



DEFAMATION AND ‘INSULT’: WRITERS REACT

A report from International PEN’s Writers in Prison Committee

Insult Laws in the European Union A SILENT THREAT

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In late 2006 and early 2007, reacting to international concern at the scores of trials against writers and journalists accused of ‘insult to Turkishness’ under Turkey’s notorious Article 301, Turkish government officials, including the President, made public comments referring to countries in the EU that have similar insult laws in their statute books. The question they asked was: how could people in these countries complain about Turkey when they themselves have similar laws?

In November 2006, International PEN had, coincidentally, launched a campaign against criminal defamation and insult laws. It has long been concerned that these laws are so vague and imprecise that they can become a vehicle for those in power to quell dissent and criticism. Furthermore, the definition of insult or offence is notoriously difficult to formulate. There are no objective standards: the difference between an opinion and an insult is subjective. The notion of ‘insult’ is so broad in its interpretation it is impossible to legislate.

In answer to the Turkish government’s challenge, International PEN’s Writers in Prison Committee undertook a study to establish the extent of such insult laws in Europe. The International law firm, Clifford Chance carried out a pro bono research project on International PEN’s behalf.

The first task was to find out whether there have been similar studies. In 2000, the World Press Freedom Committee in the USA published a global survey of insult and blasphemy laws, updated in 2006. From this, the law firm selected the sections relevant to the European Union, asking its staff in offices based across Europe, to check for any changes, and whether there had been successful prosecutions. The study found a number of EU states have laws making it a crime to insult the state or its institutions and, where monarchies exist, to members of royal families.

Germany, Poland and the Netherlands had been singled out by Turkish officials. **Poland’s** Penal Code makes it an offence to insult the Polish nation, the president, foreign and public officials and has been applied fairly regularly. Yet the study found that courts have been reluctant to pass custodial sentences and have restricted penalties to fines.

In **Germany**, the criminal code provides penalties for defamation of the President, insult of the Federal Republic, its states, the flag, and the national anthem. However, in 2000, the Federal Constitutional Court notably stated that even harsh political criticism, however unjust, does not constitute insult of the Republic.

In the **Netherlands**, it is a crime to “intentionally insult” the King and certain members of the royal family.

In a rare instance of application in 2005, there was an attempt to convict a protestor for throwing paint at the passing carriages of the Crown Prince and Princess, but this was changed to charges of attempt to cause injury. The most recent insult convictions were as long ago as the 1960s.

Other countries where insult laws exist include **France**, where the 1881 Press Law makes it an offence to insult the President, courts, armed forces and other public bodies. However, in 2000, the law was amended to remove the option of imprisonment, and now only fines can be applied. Although the World Press Freedom Committee’s report notes that the Press Law has been invoked with increasing vigour, there have been no recent successful prosecutions.

Italian law contains provisions penalising insult to the Republic, constitutional institutions, the armed forces and indeed the Italian nation, but there has been no successful prosecution since the 1950s. To ‘offend the honour’ of the President (and indeed the Pope) is also a criminal offence, and there was one successful conviction in 2004, although no-one was imprisoned.

In **Belgium** and **Spain**, there are laws against insult to members of their royal families, but in neither country have these laws been recently applied. Similarly, laws in **Portugal**, **Greece** and **Romania** against insult to officials have not been enforced.

It is interesting to note that among the newer members of the EU, formerly part of the Soviet bloc, there have been moves to abolish the concept of insult and defamation to the state and its officials. In 1994, **Hungary** abolished an article of its Criminal Code that protected the reputation or honour of a public official. In **Romania** in 2006, attempts to decriminalise insult – its existing laws include the crime of ‘defamation of the country and nation’ – were overruled earlier this year by the Constitutional Court. It is hoped that this will change when the new Penal Code comes into force in 2008. In 1994 and 1998, changes to the **Czech** Penal Code removed the crimes of insult to parliament and the President. Although there remains the crime of insult to a state institution, there have been no recent prosecutions. The suggestion is that new members of the EU, and those who are applying for membership, take the opportunity to review their legislations so as to meet the acceptance criteria that earlier members may not have been compelled to do.

This study concludes that the Turkish government’s assertion that there are indeed laws in EU states penalising insult to the state and officials. However no-one has been imprisoned under such legislation for decades, and successful prosecutions are extremely rare. In fact insult laws that relate specifically to insult to heads of state, institutions and monarchies, are again rarely, if ever, enforced. Nowhere in Europe are they applied with the same enthusiasm and rigour than in Turkey, where the many persons on trial are in real danger of imprisonment.

But this does not mean that we can be complacent. Post 9/11, there is an increasing debate around multiculturalism which has focussed attention on insult laws and religious speech, another issue of concern to International PEN. Even where these laws are not actually enforced, they remain a silent threat, particularly problematic at testing times such as these. International PEN is calling on its members in all countries where insult laws exist – in Turkey, in the European Union and elsewhere - to recognise the threat they pose to free expression, and demand their repeal.

This introduction is based on a speech given by Sara Whyatt, Programme Director of International PEN's Writers in Prison Committee, to the 5th Gathering in Istanbul for Freedom of Expression in Istanbul 25-27 May 2007.

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for their excellent global analysis of insult and criminal defamation laws on which much of this report is based.

Sources

For more information about International PEN's Writers in Prison Committee campaign on defamation 'Defamation and Insult – Writers React' Go to:
<http://www.internationalpen.org.uk/index.php?pid=33&aid=521&type=current>

General information on International PEN go to
www.internationalpen.org.uk

World Press Freedom Committee website :
www.wpfc.org

To obtain the WPFC report *It's a Crime – How Insult Laws Stifle Press Freedom* go to
http://www.wpfc.org/Its_A_Crime.pdf

For more about Clifford Chance
<http://www.cliffordchance.com/home/default.aspx>

MULTI-JURISDICTIONAL REPORT ON INSULT LAWS – SUMMARY REFERENCE TABLE

EUROPE: A GENERAL OVERVIEW

1. In most western European countries, insult laws are generally legal anachronisms; statutory reminders of earlier theories and forms of governance. Whilst they may be rarely enforced, they remain available, and therefore continue to threaten freedom of expression.
2. Insult laws exist in Austria, Belgium, Denmark, France, Germany, Greece, Italy, the Netherlands, Portugal, Romania, Spain, and Sweden. The relevant provisions of each jurisdiction are summarised below.
3. Most western European insult laws are similar in scope, providing that it is a criminal offence (punishable by imprisonment and/or fines) to insult or defame the nation itself, the head of state, as well as foreign heads of state and diplomats, public institutions and bodies, and public officials, either while they are exercising official functions or because of those functions.
4. Article 10 of the European Convention on Human Rights declares that: “[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers”. It goes on to list a series of permissible restrictions to free speech in paragraph two, including those necessary in a democratic society, in the interests of national security and the protection of judicial authority, health or morals, and the reputation or rights of others.
5. The European Court of Human Rights (“ECtHR”) has maintained that politicians and public officials must tolerate even caustic criticism and commentary, interpreting the exceptions to freedom of expression relatively narrowly. Emphasis has been placed on the interests of open discussion of political issues. The Court has repudiated a fundamental assumption underlying insult laws - that the honour and dignity of government, its institutions and officials are entitled to greater protection than the common citizen (see the decision in *Castells v Spain*).
6. The most serious contemporary effects of European insult laws appear to be felt elsewhere in the world. In many countries, insult laws are the remnants of colonialism e.g.:
 - French-speaking African nations tend to have their own versions of France’s insult law; these nations actively enforce that law, whereas in France it lies dormant for the most part.
 - The *desacato* (disrespect) laws of many Central and South American countries are similar to the provisions Spain repealed in 1995.
7. Regardless of the infrequency with which western European nations invoke insult laws, the mere existence of them in established and developed democracies, which other nations look to as models to follow, provides a continued justification for governments elsewhere to enact and enforce such legislation, e.g. Turkey’s recently enacted Article 301 has been justified by Turkish authorities by reference to rarely used insult laws in the Netherlands.

JURISDICTIONS REVIEWED BY CLIFFORD CHANCE

Country	Summary	Law	Enforcement
Belgium	Insult and criminal defamation laws exist; insult laws have been partly repealed.	<p>The Belgian Criminal Code makes it an offence to insult: a member of the Legislative Chamber, a minister, a member of the Constitutional Court or an administrative judicial magistrate or an officer of the public authority in active service (Article 275).</p> <p>Articles 276, 443, 444, 446, 447 and 448 make provision for criminal defamation and calumny.</p> <p>The Law on the Punishment of Insults of the King of 6 April 1847 prohibits insult of the King and the royal family (Articles 1 and 2).</p> <p>A similar law with respect to the punishment of insults to foreign heads of state was repealed in February 2005.</p>	No recent incidents of enforcement against the press.
Czech Republic	Insult laws and criminal defamation exist; the scope of insult provisions was recently restricted to state agency.	<p>Section 154(2) of the Czech Criminal Code prohibits insult of a state agency. Section 154(2) has been amended and does not protect the State, Government or Nation.</p> <p>In 1994, a provision criminalising defamation of the Government, Parliament and the Constitutional Court was struck down. It was held that these agencies are protected by the general provisions of Criminal Code on Insult and Defamation and do not deserve higher protection.</p> <p>In 1998, a similar provision making defamation of the President punishable by up to two years imprisonment was repealed.</p> <p>Prohibitions on slander of the Czech State, the President and/or a Public Servant were also repealed in 1998.</p>	<p>The Czech Supreme Court recently (2006) indicated that conduct under section 154(2) of the Criminal Code has to be directed at the “state agency” and not at the individual public servant. As a result, a public servant only enjoys the same level of protection as individuals.</p> <p>In 2000, the publisher of a translated version of <i>Mein Kampf</i> was given a three year sentence for defamation of race, nation and conviction.</p>
France	Insult and criminal defamation laws exist but have been partly abolished.	<p>The 1881 Press Law (as amended) includes criminal defamation and insult provisions:</p> <p>Insulting the President is a criminal offence (Article 26).</p> <p>Insulting the courts, the armed forces, constitutional bodies of the state and public administration, ministers, members of either House of Parliament, a public official and others is an offence (Article 32).</p> <p>Defaming public officials/authorities is a criminal offence (Article 31) but if the allegations are true this will be a complete defence.</p>	The conviction of two journalists working at <i>Le Monde</i> regarding an article they wrote on drug-trafficking in Morocco was overturned by the ECtHR in 2002 (<i>Colombani v. France</i>). The article had prompted the King of Morocco to complain to the French authorities, who then prosecuted the journalists under Article 36 of the 1881 Press Law. The ECtHR held that the right to freedom of expression had been violated.

Country	Summary	Law	Enforcement
		<p>Defaming the courts, armed forces, established bodies and public administrations is a criminal offence (Article 30).</p> <p>Imprisonment was abolished as a punishment for the offences of defamation and insult in 2000.</p> <p>Insult to foreign heads of state and diplomats was a criminal offence but was abolished in 2002 (Article 36).</p> <p>Of related interest is the recent introduction of a draft law prohibiting the denial of the 1915 Turkish genocide against Armenia. It carries a penalty of imprisonment and/or a fine.</p> <p>Articles 32 and 33 include the offences of libel and defamation against an individual or a group of individuals because of their origin, ethnic, national, racial or religious membership; and because of gender, sex orientation or disability. Punishment is by imprisonment and/or a fine. These specific provisions do not apply to offences directed at ‘public authorities’.</p>	<p>The public had an interest in the problem of international drug-trafficking; moreover, the absence of a defence of truth in relation to the particular provision is unacceptable. France subsequently abolished Article 36.</p> <p>The 2006 WPFC Report notes that France’s 1881 Law on Press Freedom has been invoked with increasing vigour and is cited as an example of the way in which a law that was dormant for many years may continue to be invoked.</p> <p>The French have been unwilling to relinquish laws protecting the French head of state from insult.</p>
Germany	<p>Insult and criminal defamation laws exist but no recent cases have been successful.</p>	<p>Both insult laws and criminal defamation offences exist in the German Criminal Code:</p> <p>Defamation of the President is a criminal offence (Section 90).</p> <p>Insulting or maliciously maligning the Federal Republic, one of its states (Länder) or its constitutional order, defaming the colours, the flag, the coat of arms or the anthem is a criminal offence (Section 90a).</p> <p>Insulting a foreign head of state, a member of a foreign government, or the head of a foreign diplomatic mission is a criminal offence (Section 103).</p> <p>Insult of a foreign flag or symbol of sovereignty is an offence (Section 104).</p> <p>General offences of insult (Section 185) and criminal defamation (Sections 90(b) and 187) exist but do not specify state ‘victims’.</p>	<p>No recent successful prosecutions; in practice criticism of the state is protected unless it amounts to defamation.</p> <p>In 2000 the Federal Constitutional Court decided that harsh political criticism, even if ‘unjust, unobjective or stubborn’ does not constitute an insult for the purposes of Section 90a.</p> <p>The Federal Constitutional Court has generally overturned convictions for defamation of government officials. The court has stated that public officials must tolerate a greater degree of criticism than private persons. Courts have been receptive to articles or writings that ‘contribute to political debate.’</p>
Hungary	<p>No insult laws; criminal defamation against public officials declared unconstitutional.</p>	<p>In 1994, the Hungarian Constitutional Court declared Article 232 of the Criminal Code unconstitutional.</p>	

Country	Summary	Law	Enforcement
Italy	Insult and criminal defamation laws exist but no successful prosecution of insult laws for 50 years.	<p>The Italian Criminal Code contains both insult and criminal defamation offences:</p> <p>‘Offend[ing] the honour or the prestige of the President’ is an offence (Article 278) and the 1929 Concordat with the Vatican extends this offence to the Pope.</p> <p>Publicly insulting the Republic, constitutional institutions or the armed forces is an offence (Article 290).</p> <p>Publicly slandering the Italian nation is an offence. Article 291 exists ostensibly to protect the ‘honour’ of the Republic, the constitutional institutions and the Armed Forces.</p> <p>Article 291 prohibits ‘offences [against] the honour of the Italian nation’.</p> <p>It is also an offence to ‘offend the honour of a foreign head of state’ (Article 297) or the representatives (Article 298) or flag/emblem (Article 299) of a foreign state.</p>	<p>The last conviction for insult (Article 290) was in the 1950s. More recent prosecutions (such as that brought against a political cartoonist in the early 1990s) have failed.</p> <p>In 2004, a journalist was convicted under Article 278 for offending the President.</p> <p>An attempt to convict two men who burnt a flag (under Article 278) failed in 2001.</p>
The Netherlands	Insult and criminal defamation offences exist but are not enforced.	<p>Both insult and criminal defamation are offences under the Dutch Criminal Code:</p> <p>It is an offence to ‘intentionally insult’ the King (Article 111), the King’s consort, Heir Apparent the spouse of the latter or the Regent (Article 112).</p> <p>It is an offence to ‘intentionally insult’ a head or member of a government of a friendly nation (Article 118).</p> <p>Libel and slander are criminalised under Article 261.</p> <p>Blasphemy is a criminal offence (Article 147).</p>	<p>Insult laws are rarely applied. The latest conviction was in April 2005 when a protestor was convicted for throwing paint bombs at the passing carriage of the Crown Prince and Princess. There were a couple of convictions in the 1960’s for insulting the head of a foreign state or the Dutch Royal Family.</p> <p>Criminal defamation charges are rarely brought but public officials frequently bring civil defamation claims.</p> <p>There has been a number of recent cases and considerable debate about race and religious discrimination laws.</p>
Poland	Insult and criminal defamation laws exist and are enforced; however, penalties tend to be monetary rather than custodial.	<p>The Polish Penal Code 1998 (replacing the previous Polish Penal Code) contains insult and criminal defamation provisions.</p> <p>It is an offence to insult the Nation or the Republic of Poland in public (Article 133).</p> <p>It is an offence to insult the President (Article 135(2)).</p> <p>It is an offence to insult foreign officials (Article 136(3)).</p>	<p>Whilst the provisions are enforced fairly regularly, the authorities have been reluctant in recent years to impose custodial sentences even when the defendant is found guilty. Fines in the region of £2,000 - £3,000 have been typical.</p> <p>Criminal proceedings brought against a homeless</p>

Country	Summary	Law	Enforcement
		<p>It is an offence to insult a public official (Article 226). The law provides that if the ‘insult’ is in response to the inappropriate conduct of an official, the court may mitigate the penalty or reduce its imposition.</p>	<p>man who made insulting comments about the President in 2006, were discontinued owing to the nominal damage the insult had caused.</p> <p>In 2003, the publisher of ‘Nie’ magazine was found guilty of insulting a foreign head of state under Article 136(3) and fined £3,000.</p>
Portugal	Insult and criminal defamation laws exist but are not enforced.	<p>Both insult and criminal defamation are offences in Portugal.</p> <p>Article 238 makes it an offence ‘to insult or defame the President of the Republic’. Criminal proceedings can be stopped at the President’s wish.</p> <p>Article 332 makes it an offence to ‘insult or show disrespect for the Republic, the flag, the national anthem, the coat of arms or emblems of Portuguese sovereignty’.</p>	No recent incidents.
Romania	Insult laws relating to public functions repealed; general insult laws and criminal defamation offences exist but imprisonment is no longer a penalty.	<p>The Romanian Constitution prohibits ‘defamation of the country and the nation’ (Article 30.7).</p> <p>The Penal Code reiterates this by prohibiting ‘public defamation by any means of the Romanian country or nation’ (Article 236.1).</p> <p>The Penal Code prohibits insult generally (Article 205) but the provision specifically dealing with public insults to a person serving an important public function has been repealed (Article 238).</p> <p>Article 206 prohibits calumny. Truth is a defence to insult and calumny.</p>	<p>The Romanian authorities have tried to decriminalise insult, calumny and public defamation, but have met with opposition from the Constitutional Court. In 2006, the Romanian Penal Code was amended to repeal Articles 205 to 207 and 236.1, thereby removing all insult and calumny offences from Romanian law. However, the Romanian Constitutional Court ruled in 2007 that the repeal was contrary to the Constitution. The situation is likely to change in September 2008 when a new Penal Code is scheduled to come into force.</p> <p>According to a 2003 report by the Independent Journalism Centre, 43% of newspaper journalists have been threatened with insult or calumny offences. Of these, 28% were tried and 5% were convicted.</p>

Country	Summary	Law	Enforcement
Spain	<p>Insult and criminal defamation laws exist; ECtHR overturned last conviction in 1992.</p>	<p>Both insult and criminal defamation are offences under the Spanish Criminal Code.</p> <p>‘Insults which, by their nature, effects and circumstances, are considered serious by the public shall constitute a crime’ (Article 208).</p> <p>An insult which is not serious but has been made in the knowledge that it is false or made recklessly is also prohibited (Article 208).</p> <p>Truth is a defence to insult when the insult is directed at public officials (Article 210).</p> <p>Insulting the royal family (Article 490), the government, the armed forces, or constitutional institutions (Article 504) is prohibited.</p> <p>Offences of calumny (i.e. false accusations of having committed a crime) are extensive. Where calumny is directed at a public official, the Public Prosecutor is obliged to prosecute the offender (Article 215).</p> <p>A number of recent measures designed to address ‘the threat of terrorism’ include provisions on insult of ordinary individuals on basis of religion, etc. (Article 505).</p>	<p>In February 2006, the case of two journalists convicted by three Spanish courts, including the Supreme Tribunal, for insulting a foreign head of state in 1996, was considered by the Spanish Senate.</p>

**OTHER EUROPEAN JURISDICTIONS –
INFORMATION EXTRACTED FROM WORLD PRESS FREEDOM REPORTS (2000 & 2006)**

Austria [2006]	<p>Insult and criminal defamation laws; regular national enforcement is repeatedly overturned by the ECtHR.</p>	<p>Article 248 of the Criminal Code prohibits ‘disparagement of the State and its symbols.’</p> <p>Article 111 of the Criminal Code prohibits criminal defamation and provides that the maximum sentence for criminal defamation committed ‘in a printed document ... in such a way as to make the defamation accessible to a broad section of the public’ is twice the usual sentence (i.e. imprisonment of one year instead of six months). Article 6 of the Media Act provides for strict liability of the publisher.</p> <p>Article 115 prohibits publicly insulting, mistreating or mocking another person, though ‘understandable indignation’ in response to a provocative comment operates as a defence.</p>	<p>In July 1986 the ECtHR Court overturned the conviction of a journalist under Article 115 for insulting the governor of Carinthia by referring to him as an ‘idiot’ (<i>Oberschlik v Austria</i> (no.2)).</p> <p>In recent years, government officials have regularly invoked Article 111 against journalists. In a series of opinions (most recently in 2000), the ECtHR has repeatedly ruled that it is a violation of Article 10 of the ECtHR.</p>
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Country	Summary	Law	Enforcement
		<p>Article 116 of the Criminal Code prohibits defamation of certain public authorities including the Federal Parliament.</p>	
<p>Denmark [2006]</p>	<p>Insult and criminal defamation laws exist but are not enforced.</p>	<p>Both insult laws and criminal defamation exist in the Danish Criminal Code.</p> <p>Attacking a public official with ‘insults, abusive language or other offensive words...’ is an offence but only ‘while he is executing his office...’ i.e. doubtful that this applies to former officials (Article 121).</p> <p>‘Violation of the personal honour of another by offensive words, or conduct, or by making or spreading accusations of an act likely to disparage another in the esteem of his fellow citizens’ is an offence (Article 267), but if the allegations made are true then this is a complete defence (Article 269).</p> <p>Articles 267(2) and (3) and 267a, which specifically mentioned public officials, were repealed in 2004.</p>	<p>In October 2006, a Danish court rejected proceedings brought by Muslim groups against a Danish newspaper which published cartoons about the prophet Mohammed. The court held that the cartoons were not intended to insult. An appeal is pending.</p>
<p>Greece [2000]</p>	<p>Insult and criminal defamation laws; provisions fairly frequently enforced.</p>	<p>The Greek Criminal Code contains both insult and criminal defamation offences.</p> <p>Insulting the President is a criminal offence (Article 168(2)).</p> <p>Insulting foreign heads of state (Article 153(b) or diplomats (Article 154) is a criminal offence.</p> <p>‘Injury to another’s reputation by words or deeds’ is a criminal offence (Article 361).</p> <p>Defamation is a criminal offence (Article 362).</p> <p>There is a defence of truth for defamation, but it does not extend to insult if the insult itself results from ‘the conduct or circumstances under which it occurred’.</p>	<p>The provisions are frequently enforced by national courts in Greece and the application of insult law appears to go unabated despite Greek membership of the EU. Cases resulting in convictions do not appear to have reached the ECtHR.</p> <p>Officials systematically invoke provisions on press law violations and laws on slander in suing newspapers and magazines.</p> <p>Although the courts no longer tend to hand down prison terms for press law violations, the legislation itself does provide for up to five years’ imprisonment for ‘insult’ or ‘dishonour’.</p>