessity in a democratic society."

In the case of Artun and Güvener v. Türkiye, the ECtHR held that conferring a privilege or special protection to heads of state, shielding them from criticism solely on account of their function or status, cannot be reconciled with modern practice and political conceptions.[40]

In another example, the ruling of the ECtHR in the case of Vedat Şorli v Türkiye concluded that criminal proceedings resulting in the application of the provision that criminalizes the insult of the president is incompatible with freedom of expression.

"The domestic courts based their decisions on Article 299 of the Criminal Code, which affords a higher degree of protection to the President of the Republic than to other persons-protected by the ordinary rules on defamation with regard to the disclosure of information or opinions concerning them, and laid down heavier penalties for persons who made defamatory statements."[41] "In that connection," the ECtHR stated, "affording increased protection by means of a special law on insult would not, as a rule, be in keeping with the spirit of the Convention or with a State's interest in protecting the reputation of its head of State."[42]

[38] Dirk Voorhoof. (2015). Freedom of Expression, Media and Journalism under the European Human Rights System: Characteristics, Developments and Challenges. In Peter Molnar (Ed.)., Free Speech and Censorship Around the Globe. Budapest, New York: CEU Press. DOI: https://doi.org/10.1515/9789633860571-007, p. 69.
[39] See, for instance, ECtHR, Incal v. Turkey, Application No. 22678/93, 9 June 1998; Pakdemirli v. Turkey, Application No. 35839/97, 22 February 2005; Sirin v. Turkey, Application No. 47328/99, 15 March 2005; Artun and Güvener v. Turkey, Application No 75510/01, 26 June 2007; Siz v. Turkey, Application no. 895/02, 26 May 2005.
[40] ECtHR, Artun and Guvener v. Turkey, Application No. 75510/01, 26 June 2007.
[41] ECtHR, Vedat Şorli v. Turkey, Application No.42048/19, 19.10.2021, https://hudoc.echr.coe.int/fre?i=002-13439
[42] ECtHR, Vedat Şorli v. Turkey, …, cit.

In this case, the ECtHR again noted that:

"while it was entirely legitimate for persons representing the institutions of the State, as guarantors of the institutional public order, to be protected by the competent authorities, the dominant position of those institutions required the authorities to display restraint in resorting to criminal proceedings."[43]

There had been nothing in the circumstances of the case, the ECtHR said, to justify the applicant's

"placement in police custody, the order for his pre-trial detention or the imposition of a criminal sanction, despite the fact that delivery of the judgment imposing a prison term had been suspended. Such a sanction, by its very nature, inevitably had a chilling effect on the willingness of the person concerned to express his or her views on matters of public interest, especially in view of the effects of conviction."[44]

In Tuşalp v. Turkey the ECtHR reiterated that offensive language, in this case criticizing the prime minister, "may fall outside the protection of freedom of expression if it amounts to wanton denigration, for example where the sole intent of the offensive statement is to insult."[45] But "the use of vulgar phrases in itself is not decisive in the assessment of an offensive expression as it may well serve merely stylistic purposes. … Style constitutes part of communication as a form of expression and is as such protected together with the content of the expression."[46] In addition, the ECtHR observed that there was nothing in the case to indicate that Tuşalp's articles affected the prime minister's political career or his professional and private life.

The Court came to the conclusion that

"the domestic courts failed to establish convincingly any pressing social need for putting the Prime Minister's personality rights above the journalist's rights and the general interest in promoting the freedom of the press where issues of public interest are concerned."[47]

Thus, in the ECtHR's view, "the protection of the reputation of the head of State or Government cannot serve as justification for affording the person privileged status or special protection vis-à-vis the right to convey information and opinions concerning him/her."[48]

These decisions follow the logic that the ECtHR held in the now classic case of Lingens v. Austria: "the limits of acceptable criticism are […] wider as regards a politician as such than as regards a private individual."[49]

[43] ECtHR, Vedat Şorli v. Turkey, …, cit.
[44] ECtHR, Vedat Şorli v. Turkey, …, cit.
[45] ECtHR 21 February 2012, Case Nos. 32131/08 and 41617/08, Tuşalp v. Turkey. https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-109189%22]}
[46] ECtHR 21 February 2012, Case Nos. 32131/08 and 41617/08, Tuşalp v. Turkey…, cit.
[47] ECtHR 21 February 2012, Case Nos. 32131/08 and 41617/08, TuşalpTualp v. Turkey…, cit.
[48] ECtHR. (2023). Protection of reputation. Factsheet. https://www.echr.coe.int/documents/d/echr/fs_reputation_eng
[49] ECtHR 8 July 1986. Lingens v Austria. Application no. 9815/82. https://hudoc.echr.coe.int/fre?i=001-57523

3.2. Case law of the European Court of Human Rights: Fatullayev v Azerbaijan

These pertinent issues are discussed in the case of Fatullayev v Azerbaijan that led to a judgment of the European Court of Human Rights in 2010[50] and again in 2022[51] (Azerbaijan is a member of the Council of Europe, and thus subject to the ECtHR's jurisdiction).

At the time of the events to be described below, Mr. Eynulla Fatullayev, 30, was the founder and editor-in-chief of the Russian-language weekly newspaper Realny Azerbaijan (which can be translated as "Real-life Azerbaijan"), published in Baku, the country's capital. The newspaper was popular for its investigations and frequent criticism of the state authorities and various officials. Some of them, including the interior minister and Members of the Parliament, have repeatedly demanded initiation of criminal defamation cases and filed civil defamation lawsuits against him.

Azerbaijan is one of the eight post-Soviet states (out of 15) that opted to keep criminal defamation in the national Penal Codes, as was a tradition of the Soviet criminal laws.[52] Despite the promises publicly made by the national authorities to decriminalize defamation, even including a relevant commitment in the National Programme for Action to Raise Effectiveness of Protection of Human Rights and Freedom, decreed by President Ilham Aliyev in 2011, this legacy of the Soviet times is firmly in place today.[53]

As a result of a criminal defamation trial, Fatullayev was found, in 2006, guilty of slandering a member of the government and sentenced to two years of suspended imprisonment.

In addition, Fatullayev was severely beaten in the street, his father was kidnapped, and the ransom note demanded that Fatullayev should close his publications. Both he and other editorial staff repeatedly received threatening phone calls in connection with the published or forthcoming articles.

Shortly before the serious problems started for him and the publication, Fatullayev traveled, in 2005, as a journalist to Nagorno-Karabakh, which went under the control of Armenian forces following an armed conflict in 1991-94.

This was a rare case of an Azerbaijani citizen visiting the region, since there was virtually no travel across the separation line or contact between the nationals of the two countries. During his trip, Fatullayev met and talked with some local officials, as well as with ordinary people. He wrote up his experiences in an article entitled "The Karabakh Diary," published in his weekly, Realny Azerbaijan.

[50] See Fatullayev v. Azerbaijan, European Court of Human Rights, 40984/07, Apr. 22, 2010, https://hudoc.echr.coe.int/fre?i=001-98401.
[51] See Fatullayev v. Azerbaijan (no. 2), European Court of Human Rights, 32734/11, Apr. 7, 2022, https://hudoc.echr.coe.int/fre?i=001-216685.
[52] Andrei Richter. (2019). Gesetze und Strategien zur Medienfreiheit im postsowjetischen Raum, Religion & Society in East and West (RGOW), Zürich, 2, pp. 20-23.
[53] See OSCE Representative on the Freedom of the Media. OSCE media freedom representative concerned about increasing pressure on media in Azerbaijan following online defamation provisions press release. 15 May 2013. https://www.osce.org/fom/101513

"The Karabakh Diary"

Written in the form of a travelogue about what the author saw during his trip, the story conveyed the content of his conversations with the locals. It included the controversial topic of a bloodshed that took place in the Karabakh settlement of Khojali on February 26, 1992, a turning point in the history of the conflict.

In Azerbaijan, by a decree of then-President Heydar Aliyev,[54] what happened in Khojali was formally considered as an episode in the genocide of the peaceful Azeri population by Armenians.[55] According to the Azerbaijani official history, on that day Armenian armed forces, with the help of the Soviet army, killed hundreds of unarmed people from Khojali.

In "The Karabakh Diary," the journalist recalled that, a few years before his trip in 2005, refugees from Khojali living in the Azerbaijani town of Naftalan, told him the following: on the eve of the assault on the encircled Khojali, Armenians repeatedly warned the Azerbaijani civilians about the coming offensive with the help of loudspeakers, calling on them to leave through a safe corridor along the Kar-Kar river. According to these refugees, they used the safe passage and were not shot at. At the same time, some paramilitaries from the militia of the Popular Front of Azerbaijan (PFA) who were defending Khojali, abandoned their positions, joined the civilians, but for reasons unknown crossed the Kar-Kar and led some of the refugees towards the village of Nakhichevanik, which at that time was controlled by armed Armenians. Fatullayev recalled this story in his article, as during the trip to Karabakh it was confirmed by a local official, an ethnic Armenian. Comparing the two stories, Fatullayev asserted: "Apparently, the PFA battalions were not so much striving to save the civilian population of Khojali as to shed even more blood in their plan to have [then President of Azerbaijan Ayaz] Mutalibov overthrown."[56]

AzeriTriColor

More than a year after the publication of "The Karabakh Diary" in December 2006 and in January 2007, Fatullayev posted a number of comments on a popular Internet forum, AzeriTriColor (http://www.atc.az). They were posted in a forum thread dedicated to controversies in the content of "The Karabakh Diary". Responding to several questions from forum participants, Fatullayev wrote, in particular, the following:

[54] He is the father of his successor, current President Ilham Aliyev.
[55] "О геноциде азербайджанцев" ("On the genocide of Azeris"), Decree of the President of the Azerbaijani Republic, Mar. 26, 1998, https://genocide.preslib.az/ru_s13.html.
[56] Карабахский дневник (The Karabakh Diary). See its text (in Russian): http://nv.am/karabahskij-dnevnik-azerbajdzhanskogo-zhurnalista/.

"I have visited this town [Naftalan] where I have spoken to hundreds (I repeat, hundreds) of refugees who insisted that there had been a corridor and that they had remained alive owing to this corridor ...
You see, it was wartime and there was a front line... Of course, Armenians were killing [the civilians], but some of the Khojali residents had been fired upon by our own [troops]... Whether it was done intentionally or not is to be determined by investigators. ...
[They were killed] not by [some] mysterious [shooters], but by provocateurs from the NFA battalions. ... [The corpses] had been mutilated by our own. ..."[57]

In response to his comments, a campaign against Eynulla Fatullayev started in a number of Azerbaijani media, peaking with the demands to disclose his ties with Armenia and to strip him of his citizenship.

Next, a civil defamation lawsuit was filed by the head of a local NGO for the relief of refugees from Nagorno-Karabakh[58] against the Realny Azerbaijan weekly and Fatullayev on the grounds of dissemination of information discrediting the relatives of the victims of the tragedy, veterans, soldiers of the National Army of Azerbaijan and the entire Azerbaijani people. The district court redressed the grievances, by ordering the publication of a refutation in the weekly and on AzeriTriColor, as well as compensation for moral damages in the amount of approximately €17,000, which were supposed to be spent on improving the conditions of the refugees residing in Naftalan.

Somewhat later, a group of refugees and former militants who participated in the battle of Khojali and whose interests were represented by the same head of the Refugees Protection Center, filed an application to open a criminal case against Fatullayev to the same district court. They demanded that he be found guilty of insulting and slandering Azerbaijani soldiers. The same judge who considered the civil lawsuit found Fatullayev guilty of criminal defamation, aggravated by the accusations of individuals of a grave or extremely grievous offense, and sentenced him to two and a half years imprisonment.

"The Aliyevs Go to War"

A month before this verdict of two and a half years imprisonment was passed, Realny Azerbaijan published Fatullayev's analytical article "The Aliyevs Go to War," on a completely different topic than Nagorno-Karabakh.

In it, the author expressed the opinion that in order to retain power, the national government was seeking support from the U.S. in exchange for facilitating a likely American aggression against Iran. The author believed that by openly supporting the anti-Iranian campaign, Azerbaijan should prepare for a long war that would lead to widespread destruction and human casualties.

[57] Fatullayev v. Azerbaijan, supra note 40 at 13.
[58] Center for the Protection of Refugees and Displaced Persons

He wrote that according to information from sources “close to official Paris” (the French Government), the Iranian Air Force and hundreds of missiles would strike targets in Azerbaijan. A long list of such targets was published as well, which included oil platforms and terminals, government buildings and a number of large business centers that housed offices of foreign companies. The author said that it would be better for Azerbaijan to remain neutral in the brewing conflict, also because its Talysh minority, which is ethnically, geographically and linguistically close to the Iranians, would not support the war.[59]

The Ministry of National Security opened a criminal investigation into this publication under a Penal Code article penalizing the making of a terrorist threat.
(Three months later, Fatullayev, still imprisoned for criminal defamation and now facing terrorist charges, was further accused of tax evasion on the grounds that he did not properly declare his personal income as the newspaper editor.)

Testimonies of eight employees of foreign companies were submitted at the trial on charges of intimidating the population with a terrorist threat. They testified that, having received by e-mail and read the article “The Aliyevs Go to War,” they felt disturbed, anxious and frightened. The court concluded that the publication was intended to sow panic among the population. It also found that in his article the author threatened to destroy public property and bring death to people in order to force the Government to abandon political decisions called for by the national interests.[60] In October 2007, it found Fatullayev guilty on all counts and convicted him of making a terrorist threat, inciting ethnic hatred and tax evasion.

The cumulative sentence, taking into account the partial absorption of penalties, amounted to eight and a half years imprisonment. When passing the verdict, the court stated that, taking into account previous conviction on criminal defamation, the journalist was a repeat offender, and qualified this as an aggravating circumstance. The court also ordered 23 computers and the memory disks that had been seized as material evidence in the editorial office of Realny Azerbaijan, to be confiscated in favor of the state. By that time, the weekly could no longer be published and, hence, it folded.

Having lost all possible appeals, Fatullayev filed through his lawyers an application to the European Court of Human Rights (ECtHR), considering, in particular, that the national authorities had violated his right to freedom of expression. The ECtHR handed down its judgment three years later.

[59] Fatullayev v. Azerbaijan, supra note 40 at 27.
[60] Fatullayev v. Azerbaijan, supra note 40 at 41.

Judgment of the European Court of Human Rights

The ECtHR carefully studied the articles published in Realny Azerbaijan and online. It found that the state interference with the applicant's (Fatullayev's) right to freedom of expression was based on the law – the Penal Code. Inevitably, however, the question arose as to whether the restrictive measures taken against him were necessary in a democratic society, which is an important condition for restricting free speech under European law.

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.

Examining this component of Azerbaijan's possible violation of Article 10 of the European Convention on Human Rights, the ECtHR found that Fatullayev's articles and comments in print and online dealt with the "matters of general interest."[61]

The ECtHR noted that to seek historical truth is an integral part of freedom of expression, while "it is essential in a democratic society that a debate on the causes of acts of particular gravity which may amount to war crimes or crimes against humanity should be able to take place freely."[62]

The ECtHR also noted that Fatullayev's allegations obviously did not implicate all the Azerbaijani military or all Azerbaijani armed formations that took part in the hostilities in this area, or even all the defenders of Khojali who participated in this battle. Secondly, they did not contain accusations against specific individuals – there were no names or any other clarifying information provided. [63]

In view of the foregoing, the ECtHR found that while "The Karabakh Diary" might have contained certain exaggerated or provocative statements, the author did not overstep the limits of journalistic freedom in fulfilling his duty to disseminate information on topics of general interest. The statements on the internet forum did not defame the specific persons. Under the circumstances, it concluded that the arguments given by the domestic courts in support of their judgments could not be considered relevant and sufficient, and therefore, the recognition of Fatullayev as guilty of criminal defamation did not meet a "pressing social need."[64]

[61] Fatullayev v. Azerbaijan, supra note 40 at 87.
[62] Fatullayev v. Azerbaijan, supra note 40 at 87.
[63] Fatullayev v. Azerbaijan, supra note 40 at 99.
[64] Fatullayev v. Azerbaijan, supra note 40 at 100.

But even if the intervention had met such a need, there would be problems with regard to compliance with the requirement that the punishment be proportionate to the offense. In earlier cases, the ECtHR had already generally found that investigative journalists tend to refrain from publishing sensitive topics if they risk being sentenced to imprisonment for criminal defamation. Fear of such punishment inevitably has a chilling effect on the freedom of expression of journalists.[65]

Recalling that Fatullayev was sentenced to imprisonment in addition to the judicial punishment for the same statements in the civil process, the ECtHR did not dispute that sentencing is in principle a matter for national courts. But at the same time, it noted that the choice of imprisonment as a penalty for a media offense is compatible with the freedom of expression of journalists only in exceptional circumstances, namely when other fundamental rights are seriously infringed, as, for example, in cases of inciting hatred or incitement to violence. [66]

The ECtHR considered that the circumstances of the criminal case in the article "The Karabakh Diary" and the comments on AzeriTriColor did not give grounds for sentencing the applicant to imprisonment.

With regard to the "The Aliyevs go to war" case, the ECtHR recalled that, in accordance with Article 10, paragraph 2 of the ECHR, the scope for the possible restriction of speech on political topics or discussions on issues of public interest is rather narrow. The ECtHR has repeatedly pointed out that the boundaries of "permissible criticism" in relation to public authorities are wider than in relation to ordinary citizens or even individual politicians. Moreover, the dominant position held by the authorities obliges them to exercise restraint in bringing criminal cases, even when they have to deal with unfounded attacks and criticism from opponents, especially when there are other ways to respond to them.[67]

Again, if the publication cannot be considered an incitement to violence or an incitement to ethnic hatred, then the authorities may not, on the grounds of maintaining public order and security, restrict the public's right to receive information on topics of general interest. The mere fact that Fatullayev discussed the social and economic situation in the areas populated by an ethnic minority of Talyshs and voiced an opinion about possible political tension in those areas cannot be considered as incitement to ethnic hostility.[68]

[65] Fatullayev v. Azerbaijan, supra note 40 at 101-102.
[66] Fatullayev v. Azerbaijan, supra note 40 at 103-104.
[67] Fatullayev v. Azerbaijan, supra note 40 at 116.
[68]*Fatullayev v. Azerbaijan*, *supra* note 40 at 116, 126.

The circumstances of the case convinced the ECtHR that there were no grounds for the domestic courts to issue a sentence of imprisonment. The applicant's conviction did not meet a pressing social need, it was blatantly disproportionate to the legitimate aims put forward. It followed that the interference was not necessary in a democratic society.[69]

Analyzing the content of the article "The Aliyevs Go to War," the ECtHR noted that the publication of a list of possible targets on the territory of Azerbaijan did not in itself increase or decrease the chances of hypothetical aggression from Iran. Moreover, the authorities never made any allegations that, by publishing this list, the applicant disclosed any state secrets or harmed the country's defense capability. The ECtHR stated that the list is an expression of opinion, and any opinion about future events inherently involves a high degree of uncertainty. The feasibility or impracticability of the scenarios proposed by the applicant to the ECtHR was the subject of public discussion, and every reasonable reader could be expected to understand that the words about the possible course of a future war were hypothetical.[70]

Taking into account the circumstances of the case, the ECtHR recognized the assessment of the domestic courts that Fatullayev threatened the state with terrorist acts as completely unfounded. It pointed out that the applicant, as a journalist and a private individual, clearly had no ability to influence any of the hypothetical events discussed in the article, and could not control any decision of the Iranian authorities to attack objects on the territory of Azerbaijan. He did not endorse or incite a possible attack. The purpose of writing the article was to inform the public on possible consequences of the country's foreign policy and, more specifically, to question the decision to support the "anti-Iranian" resolution of the UN Security Council. However, the ECtHR found nothing in the article to suggest that the applicant's allegations were aimed at intimidating or "pressuring" the Azerbaijani Government by illegal means. In its opinion, in this case the domestic courts had arbitrarily applied the rules of criminal law on terrorism.[71]

As a result, the European Court of Human Rights found in Fatullayev v. Azerbaijan that the domestic courts had overstepped the existing margin of appreciation in applying restrictions on discussions of topics of public interest, and that the criminal conviction violated Article 10 of the Convention on the Protection of Human Rights. It held that the respondent State had an obligation to secure the applicant's immediate release. The court also awarded Fatullayev 25,000 Euros in compensation for non-pecuniary damages.[72]

[69] Fatullayev v. Azerbaijan, supra note 40. at 102-105, 128-131.
[70] Fatullayev v. Azerbaijan, supra note 40 at 117-120.
[71] Fatullayev v. Azerbaijan, supra note 40 at 121-124.
[72] Fatullayev v. Azerbaijan, supra note 40

3.3. Case law of the European Court of Human Rights: Colombani v France

This particular case demonstrates the ECtHR's logic behind it finding the convictions of journalists for the offense of insulting a foreign head of state a violation of the ECHR.

In the context of the examination of Morocco's application for membership of the European Union, a report on drug production and trafficking in that country was drawn up at the request of the European Commission. The first version of the report mentioned the names of persons involved in drug trafficking, while the second version edited the names out. This toned-down version of the initial report was published and discussed in the French weekly newspaper Le Monde.

The original version remained confidential for a certain time, then began to circulate. Almost two years later, Le Monde reviewed it in an article under the headline (as a teaser on the front page): "Morocco: leading world hashish exporter", with the subtitle "A confidential report casts doubt on King Hassan II's entourage." The article itself was published on page 2 under the headline "A confidential report implicates the Moroccan Government in hashish trafficking". Following a complaint by the King of Morocco, criminal proceedings were brought against the first applicant, publishing director (the editor-in-chief) of Le Monde, and the author of the article, the second applicant, for insulting a foreign head of state.

They were acquitted at first instance on the grounds, inter alia, that the journalist had acted in good faith, pursuing a legitimate aim. They were, however, found guilty of insulting a foreign head of state on appeal, on the basis of Article 36 of the French law of July 29, 1881 On freedom of the press. This offense, which only applies in the event of a personal attack on a foreign head of state, is subject to specific legal rules which, unlike those governing defamation, place the burden of proving malicious intent on the plaintiff but do not allow the defense of truthfulness *(exceptio veritatis)* to be put forward as an exonerating factor. The court of appeal sentenced each of the applicants to a fine, ordered them to pay symbolic damages to King Hassan II and to pay costs, and ordered the newspaper to issue a press release publishing the details of the conviction.

The court of appeal criticized them for malicious intent towards the royal entourage, for accusing the king of duplicity and hypocrisy, for failing to check that the content of the report was accurate, and for lacking good faith. They were also criticized for not having attempted to ascertain whether the report was still relevant at the time when the article was published and for having failed to consult the Moroccan authorities about the report, since they had failed to mention a white paper on this subject published by the Moroccan authorities *after* the initial version of the report had been submitted. The Court of Cassation upheld the decision.

The ECtHR found that the interference was "prescribed by law," pursuing the legitimate aim of protecting the reputation or rights of others. There remained the question of whether the interference was "necessary in a democratic society." When the press contributes to public debate on issues giving rise to legitimate concern, it should in theory be able to rely on official reports without having to carry out independent research. In the case, the information provided by the applicants was of legitimate public interest and they acted in good faith in supplying precise and credible information based on an official report whose accuracy did not require checking on their part. The grounds relied on by the domestic courts to convict the applicants were therefore unconvincing.

Under domestic law, the offense of insulting a foreign head of state, unlike the ordinary offense of defamation, did not provide for any exemption from criminal liability in the event of the truth of the allegations being proved. The unavailability of the defense of truthfulness constituted an excessive measure for protecting a person's reputation and rights, even if that person was a head of state or government. The ordinary offense of defamation, which was proportionate to the aim pursued, was sufficient to protect any head of state from attacks on his honor or reputation.

On the other hand, the offense provided for under Article 36 of the freedom of the press law tended to confer on heads of state a status going beyond the general law and shielding them from criticism on the sole grounds of their function or status, without taking any account of the interest that lay in the criticism. This special protection afforded to foreign heads of state under the law, which gave them an inordinate privilege at variance with current political practices and ideas, did not satisfy any "overriding social need". Even though the reasons put forward by the respondent state were relevant, they were not sufficient to prove that the interference complained of was "necessary in a democratic society," notwithstanding the national authorities' margin of appreciation.[73]

[73] Based on the legal summary of the judgment Colombani and Others v. France, 25.6.2002, https://hudoc.echr.coe.int/?i=002-5314.

4. National law and practice

A study on the state of criminal defamation in the OSCE region of 57 states, conducted recently by the International Press Institute (IPI) and commissioned by the OSCE Representative on Freedom of the Media, has brought the following peculiar results (see Fig. 1).[74]

Table 1. Criminal law on defamation in 57 states of the OSCE[75]

Provisions in criminal law	Number of countries
Criminal defamation and insult	42
Increased protection for public officials under general defamation and insult law	9
Other special law on insult to public officials	15
Criminal defamation of the head of state	24
Criminal defamation of the state (excluding laws on state symbols)	16
Criminal defamation of state bodies/state institutions	16
Criminal defamation of foreign heads of state (excluding laws on state symbols)	18
Criminal defamation (insult) of foreign states	7
Criminal blasphemy/religious insult	22

[74] Scott Griffen. (2017). Defamation and Insult Laws in the OSCE Region: A Comparative Study. Commissioned by the OSCE Representative on Freedom of the Media. Vienna: International Press Institute.
[75] Based on the data from Griffen (2017) (supra note 64).

The picture with regards to recent legal development in the OSCE region is mixed. Despite the trend towards decriminalization or introducing lighter penalties, there are still too many countries where defamation is not only a criminal offense but also subject to prison sanctions. However, in most cases, the relevant penal provisions are reportedly not or rarely enforced.[76]

On the one hand, criminal defamation and insult laws have been repealed in nearly a dozen states since 2009, and there has been incremental progress in other areas such as blasphemy. On the other, several states have strengthened criminal defamation laws or reintroduced them altogether, such as the Russian Federation or Croatia. International outcry has helped prevent problematic new measures in states such as Italy and Albania, but failed in Bosnia and Herzegovina. Incipient government efforts to counter online "hate speech" and cyberbullying have included proposals to strengthen elements of criminal defamation laws which may present a challenge for the future. High courts have sent mixed signals when it comes to criminal defamation and freedom of expression. The European Court of Human Rights (ECtHR) has had a limited influence in encouraging legal reforms in line with the Court's standards.[77]

There is an increasing recognition both in the jurisprudence of regional human rights courts, as well as many national legislations and practices, of the need to abolish or limit the scope of criminal defamation laws.

"In Germany, although the Penal Code provides for the offense of defamation of the president, in 2000, the Federal Constitutional Court stated that even harsh political criticism, however unjust, does not constitute such an offense, and the provision is rarely, if ever, used. In the Netherlands, although it remains a crime to intentionally insult the king and certain members of the royal family, the most recent conviction for this offense dates back to the 1960s. A similar situation exists in Belgium, Greece, Portugal, Romania or Spain. In still other countries, such as Poland and Italy, although the criminal provision on defamation of the head of state has been applied occasionally, the courts have restricted penalties to a fine. In France, the Press Freedom Law mentioned above was amended in 2000 to remove the option of imprisonment."[78]

Various jurisdictions recognize that providing special protection for public officials creates a discrepancy with the legal principle that officials should tolerate more, not less, criticism, a principle that has repeatedly been endorsed by the European Court of Human Rights and other standard-setting bodies. Still existing special 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.

[76] Council of Europe Information Society Department. (2012). Study on the alignment of laws and practices concerning defamation with the relevant case-law of the European Court of Human Rights on freedom of expression, particularly with regard to the principle of proportionality. CDMSI(2012)Misc11Rev, https://rm.coe.int/study-on-the-alignment-of-laws-and-practices-concerning-alignment-of-l/16804915c5
[77] Scott Griffen. (2017). Defamation..., cit., p. 6.
[78] European Commission for Democracy through Law (Venice Commission). (2016). Opinion on Articles 216, 299, 301 and 314 of the Penal Code of Turkey..., cit.

In his comments on the existing situation with the criminal law on defamation in democratic Europe the then head of Reporters Without Frontiers once said:

"...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."[79]

Or, to use the words of an OSCE diplomat from a Central Asian country: "Maybe they will use their criminal libel legislation tomorrow. We are using it today."[80]

The RFOM recognized that

"criminal defamation laws, meant to protect honor and dignity from untrue or other kinds of libelous statements exist in many of the OSCE participating States. These archaic laws have been a common means of legal pressure on the media. Regardless of whether latent or actively applied, criminal defamation laws are generally used to protect the powerful from criticism. The threat can lead to self-censorship."[81]

[79] Robert Menard.,(2003). Democracies Must Set an Example. In A. Karlsreiter and H. Vuokko (Eds). Ending the Chilling Effect: Working to Repeal 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. Vienna: OSCE: Office of the Representative on Freedom of the Media, p. 14.
[80] Op. cit., p. 20.
[81] OSCE Representative on Freedom of the Media. (2016). Communiqué No.5/2016...., cit.

5. Legal arguments for decriminalization

We have analyzed the legal arguments for decriminalization, such as those provided by the NGO ARTICLE 19 based on legal research and discussions[82] and reinterpreted them in the context of the situation in Lebanon.

1. The first argument is that the criminalization of a particular activity implies a clear **state interference**.

Indeed, criminal defamation law was rooted in authoritarianism and autocracy, in intolerance of dissenting views and opinions, and in distrust of public opinion. It was justified as a way of keeping the masses in their place and in peace (under control), by suppressing information about rulers that might incite unrest or rebellion.

Usually, criminal law is reserved for harmful behavior which exceptionally disturbs the community's sense of security. It seems evident that personal misrepresentation does not fall in here, and should therefore be not subject to penal control. This probably accounts for the limited number of prosecutions and the near disuse of private criminal defamation legislation in democracies.

Criminal defamation prosecutions have evolved into a surrogate for civil lawsuits. Yet they are not an appropriate forum for redressing damage to reputation, because they aim at retribution rather than compensation to the victim, the latter being available through civil litigation.

2. The second argument is that the use of criminal defamation laws to maintain **public order** or to protect other public interests is no longer appropriate.

Historically, criminal libel was believed to be an essential weapon to avert breaches of the peace – through fights, dueling or self-appointed law enforcement – by those who sought compensation for affronts to their reputation. The purpose of the ancient laws was mainly to promote peaceful means of redress in a society characterized by constant threats to public order.

[82] ARTICLE 19. (2017). Defining Defamation: Principles on Freedom of Expression and Protection of Reputation. London, p. 10, https://www.article19.org/data/files/medialibrary/38641/Defamation-Principles-(online)-.pdf

The public order rationale for criminal defamation laws is no longer relevant. Although dueling is no longer a realistic threat, yet most countries retain criminal libel laws on their books under a variety of pretexts.

In this context, defamation laws should neither be used to protect the "reputation" of objects, such as state symbols, flags or national insignia; nor should they be used to protect the "reputation" of the state or nation as such. The only justification for a defamation law is its genuine purpose and demonstrable effect of protecting reputations of individuals against injury that lowers the esteem in which they are generally held, and that exposes them to public ridicule or hatred, or causes them to be shunned or avoided.[83]

3. The third argument is that criminal defamation is generally **abused by the powerful** to limit criticism, even in countries where it is generally applied in a moderate fashion.

It is public officials who most frequently use criminal defamation laws, including through the use of state resources or assistance from the state, to bring cases, though these laws aim at a fundamentally personal nature of protection of one's reputation.

The report on Lebanon by the HRW noted the increasing use of criminal defamation laws by powerful national individuals, such as politicians, prominent business people, high ranking civil servants, etc. According to HRW,the resulting threat of arrest, interrogation, and criminal sanctions have had a chilling effect on free speech in Lebanon. Many of the individuals interviewed by Human Rights Watch reported self-censoring after their often-intimidating experiences resulting from defamation lawsuits.[84]

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.

Preventing journalists from working freely means that ordinary citizens cannot scrutinize the people in power and that there is no need for people in power to observe transparency in their conduct of public affairs. During elections and electoral campaigns, defamation laws can easily be abused to prevent the open discussion of candidates.

Journalists who fear retribution are inclined to engage in self-censorship. That, in turn, discourages the public debate on political issues, which is the lifeblood of any democracy. This, of course, is exactly the effect that governments in jurisdictions that continue to retain and utilize criminal libel want to achieve.

[83] ARTICLE 19. (2004). Memorandum on Albanian Defamation Law by ARTICLE 19 Global Campaign for Free Expression, Commissioned by the Representative on Freedom of the Media of the OSCE. September. https://www.osce.org/files/f/documents/1/0/29581.pdf.
[84] Human Rights Watch. (2019)."There is a Price..., cit.

4. The fourth argument is that the criminalization of a particular activity has a **chilling effect on free speech**.

As discussed above, the report by the HRW noted that the use of criminal defamation laws has had a chilling effect on free speech in Lebanon, with many of their interviewees reporting self-censorship after facing defamation lawsuits. Others noted the increasing use of criminal defamation laws has created a hostile environment in Lebanon for free speech and deterred others from writing freely. Seeing fellow citizens facing possible prison time or trials in military court for complaining about performance of various authorities, corruption, or security service misconduct, some interviewees told the HRW that they took notice and were less likely to draw attention to such problems themselves, undermining effective governance and a vibrant civil society.[85]

The report noted that although "few individuals have served prison time in Lebanon on defamation charges, those subject to criminal prosecution have told Human Rights Watch about the negative impact of simply facing criminal investigations and trials."[86]

"Defendants in criminal defamation cases interviewed by Human Rights Watch endured a number of difficult consequences as a result of the charges against them. Some were forced into self-imposed exile for fear of arrest or harassment upon return to Lebanon, causing stress and hardship to themselves and their families. Others endured professional consequences as a result of the claims against them including reporting being unfairly dismissed from their job. Many do not hear from the prosecution for long periods of time, leaving them confused as to whether the cases against them were still active or not. The fines and other sanctions resulting from the criminal process have also had a significant financial impact on many defendants and the publications they work for."[87]

Thus, the sanctions that flow from criminal defamation constitute a profound threat to freedom of expression and to the free flow of information. The threat of harsh criminal sanctions, especially imprisonment, as well as of suspended prison sentences, or any other form of deprivation of liberty, "suspension of the right to express oneself through any particular form of media, or to practice journalism or any other profession,"[88] or excessive fines exert a profound chilling effect, including for the journalists. The professional ramifications of criminal defamation for the media actors include declining safety in carrying out the job and thus declining quality of the media.

[85] Human Rights Watch. (2019)."There is a Price..., cit.
[86] Human Rights Watch. (2019)."There is a Price..., cit.
[87] Human Rights Watch. (2019)."There is a Price..., cit.
[88] ARTICLE 19. (2017). Defining..., cit.

5. The fifth argument is that criminal defamation stifles debate on issues of **public interest**.

The report published by the Human Rights Watch observes that the Lebanese lawyers who have defended individuals in defamation cases, as well as free speech experts, say that because judges in the Publications Court are not well versed on international free speech standards, they apply the law literally, and are sometimes unable to effectively balance the public interest in the criticism of public officials with the right of an individual to protect their dignity.[89]

The protection of expressions that are of public interest is an essential requirement of a democratic society, deserving the highest guarantees. Nevertheless, statements of public interest are difficult to frame in a strict category as matters that may have an impact on society and on the general welfare of the population may be hard to identify beforehand. By listing some topics but not others judges may be encouraged to limit the categories of public interest speech. It is important to recognize that the categories of public interest speech are not closed ones, and, moreover, that it is not the topic that determines the scope of protection but rather the nature/content of the speech in the particular case.[90]

This "nature" generally amounts to the contribution to a public political debate. As was held by the ECtHR,

"a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who … does not exercise official functions. While in the former case the press exercises its vital role of 'watchdog' in a democracy by contributing to 'imparting information and ideas on matters of public interest …', it does not do so in the latter case."[91]

6. The sixth argument is that **non-criminal sanctions** in redressing any harm to individuals' reputations – and even alternative dispute resolution mechanisms – are adequate.

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. 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.[92]

One of the remedies is self-regulation, whereby the media revises its statement and prints an apology or a correction. When something is said or published that is factually incorrect, correcting it quickly limits the harm done to the greatest extent possible.

[89] Human Rights Watch. (2019)."There is a Price…, cit.
[90] See: European Commission for Democracy through Law (Venice Commission), Opinion the Legislation Pertaining to the Protection against Defamation of the Republic of Azerbaijan…, cit.
[91] ECtHR, Van Hannover v. Germany, Application no. 59320/00, judgment of 24 September 2004, § 63
[92] Toby Mendel. (2004)., " Criminal defamation…, cit.

6. Conclusions and recommendations

The report on Lebanon by the HRW noted that for a variety of reasons criminal defamation laws are increasingly seen as inconsistent with the conditions set forth in the ICCPR. “Even where they are inspired by legislators’ genuine desire to encourage people to responsibly exercise their freedom of expression, criminal defamation laws pose a particularly significant risk of violating the principles of legality, proportionality, and necessity”[93] and represent a breach of the right to freedom of opinion, expression through speech and writing, and the freedom of the press – all guaranteed by the Constitution of Lebanon.

A number of studies conducted by Maharat Foundation during the 2020-2022 period also point to the need for the Lebanese State to prioritize decriminalizing defamation and insult.[94]

Hence, seeking a fair balance between the protection of individuals’ reputation and the freedom to receive or impart information, alongside the proportionality principle, are key requirements for legislators and judges in addressing cases of defamation, including on the internet.

In this regard, the sanctions under the Criminal Code of Lebanon are too severe to be proportionate due to their potentially chilling effect, the potential impact of a criminal record on the individual concerned and the fact that they leave room for court decisions that potentially lead to deprivation of liberty. Even the mere threat of punishment for defamation with the possibility of a criminal penalty such as imprisonment is sufficient to cause such an effect, restraining freedom of speech. Under no circumstances should defamation law in Lebanon provide a special protection for domestic or foreign heads of state or government, public officials, whatever their rank or status. At the very least, this offense should be limited to the most serious forms of verbal attacks against heads of states while at the same time restricting the range of sanctions to those not involving imprisonment.[95]

[93] Human Rights Watch. (2019).“There is a Price…, cit. .
[94] See Global Forum for Media Development, Maharat Foundation, Samir Kassir Foundation, UNESCO IPDC. (2003). Consultation on media viability in Lebanon. Report. Beirut, pp. 5, 8, 9, 14. https://docs.google.com/document/d/1dLnZmLkS8ybiPBCz26K7MhwENo7r5m7j/edit
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