Defamation and libel laws in Europe – the framework of Article 10 of the European Convention on Human Rights (ECHR)

Dirk Voorhoof

Introduction

This article will consider the scope and effect of the guarantee of the right of freedom of expression and information provided by Article 10 of the European Convention on Human Rights (ECHR), particularly with regard to the legitimacy of restrictions and limitations based on defamation and libel laws to protect the reputation and rights of others. For this, the relevant case-law of the European Court of Human Rights will be analysed. Firstly, the general perspective and the main features of the protection of Article 10 ECHR will be briefly introduced.

1. Article 10 ECHR as a binding legal instrument in Europe

The European Convention on Human Rights is the central treaty-instrument within the European Court of Human Rights’ (ECHR) framework (Merk, 1988; Cohen and Jonathan, 1989). With regard to European media regulation in general, specific attention should be paid to Article 10 of the Convention that guarantees freedom of expression and information, which is seen as one of the essential principles of a democratic society and one of the basic conditions for its progress and development. Article 10 ECHR forms the basis for the freedom of expression and information and for media law within the Council of Europe and its 27 member states.

Moreover, Article 10 ECHR also has implications on EC-law. In some recent judgments the Court of Justice confirmed earlier jurisprudence that recognizes the effect of the ECHR and of Article 10 ECHR in particular within the legal order of the European Community (Nold, 1974; Stichting Goudse Kabel, 1991 and Commission v The Netherlands, 1991; Ellniku Radiophonia Tilleoressi 1995). More generally, in the new Treaty on European Union, Article F of title I of the common provisions provides that the Union shall respect and guarantee the rights and freedoms guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms' (Treaty on European Union, 1992). Furthermore, in the Draft EC Directive of 3 October 1989 on 'TV without frontiers' the freedom of expression of Article 10 ECHR as ratified by all EC-member states, is explicitly mentioned as a specific

2. The protection of freedom of communication and Article 10 ECHR

2.1. Article 10 of the Convention provides the following:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and without discrimination as to sources. The exercise of this freedom, including freedom of the press, shall not be subject to any prior control by public authority in law. This freedom has a public interest, and is necessary for the functioning of a democratic society, since it guarantees the possibility of criticism of public authorities and the exercise of the rights to freedom of assembly and of association.

2.2. Article 10 guarantees the freedom of expression and information, i.e. the right to freedom of expression and the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of formalities, restrictions or penalties with regard to the freedom of expression and information guaranteed by the ECHR. The freedom of expression and information is not subject to any prior control by public authority in law. The exercise of this freedom has a public interest, and is necessary for the functioning of a democratic society, since it guarantees the possibility of criticism of public authorities and the exercise of the rights to freedom of assembly and of association.

2.3. Furthermore, according to Article 10 para 2 there are three conditions that must cumulatively be fulfilled: first, the relevant conditions is neglected, the restricting rule with regard to the freedom of communication must be regarded as an infringement of freedom of communication. The Commission and the Court of First Instance have held that the contracting states have a certain margin of appreciation in assessing the existence and extent of the necessity of an interference, but this margin is subject to a European supervision as regards both the legislation and the decisions applying it. The extent of the European supervision can vary according to the case and the legitimate aim involved. The scope of domestic judicial supervision may be different, but identical for each of the aims listed in Article 10 para 2. This may be, e.g. a lower degree of supervision with regard to the interpretation of 'morals': the national authorities are considered to be in principle, in a better position than the international judge to give an opinion on the exact content of these requirements, which may strongly differ from state to state. There is no uniform European conception of 'morals': (Handyside, 1976; Müller, 1988).

When carrying out its supervision, the Court must ascertain whether the measures taken at the national level are justifiable in principle, and proportionate (Groppera Radio, 1990). In the 1991 Sunday Times case the Court clearly defined its task as follows: 'The Court states, in the exercise of its supervisory role, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power to

(3) the prevention of the disclosure of information received in confidence (interests of the administration of public authorities and the administration of justice);

(4) the prevention of disorder or crime (general interests of society);

(5) the protection of health or morals (interests of the public health);

(6) the protection of the reputation or rights of others (private interests, rights of individuals, personal protection against defamation and libel). Thirdly, the 'necessity test in a democratic society' is the most decisive and ultimate criterion: any restriction on the freedom of communication imposed by a public authority, must be proven to be really necessary in a democratic society. The Court has noted that whilst the 'reasonableness' of the requirement of proof for the meaning of Article 10 para 2, is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'. There has been a 'pressing social need' for any restriction on this freedom of communication. The Commission and finally the Court have held that the effectiveness of Article 10 ECHR, by examining this criterion sharply and by evaluating the pertinent and proportionate character of the restrictons in question. This means that every formality, condition or restriction regarding the freedom of communication, must be proportionate to the legitimate aim pursued. The Court is empowered to give a final ruling on whether a restriction or penalty with regard to the freedom of communication and information with due regard to the importance of the freedom in a democratic society.

2.4. Consequently, it has been held that the contracting states have a certain margin of appreciation in assessing the existence and extent of the necessity of an interference, but this margin is subject to a European supervision as regards both the legislation and the decisions applying it. The extent of the European supervision can vary according to the case and the legitimate aim involved. The scope of domestic judicial supervision may be different, but identical for each of the aims listed in Article 10 para 2. This may be, e.g. a lower degree of supervision with regard to the interpretation of 'morals': the national authorities are considered to be in principle, in a better position than the international judge to give an opinion on the exact content of these requirements, which may strongly differ from state to state. There is no uniform European conception of 'morals': (Handyside, 1976; Müller, 1988).

When carrying out its supervision, the Court must ascertain whether the measures taken at the national level are justifiable in principle, and proportionate (Groppera Radio, 1990). In the 1991 Sunday Times case the Court clearly defined its task as follows: 'The Court states, in the exercise of its supervisory role, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of...
appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith. The Court has had to look to the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the remitted national authorities to justify it are "relevant and sufficient." (Sunday Times, 1991).

Other recent cases (Barford, 1989; Marks Intern., 1989) have shown that in fact an internal discussion is going on within the European Court of Human Rights about the extent the Court is carrying out a 'European superstate'. In the Marks Intern. case the Court, by a 9 to 9 voting, was of the opinion that the European Court of Human Rights should not substitute its own evaluation for that of the national courts, where those courts, on a reasonable basis, had considered the restrictions to be necessary (Markt Intern., 1989).

So, in some judgments on Article 10 ECHR, this margin of national appreciation is given a relative autonomy, which is both a recognition of the national diversities in the context of the European legal order as a reduction of the importance of the European supervision over the implementation of national law and practice of the freedom of communication. In some of the jurisprudence of the European Court of Human Rights about Article 10 ECHR, the national authorities are provided a higher level of protection of freedom of information and freedom of public speech (see e.g. Sunday Times, 1979; Barthold, 1985; Lingens, 1986; Oberschlick, 1991; Sunday Times, 1991; Thorgeirsson, 1992). In other jurisprudence a higher level of autonomy seems to be given to the member states in order to keep up restrictions on the freedom of information and expression, especially where it concerns restrictions or sanctions with regard to pornography or obscenity (Handyside, 1976; Müller, 1986) or commercial speech (Marks Intern., 1989).

3. Libel and defamation and the freedom of communication according to Article 10 ECHR

The case-law of the European Court of Human Rights indicates some essential criteria as to how to decide whether restrictions or penalties for the protection of the reputation or the rights of others, are "necessary in a democratic society". Any restriction or penalty on the freedom of expression or information that is based on libel or similar law has to be proportionate to the necessity of protection of Article 10 ECHR (see also Barend, 1985; 1991).

3.1. It has to be noted that libel and defamation, the protection of every kind of expression and information, but the effect of Article 10 ECHR is especially important for the protection of critical and non-conformist speech.

The Court's case-law consistently emphasized that freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for political development and is essential to every man and woman. The freedom of expression and information as guaranteed by Article 10 ECHR is applicable not only to 'information or ideas' that are favorably received or regarded as matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".

This means Article 10 has to be interpreted from a standpoint of a high level of protection of freedom of expression, even if this information is harmful to the State or some groups, enterprises or politicians (Sunday Times, 1979; Barthold, 1985; Lingens, 1986; Weber, 1990; Thorgeirsson, 1991; Castells, 1992; Thorgeirsson, 1992).

3.2. Information and ideas are especially given a high level of protection when they are made public in the context of a political debate, i.e. more general the protection of public speech (see also Voorhoof, 1986).

In the Sunday Times case the Court drew the attention to the fact that "it is in the public interest to give the public also a right to receive them." In the same judgment the Court observed that Article 10 not only guarantees the freedom to inform the public but also the right to receive them (Sunday Times, 1979; see also Sunday Times, 1991 and Observer/Guardian, 1991).

3.3. In this the press plays an important role according to the European Court. In the Sunday Times case the Court was of the opinion that the general principles of freedom of information are of particular importance as far as the press is concerned: the media have the task of imparting information and ideas in all areas of public interest (Sunday Times, 1979). The penalty imposed on a journalist for the publishing of a story concerning "his critical and his critical attack on an important politician, reveals the danger of a kind of censorship, which would be likely to discourage the journalist from making criticism of that politician" (Sunday Times, 1979). The Court was of the opinion that "in the context of political debate such a sentence would be likely to deter the journalist from contributing to public discussion of issues affecting the life of the community" (Sunday Times, 1979).

In the Lingens and in the Oberschlick case it is recognized that for the public the freedom of the press is one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. Meanwhile, the protection of political debate is at the very core of the concept of a democratic society (Lingens, 1986; Oberschlick, 1991).

In the Weber case the Court drew attention to the fact that as a journalist Weber was, well-known for his ecological activism and that his interventions were echoed by the press at large. The secret judicial information to the journalist made public on a press conference was linked to this ecological debate and the public was interested in this information. That was not excluded by the Court and it was imposed on the journalist was seen as a breach of Article 10 ECHR (Weber, 1990).

In the 1991 'Spycatcher' cases the Court underlined the importance of free speech on matters of public interest (Sunday Times 1991; Observer/Guardian, 1991). In the Thorgeirsson case the Court estimated that the litigious articles reporting cases of police brutality were matters of serious public concern and the Court was not interested in the actions of the police. "To be of public concern. Having regard to the purpose and impact which the articles were designed to have, the Court was of the opinion that the particularly strong and offensive terms could not be regarded as excessive (Thorgeirsson, 1992). In the Castells case too, the Court drew the attention to the fact that the article published was a matter of "grand intérêt pour l'opinion publique" (Castells, 1992).

So the importance for the public to be informed is seen as a crucial factor. In the Sunday Times case the Court expressed the viewpoint that the media not only have the task to impart information and ideas in all areas of public interest, but that the public also has a right to receive them." In the same judgment the Court observed that Article 10 not only guarantees the freedom to inform the public but also the right to receive them. (Sunday Times, 1979; see also Sunday Times, 1991 and Observer/Guardian, 1991).
At attention was drawn to the fact that the Court left a larger margin of appreciation for the national courts and only recognised a lower degree of protection of the freedom of expression in the commercial context. The relevant Austrian code, the journalist in such a case cannot escape conviction unless he can prove the truth of his statements. As regards value judgments this requirement is impossible of fulfilment and it infinges freedom of opinion itself, which is a fundamental part of the right secured by Article 10 ECHR (Lingens, 1987; Oberschlick, 1992).

The convictions that the statements in the applicant’s articles had an objective and factual basis. It was undisputed that some of the reported incidents did occur, while other facts and elements consisted essentially of references to stories or rumours. This stories were known by most people and were quite numerous because of the importance of the cases. In short, the applicant was held to be essentially reporting what was being said by others about police brutality (Thorgeirson, 1992). Defamatory allegations that were based on reliable information do not always have to be proven to be true. The defamatory allegations in the Thorgeirson case, namely, that unspecified members of the Reykjavik police had committed a number of acts of serious assault as well as forgery and other criminal offences, had not to be proven before the national courts according to the European Court. Nor was it required to establish the truth of his statements, he was, in the Court’s view, faced with an unreasonable, if not impossible task” (Thorgeirson, 1992).

In the Castells case, the applicant was not in agreement with the fact that the Castells was not given the opportunity to prove the truth of his allegations before the Spanish courts. The Court was of the opinion that Castells had the possibility to prove the allegations against the government: ‘Or une tentative de preuve se concevait fort bien pour nombre de ces affirmations, tout comme M. Castells n’avait pas voulu se prêter à une nouvelle déposition, sa bonne foi nul ne sait à quel résultat le Tribunal suprême eût abouti s’il avait accueilli les offres du requérant mais sans l’exception d’une circonstance où il les déclarer irrecevables’. So the exclusion of the possibility to prove the truth (‘excepción vertual’) and the conviction of the applicant
based, i.e. on the lack of truth for the defamatory allegations he published, makes that the conviction cannot be held to be necessary in a democratic society (Casella, 1992).

The other side of the coin is that the European Court of Human Rights is also taking it into considera-

Thorgeirson case the Court recognised that 'both articles were framed in particularly strong terms'. However, having regard to their purpose and the impact they were designed to have, the Court was of the opinion that the language used could not be regarded as excessive (Thorgeirson, 1992; see also Oberschlick, 1991 and Casella, 1992). The Court showed a high degree of tolerance towards the impugned expressions when the strong wording is aimed at politician or the Government or public authorities. The negative allegations against a business group targeted at access to the media would not be against lay judges (Barford, 1989) could not count on a high degree of protection within the framework of Article 10 ECHR.

Dirk Voorhoeve

Ghent

REFERENCES
Treaty on European Union, Europe Documents, 7 February 1992, nr. 175/92/0.


Voorhoeve, D., 'Art. 10 E.V.R.M., commerciële informatie en kritiek in de economische behindertijd. Enkele beschouwingen bij het-22

In the Markt Intern case the judgment of the European Court refers to the findings of the German Federal Court that based its judgment on the prematurity nature of the disputed publication and the lack of sufficient grounds for publicising in the information bulletin an isolated incident. The European Court of Human Rights considered that 'even the publication of items which are true and describe real events may under certain circumstances be prohibited: the obligation to respect the privacy of others or the duty to respect the confidentiality of certain commercial information are examples. In addition, a correct statement can be and is often qualified in additional remarks, by value judgments, by suppositions or even insinuations. It may be recognised that such an isolated description of one such incident can give the false impression that the incident is evidence of a general practice (Markt Intern, 1989). According to the Markt Intern judgment, it is primarily for the national courts to decide which statements are permitted and which are not, when these statements are made in a context of commercial interest.

3.7. Finally, it has been emphasised that in several cases the European Court of Human Rights came to the conclusion that a national conviction because of defamatory statements infringing Article 10 ECHR although the impugned publication contained a negative or strong wording. In the Lingen case the Court was of the opinion that the content and tone of the articles were on the whole fairly balanced but the use of the very strong wording of the value-judgments a propos of M. Kriszky in particular appeared likely to harm the reputation of the defendants. In the Court these expressions used by Lingens had to be seen against the background of a post-election political controversy, a struggle in which each used the weapons of the other. The opinion of the Court that the strong criticism expressed by Lingens was in no way unusual in the context of this political debate (Lingen, 1986).

According to the Court's case law, the aim and the context in which the strong wording or harsh criticism is situated, has to be taken into account. In the