DEFAMATION LAW AND PRACTICE IN

BELARUS, MOLDOVA AND UKRAINE

London
June 2006

ARTICLE 19 · 6-8 Amwell Street · London EC1R 1UQ · United Kingdom
Tel +44 20 7278 9292 · Fax +44 20 7278 7660 · info@article19.org · http://www.article19.org

TABLE OF CONTENTS

1 EXECUTIVE SUMMARY

The right of freedom of expression is guaranteed in the Constitutions of Belarus, Moldova and Ukraine. Over the years, this right has been violated to varying degrees in all three countries, especially by widespread use of defamation lawsuits to shield the authorities from criticism. These instances have occurred in contravention of international agreements which are binding on Belarus, Moldova and Ukraine.[1]

However, this practice has substantially decreased in Ukraine following the 'Orange Revolution' of late 2004 and the adoption of progressive freedom of expression amendments to their laws. Criminal defamation laws have been abolished in Ukraine and partially abolished in Moldova. However, in both countries, penalties imposed by courts in defamation cases have been clearly disproportionate to the damage caused in some instances. Suitability of a pre-set cap on fines for defamation have been widely discussed in both countries. However, Moldova actually abolished its cap in 2003 despite protests from journalists and other civil society organisations. Ukraine has in the past attempted to introduce a ceiling, although discussions on this issue were subsequently abandoned.

By contrast, in Belarus criminal defamation laws are still widely used, particularly to provide special protection to the president. The law envisages harsh sanctions, which include periods of imprisonment and forced labour. Severe economic penalties, which are clearly disproportionate to the damage caused, are often imposed by the courts. Such practices have created a considerable 'chilling effect' on the media, with considerable self-censorship and an environment where freedom of expression is hardly possible.

This memorandum also provides recommendations for changes to laws and practices in the three countries to reduce abuse of defamation laws and to better promote freedom of expression.

[1] All three countries have ratified the International Covenant on Civil and Political Rights. Moldova and Ukraine are members of the Council of Europe and have ratified the European Convention on Human Rights. Belarus, as an applicant for membership of the Council of Europe, should still comply with the principles arising from the European Convention.

2 BELARUS

Belarus remains a country in which free expression is hardly possible. The regime of Alyaksandr Lukashenka has adopted highly restrictive legislation and instigated a barrage of other measures to strangle or silence independent media and any dissenting voices. There are no real possibilities for any public discussion of these legislative initiatives, which are regularly imposed from above.

2.1 Law

The Belarusian Constitution states that "everyone is entitled protection against unlawful interference with … his honour and dignity" (Article 28). By referring such matters to court, one can claim compensation for damages (Article 61(2)).

2.1.1 Criminal defamation

New laws and amendments are often adopted swiftly and without public debate. This was also the case in the recent approval by both houses of the Belarusian National Assembly of draconian amendments to the criminal code that will further undermine freedom of expression. The new provisions are part of the law on the "Introduction of amendments and changes to certain legislative acts of the Republic of Belarus on strengthening liability for the actions addressed against a person and public security" (the Amending Law). They were adopted on 22 December 2005 and came into force on 1 January 2006.

Criminal defamation provisions are found in the Belarusian criminal code at Articles 188 (defamation), 189 (insult), 367 (defamation of the president), 368 (insult of the president) and 369 (insult of a public official). Defamation of the president can result in up to five years in prison. Defamation and insult of ordinary citizens (as per Articles 188 and 189) can lead to imprisonment for up to two years.

Article 188 prohibits knowingly spreading false information discrediting another person, while Article 189 targets the "deliberate degradation of the honour and dignity of an individual expressed in an indecent manner."

Articles 367 and 368 were introduced in January 2001, in preparation for the (then) upcoming presidential elections. However, they still continue to be widely used against those who accuse the government of corruption. These cases are initiated *ex officio*: despite numerous prosecutions for defamation and insult of the president, President Lukashenka has never brought a defamation case himself.

Article 369(1) of the Amending Law introduces the criminalisation of defamation of the Republic of Belarus vis-à-vis foreign States and foreign or international organisations, a

concept defined as "knowingly handing over false information concerning the Belarusian State or its organs."[2]

Comments to the Criminal Code Defamation Provisions and Recent Amendments

The key problem with Articles 188 and 189 is their inclusion in the criminal code rather than the civil code. Addressing such issues through the civil code would reduce the 'chilling effect' on individuals and the media, and thereby enhance the free flow of information. Articles 367, 368 and 369 are clearly contrary to international standards of freedom of expression, according to which public figures should tolerate a *higher* degree of criticism than ordinary citizens.[3] The penalties envisaged by the criminal code are grossly disproportionate and the legislation does not even allow a defence of reasonable publication.

In early 2003 the Belarusian Association of Journalists launched a campaign for the review of Articles 367, 368 and 369 and sent an appeal to the Constitutional Court. As a result of the appeal, on 1 September 2003, the Constitutional Court issued resolution "On the addition to the Criminal Code of the Republic of Belarus", proposing to the Chamber of Representatives to amend Articles 367-369. Unfortunately, the Constitutional Court's recommendation has never been implemented.

ARTICLE 19 considers the Amending Law to be inconsistent with guarantees of the right to free expression enshrined in the Belarusian constitution and Article 19 of the International Covenant on Civil and Political Rights, which Belarus has ratified. In particular, Article 369(1) is problematic, as it criminalises defamation of the Belarusian State. The prevailing view in advanced democracies is that public bodies, including the State, do not have a reputation entitled to legal protection, since they lack an emotional or financial interest in preserving their good name. Furthermore, the disproportionate penalties envisaged for this offence is likely to greatly undermine exchanges between Belarusian people and foreign countries. In the words of the Belarusian Association of Journalists, the amendments "will plunge Belarusian society further into an atmosphere of fear."[4]

2.1.2 Civil defamation

Civil defamation cases are much more common in Belarus than criminal ones. The reason for this is presumably that in civil cases there is no need to prove the falsehood of the impugned statement, or to establish malicious intent[5] in its dissemination.

Article 5 of the civil code prohibits the publication of information damaging the honour or dignity of the president, as well as high-ranking officials, and can lead to the closure of a media outlet following the accumulation of two or more warnings.[6] The prohibition of

[2] Other provisions in the Amending Law relate to the national security of Belarus (Article 361(1) and (2)).
[3] See, for example, the European Court of Human Rights in its landmark judgment in *Lingens v. Austria*, Judgment of 8 July 1986, Application No. 9815/82 (European Court of Human Rights) paragraph 45.
[4] Belarusian Association of Journalists, "Appeal to the Council of the Republic of the National Assembly of the Republic of Belarus and Constitutional Court", 7 December 2005, http://baj.ru/2005/Dec/z071205e2.asp.
[5] See for example Article 188 and 189 of the criminal code, referring, respectively, to "false information *known* to be false" and "*deliberate* degradation of honour and dignity" [italics added].
[6] Article 5 prohibits the "dissemination of information defaming the honour and dignity of the President of

insulting the president can also be found in Article 79 of the Belarusian Constitution, while Article 9 of Presidential Decree No. 5 renders unlawful the insult of State bodies' executive officials. Moreover, Article 47 of the Electoral Code contains a prohibition on "insulting or defaming the honour and dignity of official persons, presidential and parliamentary candidates." Privacy laws also provide an alternative way to thwart the dissemination of nearly any information concerning public officials.

All of the defamation provisions allow imposition of disproportionate penalties, fail to establish adequate defences (such as a defence of reasonable publication) and are excessively vague. In addition, although the Constitution guarantees the independence of the judiciary, in practice it is prone to political pressure.

In order to circumvent the problem of the routine use of defamation suits to silence non-State media, a number of media outlets have hired lawyers to ensure that their articles do not attract liability. However, many media outlets cannot afford to retain lawyers and legal advice is often an incomplete guarantee because of the extremely broad scope of statements that can fall foul of Belarusian law; self-censorship is consequently widely practiced. The Press Law provides under Article 40 that journalists must "verify the truthfulness of the data received" and "provide objective information for publication". The meaning of 'objective' is not defined in the legislation and subject to wide judicial discretion. In cases against the print media, judges normally consider any statement made in a newspaper as being subject to the objectivity requirement, even if it is presented as a commentary. Readers' letters published in a newspaper or information by interviewees thus also have to pass the 'objectivity' test.

2.2 Practice

Lawsuits against media outlets are extremely common in Belarus. On top of their 'chilling effect' on the media, they make the already ruinous financial situation of most media outlets even more precarious, as the imposition of disproportionate fines can cause media outlets to go bankrupt.

Several journalists have been convicted under Articles 367-369 of the criminal code. Such was the fate of Pavel Mazheika and Mikola Markievich of the non-State newspaper *Pahonia*. In June 2002, they were sentenced to two and two and a half years' 'restricted freedom' respectively, for 'false' and 'defamatory' articles published in the run-up to the 2001 presidential elections. In these articles, Mazheika and Markievich had questioned the legitimacy of President Lukashenka's re-election bid, given widespread suspicions of his involvement in the disappearances of people opposed to his regime. A similar case is that of Victar Ivashkievich, editor of *Rabochy*. His article 'The Thief Must Go to Prison', printed on the eve of the 2001 presidential elections, contained allegations of high-level corruption as well as the implication of the president in arms deals.

One of the publications most frequently targeted the independent newspaper *Belorusskaia Delovaia Gazeta* (*BDG*), whose editors and contributors have been taken to court for defamation following articles investigating the shady affairs of certain public officials.

---

the Republic of Belarus and heads of State bodies whose status is established by the Constitution of the Republic of Belarus."

Most recently, *BDG* journalist Siarhej Satsuk was sued for defamation by Siarhej Bedrytski, a former officer of the Special Militia Unit. In 2003, Satsuk had accused Bedrytski of involvement in a crime of which he was later cleared. Bedrytski claimed that, as a result of this 'defamation', he had not been able to find employment for two years and demanded BYR 100 million (approx. € 40,000) in damages. In December 2005, the court imposed a fine of BYR 50 million (approx. € 20,000) on the newspaper and BYR 5 million on Satsuk. These were subsequently lowered to BYR 20 million (approx. € 7,000) and BYR 2 million, respectively. *BDG* argued that both the ruling that originally cleared Bedrytski of the crime and the later charges against the newspaper were ordered 'from above'.

Occasionally, the authorities chastise a newspaper more than once for the same material. For example, Alena Raubetskaya, editor-in-chief of *Birzha Informatsii*, was fined BYR 1.5 million in September 2004 for her article "Treason in the Name of the People", where she criticised a national referendum. Two months later the Ministry of Information considered the article again, issued a warning and then an order freezing the publication for 3 months.

3 MOLDOVA

Moldova has decriminalised defamation in most instances. Although that has improved the situation in the area of defamation to a degree, its laws and practices remain an overall obstacle to the free flow of information.

Decriminalisation was at times presented by the authorities as a comprehensive solution to the problem of abuse of defamation provisions. The need to adopt other measures has consequently not been given full consideration. Existing problems include the failure to differentiate between fact and opinion; an inadequate degree of independence of the judiciary; disproportionate fines in civil defamation cases; and the use of defamation provisions by powerful individuals to intimidate the media and thereby prevent criticism.

3.1 Law

Article 32(2) of the Moldovan Constitution on 'Freedom of Opinion and Expression' states that all are "guaranteed freedom of expression", although this may not harm the honour and dignity of others.[7] In a progressive move, on 22 April 2004, the Moldovan Parliament voted to remove from the criminal code Article 170 on defamation, which stated:

> Slander, namely knowingly spreading lies that defame another person associated with accusation of committing an exceptionally serious crime or heinous crime, shall be punished with imprisonment for up to five years.

This was a timely and important step towards the effective guarantee of the right of freedom of expression. An earlier positive development was a ruling of the Supreme Court on 19 June 2000, in which it was held that international law - in this case Article 10 of the European Convention on Human Rights - is directly applicable by all Moldovan courts. Although the ruling does not have a compulsory character and serves as a recommendation, some judges have subsequently referred to the case-law of the European Court in their verdicts.

Despite the welcome positive changes mentioned above, Moldova has so far failed to repeal from the criminal code: Article 304, on 'libel of judges, criminal investigators and enforcers of justice'; Article 347, prohibiting the 'profanation of national and State symbols', and Article 366, punishing those who are involved in the military for the offence of 'insulting a military person' by a subordinate. Criminal defamation is generally a concern, as it often negatively impacts the free flow of information. However, Article 347 is particularly worrisome as State symbols cannot be protected from defamation since they are objects and, as such, they cannot have a reputation.

On 12 June 2003, new civil and criminal codes entered into force. These abolished the previous floor and ceiling[8] on civil defamation penalties. The abolition of the floor limits was positive, since it made it possible for non-pecuniary remedies to be used rather than

[7] Paragraph 3 states that "the law shall forbid and prosecute all actions aimed at denying and slandering the State or the people".
[8] According to Article 7(1) of the 1964 Civil Code, penalties could not exceed 3,600 Moldovan lei (US$270).

mandatory economic penalties. However, many feared that without a maximum ceiling, disproportionate fines would be imposed routinely, leading to increased self-censorship.
Article 16 of the new civil code defines defamation as the dissemination of false and harmful information. The plaintiff bears the burden to prove that the information was disseminated while the defendant must show the truth of the information. In cases in which it is not possible to identify the person who disseminated the defamatory information, the plaintiff may apply to a court for a public declaration that the information was untruthful.[9]

In addition to the civil code, Article 3 of the Law on Television and Radio prohibits expressions that can damage another's honour, dignity and private life. Article 3 thus duplicates the general provisions on defamation found in the civil code; it is both unnecessary and a chilling 'double warning' to broadcasters.

3.2 Practice

Between 1994 and 2001 there were 800 lawsuits against the media in Moldova, filed under the Press Law and the Civil Code.[10] In particular, there have been numerous lawsuits against independent newspapers such as *Accente*, *Timpul* and *Jurnal de Chişinău*.

According to a study by the Moldovan organisation Independent Journalism Center, the period between 1998 and 2003 saw 235 defamation suits, of which about half were won by the plaintiff. Of the remainder, 56 were suspended, 52 ruled unfounded, 9 withdrawn by the plaintiff and only 3 ended in settlement. After an increase in the number of lawsuits against the media in 1998-99, they subsequently decreased, primarily due to a heightened worry amongst journalists of the risk of litigation and a concomitant increase in self-censorship. Indeed, in Moldova investigative journalism and exposure of alleged corruption often leads to harassment. And as noted above, journalists must consider dire financial consequences of critical reporting since there are no longer limits to compensation in defamation cases.

Exemplary of the defamation suits brought by politicians - involving requests for high awards - was a high-profile lawsuit in January 2004 by DAAC-Hermes Company, against the non-State newspaper *Timpul* for an article on the purchase of Skoda cars for the leaders of local offices of the State chancellery. The claims amounted to € 1.6 million; the Court of First Instance set the award at 1,350,000 Lei (approx. € 80,000), which on appeal was reduced to 100,000 Lei (approx. € 6,000). Nevertheless, *Timpul* was unable to pay the fine, and was forced to declare bankruptcy. Another non-State newspaper that has repeatedly been at the receiving end of defamation suits is *Moldavskie Vedomosti*.

Judges still fail to discriminate between fact and opinion, and, in the case of facts, the truth is considered immaterial to a judgement of liability. Instead, the truth should be recognised as an absolute defence, absolving the defendant of any and all liability.

Defamation suits are also common in the breakaway region of Transdniestria. Here, the media have, for the most part, refrained from criticising the authorities, while the authorities have become accustomed to being shielded from criticism. Any dissenting

[9] A similar provision also exists in Ukrainian legislation.
[10] ARTICLE 19 interview with the Union of Journalists, February 2003.

voices have been harshly punished. For example, the non-State newspaper *Novaya Gazeta* has been sued repeatedly for violation of honour and dignity provisions.

4 UKRAINE

The 'Orange Revolution' that followed the second round of presidential elections in late 2004 was a source of inspiration for many human rights and media freedom activists, who believed that Viktor Yushchenko's victory would facilitate the establishment of a truly democratic system in Ukraine. Yet the 'revolution' did not alter the political system at its foundations; in addition, shortly after Yushchenko's elections, the cabinet and the Prime Minister were dismissed, causing the country to once again experience a wave of political instability. The Ukrainian parliamentary election of 26 March 2006 showed limited support for the Yushchenko's Our Ukraine Bloc, which received only 14% of votes, presumably as a reaction to the inefficiency of his divided team and accusations of corruption.[11]

However, there have been improvements in the general political and media landscape in Ukraine, including in the area of defamation. These positive changes were not simply the result of the 'Orange Revolution', but were due to years of wide-spread campaigning by Ukrainian journalists and civil society for media freedom and legal reform. This has, among other things, resulted in the adoption of positive legal provisions that have contributed to the greater harmonisation of Ukraine's law with international standards of free expression. As a result, the cases of abuse of defamation provisions to shield the authorities from criticism, and the imposition of disproportionate awards in defamation cases, substantially decreased in 2004 and 2005.

As well as positive legal amendments, the 'Orange Revolution' added a new dimension to the struggle for media freedom. One of the results is that there is a greater awareness of the need for media freedom and a rejection of media manipulation, with the media being increasingly left out of political battles.

4.1 Law

In Article 3 of its Constitution, Ukraine acknowledges a person's honour and dignity as one of the main social values.

In 2001, Ukraine abolished criminal defamation.[12] However, other criminal charges can still be laid against the media, for example in cases of invasion of privacy. Moreover, even after the 2001 legislative changes, defamation continued to be a concern in Ukraine given the frequent imposition of high awards by courts, and the abuse of defamation provisions by politicians and other powerful individuals to protect themselves from criticism.

A turning point was in the adoption, in April 2003, of the progressive 'Law on the Insertion of Changes to Certain Laws of Ukraine which Guarantee Unimpeded Use of the Human Rights of Freedom of Speech' (Law on Guarantee of Freedom of Speech). Positive provisions under the law include:

[11] The Regions Party of Viktor Yanukovich received 32.14% of votes and the Bloc of Yulia Tymoshenko 22.29%.
[12] Criminal defamation was not included in the criminal code adopted on 1 September 2001. Article 125 of the old criminal code prescribed imprisonment of up to three years for defamation.

- State bodies are prevented from demanding pecuniary damages for the publication of false information, although they can demand a refutation and still protect their right of honour and dignity though the courts.
- The law provides a defence of reasonable publication.[13]
- The law establishes that the plaintiff has to pay to the court a percentage of the amount claimed in compensation when filing a defamation case.[14] The percentage becomes greater as the amount claimed increases.[15] This contributed to the reduction of the amounts imposed as awards in defamation cases.
- The distinction between fact and value-judgement was clarified with the inclusion of a definition of 'value-judgement' in Article 47(1) in the Law on Information. This states that a 'value-judgements' is an "expression which does not contain factual data, in particular criticism, evaluation of actions", including "hyperbole, allegory [and] satire." It adds that "value judgements … shall not be proven", in compliance with the case-law of the European Court.
- Compensation for moral damage in defamation cases can be imposed only in cases of malicious intent by the journalist or media outlet that disseminated the impugned expression.[16] Moreover, in such cases "the court shall also consider the consequences of the use by a plaintiff of the possibilities of pre-trial refutation of the false information, protection of his honour, dignity and settlement of the conflict on the whole".
- The law contains a prohibition for public officials to refuse information or to interfere in the professional activity of journalists.[17]

Other legislative amendments followed. A new Civil Code was passed in January 2004, and was amended through a law adopted on 22 December 2005, the 'Law on Amendments to the Civil Code as to the Right to Information'. Some of the new provisions led to positive change, particularly through the amendment of the problematic Article 277. Before its amendment, this article provided that "negative information disseminated about an individual is considered false." 'Negative information' was to be understood as any form of criticism or description of a person in a negative light. In December 2005, the article was amended to read "negative information disseminated about a person is false unless the person who disseminated it can prove the contrary".

In addition, Paragraph 3 was added to Article 320, to state that a natural person who disseminates information from official sources is not obliged to verify its truth before

[13] It states that "a journalist and/or a mass medium are exempt of liability for dissemination of false information if the court rules that a journalist acted in good faith and verified the information."

[14] Through a provision added to the Law on State Duty (Article I.4).

[15] For claims of a non-property nature: 1 non-taxable minimum income should be paid by the plaintiff. For claims on compensation of moral (non-property) damage the plaintiff has to pay: 1 percent of the amount claimed if this is no more than 100 non-taxable minimum incomes; 5 percent if the amount claimed is between 100 and 10,000 non-taxable minimum incomes; and 10 percent if the amount claimed is more than 10,000 non-taxable minimum income.

[16] Though the addition of Paragraph 4 to Article 17 Law of Ukraine "On State Support of Mass Media and Social Security of Journalists". Malicious intent is defined as "such attitude to the dissemination of information when a journalist and/or a representative of media outlet realises that the information is false and foresees its dangerous consequences for a society."

[17] Article 45(1), on "Prohibition of censorship and prohibition of interference in the professional activity of journalists and mass media on the part of State bodies or local bodies and their officials" was included in the 1992 Law on Information.

publication. Yet when information is not from an official source, Article 302(2) remains in force, stating that "an individual who disseminates information is obliged to ascertain its veracity."

Analysis of the Amendments

Overall, the civil code amendments of 2005 were positive, especially the amendment of Article 277. The original wording of Article 277 represented a serious breach of the right to freedom of expression, and reportedly caused a great deal of confusion. It could not be justified as necessary, since there is often a great public interest in disseminating facts, as well as opinions, which place people in a negative light (for example in the exposure of corruption). The amendment also clarified the issue of burden of proof, which previously was not properly codified and had created confusion. However, it now places the burden of proof on the defendant. A more progressive provision would require that in statements of fact on matters of public concern, the onus should be on the person bringing the case to prove that the matter is false, rather than on the defendant to prove that it is true. This would reflect the need to ensure open public debate about such matters, and the relative importance of this compared to individual reputations.[18]

The inclusion of Paragraph 3, stating that there is no need to verify information from official sources, is a positive one. However, Paragraph 2 of Article 302, providing that all information disseminated should be previously verified, presents an unfair and unnecessary burden, particularly to the media. A professional journalist will certainly take steps to verify information but this should be a matter of self-regulation rather than it being codified in the law. This type of provision can discourage timely reporting on current events and, as the European Court of Human Rights has noted:

> [N]ews is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest."[19]

4.2 Practice

In 2002, 1,109 suits were lodged against media outlets for violation of honour, dignity and business reputation. The aggregate amount of awards rendered against the media in compensation for defamatory statements came to UAH 1,191,000 (approx. € 190,000).[20] In 2003 there were 927 defamation cases against the media - 16.4 percent less than in the previous year. The total amount of awards claimed amounted to UAH 4,535,000 (approx. € 730,000).[21] The highest single defamation award was rendered in 1999 and came to € 1,600,000. As noted above, in 2004 and 2005, the amount of cases lodged against the media with the purpose of shielding politicians from legitimate criticism fell substantially. The awards in defamation cases were also reduced. The highest damages imposed between 2004 and 2005 amounted to approximately € 8,500 - a much lower figure compared to the awards of preceding years. One of the main reasons for this positive change appears to be the adoption of the 'Law on Guarantee of Freedom of Speech' in 2003, which requires the

[18] *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, ARTICLE 19, London, July 2000, Principle 7.
[19] *The Observer and Guardian v. United Kingdom*, Observer and Guardian v. the United Kingdom, 26 November 1991, Application No. 13585/88.
[20] Ukrainian Supreme Court statistics for 2002.
[21] Ukrainian Supreme Court statistics for 2003.

plaintiff to pay the court a percentage of the amount claimed in compensation when filing a defamation case. In some cases, high awards that had been approved by lower courts were later reduced by higher courts. In addition, in the majority of cases, courts have been differentiating between fact and opinion.

On a less positive note, the defence of reasonable publication, whose adoption was a progressive step for Ukraine, does not appear to be applied.[22] There is little awareness of the existence of this provision, resulting in the fact that journalists do not invoke it and judges do not apply it.

[22] ARTICLE 19 is not aware of any case in which the defence was applied.

5 CONCLUSIONS, COMMENTS AND RECOMMENDATIONS

Provisions giving special protection to public officials and shielding them from criticism are contrary to international standards on freedom of expression, which state that public figures should tolerate a *higher* degree of criticism than ordinary citizens.[23]

Given the poor standards of journalism in many of the local media outlets and the limited specialised training facilities available to journalists, defamatory statements are frequent in the region. Consequently, there is a marked need to educate journalists in journalistic ethics and media responsibility and to set up self-regulatory mechanisms for the respect of ethical norms.

As noted in the preceding sections, in Moldova and Ukraine there have been debates as to the possibility of having a ceiling for defamation awards. Although setting a cap may contribute to limiting the fines to a more realistic amount, what is even more essential in defamation cases is that the defendant is found liable only for genuine cases of defamation - that is, when he or she disseminated a statement which *unjustifiably* lowered somebody's reputation. The genuine purpose and demonstrable effect of a defamation law should always be to protect deserved reputations and not to protect public figures from embarrassment, disparagement or invasion of their privacy. The proportionality rule should also be strictly applied: the penalties imposed should always be proportional to the damage caused, as the imposition of disproportionately high fines or prison sentences have an adverse impact on the free flow of information. In particular, when handing down sentences for defamation, courts should take into consideration the 'chilling effect' that the penalties are likely to have on the work of the media.

Moreover, not all defamation cases should lead to economic penalties. Instead, courts should prioritise non-pecuniary remedies. Damages should be awarded only when non–pecuniary measures are insufficient. This is because alternative remedies, such as the right of reply and refutation, can often adequately repair the claimant's reputation while causing much less of a 'chilling effect', and should therefore be given preference. Regrettably, in the region the right of reply is often not regarded as sufficient to address the issue of defamation. Positive legal developments in this area occurred in Ukraine, where compensation for moral damage can be imposed only in cases of malicious intent in the dissemination of the impugned expression, and where public officials are only allowed to use refutation to protect their reputation.

A complicating factor in the three countries in question is the fact that the judiciary is not fully impartial, and judges' lack of training in international standards compounds the problem. Journalists and NGOs have little confidence in the judiciary. This also explains the motivation behind measures that limit the judicial discretion, such as attempts to re-establish an upper limit for fines in Moldova.

Another widespread problem is the failure by courts to differentiate between fact and value-judgement, although improvement in the area was seen in Ukraine, both in law and in practice. Under international law, an expression can only be legitimately deemed defamatory when it relates to a *false fact* that lowers somebody's reputation. The

[23] See note 3.

dissemination of true information or of an opinion should never lead to a guilty verdict under defamation laws.[24] The European Court of Human Rights has noted that:

> [A] careful distinction must be made between facts and value-judgements. The existence of facts can be demonstrated, whereas the truth of value-judgements is not susceptible of proof. …As regards value judgements this requirement [to prove their truth] is impossible of fulfilment and it infringes freedom of opinion itself.…[25]

In the three countries, *bona fide* mistakes often attract liability. The law does not recognise a defence of 'reasonable publication', under which journalists would escape liability for incorrect stories whose publication was reasonable under the circumstances. The legislation of many advanced democracies provides for such a defence, based on the understanding that news is a perishable commodity which has to be disseminated quickly in the interest of the public.[26] In cases of rapidly developing stories, it may not be possible for journalists to verify the truth of all information – while they can be expected to try their utmost to disseminate accurate information in compliance with principles of professional ethics. In Ukraine, provisions for 'reasonable publication' do exist in the legislation but are not implemented. Instead, in Belarus, journalists are not only expected to prove the veracity of all information they disseminate, but all information has to be 'objective'. Such provisions are extremely dangerous and act to gravely hinder the free flow of information.

Belarus still retains and applies criminal defamation, while Ukraine and Moldova have abolished it.[27] Although most European countries still have criminal defamation provisions on the books, in practice they are used rarely, if ever. ARTICLE 19 is of the opinion that all criminal defamation provisions should be abolished and replaced with appropriate civil defamation laws. The criminalisation of a particular activity implies a clear State interest in controlling it and imparts a social stigma to it, while ARTICLE 19 believes that protection of reputation is essentially a private matter with little justification for State interference. International courts have stressed the need for governments to exercise restraint in restricting fundamental rights through criminal law. In many countries, the protection of reputations is adequately dealt with primarily or exclusively through the civil law, proving that a criminal approach is unnecessary. As the Parliamentary Assembly of the Council of Europe stated in Recommendation 1589(2003) on Freedom of Expression in the Media in Europe, "it is … unacceptable in a democracy that journalists should be sent to prison for their work…"[28]

ARTICLE 19 therefore encourages the abolition of criminal defamation statutes or at least compliance with the following conditions, to limit the negative impact of criminal defamation laws on the free flow of information:

---

[24] *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, see note 18, Principle 10.
[25] *Oberschlick v. Austria*, Judgment of 23 May 1991, Application No. 11662/85 (European Court of Human Rights), para.13.
[26] In Ukraine, a defence of reasonable publication does exist, but it is rarely invoked.
[27] Moldova still has provisions of criminal defamation in a limited number of cases.
[28] Recommendation 1589(2003), Adopted at the Parliamentary Assembly of the Council of Europe (PACE) debate of 28 January 2003.
http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/AdoptedText/ta03/EREC1589.htm.

i no-one should be convicted for criminal defamation unless the party claiming to be defamed proves, beyond a reasonable doubt, the presence of all the elements of the offence, as set out below;

ii the offence of criminal defamation shall not be made out unless it has been proven that the impugned statements are false, that they were made with actual knowledge of falsity, or recklessness as to whether or not they were false, and that they were made with a specific intention to cause harm to the party claiming to be defamed;

iii public authorities, including police and public prosecutors, should take no part in the initiation or prosecution of criminal defamation cases, regardless of the status of the party claiming to have been defamed, even if he or she is a senior public official;

iv prison sentences, suspended prison sentences, suspension of the right to express oneself through any particular form of media, or to practise journalism or any other profession, excessive fines and other harsh criminal penalties should never be available as a sanction for breach of defamation laws, no matter how egregious or blatant the defamatory statement.[29]

Finally, in all three countries, courts often have insufficient regard for the fact that the right to freedom of expression also covers statements which may be deemed to be insulting or otherwise shocking. The European Court of Human Rights, for example, has stated:

> [The right to freedom of expression] is applicable not only to 'information' or 'ideas' that are favourably received… but also to those which offend, shock or disturb the State or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.[30]

On a more positive note, in Moldova and Ukraine, judges have referred in some of their judgements to the case-law of the European Court of Human Rights. This is partly due to training events organised by the Council of Europe as well as local and international organisations on the European Convention on Human Rights. Although still not sufficiently widespread, it is an important and positive development. Cases on freedom of expression have also been taken by human rights organisations from these countries to the European Court.[31]

RECOMMENDATIONS

BELARUS

- All criminal defamation laws should be repealed and, where necessary, replaced with civil defamation laws. At a minimum, immediate steps should be taken to ensure that prison sentences, disproportionate fines and harsh criminal provisions are never imposed in defamation cases.
- All provisions giving special protection to the president and other government officials against defamation and/or insult (particularly Article 367, 368 and 369 of the criminal code) should be repealed.
- Article 369(1), on defamation of the Belarusian State vis-à-vis other States, should be repealed.

[29] *Defining Defamation: Principles on Freedom of Expression and Protection of Reputation*, see note 18, Principle 4.

[30] *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72 (European Court of Human Rights), para. 49.

[31] Except for Belarus, as the country is not member of the Council of Europe. However, Belarusian human rights activists have submitted cases to the UN Human Rights Committee under the International Covenant on Civil and Political Rights.

- Nobody should be found guilty and penalised for the same offence twice.
- No one should be held criminally or civilly liable for the expression of any opinion or truthful fact.
- The obligation to verify the truthfulness and objectivity of all information should be repealed and a defence of reasonable publication should be recognised in the law.
- The authorities should ensure that there are opportunities for public debates on legislative initiatives.

MOLDOVA

- Moldova should complete the process of de-criminalisation of defamation by repealing Articles 304, 347 and 366 of the criminal code.
- The State should take measures to limit the practice of using defamation laws to deter or punish investigative and/or critical journalism, for example by providing for the possibility of counterclaims against plaintiffs who launch frivolous or vexatious lawsuits.
- In all defamation cases, the award rendered should be strictly proportionate to the damage caused. Non-pecuniary remedies should have priority over pecuniary ones.
- Judges should differentiate between fact and opinion in defamation cases.
- The legislation should include a defence of reasonable publication.
- Proof of the truth should always absolve the defendant of liability for his/her statements.
- In defamation cases, judges should apply the principle that public officials are subject to a wider margin of criticism than ordinary citizens.

UKRAINE

- Where a statement relates to a matter of public concern, the burden of proof to show its falsehood should always lie with the plaintiff.
- Steps should be taken to increase awareness of the defence for reasonable publication.
- The obligation to verify the truthfulness of *all* information under Article 302(2) of the civil code should be repealed.