Steering Committee on the Media and New Communication Services: Working Paper on the Alignment of Defamation Laws with ECHR Case-law

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On 15 March 2006, a working paper of the Steering Committee on the Media and New Communication Services (CDMC) on the alignment of the laws on defamation in Council of Europe Member States with the relevant case-law of the European Court of Human Rights (ECHR), including the issue of decriminalisation of defamation, was released. The paper was prepared by the Secretariat at the request of the CDMC following decisions of the Committee of Ministers of the Council of Europe and the 2005 European Ministerial Conference on Mass Media Policy.

The paper, which focuses on the media, provides information on the laws on defamation in Council of Europe Member States, examines the ECHR case-law and outlines other international standards concerning defamation. It also seeks to identify trends in developments concerning the regulation of defamation both in the domestic legal systems and international law.

The term defamation refers to oral or written statements that harm the reputation of others and/or are insulting or offensive. It is often also used in connection with the symbols of the state (e.g. flag or anthem). Article 10 of the European Convention on Human Rights consecrates the fundamental right to freedom of expression, but authorises its restriction inter alia for the protection of the reputation of others (a notion distinct from preservation of public order, incitement to violence or hatred, racism and xenophobia).

State interference with freedom of expression can only be justified if it is necessary in a democratic society or, according to ECHR case-law, responds to a ‘pressing social need’. When circumscribing the scope for state interference, the Court has paid particular attention to the interests of democracy and the need for public scrutiny and accountability of public figures, to the higher tolerance due to opinion, to the means of defence against accusations of defamation, and to the proportionality of criminal sanctions and civil damages.

The requirements of the ECHR case-law are met in law and/or in practice in many Council of Europe Member States. Indeed, respect for freedom of expression and the media is solidly entrenched in the culture of a number of Member States. But

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the situation is not the same throughout Europe, and there is no guarantee that legal provisions that have fallen into desuetude remain unused. The risk of criminal or disproportionate civil sanctions can have a chilling effect on desirable public debate and accountability.

In line with the trend that emerges from the ECHR case-law in respect of defamation and the media, the specialised bodies of international or regional organisations have increasingly called for a shift from dealing with defamation under criminal law to handling it under civil non-punitive legal provisions. This call would appear at present to be unanimous.

It might be added that, in Europe, the great differences in the legal treatment of defamation in a context of cross-border media and information services pose a real risk of jurisdiction shopping. This is a source of legal uncertainty.

The CDMC will pursue its work on this subject during its next meeting (to be held between 30 May and 2 June 2006).

Steering Committee on the Media and New Communication Services (CDMC), Examination of 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, CDMC(2005)007, Final version, Strasbourg, 15 March 2006

http://www.coe.int/T/E/human_rights/media/1_Intergovernmental_Co-operation/CDMC/CDMC%282005%29007_en.pdf

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