

OUT OF BALANCE

EUROPE,
DEFAMATION LAWS
&
PRESS FREEDOM



BRIEFING: CRIMINAL DEFAMATION IN PORTUGAL

[Report on the IPI Working Visit ■ June 2015]



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[About this Report]

In January 2015, the **International Press Institute** (IPI) conducted a four-day visit to Portugal centred on the theme of defamation laws and freedom of expression. The first element of the visit, a two-day seminar jointly hosted by IPI, the Lisbon-based **Observatório da Imprensa** and the London-based **Media Legal Defence Initiative** (MLDI), brought together nearly 50 journalists, editors, lawyers, civil society representatives, judges and Portuguese government representatives to evaluate the effect of Portugal's defamation laws on the work of the Portuguese press and to debate the extent to which these laws respected constitutional guarantees as well as international standards on freedom of expression.

The second element of the visit consisted of a two-day IPI mission, during which IPI delegates met with representatives of Portuguese legislative, judiciary and regulatory bodies to gather these officials' opinions on the use of defamation laws as well as to encourage legal reforms that meet international standards. The mission included audiences, among others, with the plenary Committee on Constitutional Rights, Freedoms, Liberties and Guarantees of the Portuguese National Assembly, as well as with the president of the Portuguese Supreme Court. The IPI delegation was led by IPI Executive Director Barbara Trionfi and included IPI Director of Advocacy and Communications Steven M. Ellis and IPI Director of Press Freedom Programmes Scott Griffen.

This report highlights key findings from both the seminar and the mission, and seeks to place the issue of Portugal's defamation laws in comparative light.

It also features joint recommendations from IPI and the Observatório da Imprensa for reforming Portuguese defamation law in line with international standards on freedom of expression.

The seminar and mission in Portugal were supported with co-funding from the European Commission under its European Centre for Press and Media Freedom pilot programme and from the Foundation Open Society Institute in cooperation with the Program on Independent Journalism of the Open Society Foundation. IPI's programme on defamation laws in the European Union, of which this report forms part, was initiated with generous support from the European Commission in 2014.

IPI's activities in Portugal are part of its European Union-wide advocacy and awareness-building campaign on defamation laws, which seeks to highlight the dangers these laws pose for the free flow of information in Europe and to promote necessary legal reform. The campaign also encourages EU states to consider the example that the existence of criminal defamation laws in Europe may set for countries where press freedom does not enjoy the same high cultural or legal status as in Europe.



View of the Assembleia da República (Assembly of the Republic), Portugal's parliament, where IPI met with the Committee on Constitutional Rights. *Photo: IPI.*



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Criminal Defamation Laws in Portugal

The selection of Portugal as a target country for IPI's advocacy efforts on defamation laws was based on two considerations:

1. **The existence of outdated criminal defamation provisions in Portugal that fail to meet international standards by an alarmingly wide margin;** and
2. **An unusually high number of condemnations of Portugal at the European Court of Human Rights (ECHR) for violations of Art. 10 of the European Convention on Human Rights, many of which concerned the application of defamation laws.**

In terms of the legal provisions currently in force in Portugal, IPI has identified the following concerns:

a. Defamation remains a criminal offence punishable with imprisonment.

- **Art. 180** of the Portuguese Criminal Code punishes defamation (*difamação*) – defined as alleging a fact or formulating a judgment (or reproducing such) about a third person that is offensive to that person's honour or reputation – with up to six months in prison or a fine of 240 days.
- **Art. 181** of the Criminal Code punishes insult (*injúria*), defined as alleging a fact or expressing offensive words directly to a person that is/are offensive to that person's honour or reputation, with up to three months in prison or a fine of up to 120 days.
- According to **Art. 183**, when an act of defamation or insult is committed with "publicity" or concerns

an allegation that the defendant knew to be untrue, this constitutes *calúnia* and the potential maximum punishments are raised by one-third.

- Finally, also under **Art. 183**, when defamation or insult is committed through the media, punishments increase to a prison term of up to two years or a fine of not less than 120 days.

Portuguese criminal defamation cases are generally brought via private prosecution. Under this system, a private party lodges a complaint before a prosecutor, who oversees an initial inquiry (*inquérito*). However, at the end of this inquiry it is the private party, not the prosecutor, who takes the decision to file charges. If charges are filed, the defendant then has the opportunity to produce evidence and ask a judge to review and decide if the case should go to trial (*instrução*). In terms of freedom of expression, this type of system is a double-edged sword. On the one hand, one could say that it reduces the space for abuse by governments, although the prosecutor must file charges when the plaintiff is one of a wide range of government and public officials in virtue of their function, including members of Parliament, the Council of state, or the Ministry of the Republic; police and security service officers; public, civil, and military officials; judges, lawyers, witnesses, and jury members; ministers; and university professors. On the other, by bypassing prosecutorial judgment, it potentially increases the opportunity for frivolous claims to reach court.

In Portugal, as in other continental European countries, the system of "private prosecution" appears to resemble civil action, and is even often referred to informally as such. However, there are important differences. First, regardless of whether prosecutions are public or private, punishments (including imprisonment) will still be

Portuguese Criminal Defamation Law, in figures

1/2

Amount by which punishments for defamation are increased if victim is public official

2

Possible years in prison for defamation committed through the media

50

Limitations period, in years, for the crime of “seriously offending the dead”

criminal in nature, i.e., backed by the state. This is in contrast with civil damage awards, which involve exchanges between private parties. Second, criminal defamation cases in Portugal offer the plaintiff a financial advantage, as numerous lawyers and journalists pointed out during IPI’s visit. A plaintiff in a Portuguese civil court, in addition to paying his or her lawyer, must pay two rounds of expensive court fees before proceedings begin, thus offering a certain degree of protection against unfounded suits. In a criminal court, by contrast, a plaintiff is liable for a fee after proceedings but only if he or she loses the case.

In its testimony before the Constitutional Rights Committee, as well as in a written submission to the Committee and to the Minister of Justice, IPI observed that numerous international human rights authorities, including the U.N. Human Rights Committee¹ and the special rapporteurs on freedom of expression of the U.N., the Organization for Security and Co-operation in Europe and the Organization of American States,² have all urged states to repeal criminal defamation laws.

IPI also pointed out the clear international consensus against the possibility of imprisonment in defamation cases. This consensus includes not only the special rapporteurs listed above, but also international judicial bodies such as the European Court of Human Rights (ECHR).³ On several occasions, the ECHR has ruled that the imposition of a prison sentence for defamation violates Art. 10 even when the national courts were justified in their finding of liability.⁴

In response to IPI’s advocacy for the repeal of criminal defamation laws, members of the Committee on Constitutional Affairs suggested that the Portuguese Criminal Code contained “generous grounds for the

exemption of criminal responsibility” in defamation cases. These grounds, according to several MPs, provided sufficient safeguards for the protection of freedom of expression.

To be sure, the Criminal Code explicitly provides the defences of truth and good-faith for statements made in support of “legitimate interests” or to exercise a right. Nevertheless, IPI notes that the mere threat of criminal prosecution, particularly for journalists without access to adequate legal representation, can be sufficient to produce self-censorship. This is particularly the case under Portuguese law, which offers increased protection to those in positions of power. Furthermore, insofar as the application of criminal law involves the interpretation of individual judges, a degree of uncertainty may accompany criminal cases despite legal guarantees. It is necessary to point out here that Portuguese courts have been condemned by the ECHR for violating freedom of expression in 12 criminal defamation cases since 2005.

During the Lisbon seminar, a representative of the association of Portuguese prosecutors suggested that civil and criminal defamation laws served distinct purposes. The former, he said, are meant to protect or repair damage, while the latter serve, in part, a preventative purpose, warning against repeat offence by the defendant in question or by others.

On the one hand, it is true that Portuguese law, like that of other continental European countries, lacks the concept of punitive damages. Yet, on the other, because compensation for non-pecuniary damage is inherently subjective, one can argue that such compensation already includes a punitive element, or at least serves that purpose in practice. In any case, IPI believes, in general, that the primary purpose of defamation laws should be to

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ensure that victims of false or misleading media coverage can adequately redress damage done to their reputations as opposed to punishing speakers in a way that induces generalised self-censorship.

The president of Portugal’s Supreme Court, António Silva Henriques Gaspar, told IPI that it was mandatory for prison sentences handed down in defamation cases to be turned into fines and called the possibility that a two-year sentence “unthinkable”. He also suggested that criminal defamation laws were “important for maintaining civil peace, especially in small communities”. Although the preservation of public order can serve as a justification for restricting freedom of expression, such preservation should be accomplished through laws specifically tailored to that purpose. Moreover, while it is surely true that the vigorous exercise of freedom of expression inevitably ruffles feathers, this consideration is far outweighed by long-term gains in public accountability.

Gaspar also noted that changes to criminal defamation laws would have to apply to all speakers, not just to the press. This, however, is to be welcomed, as such provisions pose a threat to freedom of expression in Portugal generally. In 2009, for example, a British lawyer, Serena Wylde, was charged with aggravated criminal defamation (*see below*) after submitting a

private complaint to Portugal’s legal regulator over the actions of an attorney serving in a civil property case involving Wylde. The regulator forwarded the complaint to the attorney – the son of a former Supreme Court president – who filed charges carrying up to nine months in prison and demanded €50,000 in damages. The case ended in 2011 due to the statute of limitations. Cases such as Wylde’s highlight the need for all members of the Portuguese public to be concerned about the potential abuse of criminal defamation laws, especially given that criminal cases often involve fewer financial risks to the plaintiffs than do civil cases.

Most Portuguese officials indicated to IPI that, to the extent that there were problems with defamation, these lay not with the law itself but with its application. Yet IPI points out that the mere existence of criminal defamation laws in Portugal, regardless of how carefully they are framed, sets a negative example for other countries where such laws are subject to frequent abuse, including in other Portuguese-speaking countries around the world.

b. The existence of a criminal provision on “aggravated defamation” under which punishments for defamation are elevated when the victim is a public official.

Art. 184 of the Criminal Code specifies that when defamation, insult or calumny are committed against a wide range of government and public figures in virtue of their function, the minimum and maximum punishments are raised by one-half. The list of figures includes members of Parliament, the Council of State, or the Ministry of the Republic; police and security service officers; public, civil, and military officials; judges, lawyers (*see Serena Wylde case above*), witnesses, and jury members; ministers; and university professors.

A cornerstone of international standards of defamation and freedom of expression is that the limits of acceptable criticism are wider as concerns public officials than private persons. The notion that the activities of public officials – particularly elected officials, but arguably any person who holds a position of public responsibility or who deals with public funds – must be open to



IPI Director of Press Freedom Programmes Scott Griffen speaks on the current state of criminal defamation laws in Europe at the IPI/MLDI/Observatório da Imprensa seminar in Lisbon. Photo: IPI.

scrutiny by the public reflects a basic understanding of democratic accountability and has been a bedrock of the jurisprudence of the ECHR since its landmark 1986 decision in *Lingens v. Austria*. The Portuguese Criminal Code inverts this standard completely. Portugal is one of just six EU countries in which public officials receive greater protection under defamation law (the other five are Bulgaria, France, Germany, Italy and the Netherlands).

c. Criminal provisions protecting the “honour” of the state, its institutions or its symbols.

Art. 187 punishes the assertion of false information “liable to offend the credibility or prestige” of an “institution, corporation, organism or service run by public authorities” with a prison term of up to six months or a fine of up to 240 days.

Additionally, **Art. 332** punishes insulting the State, the national flag or anthem, or the symbols of Portuguese sovereignty, or failing to give the State or its symbols “the respect they deserve” with a prison term of up to two years or a fine up to 240 days. **Art. 323** punishes insulting the flag or official symbol of a foreign state or international organisation of which Portugal is a member with up to one year in prison or a fine.

of institutions, such as the army or the administration.”⁵ In 2000, the special rapporteurs declared: “the State, objects such as flags or symbols, government bodies, and public authorities of all kinds should be prevented from bringing defamation actions.”⁶

d. Further related provisions.

It is necessary to point out the offence of false public accusation (*denúncia caluniosa*) under **Art. 365** of the Criminal Code. The offence consists in “accusing – through whatever means, whether before an authority or publicly – or throwing suspicion upon a person of having committed a crime while knowing the accusation to be false” and is punishable with up to three years generally, but up to eight years if the accusation results in the victim’s imprisonment.

Although this offence is not grouped with defamation or insult, it is clearly related. Indeed, in neighbouring Spain, the “equivalent” offence to defamation, *calumnia*, is defined precisely as accusing another person of having committed a felony. Moreover, Portuguese courts have accepted that “the crime of false public accusation, in addition to directly protecting the administration of justice, allowing the State to guarantee the credibility and seriousness of criminal proceedings ... also protects ... the honour and dignity of the accused”⁷

The notion that the activities of public officials must be open to scrutiny by the public reflects a basic understanding of democratic accountability and has been a bedrock on the jurisprudence of the ECHR since its landmark 1986 decision in Lingens v. Austria. The Portuguese Criminal Code inverts this standard completely.

The provisions noted here, and in particular Art. 332 reflect an outdated, authoritarian tendency to shield the State from criticism and stand in contrast to the ECHR’s oft-repeated maxim that freedom of expression includes the freedom to express views that “shock, offend, and disturb”. Moreover, in less democratic countries around the world, similar provisions are subject to abuse to protect the government and/or majority positions. The existence of the above articles in countries committed to protecting freedom of expression, such as Portugal, makes it more difficult to encourage necessary reforms where they are urgently needed.

The U.N. Human Rights Committee places a high value on debate concerning public figures and public institutions. It “expresses concern regarding laws on such matters as, lese majesty, *desacato*, disrespect for authority, disrespect for flags and symbols, defamation of the head of state and the protection of the honour of public officials” and has stated: “States parties should not prohibit criticism

IPI believes that this offence, as currently worded, falls under the umbrella of defamation and should thus be abolished. The protection of honour should be relegated to civil courts, while the interest in protecting the administration of justice can be served through specific laws on making false reports to the authorities.

Also problematic is **Art. 185**, which punishes “seriously offending” the dead with up to six months in prison, which sets a staggering 50-year limitations period for filing claims. IPI believes such provisions can be easily abused and that persons should be barred from bringing defamation actions on behalf of a deceased person unless the impugned material directly and intentionally also damages the reputation of a living person. In any case, the limitations period should be not more than one year except in highly exceptional circumstances.

[2]

Portugal, Article 10, and the ECHR

IPI's selection of Portugal as a target country for its defamation work was partly founded in what appeared to be an unusually high number of Portuguese defamation cases before the ECHR.

When IPI broached this concern at the Lisbon seminar, it was suggested in response that the number of condemnations of Portugal for Art. 10 was similar to the EU average. However, subsequent research by IPI shows clearly that this is not the case.

In the 10-year period between February 9, 2005 and February 9, 2015, according to statistics from the ECHR's official database, Portugal was condemned 18 times for violating Art. 10. Only three EU states had more Art. 10 condemnations: France (22), Poland (21), and Romania (20). Moreover, among all 28 EU states, the average number of Art. 10 convictions was approximately six (6.46), with four states having no condemnations at all and 10 having just one or two violations.

Portugal, with 18, had therefore three times as many Art. 10 condemnations as the average EU state during this period.

Of Portugal's 18 violations, 12, or two-thirds, concern convictions for criminal defamation – evidence enough to demonstrate that criminal defamation laws continue to be actively and problematically applied in Portugal. Among these 12, in six cases the party convicted was a journalist, editor or publisher; among the other six were a historian, two authors, and a politician. It bears noting

that five of the criminal cases involved a conviction for violating Art. 184 (aggravated defamation against a public official), a highly problematic provision in light of international standards.

Three of the 18 cases relate exclusively to civil liability for defamation; two⁸ to the violation of judicial secrecy (*segredo de justiça*); and one to an instance in which an NGO flotilla was denied entrance to Portuguese waters.

Among the criminal defamation cases, the ECHR's decisions frequently criticise a failure to balance freedom of expression with reputation as well as the awarding of disproportionate punishments.

For example, in *Amorim Giestas and Jesus Costa Bordalo v. Portugal* (2014), the Court characterised one of the impugned articles as “not only based on facts but also a judicious contribution to a public interest debate” and called the fines ordered of the two journalists “clearly disproportionate”.⁹ In *Azevedo v. Portugal* (2008), concerning a book author sentenced to a €1,000 fine or 66 days in prison, the Court wrote: “Contrary to the Government, the Court cannot consider the criminal punishment ... to be of minor character if the circumstances are taken into account. Indeed, foreseeing the possibility of a prison punishment in a classic defamation case such as this one inevitably produces a disproportionate chilling effect.”¹⁰

Many factors may influence a country's number of condemnations at the ECHR – including, most

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obviously, the overall number of applications lodged per country – and as such these comparative figures should be interpreted cautiously. In the case of Portugal, it is also necessary to explain that, under the Portuguese

judicial system, defendants may appeal first-order rulings to regional appeals courts, but have no leave to appeal further to the Supreme Court unless the punishment or damage award assigned reaches a certain threshold (in criminal cases, the threshold is a sentence of at least five years in prison or a fine of €30,000). In general, it is unusual for defamation cases in Portugal to advance beyond the regional appeals courts and appears to be extremely rare for criminal defamation cases specifically.

All 12 criminal defamation cases were appealed to the ECHR directly from Portugal's regional appeals courts – i.e., these cases were not reviewed by the Portuguese Supreme Court. In 11 cases, the appeals court confirmed the conviction of the first-level court; in the remaining case, the first-level court acquitted the defendant, a journalist, but the appeals court reversed the verdict.

The picture as regards the three exclusively civil defamation cases is different. In two of the cases, the Supreme Court denied request for appeal. However, in the third case, the Portuguese Supreme Court reversed the decisions of both the Lisbon first instance court and the Lisbon Appeals Court and ordered the newspaper *Público* to pay €75,000 in damages to the Sporting football club (see more on this case below).

The president of the Supreme Court, Gaspar, who took office in 2013 and served as the Portuguese government's representative before the ECHR until 2003, said that while “it is not good to have the ECHR condemning Portugal, the number of cases is very low”.

Gaspar also expressed confidence in the ability of the Portuguese lower courts to properly balance freedom of expression and the right to reputation in line with the ECHR's jurisprudence and pointed out that the national judicial academy ran specific courses on freedom of expression matters as well as ECHR case law.

In a 2015 institutional report, the Supreme Court affirmed that citing ECHR case law in its decisions involving freedom of expression had become “common practice” and offered several concrete examples. This is a welcome evolution: Francisco Teixeira de Mota, a leading Portuguese free-speech lawyer, told seminar participants that the first time Portuguese courts referenced the ECHR in free expression cases was in 2005, five years after a seminal Strasbourg decision against Portugal, *Vicente Jorge da Silva*.

But it is unclear to what extent Portuguese lower courts incorporate ECHR jurisprudence and concerns in this respect have been expressed. For example, Isabel Costa Bordalo, one of the applicants in *Amorim Giestas* and a panellist at IPI's seminar, said the first-instance court in São Pedro do Sul never mentioned the ECHR in its 2009 decision. Teixeira da Mota, in his book *Freedom of Expression in Court*, noted that in *Azevedo*, the first-instance court convicted an author of criminal

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defamation “without ever considering or even referring to freedom of expression”.¹¹

As for the Supreme Court itself, as noted above the Court rarely, if ever, considers criminal defamation cases on their merits. Between 2004 and 2014, however, according to an institutional report provided to IPI, the Supreme Court considered 63 civil cases involving a clash between press freedom and personality rights (as protected by Arts. 70, 483 and 484 of the Civil Code). The report offers a detailed analysis of the years 2012-2014, indicating that 13 such cases were decided during this period. In 10 cases, the Court upheld the decision of the appeals court, nine of which went against the media defendant.

In the other three cases, the Supreme Court overturned, in favour of the media defendant, the appeals court ruling. The report notes that in these (Supreme Court) rulings, “preference was given to the right to freedom of expression (press freedom) over the right to honour

and/or the right to personal image, emphasising the right to report in the public and social interest”. For example, the Court reversed a civil verdict against two journalists, Célia Rosa and Isabel Stilwell, who had been sentenced to pay €15,000 over four articles examining controversial rulings by a Lisbon family court judge. The decision had been vehemently criticised by, among others, the Portuguese Journalists Union.¹² In its decision, the Supreme Court reportedly ruled that the articles met the criteria of truthful reporting, that they “were of clear public interest”, and that the judge in the case “is not only subject to public criticism through the media, but must also be tolerant of such”.

Between 2004 and 2014, only one of the Supreme Court’s decisions has, to date, been considered by the ECHR and been found to violate Art. 10. This is the Court’s 2007 decision in the case that became known as *Público – Comunicação Social, S.A. and others v. Portugal* (2010). In that instance, as noted above, the Supreme Court overruled two lower courts and ordered



View of the main chamber of Portugal's Supreme Court of Justice. Photo: IPI.

the newspaper *Público* to pay €75,000 in damages to the football club Sporting. In the ruling, the Supreme Court, as the ECHR noted, appeared to suggest that the question as to whether the allegations contained in *Público*'s article were true or not was of little importance:

“In this case, there is a concrete conflict between the right to reputation of an individual of recognised public interest and that of press and media freedom that cannot be resolved in favour of the first of these rights to the detriment of the second. The violation of Art. 484 of the Civil Code does not depend on the truthfulness of the fact published as the illicit nature of the act is not affected by the proof – or the absence of proof – of the truth.”

Several participants at the IPI seminar specifically highlighted the *Público* case as a negative example of the way in which Portuguese courts decide defamation cases. One participant, a journalist, called the Supreme Court's ruling an act of “censorship” intended to “tame” the media.

[3]

Perceptions on Defamation Laws

During the seminar jointly hosted by IPI, MLDI and the Observatório da Imprensa, Teixeira da Mota acknowledged that the situation of freedom of expression in Portugal was “completely different” from even 10 or 15 years ago, a positive evolution he attributed to the influence of the ECHR. “Freedom of expression previously had much less value than reputation, especially as regards the honour of public officials” he said. “Courts always identified with powerful plaintiffs.”

Yet he remains critical of Portuguese courts’ “conservative” approach to balancing free expression and reputation. “Even today”, he told IPI in a 2014 interview, “there remains in many cases a tendency to place too much value on the words, image and reputation of powerful figures when weighed against critical opinions about those figures. Courts continue, at times, to not distinguish between assertions of fact and value judgments, which obviously ends up harming freedom of expression.”¹³

Some participants highlighted a general lack of discussion on defamation laws. Isabel Duarte, a lawyer who has frequently worked as outside counsel for Grupo Imprensa (*Expresso*, *Visão*, the television station SIC, among others), suggested that “the issue of fundamental rights of journalists is not something that is discussed in Portugal, not by the media, with the exception of ECHR decisions”.

Vitor Serpa, editor of *A Bola*, Portugal’s most widely read sports magazine, criticised what he viewed as a lack of consistency among court rulings in defamation cases. “Some [judges] are more likely to consider the constitutional defence of reputation and honour the most important [element]; on the other hand, there are those that are more sensitive to questions of freedoms [of expression and information].” His observations, he

said, came from having to make “regular journeys” to courthouses all over Portugal during his 40-year career as a journalist and 23-year stint as *A Bola*’s editor. Indeed, participating journalists and lawyers generally directed any criticism more toward the application of defamation laws, rather than the text of the laws themselves. Moreover, there appeared to be greater concern regarding civil cases than criminal ones.

José Manuel Fernandes, the founder of the online news site Observador and former editor of *Público*, stated that he had faced few criminal proceedings over his career and had never been convicted. In Fernandes’s view, the reason that individuals continued to turn to criminal court was due to a much lower level of financial risk. In civil cases, by contrast, he noted, “you have to pay from day one”.

Nevertheless, he suggested that the biggest problem relative to defamation in Portugal remains high damage awards in civil cases. He recalled a case from the late 1990s in which a wealthy businessman, António Champalimaud, demanded 500 million escudos, or €5 million, from *Público*, where Fernandes was editor at the time, and two other journalists over an alleged “campaign” to discredit his honour.¹⁴ Fernandes called the sum “brutal” with potentially “catastrophic” consequences. The case was eventually settled.

Nicolau Santos, a journalist and columnist with *Expresso*, said the issue of damages was particularly acute for media covering finance and economics. “All of us are of course subject to retaliation,” he affirmed. “But I tend to think that the retaliation against financial journalism is harsher than against other types.” Economic interests in Portugal, he continued, “use damage awards not only to intimidate the media outlet specifically targeted and that wrote the article, but also to send a message to all those who write on

Legal experts at the seminar also voiced concern about high damage awards, with many noting that compensation in civil cases could be many times larger than criminal fines – and thus harbouring a similar, if not greater, potential for producing self-censorship.

the same topic that if they write about [those interests] as well, they will be subject to lawsuits requesting compensation”.

Santos spoke from personal experience. In 2011, an investment group and part owner of *Expresso*'s parent company filed a €70 million (!) libel lawsuit for economic and non-pecuniary damages against *Expresso* and Santos. A Lisbon judge ruled in *Expresso*'s favour in 2012 (see Sidebar on p.19).

Serpa indicated that *A Bola* had also been the subject of enormous damage requests. In one recent case, he said, a contributor to the paper had raised questions about the transfer of a football player for an amount several times greater than that stipulated in his contract. In response, the management of one of the teams involved filed a €1 million civil suit against the contributor and *A Bola*. During negotiations, Serpa said, the management's legal team offered to drop the suit if the paper agreed not to make any more references to the management – an offer Serpa called “absolutely unacceptable”.

Such transfers, Serpa added, interested *A Bola* “in terms of transparency of the reality of the sporting world”, a world in which “a lot of money and influence” are involved.

Legal experts at the seminar also voiced concern about high damage awards, with many noting that compensation in civil cases could be many times larger than criminal fines – and thus harbouring a similar, if not greater, potential for producing self-censorship. Indeed, Jónatas Machado, professor of constitutional law at the University of Coimbra, stressed the threat that economic power posed the freedom of expression, in part via SLAPPs, or strategic lawsuits against public participation, that are designed to financially overwhelm defendants into submission.

Portuguese civil law does not cap compensation for non-pecuniary damage in defamation cases, although a number of international experts have called on states to do so. The Parliamentary Assembly of the Council of Europe in 2007 condemned “abusive recourse to unreasonably large awards for damages” and called on states to “set reasonable and proportional maxima for awards ... in defamation cases so that the viability of a defendant media organ is not placed at risk”. Among EU states, only Austria and Malta currently cap damages in law.

Caps aside, international standards as well as ECHR jurisprudence require that damages be proportionate to the harm caused and take into account the full circumstances of the case, including the potential for high compensation to produce a chilling effect on the media generally.

In terms of damages awarded in practice, in 13 decisions between 2012 and 2014 involving a clash between freedom of expression and personality rights, the Portuguese Supreme Court ordered, or approved rulings ordering, media defendants to pay an average of €27,500. The highest award in this period was €65,000. IPI has not obtained data relating to lower courts. However, as the Supreme Court only considers appeals when the compensation reaches a particular threshold, it is unlikely that many higher damage awards exist. To date, the most expensive case is believed to be the Supreme Court's decision ordering the newspaper *Público* to pay the football club Sporting €75,000 in 2008. It is worth noting that the ECHR viewed that award as disproportionate and “unusually high” in comparison to similar Portuguese cases. The ECHR concluded that such compensation “inevitably risked dissuading journalists from contributing to public debate on questions of general interest”.¹⁵

IPI believes that, at the very least, Portuguese civil law should state that compensation awarded must be reasonable and proportionate; ideally, such damages should be capped.

As it stands, the lack of such a requirement is not the only challenge regarding Portuguese civil defamation law, which draws primarily from the following three articles of the Civil Code:

- **Art. 70**, which provides for the defence of personality rights generally;
- **Art. 483**, which requires those who violate personality rights to pay compensation; and
- **Art. 484**, which states that “[w]hoever asserts or disseminates a matter capable of damaging the reputation or good name of any person, individual or collective, is liable for the damage caused”.

The Portuguese Civil Code was promulgated in 1966, in the waning years of the authoritarian Estado Novo regime. Although Portuguese jurisprudence has clearly evolved, the law itself remains antiquated. As Machado, pointed out to seminar participants, the Civil Code does not mention freedom of expression or information nor does it consider any type of defence, such as truth or public interest.

“What is freedom of expression worth in São Pedro do Sul, away from Lisbon, Porto, and Coimbra. How much free speech do you have there?”

During the seminar, it was also suggested that the abuse of defamation laws, to the extent it existed, was more acutely felt outside of Portugal’s largest cities for a variety of reasons.

The recent *Amorim Giestas* case was posed as a typical example. In that affair, a court in São Pedro do Sul brought criminal charges against a journalist, Fernando Giestas, and an editor, Isabel Costa Bordalo, over articles suggesting that a local court’s donation of used furniture to charity was marred by favouritism. Problematically, the pair’s trial took place in the same court implicated; the secretary of the court was one of the accusing parties. The court sentenced Giestas and Bordalo to a criminal fine as well €3,500 in damages, plus legal costs.

Moreover, Bordalo said, while national newspapers generally pay legal costs of their employees, “in our case we had to support by ourselves the sum of the legal proceedings plus the damages”. The journalists at the time did not have contacts to leading lawyers, such as Isabel Duarte or Teixeira da Mota, who later represented them at the ECHR. “We had the support of the trade union, which did what it could”, Giestas noted. But in the end, he said, “we felt alone”.

“This kind of case has an immediate consequence: self-censorship”, explained Bordalo, who is now the editor of a newspaper in Angola. “I am not going to risk publishing something that incriminates someone even if it is true [...] this self-censorship endangers the newspaper and, in the end, endangers democracy.”

In light of his experience, Giestas challenged seminar participants to consider “what freedom of expression is worth in São Pedro do Sul, far from Lisbon, Porto and Coimbra. What is freedom of expression worth there?”



Participants at the IPI/MLDI/Observatório da Imprensa seminar on defamation laws in Lisbon. Photo: IPI.

[Sidebar]

“Their honour is huge and it’s worth €70 million.”

It is a number that defies belief. In 2011, an investment group, Ongoing Strategy Investments, filed a €70,130,000 defamation suit against the weekly newspaper *Expresso* and one of the paper’s journalists, Nicolau Santos. The claim is widely believed to be the most expensive against a Portuguese media outlet in history.

According to court filings, Ongoing accused *Expresso* and Santos of conducting an “extensive and systematic campaign” to damage the company’s reputation through a series of nine articles that appeared between August 2009 and March 2010.

In the summer of 2009, Ongoing, which at the time maintained a 21.77 percent stake in Grupo Impresa, *Expresso*’s parent company, reportedly became involved in a dispute with Grupo Impresa’s majority shareholder over the company’s direction. Shortly thereafter, Ongoing, by its own account, sought to diversify its media holdings and concluded a multi-party agreement to acquire a 35 percent stake in Grupo Media Capital, a company whose holdings include the private broadcaster TVI, a direct competitor to the broadcaster SIC, owned by Grupo Impresa.

The impugned articles published around this time by *Expresso* scrutinised Ongoing’s financial situation and raised questions about its dealings with Portugal Telecom, a company with links to the Portuguese state that had reportedly invested €70 million in Ongoing and itself allegedly had an interest in controlling Media Capital and TVI specifically.

In March 2010, Portugal’s competition authority blocked Ongoing’s acquisition of Media Capital, acting on the recommendation of the country’s media regulator, the ERC.¹⁶ The ERC had feared the acquisition would result “in a very significant risk for pluralism and diversity” in the media, ostensibly because Ongoing would thereby control a significant ownership percentage in Portugal’s two main private broadcasters. The ERC had stated it would not recommend to approve the transaction unless Ongoing sold its shares in Impresa to achieve a less than 1 percent stake in the company and were barred from interfering in Impresa’s internal affairs while remaining part-owner of Media Capital.

In court filings, Ongoing accused *Expresso* and Santos of manufacturing a conspiracy “whose only source of substantiation was the imagination of [Santos]” and claimed: “If it had not been for the inflammation of the political and social environment provoked by the [impugned] articles, the ERC would have assuredly approved Ongoing’s participation in Grupo Media Capital.”

Ongoing accordingly demanded €68,900,000 in self-calculated lost earnings via its inability to acquire shares in Grupo Media Capital. It also requested €180,000 in legal costs incurred during the acquisition negotiations; €300,000 in actual damages; and €250,000 in non-pecuniary damages on behalf of four of its corporate officers for harm to honour and reputation. Separately, under the Portuguese system of private criminal complaints, Ongoing charged Santos with criminal defamation committed by means of the press – an offence carrying up to two years in prison. The company also requested that the court’s sentence be published, at Santos’s expense, in *Expresso*.

Ongoing lost in both proceedings.¹⁷ In the civil case, a Lisbon judge reportedly ruled that the impugned articles, if at times “contentious” in tone, “are merely an opinion” and involved no illicit damage to Ongoing’s reputation. In democratic society, she added, “the right to criticism implies a corresponding duty to put up with criticism”.¹⁸

The company was further ordered to cover the defendants’ legal costs.

[4]

Other Issues Related to Press Freedom

A selection of other press freedom issues that were brought to IPI's attention during its visit to Portugal are briefly summarised here.

a. Electoral law reform and televised debates

As a consequence of Portuguese electoral law, televised debates must include candidates from all parties in a given election. Due to the sheer number of parties, which has increased in recent years, Portugal's television broadcasters have determined that debates are impractical and have collectively decided not to hold them.

Representatives of Grupo Impresa told IPI the requirement and the subsequent lack of debates had a "negative impact on democracy". A number of participants at the seminar echoed that view, suggesting that the electoral law, drawn up more than 40 years ago, was no longer adequate.

Portugal's media regulator, ERC, agrees. Its president, Carlos Magno, said that, in his view, Portugal's electoral laws constituted the greatest challenge to freedom of information in the country. Magno noted that the ERC did not have direct responsibility for the electoral laws – which fall under the province of the national electoral commission – but in 2013 proposed a reform to Parliament. Parliament, however, was unable to take up the issue prior to the 2014 European Parliament elections.

At the time of IPI's visit, it was unclear whether the issue would be resolved before national parliamentary elections in autumn 2015 or the presidential election in January 2016.

b. Blasphemy

During IPI's audience with the Commission on Constitutional Affairs, which occurred shortly after the attacks on the French satire magazine *Charlie Hebdo*, parliamentarians requested IPI's opinion on Portugal's "religious insult" law.

Arts. 251-252 of the Criminal Code punish offending a person in virtue of his religious belief, or denigrating an object of religious worship in a way that could disturb public order, or vilifying a religious practice. The offence is punishable with a prison term of up to one year.

This provision does not fit the traditional understanding of blasphemy. However, IPI opposes all religious insult laws, as it does not believe that religious belief or beliefs of any other kind should benefit from specific legal protection. Moreover, "denigrating an object of religious worship" or "vilifying a religious practice" could conceivably be used to restrict debate on matters of public interest. The state's interest in maintaining public order or prevent incitement to hatred or violence should be channelled through laws specific to that purpose.

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c. Right of reply

Several participants in the seminar criticised Portugal's right-of-reply legislation, with one journalist calling it "clearly absurd and obsolete" and "written to protect politicians".

Arts. 24-27 of the Press Law, which was passed in 1999, state that individuals or bodies have a right to respond to media content that "may affect their reputation and good name, even indirectly".

It was suggested during the seminar by some that the vagueness of this provision allowed individuals free rein to respond to disagreeable content. Respondents "can say whatever they want", said one participant, with the journalist who wrote the article forced to stay silent.

d. Segredo de justiça laws

While there is no space here to go into detail on this topic, suffice to say that many Portuguese lawyers and journalists expressed concern about the country's *segredo de justiça*, or judicial secrecy, laws and it was suggested that this issue would grow in importance in the coming years. As noted previously, three of Portugal's Art. 10 condemnations at the ECHR involved *segredo de justiça*.

[5]

Recommendations

In order to bring Portuguese defamation law in line with international standards, the **International Press Institute** and the **Observatório da Imprensa** make the following key recommendations:

1. **Art. 184** of the Portuguese Criminal Code on “aggravated defamation” involving public officials should be completely repealed.
2. **Arts. 180 –183** on criminal defamation should be repealed (at the least, the potential prison sentences for the offences contained thereunder should be eliminated);
3. **Arts. 187, 322, 323, and 323** should be repealed (at the least, the potential prison sentences for the offences in question should be eliminated);
4. **Art. 185** on defaming the deceased should be repealed or modified to remove the possibility of imprisonment, to shorten the statute of limitations to no more than one year in normal circumstances, and to specify that in order to be liable content must also directly and intentionally damage the reputation of a living person.
5. Legislators should consider restricting liability under **Art. 365** to false reports made before authorities.
6. Portuguese **civil defamation law** should be reformed to provide for clear standard defences, including truth, reasonable publication and opinion; and to set a reasonable cap on damages or at the very least to specify that any compensation awarded must be reasonable and in proportion to the damage done.



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[6]

Notes to Text

[1] See “General comment No. 34”, U.N. Human Rights Committee, 102nd session, published 12 September 2011, www2.ohchr.org/english/bodies/hrc/docs/GC34.pdf.

[2] See Joint Declaration on Freedom of Expression and the Administration of Justice, Commercialisation and Freedom of Expression, and Criminal Defamation (2002), available at www.oas.org/en/iachr/expression/showarticle.asp?artID=87&IID=1.

[3] See, e.g. *Cumpănă and Mazăre v. Romania*, no. 33348/96 [2004]: *Although sentencing is in principle a matter for the national courts, the Court considers that the imposition of a prison sentence for a press offence will be compatible with journalists’ freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence.*” (emphasis added)

[4] See, e.g. *Affaire Belpietro c. Italie*, no. 43612/10 [2013]: “[We] cannot conclude that the plaintiff’s conviction as such was contrary to Article 10 of the Convention [...] Due to the degree and nature of the sanction imposed on the plaintiff, the restriction on latter’s freedom of expression was not proportionate to the legitimate aim pursued.” See also *Affaire Mika c. Grèce*, no 10347/10 [2013], *Mariapori v. Finland*, no. 37751/07 [2013].

[5] *Supra* 1

[6] See Joint Declaration on Censorship by Killing and Defamation (2000), available at www.oas.org/en/iachr/expression/showarticle.asp?artID=142&IID=1.

[7] See, e.g., decision of the Porto Appeals Court of 1 Oct. 2014 n.º 12/12.1TAAFE-A.P1: Database of the Lisbon Prosecutor General, available at http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?artigo_id=109A0365&nid=109&tabela=leis&pagina=1&ficha=1&nversao=

[8] A third *segredo de justiça* case also involved criminal defamation

[9] *Affaire Amorim Giestas et Jesus Costas Bordalo v. Portugal*, no. 37840/10 [2014].

[10] *Affaire Azevedo c. Portugal*, no. 20620/04 [2008].

[11] Francisco Teixeira da Mota, *A Liberdade de Expressão em Tribunal*, Lisbon: Fundação Francisco Manuel dos Santos, 2013, 55.

[12] SJ saúda absolvição de jornalistas Célia Rosa e Isabel Stilwell, Sindicato dos Jornalistas, 14 May 2013, <http://www.jornalistas.eu/?n=9131>.

[13] “Portuguese defamation laws still reflect ‘authoritarian concept of power’, expert says”, IPI, 4 Sept. 2014, <http://www.freemediatv.com/newssview/article/portuguese-defamation-laws-still-reflect-authoritarian-concept-of-power-expert-says.html>.

[14] “Eunice Lourenço, “Jornalista acusa Champalimaud de difamação”, *Público*, 28 Dec. 1999, <http://www.publico.pt/media/jornal/jornalista-acusa-champalimaud-de-difamacao-128417>.

[15] *Affaire Público – Comunicação Social, S.A. et autres c. Portugal*, no. 39324/07 [2011].

[16] “Competition Authority rules against Ongoing/Vertex/Media Capital merger as a result of ERC Advisory Report”, Autoridade da Concorrência, 30 March 2010, http://www.concorrenca.pt/vEN/News_Events/Comunicados/Arquivo/Pages/2010_Competition-Authority-rules-against-Ongoing-Vertex-Media-Capital-merger-as-a-result-of-ERC-Advisory-Report.aspx.

[17] Filipe Pacheco, “Ongoing perde processo contra Nicolau Santos”, *Jornal de Negócios*, 28 Feb 2013, available at http://www.jornaldenegocios.pt/empresas/detalhe/ongoing_perde_processo_contra_nicolau_santos.html.

[18] “Ongoing perde processo contra Expresso e Nicolau Santos”, *Expresso*, 2 Nov 2012, available at <http://expresso.sapo.pt/ongoing-perde-processo-contra-expresso-e-nicolau-santos=f764001>; Christina Ferreira, “Balsemão e Nicolau Santos absolvidos de pagar 70 milhões à Ongoing”, *Público*, 2 Nov 2012, available at <http://www.publico.pt/economia/jornal/balsemao-e-nicolau-santos-absolvidos-de-pagar-70-milhoes-a-ongoing-25519156>.



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