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Towards decriminalisation of defamation

Report
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Jaume BARTUMEU CASSANY, Andorra

Summary

Freedom of expression, guaranteed by Article 10 of the European Convention on Human Rights, as interpreted by the European Court of Human Rights, is one of the cornerstones of all democracy, ensuring its vitality.

While anti-defamation laws can pursue legitimate aims, criminal sanctions may have a "chilling effect" and restrict free debate. Improper use of these laws – whether in the criminal or the civil sphere – places a real "sword of Damocles" over all who wish to avail themselves of their freedom of expression, especially the media. Ultimately, the whole of society suffers the consequences of the pressure that may be placed on journalists.

That is why the Assembly deemed it expedient to address this issue. The Committee on Legal Affairs and Human Rights now invites it to take a clear stance for the outright abolition of prison sentences and against disproportionate award of damages.

The Committee of Ministers is also invited to ask all member states to review their defamation laws; to prepare a recommendation aimed at eradicating abusive recourse to criminal proceedings; and to revise Recommendation No. R (97) 20 on "hate speech", in the light of the European Court of Human Rights' evolving case law.

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A. Draft resolution

1. The Parliamentary Assembly, recalling its Recommendation 1589 (2003) and its Resolution 1535 (2007), unequivocally reiterates that freedom of expression is a cornerstone of democracy. Where there is no real freedom of expression, there can be no real democracy.

2. The Assembly states from the outset that the press plays a fundamental role in promoting debate on issues of public concern; and debate of that kind – as transparent as possible – is vital to democracy.

3. The Assembly draws attention to its Resolution 1003 (1993) on the ethics of journalism and emphasises that those who exercise the right to freedom of expression also have duties and obligations. They must act in good faith and provide accurate, trustworthy information in compliance with journalistic ethics.

4. As established in the case law of the European Court of Human Rights, Article 10 of the European Convention on Human Rights guarantees freedom of expression in respect not only of "'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also of those that offend, shock or disturb".

5. The Assembly notes that freedom of expression is not unlimited and that it may prove necessary for the state to intervene in a democratic society, provided that there is a solid legal basis and that it is clearly in the public interest, in accordance with Article 10, paragraph 2, of the European Convention on Human Rights.

6. Anti-defamation laws pursue the legitimate aim of protecting the reputation and rights of others. The Assembly nonetheless urges member states to apply these laws with the utmost restraint since they can seriously infringe freedom of expression. For this reason, the Assembly insists that there be procedural safeguards enabling anyone charged with defamation to substantiate their statements in order to absolve themselves of possible criminal responsibility.

7. In addition, statements or allegations which are made in the public interest, even if they prove to be inaccurate, should not be punishable provided that they were made without knowledge of their inaccuracy, without intention to cause harm, and their truthfulness was checked with proper diligence.

8. The Assembly deplores the fact that in a number of member states prosecution for defamation is misused in what could be seen as attempts by the authorities to silence media criticism. Such abuse – leading to a genuine media self-censorship and causing progressive shrinkage of democratic debate and of the circulation of general information – has been denounced by civil society, notably in Albania, in Azerbaijan as well as in the Russian Federation.

9. The Assembly concurs with the clear position adopted by the Secretary General of the Council of Europe, who has denounced threats of prosecution for libel as "a particularly insidious form of intimidation". The Assembly views such aberrant use of anti-defamation laws as unacceptable.

10. The Assembly also welcomes the efforts of the Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe (OSCE) in favour of decriminalising defamation, and his unfaltering commitment to media freedom.

11. It notes with great concern that in many member states the law provides for prison sentences for defamation and that some still impose them in practice – Azerbaijan and Turkey, for example.

12. Every case of imprisonment of a media professional is an unacceptable hindrance to freedom of expression and entails that, despite the fact that their work is in the public interest, journalists have a sword of Damocles hanging over them; the whole of society suffers the consequences when journalists are gagged by pressure of this kind.

13. The Assembly consequently takes the view that prison sentences for defamation should be abolished without further delay. In particular it exhorts states whose laws still provide for prison sentences – though prison sentences are not actually imposed – to abolish them without delay so as not to give any excuse, however unjustified, to those countries which continue to impose them, thus provoking a corrosion of fundamental freedoms.

14. The Assembly likewise condemns abusive recourse to unreasonably large awards for damages and interest in defamation cases and points out that a compensation award of a disproportionate amount may also contravene Article 10 of the European Convention on Human Rights.

15. The Assembly is aware that abuse of freedom of expression can be dangerous, as history shows. As recently acknowledged in a framework decision applicable to member countries of the European Union, it must be possible to prosecute those who incite violence, promote negationism or racial hatred, conduct inimical to the values of pluralism, tolerance and open-mindedness which the Council of Europe and the Convention promote.

16. Lastly, the Assembly would reaffirm that protection of journalists' sources is of paramount public interest. Journalists prosecuted for defamation must be allowed to protect their sources or to produce a document in their own defence without having to show that they obtained it through lawful channels.

17. The Assembly accordingly calls on the member states to:

17.1. abolish prison sentences for defamation without delay;

17.2. guarantee that there is no misuse of criminal prosecutions for defamation and safeguard the independence of prosecutors in these cases;

17.3. define the concept of defamation more precisely in their legislation so as to avoid an arbitrary application of the law and to ensure that civil law provides effective protection of the dignity of persons affected by defamation;

17.4. in accordance with General Policy Recommendation No. 7 of the European Commission against Racism and Intolerance (ECRI), make it a criminal offence to publicly incite violence, hatred or discrimination, or to threaten an individual or group of persons, for reasons of race, colour, language, religion, nationality or national or ethnic origin where those acts are deliberate;

17.5. make only incitement to violence, hate speech and promotion of negationism punishable by imprisonment;

17.6. remove from their defamation legislation any increased protection for public figures, in accordance with the European Court of Human Rights' case law, and in particular calls on:

17.6.1. Turkey to amend Article 125.3 of its Criminal Code accordingly;

17.6.2. France to revise its law of 29 July 1881 in the light of the European Court of Human Rights' case law;

17.7. ensure that, under their legislation, persons pursued for defamation have appropriate means of defending themselves, in particular means based on establishing the truth of their assertions and on the general interest, and calls in particular on France to amend or repeal Article 35 of its law of 29 July 1881 which provides for unjustified exceptions preventing the defendant from establishing the truth of the alleged defamation;

17.8. set reasonable and proportionate maxima for awards for damages and interest in defamation cases so that the viability of a defendant media organ is not placed at risk;

17.9. provide appropriate legal guarantees against awards for damages and interest that are disproportionate to the actual injury;

17.10. bring their laws into line with the case law of the European Court as regards the protection of journalists' sources.

18. The Assembly calls on journalists' professional organisations to draw up codes of journalistic ethics if they have not already done so.

19. It welcomes the moves by the Turkish authorities to amend Article 301 of the Turkish Criminal Code concerning "denigration of Turkishness" and strongly encourages them to pursue that course of action without delay.

B. Draft recommendation

1. The Parliamentary Assembly, referring to its Resolution … (2007) entitled "Towards decriminalisation of defamation", calls on the Committee of Ministers to urge all member states to review their defamation laws and, where necessary, make amendments in order to bring them into line with the case law of the European Court of Human Rights, with a view to removing all risk of abuse or unjustified prosecutions;

2. The Assembly urges the Committee of Ministers to instruct the competent intergovernmental committee, the Steering Committee on the Media and New Communication Services (CDMC) to prepare, following its considerable amount of work on this question and in the light of the Court's case law, a draft recommendation to member states laying down detailed rules on defamation with a view to eradicating abusive recourse to criminal proceedings.

3. In addition, bearing in mind the considerable work done on hate speech by the Steering Committee for Human Rights (CDDH), particularly its Committee of Experts for the Development of Human Rights (DH-DEV), the Assembly suggests to the Committee of Ministers that it instruct the CDDH to revise its Recommendation No. R (97) 20 or to prepare guidelines taking into account new developments on this subject, notably as regards the European Court of Human Rights' case law.

C. Explanatory memorandum, by Mr Bartumeu Cassany

1. Interpretation of the terms of reference

1. On 6 June 2005, the Bureau submitted the proposal contained in Doc. 10531 to the Committee on Legal Affairs and Human Rights for report (Reference No. 3087). The committee appointed me its rapporteur on 7 November 2005 (to replace the former rapporteur, Mr Holovaty).

2. The Sub-Committee on Crime Problems and the Fight against Terrorism, which I chair, held an exchange of views on this issue on 5 October 2006. Ms Akcay (Turkey), Vice-Chair of the Steering Committee for Human Rights (CDDH), and Ms Zankova (Bulgaria), member of the Bureau of the Steering Committee on the Media and New Communication Services (CDMC), were asked for their views.[1]

3. The rapporteur wishes to note at the outset that opinions differ on whether or not defamation should be decriminalised.

4. The rapporteur will show that current legislation of Council of Europe member states mostly provides for defamation to come under the criminal law and for an offence to be punishable, at least in theory, by a custodial sentence.

5. While this is the legal situation, it has to be said that few states have in fact recourse to such sanctions even though they are provided for by law.

6. It is therefore necessary to ask whether the criminallaw penalties incurred in the case of defamation are really appropriate and properly meet the objective of protecting the reputation and rights of others.

7. In order to avoid repetition, the rapporteur refers the reader for more precise information to the very extensive report drawn up by the Steering Committee on the Media and New Communication Services (CDMC) published in March 2006.[2]The overview of the legislation in force will accordingly be presented in a more or less summary form as it appears in some detail in the CDMC's report.

2. Definition of concepts

8. Defamation may be an affirmation of facts in written or other form, or an oral or gestural expression of what is referred to as "slander". In order to be considered defamatory, an affirmation of fact must be public, harm a person's reputation and be false. Insult, in contrast to defamation, does not imply an allegation of a specific fact.

9. In its report, the CDMC notes that theoretical distinctions between defamation and insult are not always clear in practice, and points out that "because of their poor wording and construction, defamation laws are frequently applied to insult".

10. This is why it considers that "the term defamation is used to describe statements of facts, whether they are true or false, and opinions which harm the reputation of others and/or are offensive; it can also extend to particular symbols of the state (for example, flag, anthem)".[3]

11. Furthermore, several non-governmental organisations (NGOs) have also given thought to the issue, looking at both defamation and insult and condemning the misuse that may be made of the relevant legislation.[4]

12. It is the intention here as well to adopt this broad-brush approach, so as to take account of all the possible cases encountered in practice, while maintaining the distinction between the two types of offence against honour and reputation. Member states should revise their legislation in order to better define the terms used, so as to prevent any confusion and, consequently, any risk of arbitrary application of the law.

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1. Details of the discussion are contained in the minutes of the sub-committee's meeting.
2. CDMC(2005)007; the CDMC (then still called the Steering Committee on the Mass Media (CDMM)) was charged by a Committee of Ministers decision of 24 November 2004 to examine "the alignment of the laws on defamation with the relevant case law of the European Court of Human Rights, including the issue of decriminalisation of defamation"; also see the reply of the CDMC to the Committee of Ministers, CDMC(2006)028.
3. Ibid.
4. See, *inter alia*, "Rights vs Reputations – Campaign against the abuse of defamation and insult laws", Article 19, 2003.

3. Overview of the legislation in member states: lack of harmonisation

13. The aim of the legislation on defamation is to guarantee the protection of the reputation of others.

14. There is as yet no legislative harmonisation in the Council of Europe member states on the question of the criminal or civil law character of sanctions imposed for defamation, but most member states still provide for criminal sanctions.

15. Maximum prison sentences incurred range from one year (in Croatia, Iceland, Latvia and San Marino) to five years (in Armenia, Azerbaijan, Germany, Italy and Slovakia). It may be noted that in several cases stiffer sentences are incurred for defamation of the head of state (including Italy, Portugal and Turkey) or, where appropriate, the royal family (Netherlands, Norway). There is a specific provision in Poland that provides for a maximum sentence of ten years' imprisonment in the case of a public insult by a mass communication medium against the Polish nation, its political system or its principal organs. This is an exception regarding both the severity of the punishment provided for and the nature of the offence as such.

16. It should be pointed out that, while the majority of member states provide for criminal sanctions (including imprisonment) in the case of defamation, few actually impose custodial sentences in practice.

17. However, a significant number of member states have recently decriminalised defamation and accordingly now only provide for redress under the civil law.[5]Civil proceedings can result in the award of considerable amounts in damages.

18. Quite a large number of member states establish in their respective legislation various arguments that may be put forward by the defence, such as truth, the public interest and, sometimes, good faith.

4. Context: freedom of expression a cornerstone of democracy

19. It will suffice at this juncture briefly to reiterate certain elements of the legal framework defined by the European Court of Human Rights in Strasbourg ("the Court").

20. Article 10 of the European Convention on Human Rights guarantees the right to freedom of expression. This provision is the subject of an extensive body of case law established by the Court, which gives it a particularly broad interpretation.

21. Pluralism, tolerance and open-mindedness – and, accordingly, a democratic society – can only exist if free public debate is possible.

22. This is why the restrictions provided for in paragraph 2 of Article 10 of the European Convention on Human Rights are interpreted particularly narrowly by the Court[6]and why the Court only allows states very limited room for manoeuvre with regard to restrictions on freedom of expression.

23. In the *Handyside* judgment, the Court stated that freedom of expression "constitutes one of the essential foundations" of a democratic society. The protection given to this freedom applies 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".[7]

24. The defamation debate is clearly taking place much more in the context of press freedom than that of individual freedom of expression. Journalists are obviously more often prosecuted for defamation than others, and this happens virtually systematically because of the statements they make about public and/or political figures.

25. The press has a "public watchdog" role, which has been upheld in case law and has been acknowledged on many occasions by the Court,[8]which stresses the key role played by the media in democratic societies.

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5. This is, for example, the case in Bosnia and Herzegovina, Cyprus, Estonia, Georgia, Moldova, "the former Yugoslav Republic of Macedonia", Romania and Ukraine.

6. The Court has stated, for example, that in the context of "a political debate on matters of general interest, […], restrictions on the freedom of expression should be interpreted narrowly"; *Lopes Gomes da Silva v. Portugal*, 28 September 2000, paragraph 33.

7. *Handyside v. the United Kingdom*, judgment of 7 December 1976, paragraph 49.

26. It is necessary to distinguish between facts and opinions (including value judgments, criticism and satire). In the case of the latter, the possibility of state interference is reduced even more in order to avoid the effect of self-censorship in the expression of opinions for fear of prosecution. The Assembly very clearly drew this distinction in its Resolution 1003 (1993), by declaring that "(t)he basic principle of any ethical consideration of journalism is that a clear distinction must be drawn between news and opinions, making it impossible to confuse them. News is information about facts and data, while opinions convey thoughts, ideas, beliefs or value judgments on the part of media companies, publishers or journalists."[9]

27. Finally, and this is crucially important, any state interference with freedom of expression must be necessary in a democratic society, that is, it must meet a "pressing social need".[10]

5. Appeals in favour of the decriminalisation of defamation

28. The Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe (OSCE) has made determined efforts to bring about the decriminalisation of defamation. He has taken numerous steps and made a number of statements on this subject and is having some success.

29. The Representative on Freedom of the Media is becoming involved not only by denouncing the imprisonment of journalists on the basis of defamation legislation and by calling on the authorities of the states concerned to decriminalise defamation, but also by organising and participating in round tables on this issue. A round table has, for example, been organised in Azerbaijan to which both members of the government and representatives of civil society were invited. He is also providing his support in the preparation of draft laws on defamation.

30. In 2003, the OSCE and Reporters Without Borders (RWB) jointly organised a round table on defamation in the OSCE countries, at the conclusion of which several recommendations were adopted that, *inter alia*, call for the repeal of criminal laws on libel and slander and those on insulting politicians that give excessive protection to the powers that be. They also emphasise the narrow interpretation to be applied to what might be considered defamatory by limiting it to statements of fact, excluding expression of opinions.[11]

31. The Secretary General of the Council of Europe stated unequivocally in May 2006 that he was in favour of the decriminalisation of defamation: "A particularly insidious form of intimidation is the threat of prosecution for libel."[12]

32. The Assembly has also adopted several relevant texts, in some of which it has been quite bold in its conclusions on the decriminalisation of defamation by recommending in specific cases, for example to Albania, that the authorities "repeal or substantially review the criminal defamation laws and reform civil defamation laws, in order to prevent their abusive application".[13]

6. Situations to be distinguished

33. The rapporteur wishes to distinguish between different situations in order to establish whether criminal law is an appropriate response in particular cases.

6.1. Politicians and heads of state

34. The key judgments that make up the case law on freedom of expression include *Lingens v. Austria*, in which the Court states that "(f)reedom of the press […] affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. […] The limits of acceptable criticism are

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8. The Court has ruled that the margin of appreciation afforded to national authorities is limited by the interest democratic societies have in enabling the press to exercise its vital role of "public watchdog" in imparting information of serious public concern (see the *Goodwin v. the United Kingdom* judgment of 27 March 1996, Reports 1996-II, p. 500, paragraph 39).

9. Parliamentary Assembly Resolution 1003 (1993) on the ethics of journalism.

10. As the Court states in its established case law.

11. See the recommendations of 25 November 2003 adopted at the conclusion of the Conference on Libel and Insult Laws organised by the OSCE Representative on Freedom of the Media and RWB in Paris on 24 and 25 November 2003.

12. See the Secretary General's press release of 2 May 2006.

13. Resolution 1377 (2004) on honouring of obligations and commitments by Albania; see also Recommendation 1589 (2003) on freedom of expression in the media in Europe.

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."[14]

35. The Court thus considers, and has reiterated this on numerous occasions,[15]that public figures, especially politicians, who more often than anyone else are the targets of what may be qualified as defamation, must accept greater criticism than private individuals simply because of their official functions.

36. Any legal provision that gives politicians, members of the government and senior officials greater protection against defamation is therefore incompatible with Article 10 of the ECHR.[16]

37. Mention should also be made of the declaration on freedom of political debate in the media adopted by the Committee of Ministers on 12 February 2004, which states that "(t)he state, the government or any other institution of the executive, legislative or judicial branch may be subject to criticism in the media. Because of their dominant position, these institutions as such should not be protected by criminal law against defamatory or insulting statements. Where, however, these institutions enjoy such a protection, this protection should be applied in a restrictive manner, avoiding in any circumstances its use to restrict freedom to criticise. Individuals representing these institutions remain furthermore protected as individuals."

38. In addition, the Court has applied the same case law with regard to allegations of defamation against heads of foreign governments and heads of state.[17]

39. Following the Court's judgment against it,[18]France amended its legislation and, by the Law of 9 March 2004, repealed Section 36 of the Law of 29 July 1881, which made it an offence punishable by twelve months' imprisonment and/or a fine of about €45 000 publicly to insult heads of foreign states, heads of foreign governments and ministers of foreign affairs of foreign governments. Some observers note that several provisions of the French law on press freedom were repealed after repeated censure by the Strasbourg Court, and that these one-off amendments have led to certain inconsistencies in this law.[19]It might therefore be useful for French legislation on the press to undergo a thorough review so as to bring it consistently into conformity with the case law of the Court.[20]In this context, the rapporteur notes that Irish legislation is currently undergoing complete reform and that a draft law on defamation was published in June 2006. This reform, which is long awaited – as much by media professionals as by academics – aims to revise legislation in order to bring it into line with the case law of the Court.[21]

40. The OSCE has highlighted the need to amend certain provisions of the new Turkish Penal Code, so as to bring it into conformity with international standards on freedom of expression, including Article 125(3) thereof. This article provides for heavier penalties for slandering official public figures (accompanied by a prison sentence).[22]Such a provision seems to conflict with the aforementioned case law of the Court.

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14. See *Lingens v. Austria* judgment, 8 July 1986, paragraph 42.
15. Ibid. see also the *Oberschlick v. Austria* judgment, 1 July 1997, paragraph 29.
16. See also in this context "Putting Expression Behind Bars: Criminal Defamation and Freedom of Expression", Article 19, Background Paper for EU NGO Forum, 8-9 December 2005.
17. See the *Colombani and Others v. France* judgment, 25 June 2002, paragraphs 68-69; see on this subject "L'inconventionnalité du délit d'offense envers les chefs d'Etat étrangers" (The incompatibility with the Convention of the offence of insulting a foreign head of state), by Bernard Beignier and Bertrand de Lamy, in *Le Dalloz*, 2003, No. 11, pp. 715-19 (in French only).
18. Ibid.
19. One result, for instance, is that French law now reduces foreign heads of state to the status of ordinary individuals, who therefore enjoy less protection than French mayors (who, for their part, enjoy protection under Article 31 of the law of 1881); among further reading, see "Le délit d'offense envers un chef d'Etat étranger à l'épreuve de la Convention européenne des droits de l'homme" (The offence of insulting a foreign head of state measured against the European Convention on Human Rights), by Patrick Wachsmann, in *RTDH* (55/2003), pp. 975-97 (in French only).
20. On this subject see "L'inconventionnalité du délit d'offense envers les chefs d'Etat étrangers", by Bernard Beignier and Bertrand de Lamy, op. cit, p. 719, and "Le délit d'offense envers un chef d'Etat étranger à l'épreuve de la Convention européenne des droits de l'homme", by Patrick Wachsmann, in *RTDH* (55/2003), op. cit., pp. 996-97. In this article, the writer describes French law on the press as "archaic".
21. See "Reforming media law in Ireland", Marie McGonagle, *Communications Law Journal*, August 2006; see also the explanatory report to the draft law.
22. The new Turkish Penal Code was adopted on 27 May 2004 and came into force on 1 June 2005; see "Review of the draft Turkish Penal Code: Freedom of Media Concerns", OSCE, May 2005.

6.2. Attacks on state symbols

41. It would appear to be generally agreed that this matter is not to be considered in the context of defamation. However, the abuse of specific legal provisions which guarantee, in certain member states, the protection of national symbols, risks restricting the freedom of expression in a similar way as the abuse of anti-defamation legislation. That is why the rapporteur has chosen to mention this issue here. He notes that the Representative on Freedom of the Media has asked the Turkish authorities to repeal Article 301 of the Turkish Penal Code concerning the "denigration of Turkishness".[23]The Council of Europe, the European Union and the OSCE have also expressed serious concerns about this provision, even going as far as to call for its repeal.[24]At the end of 2006, the Turkish Prime Minister, Recep Erdogan, said he was prepared to amend this law restricting freedom of expression,[25]and it is reported that the government has started discussions on this with civil society. The rapporteur welcomes this initiative and hopes that concrete results will be achieved very soon.[26]

6.3. Criminal nature of the sanction

42. With regard to restrictions on freedom of expression, there is one element that is prevalent in the reasoning of the European Court of Human Rights, namely respect for proportionality. For example, the Court states: "Nevertheless it certainly remains open to the competent state authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks".[27] The Committee of Ministers' Declaration on freedom of political debate in the media clearly backs this position.[28]

43. While the Court has never considered recourse to criminal sanctions as such as a violation of Article 10 of the European Convention on Human Rights, it has ruled that "the 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".[29]

44. Might taking the civil route presently be always considered a far more appropriate way of responding to unjustified attacks and criticism from the media?

45. The case law of the French Court of Cassation, meeting in plenary session, will be noted with interest: it states that "abuses of freedom of expression governed by and punishable under the law of 29 July 1881 cannot be redressed on the basis of Article 1382 of the Civil Code".[30]The Court held that such a means of redress based on the Civil Code would enable individuals who claim to have been defamed to escape the procedural requirements of the 1881 law aimed at protecting the press. The Court of Cassation thus considers that in this case the 1881 law, although it provides for sanctions under the Criminal Code, gives greater protection to freedom of the press than the provisions of the Civil Code.

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23. See, for example, its press release of 17 October 2006; in Turkey, according to Human Rights Watch, "more than 50 people have been indicted for statements or speeches that questioned state policies on controversial topics such as religion, ethnicity and the role of the army". See Human Rights Watch, Country Summary Turkey, January 2007.
24. See Parliamentary Assembly Resolution 1535 (2007) on threats to the lives and freedom of expression of journalists, which calls on national parliaments "to abolish laws which place disproportionate limits on freedom of expression and are liable to be abused to incite extreme nationalism and intolerance – for example, the Turkish Parliament as regards Article 301 of the Turkish Penal Code on the 'denigration of Turkishness'"; see also OSCE "Review of the draft Turkish Penal Code: Freedom of Media Concerns", May 2005.
25. See the article in the *International Herald Tribune* entitled "Ankara may amend law on free speech", 5 November 2006.
26. The rapporteur notes that only a major reform of the law and the way it is enforced will provide a proper guarantee of freedom of expression, since many ways of restricting it are permitted by a large number of provisions of Turkish law (see the report of the Monitoring Committee, Doc. 10111, 17 March 2004, paragraph 167). Moreover, Mr Jurgens notes in his report on the implementation of judgments of the European Court of Human Rights that "despite the comprehensive reforms adopted, doubts still remain as to whether the authorities interpret the new provisions in conformity with the European Convention on Human Rights" (see the report of the Committee on Legal Affairs and Human Rights, Doc. 11020, 18 September 2006, paragraph 71 and the relevant appendix).
27. *Okçuog˘lu v. Turkey* (8 July 1999), paragraph 46.
28. "Damages and fines for defamation or insult must bear a reasonable relationship of proportionality to the violation of the rights or reputation of others."
29. *Castells v. Spain* (23 April 1992), paragraph 46.
30. See the two judgments of 12 July 2000, Appeals Nos. 98-10160 and 98-11155.

46. This example shows that in the present situation, as far as civil law is concerned, freedom of the press and freedom of expression could actually suffer as a result of the decriminalisation of defamation. A complete overhaul of the legal provisions, indeed even a redefinition of certain legal concepts, would be necessary.

47. However, let us not forget that the imposition of a criminal sanction, even one not involving a custodial sentence, results in an entry in the criminal record of the person responsible, and this may have serious consequences, both symbolically and in practical terms.

48. The rapporteur is concerned that some member states do not show the necessary moderation in respect of sanctions for defamation, whether these come under criminal or civil law. One example is that of Albania, already condemned by the Parliamentary Assembly in Resolution 1377 (2004).[31] In this resolution, the Assembly calls on the authorities to reform the provisions of both the Criminal and the Civil Code in respect of defamation "in order to prevent their abusive application".[32] In its report on Albania, the European Commission notes attempts by the authorities to influence the information broadcast by the media, *inter alia*, "through systematic recourse to defamation suits".[33] Article 19 has also condemned misuse of the anti-defamation legislation in the Russian Federation.[34]

6.4. Imprisonment for defamation

49. In its declaration on freedom of political debate in the media adopted on 12 February 2004, the Committee of Ministers declared that "(d)efamation or insult by the media should not lead to imprisonment, unless the seriousness of the violation of the rights or reputation of others makes it a strictly necessary and proportionate penalty, especially where other fundamental rights have been seriously violated through defamatory or insulting statements in the media, such as hate speech".

50. The Court recently ruled that "(a)lthough sentencing is in principle a matter for the national courts, the Court considers that the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence".[35]

51. The Court is thus clearly in favour of abolishing prison sentences in defamation cases when there has not been a serious infringement of other fundamental rights.

52. In 2003, the Assembly voiced its opposition to prison sentences for journalists, which it considered unacceptable.[36]

53. A number of Council of Europe member states have now abolished prison sentences in defamation cases.[37] In this context, doubts might be expressed concerning the appropriateness and legality of the prison sentence imposed in Serbia in appeal proceedings against a journalist, Slavko Savic, a few months after the entry into force of the new Criminal Code abolishing prison sentences in defamation cases. Thanks to the efforts undertaken in this connection by the Representative on Freedom of the Media, the public prosecutor raised the question of the legality of this decision by asking the Supreme Court to re-examine the case.[38]

54. There are still cases of imprisonment in several countries, such as Turkey, Azerbaijan, etc. The Representative on Freedom of the Media has pointed to many prosecutions of journalists in Azerbaijan, a large number of which were initiated by government officials. Several journalists are currently in prison following such proceedings. The Representative on Freedom of the Media has expressed his regret that this

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31. Resolution 1377 (2004) on the honouring of obligations and commitments by Albania.
32. Ibid. paragraph 16.iv.
33. Commission Staff Working Paper, "Albania, Stabilisation and Association Report 2004", COM(2004)203 final/ SEC(2004)374/2; also see the letter from Article 19 to the Albanian Minister of Justice dated 25 October 2006.
34. Letter from Article 19 to Vladimir Putin dated 28 September 2006; see also Human Rights Watch, "The pen put to the sword", 7 March 2007.
35. See the *Cumpaˇ naˇ and Mazaˇ re v. Romania* judgment, 17 December 2004, paragraph 115; also see on this subject Nicolas Riou's article on the prohibition of the use of imprisonment as a sanction for using freedom of expression, "L'interdiction de la peine de prison comme sanction de l'usage de la liberté d'expression, CourEDH, Grand Chamber, Cumpaˇna˘ et Mazaˇre c. Roumanie", 17 December 2004, in *L'Europe des libertés*, 4th year, No. 16 (June 2005), p. 17 (in French only).
36. See Parliamentary Assembly Recommendation 1589 (2003) on freedom of expression in the media in Europe.
37. This is, for example, the case with Serbia (since 1 January 2006), "the former Yugoslav Republic of Macedonia", etc.
38. See the regular report by the OSCE Representative on Freedom of the Media of 25 October 2006 (http:// www.osce.org/documents/rfm/ 2006/10/21890_en.pdf).

trend is contrary to President Ilham Aliev's appeal to Azerbaijani officials in March 2005, after the murder of Elmar Huseynov, not to bring prosecutions for defamation against journalists and the media.[39]In the same context, two publishers imprisoned for defaming and insulting public figures were pardoned by presidential decree in October 2006.[40]The Representative on Freedom of the Media has described these pardons as positive developments.[41]Notwithstanding this progress, it is disturbing to note that an editor was sentenced to two and a half years in prison for defamation on 20 April 2007. His conviction is said to have occurred in the context of the authorities' wish to reduce critical media to silence.[42]

55. Journalists are not the only people to be given prison sentences for making use of their freedom of expression. Mr Pourgourides' report on "Fair trial issues in criminal cases concerning espionage or divulging state secrets" is very clear on this subject and shows the injustice of the imprisonment of the scientists Soutiaguine and Danilov for "revealing" information that was already in the public domain.[43]

56. Each of these cases of imprisonment is an unacceptable obstacle to freedom of expression and places a real sword of Damocles over journalists in the exercise of their work in the public interest. The whole of society suffers the consequences of pressure to which muzzled journalists may be subject in the exercise of their profession. The rapporteur believes that custodial sentences for defamation must be abolished without delay, and he urges the Council of Europe member states whose legislation still provides for prison sentences but which have never had recourse to them, to repeal it at the earliest opportunity so as not to give states that still resort to such sanctions an all too obvious excuse, however unjustified it may be, not to repeal similar provisions in their legislation.[44]

6.5. Means of defence and burden of proof for allegations involving a matter of public concern

57. In the light of the Court's case law, when there is no pressing social need, individuals accused of defamation must be able to cite the public interest as a defence. In this case, the protection of the reputation of other people should not take precedence over the communication in good faith of information and opinions on matters of public concern.

58. Moreover, the Court has clearly ruled that, in the case of criminal proceedings, journalists must be able to prove the truth of their statements of fact (*exceptio veritatis*) and thus clear themselves of any criminal responsibility.[45]

59. The deterrent effect of a criminal sanction, however insignificant it may be, puts freedom of expression at risk, so it is all the more important for procedural provisions to afford appropriate protection to journalists and private individuals who are prosecuted for expressing their views.

60. Furthermore, if the accused person is able to prove that the requisite diligence was shown by the publication and that it was therefore reasonable to publish the allegations in question, even if these subsequently prove to have been false, the accused should be acquitted. This demand is based on the finding by the Court that "news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest".[46]The Court also took the view that "the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the contents of official reports without having to undertake independent research".[47]Evidence of good faith[48]guarantees that taking

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39. See the regular report by the OSCE Representative on Freedom of the Media of 25 October 2006 (http://www.osce.org/documents/rfm/ 2006/10/21890_en.pdf).
40. Shahin Agabayli and Samir Adigozalov.
41. See the regular report by the OSCE Representative on Freedom of the Media of 25 October 2006 (http://www.osce.org/documents/rfm/ 2006/10/21890_en.pdf).
42. See "Editor convicted of Libel", AP, 23 April 2007; see also Press Release No. 274 (2007) of the Secretary General of the Council of Europe, 3 May 2007.
43. See Parliamentary Assembly Resolution 1551 (2007) and Doc. 11031.
44. Of interest in this context is an article by E. Derieux, who writes that, "it is, however, neither legally nor intellectually satisfactory to preserve in our national legal armoury provisions which we know that it is neither possible nor desirable to apply. This seriously undermines the notion of law. French legislation nevertheless provides a reference point or model and justification for some countries where there is no hesitation about imprisoning those, journalists or not, found guilty of such offences – and not always with the same guarantees of a complex judicial procedure! We bear a heavy responsibility in that respect!" "Justice pénale et droits des médias" (Criminal justice and media law), in *Justices*, No. 10, April/June 1998, p. 148 (in French only).
45. See the *Fressoz and Roire v. France* judgment, 21 January 1999, paragraph 54.
46. *Sunday Times v. the United Kingdom*, 26 November 1991, paragraph 51.
47. See the *Bladet Tromsø and Stensaas v. Norway* judgment of 20 May 1999, paragraph 68.
48. By which is meant the legitimacy of the aim, sincerity, prudence and objectivity.

advantage of freedom of expression, which allows critical opinions to be voiced, is legitimate on the basis of a sound foundation, even if it is impossible fully to prove its veracity. The Court therefore considers in its case law that allegations not wholly lacking a factual basis are a matter for the exercise of freedom of expression.[49]

61. In this context, it is amazing that Article 35 of the French law on freedom of the press, of 29 July 1881, makes provision for numerous exceptions, cases in which the truth of defamatory facts may not be proven in order to bring proceedings to an end. Article 35 of the law, for instance, states that:

> *"the truth of defamatory facts may always be proven, unless:*
>
> *a. the allegation relates to the private life of the individual;*
>
> *b. the allegation refers to facts which date from more than 10 years previously;*
>
> *c. the allegation refers to a fact constituting an amnestied or time-barred offence, or one which has given rise to a conviction expunged through rehabilitation or retrial".*

62. It seems unjustified not to allow the accused to prove the veracity of defamatory facts if the allegation refers to facts from over ten years previously. Quite the contrary, it is often after fairly long periods of time that evidence emerges or documents become accessible and enable certain facts to be made fully clear. One may be so bold as to draw a comparison with the Court's case law in the *Colombani* judgment and take the view that the Strasbourg Court considered this provision incompatible with the Convention.[50] In effect, the Court considered in this case that the special protection afforded to foreign heads of state, which, unlike ordinary law, prohibited proof of the veracity of the facts, was incompatible with the provisions of Article 10 of the European Convention on Human Rights.[51]

6.5.1. Burden of proof for allegations involving a matter of public concern

63. In the United Kingdom, it is interesting to note a decision that will have considerable consequences in terms of case law, namely the *Jameel v.* Wall Street Journal Europe case, in which the House of Lords ruled that a newspaper was entitled to publish unproved allegations if they were in the public interest, provided that it had done all it could to establish the facts.[52]

64. Not all the member states' legislation is in conformity with this case law and some place the burden of proving the truth of the facts recounted on the journalist.[53]The rapporteur is of the opinion that, in order to guarantee freedom of expression and in society's interest in ensuring matters of public concern are the subject of open debate, the aforementioned case law of the House of Lords should be incorporated in order to establish better protection for journalists' freedom of expression when they have manifestly done everything possible to establish the facts.

6.6. Protection of journalists' sources

65. A fairly awkward question arises as to proof of the veracity of facts considered defamatory. In practice, the right to protection of journalists' sources sometimes means that journalists are unable to reveal the source of their information.[54]

66. The Court has several times affirmed that "protection of journalistic sources is one of the basic conditions for press freedom" and described this protection as being "an overriding requirement in the public interest".[55] It even went so far as to say in the case in point that the obligation to divulge a journalist's source violated the right to freedom of expression within the meaning of Article 10 of the Convention, even though the information had been confidential and the informer had obtained it through unfair means.

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49. It would seem that the Irish draft law on defamation is not completely in line with this case law of the Court; see, on this subject, "Reforming media law in Ireland", Marie McGonagle, *Communications Law Journal*, August 2006.

50. In this context, see "Le délit d'offense envers un chef d'Etat étranger à l'épreuve de la Convention européenne des droits de l'homme", by Patrick Wachsmann, in *RTDH* (55/2003), op. cit., p. 993.

51. See the *Colombani and Others v. France* judgment, 25 June 2002.

52. See the judgment, dated 11 October 2006.

53. See, for example, section 186 of the German Criminal Code.

54. For fuller information, see the Committee of Ministers' Declaration on the provision of information through the media in relation to criminal proceedings (10 July 2003), the Resolution on Journalistic Freedoms and Human Rights, adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994) and the European Parliament Resolution on the Confidentiality of Journalistic Sources, of 18 January 1994, which appeared in *The Official Journal of the European Communities*, No. C 44/34.

67. Developments in national law under the influence of the Court's case law have been particularly conspicuous on this question. One example worth quoting is that of France, where the national judicial authorities had introduced an offence of "concealment of a violation of professional confidentiality or of the investigation process" for cases in which journalists published information on the basis of documents obtained following an offence (committed by their sources and originating, for instance, in a violation of professional confidentiality or in a theft by these sources). The Court took the view that the offence of concealment as thus defined constituted a violation of Article 10 of the European Convention on Human Rights.[56]Furthermore, the offence of concealment may prevent a journalist who is being prosecuted from freeing him or herself from criminal liability, which violates his or her right of defence.[57]

68. Through this case law, the Court has created what has been described in legal theory as a "true immunity of the defence" benefiting journalists prosecuted for defamation, allowing them to keep their sources secret or to produce a document underlying their defence without being able to prove that they received this through channels for which the Criminal Code provides, that is to say, by lawful means.[58]In doing so, the Court has reinforced the right to information, for "without such protection [of journalists' sources], sources may be deterred from assisting the press in informing the public on matters of public interest".[59]

69. It seems that the legislation of a number of member states is not in conformity with the case law of the Court. One example is that of Azerbaijan, where Article 19 reports that the law on defamation may be interpreted in such a way that a refusal to reveal one's sources may be regarded as evidence against a person charged with defamation. Article 19 urges the authorities to clarify the provisions of Article 7 (2) of the law on defamation to render such an interpretation clearly impossible.[60]In this context, the recent decision of the *Bundesverfassungsgericht* (German Constitutional Court) of 27 February 2007 is interesting. This decision has significantly reinforced the protection of journalists' sources, because the searching of a newspaper's (CICERO) premises, with the main aim of discovering the identity of a source, is declared anti-constitutional. The newspaper had published secret documents of the German Federal Intelligence Service (BND).[61]

6.7. Defamation/hate speech and historical revisionism (negationism)

70. The rapporteur is of the opinion that these situations cannot be equated to one another. It is true that defamation – an imprecise statement of facts – and insults can, by their very nature, be hurtful, but hate speech has an entirely different intentional intensity and has much more serious consequences because of the incitement factor.

71. In Recommendation No. R (97) 20, the Committee of Ministers defined hate speech as follows: "the term 'hate speech' shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin".[62]On the other hand, the Committee of Experts for the Development of Human Rights (DH-DEV), which reports to the Steering Committee for Human Rights, notes that no universally acknowledged definition of hate speech exists, and that member states' legislation does not interpret this concept uniformly.[63]

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55. See the *Goodwin v. United Kingdom* judgment, 27 March 1996, paragraphs 39 and 45; also see the *Roemen and Schmit v. Luxembourg* judgment, 25 February 2003, paragraph 46.
56. *Fressoz and Roire v. France* judgment, 21 January 1999.
57. On this subject, see "Le droit de la presse et la diffamation devant la Cour européenne des droits de l'homme" (Press law and defamation in the European Court of Human Rights), Lyn François, in *Revue du droit public*, No. 3-2005, p. 693, and especially p. 699.
58. Ibid., p. 699. This case law has been perceived by legal theory as very, or even as too, liberal and has been subjected to much criticism, with the protection of journalists' sources by the European Court even being described as "blind" (on this subject, see "Le droit de la presse et la diffamation devant la Cour européenne des droits de l'homme", Lyn François, in *Revue du droit public*, No. 3-2005, p. 693, and especially p. 699).
59. See the *Goodwin v. the United Kingdom* judgment, 27 March 1996, paragraph 39.
60. Article 19, Memorandum on the Law of the Republic of Azerbaijan on Defamation, October 2006.
61. See *Spiegel Online*, 27 February 2007, "'Cicero' – Durchsuchung war verfassungswidrig" and: http://www.bundesverfassungsgericht.de/ entscheidungen/rs20070227_1bvr053806.html.
62. See Committee of Ministers Recommendation No. R (97) 20 on "hate speech".
63. On the subject of hate speech in general, see the report of the Committee of Experts for the Development of Human Rights (DH-DEV) on hate speech (GT-DH-DEV_A(2006)008).

72. The European Commission against Racism and Intolerance (ECRI) recommends that the following acts be made criminal offences when committed intentionally: public incitement to violence, hatred or discrimination; threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin.[64]

73. In its case law, the Court draws a distinction between different categories of defamation. Contrary to its position in other defamation cases, it has sometimes happened that the Court has not found a violation of the Convention, even when a prison sentence has been imposed, in cases of defamation involving incitement to violence or the dissemination of hate speech.[65]

74. The Court goes much further by excluding speech that is clearly racist, xenophobic or negationist from the Convention's scope. It bases its reasoning on Article 17 of the Convention, the aim of which is to "withdraw the benefit of these rights from those who wish to use the Convention guarantees since their aim is to call into question the values that the Convention protects".[66]It has held that "(t)he denial or rewriting of this type of historical fact [in the case concerned, the atrocities of the National Socialist regime] undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order".[67]The Court ultimately ruled in the clearest possible fashion that "there can be no doubt that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention".[68]

75. In France, a draft law adopted on first reading by the National Assembly gave rise to particular worries since it makes denial of the Armenian genocide a criminal offence.[69]This would appear to be a development contrary to the established trend towards decriminalisation because its aim is to make denying the Armenian genocide punishable by up to five years' imprisonment or a fine of €45 000. The Representative on Freedom of the Media reacted immediately and called on the French Senate to reject the draft.[70]There was no lack of reactions in this connection: among others, the Green Group in the European Parliament called on the French parliamentarians to vote against the draft law, which, they said, represented a "serious threat to freedom of expression".[71]For its part, the French Government expressed its disagreement with the National Assembly's decision.[72]The Senate has not yet examined the draft. The rapporteur wishes to note that, in his opinion, a priori such a law would be in conformity with the Court's case law, bearing in mind its ruling in the *Garaudy* case. The Court in effect took the view that "the denial or rewriting of this type of historical fact [in this case denial of the Holocaust] undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Its proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention".[73]

76. In this context the rapporteur notes with interest that European Union interior ministers have recently decided to make incitement to racism a crime in all EU member states.[74]It was not easy, however, to reach this agreement, which required over six years of discussions, and it was not possible to reach a consensus on criminalisation pure and simple of negation of the Holocaust.

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64. See the ECRI's general policy recommendation No. 7 on national legislation to combat racism and racial discrimination, CRI(2003)8, 13 December 2002.
65. See the *Cumpaˇ naˇ and Mazaˇ re v. Romania* judgment of 17 December 2004, paragraph 115; also see in this context the work of the Committee of Experts for the Development of Human Rights (DH-DEV) on hate speech (GT-DH-DEV_A(2006)008).
66. "La Cour européenne des droits de l'homme face au discours de haine", Mario Oetheimer, *Revue trimestrielle des droits de l'homme*, January 2007, No. 69, pp. 63-80 (in French only). See with regard to racist speech the principle laid down since the *Jersild v. Denmark* case, 23 September 1994, paragraph 35. With regard to negationism, see the *Lehideux and Isorni v. France* judgment, 23 September 1998, paragraph 53.
67. See the *Garaudy v. France* judgment, 24 June 2003.
68. See the *Gündüz v. Turkey* judgment, 4 December 2003, paragraph 40.
69. See Text No. 610, adopted on 12 October 2006 and sent to the Senate on the same date.
70. See its press release of 17 October 2006.
71. http://verts-europe-sinople.net/article754.html.
72. "Génocide arménien: les députés votent la pénalisation du négationnisme", *Le Figaro*, 12 October 2006 (in French only).
73. See the inadmissibility decision in the case of *Garaudy v. France*, 24 June 2003; also see the *Lehideux and Isorni v. France* judgment of 23 September 1998, § 53 and 47, in which the Court ruled that there was a "category of clearly established historical facts – such as the Holocaust – whose negation or revision would be removed from the protection of Article 10 by Article 17".
74. See "EU agrees new racial hatred law", BBC News, 19 April 2007.

77. Notwithstanding this lack of consensus, and in spite of the fact that there is surely no such consensus among Council of Europe member states either, the Court's position seems to allow criminalisation of the negation of the Holocaust, and possibly of other genocides.

78. Attention is drawn finally to the list of examples of national initiatives intended to prevent "hate speech" and to promote tolerance included in the DH-DEV's report. This list should be able to provide member states with a source of inspiration.[75]

6.8. Amount of damages awarded

79. Here too, the Court has developed a body of case law that advocates respect for the principle of proportionality in the use of fines payable in respect of damages and considers that a disproportionately large award constitutes a violation of Article 10 of the European Convention on Human Rights.[76]In addition, the law must provide adequate and effective safeguards against disproportionate awards, as disproportionate, and sometimes arbitrary, awards are a punishment that far exceeds the redress they are supposed to bring about. In such cases, civil proceedings become improperly akin to proceedings before the criminal courts, with a definite deterrent effect whose consequences are just as serious for freedom of expression and the exercise of the journalistic profession.

80. The Court is also of the opinion that the law must provide for adequate and effective safeguards against awards that are disproportionately large in relation to the actual damage sustained.[77]

81. It is clear that, in the light of the Court's case law, the sanctions (whether criminal or civil) imposed by the courts in the case of proven defamation must be proportionate in order to avoid the effect of media self-censorship. Such an effect can only be harmful in a democratic society because it puts an end to debates and discussions on matters of public interest.

82. The Committee of Ministers also stated this in its declaration on freedom of political debate in the media: "Damages and fines for defamation or insult must bear a reasonable relationship of proportionality to the violation of the rights or reputation of others, taking into consideration any possible effective and adequate voluntary remedies that have been granted by the media and accepted by the persons concerned."

6.9. Offending religious sensitivities

83. The rapporteur points out that it is necessary to avoid mixing up issues of moral conscience and the question of legality. The fact that some editorial statements or choices may offend against the moral values of some readers does not necessarily mean that these choices are reprehensible before the law.

84. The rapporteur recalls Parliamentary Assembly Resolution 1510 (2006) on freedom of expression and respect for religious beliefs which states that "Freedom of thought and freedom of expression in a democratic society must […] permit open debate on matters relating to religion and beliefs", and in which it expresses the opinion that "freedom of expression as protected under Article 10 of the European Convention on Human Rights should not be further restricted to meet increasing sensitivities of certain religious groups".

85. As the Court has ruled, "journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation".[78]In the case of *Bladet Tromsø and Stensaas v. Norway*, the Court reiterates its constant case law in the following terms: "the methods of objective and balanced reporting may vary considerably, depending among other things on the medium in question; it is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted by journalists".[79]Satire is undeniably one such technique.

86. It nevertheless has to be said that satirical freedom has been very much called into question in recent times.

87. Yet clearly, by its very nature, it must be the subject of greater tolerance, without which it would certainly give rise to constant prosecutions and convictions, or become boring and lack any interest. Two grounds may support such flexibility: one is that satire plays a useful role in any democratic society as a fully

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75. See the DH-DEV report on hate speech, p. 28 onwards (GT-DH-DEV_A(2006)008).
76. *Tolstoy Miloslavsky v. the United Kingdom* (13 July 1995), paragraph 51.
77. Ibid., paragraph 51.
78. *Prager and Oberschlick v. Austria*, 26 April 1995, paragraph 38; also see *Dichand and Others v. Austria*, 26 February 2002, paragraph 41.
79. *Bladet Tromsø and Stensaas v. Norway*, 20 May 1999, paragraph 57.

fledged contributor to civil society and democratic debate, while the other is that satire intrinsically contains a clearly identifiable dose of humour. The humorous style must be allowed a particularly broad freedom of expression.

88. It is clear, however, that a humorous style cannot be a pretext for undermining human dignity, or even make possible a deliberate insult designed solely to make a person look foolish or to cause hurt.

89. In its declaration on freedom of political debate in the media, the Committee of Ministers expresses the view that: "The humorous and satirical genre, as protected by Article 10 of the Convention, allows for a wider degree of exaggeration and even provocation, as long as the public is not misled about facts".

90. In this context, it is impossible to make no reference to the case of the Danish cartoons. It is reassuring to note that, in the name of freedom of expression, and with a reference to the case law of the European Court of Human Rights, the prosecutor responsible for this case in France took the view that the offence of public abuse had not been committed and ordered the acquittal of the editor of the satirical newspaper *Charlie Hebdo*, which had reproduced these cartoons.[80]The French courts ultimately acquitted the newspaper, giving an encouraging indication of respect for freedom of expression.[81]

91. Finally, it may be helpful to point out, as noted by the Committee of Experts for the Development of Human Rights (DH-DEV), that the Court "has repeatedly stated that members of a religious community must tolerate the denial by others of their religious beliefs".[82]However, the Court grants broad discretion to member states, which may restrict freedom of expression in the event of gratuitous insulting attacks on religious objects. It is the rapporteur's opinion that the extent of this discretion is still too vague and needs more detailed definition in case law.

6.10. Alternative methods – self-regulation

92. The codes of conduct adopted in certain member states set down a good number of ethical principles by which journalists should abide in their work.[83]Furthermore, the International Federation of Journalists (IFJ) has adopted a declaration of principles on the conduct of journalists, which is one of the reference texts in this sphere.[84]The rapporteur encourages associations of media professionals in member states which do not yet have a code of good conduct for journalists to draw one up on the basis of the case law of the Court in relation to freedom of expression.

93. The rapporteur also points out that appropriate use of the right of reply, or of rectification, may sometimes offer an adequate response to defamatory allegations, particularly in the electronic media. In this context, he draws attention to Committee of Ministers Recommendation Rec(2004)16, in which the Committee of Ministers recommends that the governments of member states "should examine and, if necessary, introduce in their domestic law or practice a right of reply or any other equivalent remedy, which allows a rapid correction of incorrect information in online or off-line media along the lines of the […] minimum principles [set out in the recommendation], without prejudice to the possibility to adjust their exercise to the particularities of each type of media".

7. Conclusions

94. Despite the many statements made, some of them very clear-cut, it is difficult to arrive at a common position that is likely to result in unanimity. The ongoing efforts of the Representative on Freedom of the Media to have defamation decriminalised will no doubt have real consequences in terms of amending legislation but these are limited and will not affect the countries of western Europe which, although they do not impose prison sentences, are not in the process of repealing their criminal legislation relating to defamation.

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80. The prosecutor said that "the European Court of Human Rights allows the principle that freedom of expression may override freedom of religion when religious beliefs are not subjected to attacks, in the context of a debate in society", *Le Monde*, 9 February 2007, -862973,0.html (in French only).

81. See OSCE press release, OSCE Media Freedom Representative welcomes French acquittal in cartoons row, 22 March 2007.

82. See the report of the Committee of Experts for the Development of Human Rights (DH-DEV) on hate speech (GT-DH-DEV_A(2006)008) and the *Nilsen and Johnsen v. Norway* judgment, 25 November 1999, paragraph 52.

83. The aforementioned DH-DEV report (GT-DH-DEV_A(2006)008) lists a number of examples of countries which have adopted codes of good conduct.

84. The IFJ Declaration of Principles on the Conduct of Journalists, first adopted in 1954, sets down the rules of conduct for journalists adopted by all national organisations of journalists' representatives in Europe.

95. In addition, the European Court of Human Rights, which has distinguished itself in many areas with a body of case law that may be described as bold and avant-garde, in this case merely stresses the need to respect the principle that a restriction must be proportionate without considering the criminal nature of the penalty incurred in the case of defamation to be problematic in itself.

96. The criminal law character of defamation has a completely different objective from that pursued in civil proceedings. The authorities have recourse to the criminal law both because of its deterrent effect and because of its symbolic aspect, namely society's expression of its disapproval of an act.

97. By intentionally making false declarations and allegations, it is possible to do considerable harm to the reputation of other people. The consequences may prove irreparable and can, for example, ruin a person's career. If it turns out that this harm has been caused in full knowledge of the facts and with the intention of doing harm, then a criminal sanction and not just civil redress is called for.

98. Quite clearly, declarations or allegations, including false statements, in the public interest should not be punished if they have been made without any knowledge of their falseness and the individual making them has shown due diligence in verifying their truth and had no intention of doing harm.

99. While the criminal law character of the punishment incurred in the case of actual defamation may be acceptable in itself, prison sentences seem disproportionate. A number of cases mentioned in this report clearly show such a measure to be too restrictive of freedom of expression and freedom of the press. The mere risk of imprisonment may lead journalists to practise self-censorship and, therefore, prevent them from freely exercising their profession. Such an impediment, tantamount to muzzling of freedom of expression and freedom of the press, is unacceptable.

100. However, certain forms of defamation may turn out to have more serious consequences than others, and the same applies to insults of a racist nature and hate speech. The rapporteur advocates adopting a balanced approach and retaining the possibility of imposing prison sentences in cases of this type. The aspect of incitement to racial hatred in hate speech must be considered, as must the specific case of negationism.

101. With regard to damages sought in the context of a civil action, the rapporteur calls on member states to show moderation and ensure that their legislation is implemented in conformity with the Court's case law. The award of a very large amount is an equally serious and unacceptable act of interference with freedom of expression.

102. The rapporteur thinks it would be wise to try to differentiate between different situations and, consequently, to propose amendments to the law that would enable freedom of expression to be better protected while ensuring a greater potential degree of acceptance. Simply advocating the decriminalisation of defamation does not at this stage seem to him the best solution for strengthening the guarantees and protection of freedom of expression.

8. Recommendations

103. In the light of the foregoing, and at the present stage of his analysis, the rapporteur makes the following proposals:

8.1. Political figures and heads of state

104. In view of the Court's case law, the rapporteur believes that political figures and heads of state should not enjoy more protection against defamation than ordinary citizens. He calls on member states' legislatures to revise their respective legislation if need be.

8.2. Abolition of imprisonment for defamation

105. The rapporteur thinks that prison sentences must be excluded in the case of defamation. A decision to impose such a sentence appears to be too restrictive in the light of Article 10 of the Convention. In support of this proposal, the rapporteur notes that, while the Court has never condemned criminal sentences per se in defamation cases, it has usually found a violation of Article 10 of the Convention in cases involving a prison sentence.

8.3. Distinction between defamation and hate speech

106. It seems necessary and justified to make a distinction between defamation and hate speech. It might accordingly be recommended that a clear distinction be drawn between hate speech and defamation and that hate speech remain punishable by imprisonment.

8.4. Burden of proof for allegations and the public interest

107. As explained in paragraph 64, it is necessary to work towards better protection for journalists when they have manifestly done everything possible to establish the facts. Without going so far as to reverse the burden of proof, which might be detrimental to public figures' right to privacy, legislative texts must confirm the case law of the Court where the intention is to give journalists the opportunity to prove the veracity of their information and comments, and thus to free themselves from criminal liability.[85]

108. The recent judgment of the House of Lords[86]should also be borne in mind when national legislation is brought into line with the case law of the Court. The ultimate aim is significantly to reduce the self-censorship exercised by journalists in their work when they know that they are at risk of prosecution, when it may be very difficult to prove the veracity of the facts, despite the allegations not being false.

8.5. Amount of damages

109. The amount of the award fixed by courts in civil proceedings must be reasonable and proportionate to the damage sustained. The award must in no case be such as to include, by reason of its magnitude, a disproportionate punitive element (which would not be appropriate in civil law)[87]and must be confined to achieving its objective of reparation. Legislation should provide for guarantees in this connection.

110. In addition, the rapporteur believes that the Assembly should invite member states:

– to demonstrate prudence and restraint when taking criminal proceedings for defamation;

– to give a more precise definition in their legislation of the concept of defamation, with a view to preventing arbitrary application of the law;

– to guarantee in their legislation appropriate grounds of defence to persons prosecuted for defamation, and in particular grounds based on the *exceptio veritatis* and the public interest;

– to bring their legislation into conformity with the case law of the Court in respect of the protection of journalists' sources;

– to adopt, if they have not yet done so, codes of ethics relating to journalism.

111. Finally, the rapporteur is convinced that urgent action by the Council of Europe is necessary to promote the strict alignment with the case law of the European Court of Human Rights of national legislation relating to defamation and its application, and suggests proposing that the Committee of Ministers:

– instruct the competent intergovernmental committee, the Steering Committee on the Media and New Communication Services (CDMC), to prepare, following its considerable amount of work on this question and in the light of the Court's case law, a draft recommendation to member states laying down detailed rules on defamation with a view to eradicating abusive recourse to criminal proceedings; and

– in addition, bearing in mind the considerable work done on hate speech by the Steering Committee for Human Rights (CDDH), particularly its Committee of Experts for the Development of Human Rights (DH-DEV), that the Committee of Ministers instruct the CDDH to revise its Recommendation No. R (97) 20 or to prepare guidelines taking into account new developments on this subject, notably as regards the Court's case law.

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Reporting committee: Committee on Legal Affairs and Human Rights.

Reference to committee: Doc. 10531 and Reference No. 3087 of 6 June 2005.

Draft resolution and draft recommendation unanimously adopted by the committee on 14 May 2007.

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85. See the *Fressoz and Roire v. France* judgment, 21 January 1999, paragraph 54.
86. See the *Jameel* judgment of 11 October 2006.
87. *Tolstoy Miloslavsky v. the United Kingdom*, 13 July 1995, paragraph 51.

Members of the committee: Mr Dick **Marty** (Chairperson), Mr Erik Jurgens (alternate: Mr Frans **Weekers**), Mr György Frunda (alternate: Mr Vasile **Ungureanu**), Mrs Herta **Däubler-Gmelin** (Vice-Chairpersons), Mr Athanasios **Alevras**, Mr Miguel Arias, Mr Birgir Ármannsson, Mrs Aneliya Atanasova, Mr Abdülkadir Ates¸, Mr Jaume **Bartumeu Cassany**, Mrs Meritxell Batet, Mrs Soledad Becerril, Mrs Marie-Louise **Bemelmans-Videc**, Mr Erol Aslan **Cebeci**, Mrs Pia Christmas-Møller, Mrs Ingr¯ıda **Circene**, Mrs Lydie Err, Mr Valeriy Fedorov, Mr Aniello Formisano, Mr Jean-Charles Gardetto, Mr József Gedei, Mr Stef Goris, Mr Valery Grebennikov, Mr Holger Haibach, Mrs Gultakin Hajiyeva, Mrs Karin Hakl, Mr Nick Harvey (alternate: Mr Christopher **Chope**), Mr Andres Herkel, Mr Serhiy **Holovaty**, Mr Michel Hunault, Mr Rafael **Huseynov**, Mrs Fatme Ilyaz, Mr Kastriot Islami; Mr Sergei Ivanov (alternate: Mr Andres **Herkel**), Mr Zˇeliko Ivanji, Mrs Kateˇrina **Jacques**, Mr Antti Kaikonnen (alternate: Mr Kimmo **Sasi**), Mr Karol Karski, Mr Hans Kaufmann (alternate: Mr Andreas **Gross**), Mr András Kelemen, Mrs Katerˇina **Konecˇná**, Mr Nikolay Kovalev, Mr Jean-Pierre Kucheida, Mr Eduard **Kukan**, Mrs Darja Lavtizˇar-Bebler, Mr Andrzej Lepper, Mrs Sabine Leutheusser-Schnarrenberger, Mr Tony Lloyd, Mr Humfrey Malins, Mr Pietro **Marcenaro**, Mr Alberto Martins, Mr Andrew McIntosh, Mr Murat **Mercan**, Mrs Ilinka Mitreva, Mr Philippe Monfils, Mr João Bosco Mota Amaral, Mr Philippe Nachbar, Mrs Nino Nakashidzé, Mr Tomislav Nikolic´, Mrs Carina Ohlsson, Ms Ann Ormonde, Mr Claudio Podeschi, Mr Ivan **Popescu**, Mrs Maria Postoico, Mrs Marietta de Pourbaix-Lundin, Mr Christos Pourgourides, Mr Jeffrey Pullicino Orlando, Mr Valeriy Pysarenko, Mr François Rochebloine, Mr Francesco Saverio Romano, Mr Armen Rustamyan, Mr Christoph Strässer, Mr Mihai Tudose (alternate: Mrs Florentina **Toma**), Mr Øyvind **Vaksdal**, Mr Egidijus Vareikis, Mr Miltiadis Varvitsiotis (alternate: Mr Theodoros **Pangalos**), Mrs Renate Wohlwend, Mr Marco Zacchera, Mr Krysztof Zaremba, Mr Vladimir Zhirinovsky, Mr Miomir **Zˇ uzˇul**.

NB: The names of the members present at the meeting are printed in bold.

The draft resolution and draft recommendation will be discussed at a later sitting.