

European Court of Human Rights judgments on the right to freedom of expression

Bulletin LIX: Defamation of judges, prosecutors and others in the justice system

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One of the earlier bulletins – “Freedom of expression and criticism of judiciary”, number 8, of January 2013 – discussed the extent to which judges can be criticised. Since then a number of cases on this topic have been decided, and the question whether prosecutors and others who work in the justice system should receive special protection from the law. This bulletin therefore discusses a further number of judgments from the European Court of Human Rights on this topic, particularly concerning criticism of the judiciary by journalists.

The general principle has been stated by the European Court of Human Rights in the case of ***Sunday Times v. UK (no. 1)***:

“[T]he administration of justice ... serves the interests of the community at large and requires the co-operation of an enlightened public. There is general recognition of the fact that the courts cannot operate in a vacuum. Whilst they are the forum for the settlement of disputes, this does not mean that there can be no prior discussion of disputes elsewhere, be it in specialised journals, in the general press or amongst the public at large. Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them.” (application no. 6538/74, judgment of 26 April 1979, paragraph 65)

At the same time, the European Court has emphasised that the courts have an extremely important role to play in a State governed by the rule of law and need to enjoy public confidence. They should therefore be protected against unfounded attacks. Therefore the media – and others – are entitled to comment on the administration of justice so long as their criticism does not overstep certain bounds. In particular, a clear distinction must be made between criticism and insult. If the sole intent of any form of expression is to insult a court, or individual judges, this will not be protected by the right to freedom of expression.

The Court applies slightly different standards to lawyers who criticise courts, because they are seen as having a special duty to behave professionally. At the end of this bulletin, a few of the relevant cases will be summarised.

The following cases illustrate the approach taken by the Court in specific cases.

- ***Perna v. Italy***, application no. 48898/99, judgment of 6 May 2003 (Grand Chamber) (defamation conviction for unfounded criticism of public prosecutor did not violate right to freedom of expression)

This concerned a journalist who had published an article about the Public Prosecutor in Palermo. The article was entitled “Caselli, the judge with the white quiff”, and the sub-heading was “Catholic schooling, communist militancy – like his friend Violante...” The article criticised the prosecutor’s political militancy, referring to “a threefold oath of obedience – to God, to the Law and to Via Botteghe Oscure (a reference to the Italian Communist Party). It then accused him of taking part in a plan to gain control of the public prosecutors’ offices in all Italian cities and of using a criminal-turned-informer to destroy the political career of Italy’s former prime minister, Andreotti, by charging him with aiding and abetting crime – in the full knowledge that he would eventually have to discontinue the case for lack of evidence. The prosecutor lodged a complaint for defamation and the journalist and the manager of the newspaper were found guilty and fined €775 and €515 euros. They were also ordered to pay damages and legal costs totalling €31,000 euros, reimburse the complainant’s costs and publish the judgment. The fines were upheld on appeal.

The European Court of Human Rights held that the conviction did not violate the journalist’s right to freedom of expression. The Court observed that it was important not to lose sight of the report’s overall content. The journalist had not confined his remarks to the assertion that the prosecutor had particular political conviction; he had alleged that the prosecutor had committed an abuse of authority by taking part in a Communist Party plot to gain control of public prosecutors’ offices in Italy. In that context, even phrases like the one relating to the “oath of obedience” took on a meaning which was anything but symbolic. Moreover, at no time had the applicant tried to prove the truth of his allegations; on the contrary, he had argued that he had merely expressed value judgments which there was no need to prove. For these reasons, the Court held that the defamation judgment against him did not violate the right to freedom of expression.

- ***The Sunday Times v. The United Kingdom (No. 1)***, Application No. 6538/74, 26 April 1979 (prohibition on newspaper publishing article criticising a settlement violated right to freedom of expression)

This concerned the reporting by a British newspaper on court proceedings and settlement negotiations involving a company which had provided drugs to expectant mothers which had resulted in children being born with deformities, and the children that had been born with deformities. These proceedings had been going on for years and a settlement was reached with some families, but not with all. The newspaper had criticised the settlement and had also opined that the pharmaceutical company had not done enough testing before selling the drugs. The British Attorney General obtained an injunction prohibiting the newspaper from elaborating on these last allegations.

The European Court held that the injunction violated the right to freedom of expression. While the judiciary, taken to mean the entire machinery of the administration of justice, needed to be protected from false accusations, it did not operate in a vacuum and “it is incumbent on [the media] to impart information and ideas concerning matters that come before the courts just as in other areas of public interest ... the public also has a right to receive this.” The injunction had been granted

to prevent “disrespect” for the processes of the law and to prevent the proceedings becoming a ‘trial by media’. Whilst these were legitimate aims, it was not shown that the injunction had been proportionate to these aims. The proposed article had been balanced, presenting both sides of the argument, and it was unlikely that it would have had adverse consequences for the “authority of the judiciary”, especially since there had been a nation-wide debate in the meantime. Finally, the issues raised were concerned important questions about the rights of the victims, and the proceedings had been dragging on for years.

- **Ümit Bilgiç v. Turkey** (Application no. 22398/05), 3 September 2013 (detention in psychiatric hospital for insulting judges violated the right to freedom of expression and the right to liberty)

This concerned the conviction for contempt of court of an individual who had written letters accusing local judges of bias in proceedings against him, and alleging that they conspired against him with prosecutors. He was found guilty and sentenced to be detained in a psychiatric hospital.

The European Court of Human Rights considered that his detention violated the right to freedom of expression as well as the right to liberty. The Court recalled that the judiciary, as the guarantor of justice, needs the public’s trust and may therefore be protected against insult; and while individual judges may be criticised for the exercise of their duties they may be protected against unnecessarily harsh verbal attacks. At the same time, the Court recalled that in the context of criminal proceedings there must be room for the parties in proceedings to state their case, and that there should also be room for a free and energetic exchange of views. The Court noted that in this case, the applicant had written letters that were particularly virulent and offensive, and that he had accused judges of bias and corruption. This went beyond a simple criticism of the administration of justice. While the letters had not been published, and while the Court noted that the applicant did suffer from a psychiatric disorder, the Court therefore considered that in principle some form of sanction against the applicant might have been justified. However, the severity of the sanction eventually imposed – detention in a psychiatric institution – was disproportionate and constituted a violation of the applicant’s rights.

- **Belpietro v. Italy** (application no. 43612/10), 24 September 2013 (suspended imprisonment and order to pay damages for defamation violated the right to freedom of expression)

This concerned the defamation conviction of the publisher of a national newspaper for an article, published by an Italian Senator, which referred to a “war” between judges and prosecutors on the one hand and the police on the other hand, in the effort to combat the Mafia. The newspaper article accused judges and prosecutors of using political strategies. Two prosecutors alleged that the article harmed their reputation and lodged a complaint for defamation. Proceedings were instituted and the applicant was eventually sentenced to a suspended term of four months’ imprisonment and ordered to pay damages in the amount of 110.000 euros.

The European Court of Human Rights first recalled its general principles: the press must be able to provide information and ideas on all matters of general interest, including those related to the justice system. However, while the limits of acceptable criticism may be wider in relation to public officials than to private individuals the Court also considered that public officials need to enjoy the confidence of the public without being unduly disturbed. The Court noted that this was particularly so for public officials who work in the justice system.

The Court noted that the article clearly concerned an issue of very high public interest; but it also noted that the allegations made in the article were very serious and were not supported by objective evidence. While the article had been written by a member of the Italian Senate, this did not absolve the applicant – the newspaper’s publisher – from the duty to check the veracity of claims made. The Court also considered that the article had been accompanied by an illustration that had reinforced the claim made in the article. The Court therefore did not find that the conviction for defamation as such violated the right to freedom of expression. However, it found that the sentence of imprisonment, even if suspended, together with the requirement to pay substantial damages, in the case, which concerned a lack of supervision in connection with defamation was disproportionate and had a serious chilling effect on the right to freedom of expression. Therefore, the Court found that the case constituted a violation of the right to freedom of expression.

- ***Ungváry and Irodalom Kft v. Hungary*** (no. 64520/10), 3 December 2013 (defamation conviction for article alleging that a Constitutional Court judge had been an informer for the security service violated right to freedom of expression)

This concerned a defamation case against a historian and a magazine publisher who had published an article written by the historian. In the article, the historian discussed the relationship between civil society and the security services during the communist era, and as part of this he stated that a Constitutional Court judge had been an active party member and an “official contact” for the state security services. The judge complained and although the magazine printed a rectification, the historian repeated his allegation in interviews and in a book. The Constitutional Court judge then sued for defamation and won a judgment awarding him damages. The historian and the magazine publisher complained to the European Court of Human Rights arguing that this violated their right to freedom of expression.

The Court held that there had been a violation of the right to freedom of expression. The Court first recalled its general principles on freedom of expression, including that while civil servants should tolerate criticism of their functioning, it may be necessary to protect judges from offensive and abusive verbal attacks in order to preserve public faith in the functioning of the judiciary. Applying these general principles to the first applicant, the historian, the Court noted that the article had a strong basis in fact. The Court held that the term “official contact” could be understood to have a number of different meanings, including that the judge had written reports and provided information which had contributed to the work of the security services – even though the security service had not instructed the judge to do so. The Court particularly considered that the domestic courts had failed to take into account the overall context of the article, which had argued that there was a close relationship between various civil society organisations and the state security service. The Court therefore concluded that the domestic courts had interpreted the meaning of the term “official contact” too restrictively; they should have looked at it in light of the broader context of the article. The Court also emphasised that the subject matter of the article, the role of the security services during the communist era, was an issue of strong public interest; and that the judge, as a senior civil servant elected to the highest judicial office in the country by parliament, should tolerate criticism. The Court also noted that it was undisputed that the judge had been an active party member during the communist era.

As regards the magazine publishers, the Court held that it had exercised sufficient responsibility. The Court held, in particular, that

“[p]ublishers are understandably motivated by considerations of profitability and (...) holding them responsible for publications often results in proprietary interference in the editorial process. In order to enable the press to exercise its ‘watchdog’ function, it is important that the standards of liability of publishers for publication [should] be such that they shall not encourage censorship of publications by the publisher ...”

The Court concluded that given the reputation of the first applicant as a well-respected historian, the magazine publisher had no reason to call into question the accuracy of the article. There was no evidence that the article had been published with the intention to denigrate the judge. The Court therefore concluded that the publishers had acted in accordance with journalistic ethics.

- ***Mustafa Erdoğan and others v. Turkey*** (nos. 346/04 and 39779/04), 27 May 2014 (academic criticism of Turkish judges for dissolving a political party was within acceptable bounds)

This concerned the complaint by a law professor and the editor and publisher of an academic journal that they were ordered by the Turkish courts to pay damages to three judges of the Constitutional Court for insulting them in a journal article which had criticised a decision dissolving a political party. The article was published in a quarterly law journal in 2001, and had questioned whether, as a matter of law, the conditions for dissolving the political party had been met. The article called the impartiality of the judges into question and insinuated that the judges were incompetent. Three of the judges brought defamation proceedings against the applicants, claiming that the article was a serious personal attack on their honour and integrity, and won damages.

The European Court of Human Rights held that the defamation award violated the right to freedom of expression. It considered that members of the judiciary acting in an official capacity should expect to be subject to wider limits of acceptable criticism than ordinary citizens. While the judiciary must enjoy public confidence, criticism of it can be restrained only when this constitutes an unfounded destructive attack. The Court found that the national courts did not place the language and expressions used in the article in the context and form in which they were expressed. Therefore, whilst some of the remarks made in the article were harsh they were largely value judgments, set out in general terms, with sufficient factual basis. They could not be considered gratuitous personal attacks on the three judges. In addition, the article was published in a quarterly law journal, and had been written in the context of an ongoing public debate on the dissolution of the political party. Neither of these factors had been considered by the national courts. The Court emphasised the importance of academic freedom and the ability of academics to freely express their views, even if controversial or unpopular, in the areas of their research, professional expertise and competence.

- ***Marian Maciejewski v. Poland***, application no. 34447/05, 13 January 2015 (defamation conviction for allegations of corruption in the administration of justice violated right to freedom of expression)

This concerned a journalist for a national newspaper who had been convicted of defamation for an article on the alleged theft of hunting trophies from the office of a former bailiff. The sub-heading for the article read, “Thieves in the administration of justice”, and the article itself referred to the

“mafia-like prosecutor-judge association”. Among other things, the article described how a prosecutor had mismanaged the investigation against the former bailiff. The domestic court held that both the heading and the reference to mafia were defamatory. The journalist appealed to the European Court of Human Rights.

With regard to the first count of defamation which concerned the phrases “thieves in the administration of justice” and “mafia-like prosecutor-judge association”, the Court considered that the factual basis on which these comments were made – namely, the long and drawn-out proceedings – was not contested and that there clearly were irregularities in the functioning of the courts and of the prosecution service. This was an issue of public interest which the media should be allowed to comment on and even use harsh language. Overall, while the article was undoubtedly critical in tone, it did not aim to undermine the public confidence in the integrity of the judicial system.

With regard to the second count of defamation, concerning the allegation that the prosecutor had mishandled the investigation, the Court noted that the domestic courts had left several questions concerning the prosecutor’s conduct unanswered and that there had been numerous irregularities in the investigation, which the domestic courts had disregarded. The journalist had commented on this in good faith and in line with his journalistic code of ethics, and the domestic courts had disregarded this and instead focused purely on whether or not the allegations made were fully ‘true’. This violated the journalist’s right to freedom of expression.

- *Łozowska v. Poland*, application no. 62716/09, 13 January 2015 (defamation conviction for unfounded accusation of criminal dealings did not violate right to freedom of expression)

The applicant was a journalist for a regional newspaper who had been convicted of “malicious defamation” for a series of articles in which she speculated on the possible overlap between members of a mafia-like network and persons working for the local justice system. In particular, she had written that a specific judge had been dismissed because of “her shady links with criminal circles, ... [and] of the role she had played in cases in which her spouse had been implicated”. Her appeal was dismissed by a single judge – the only one out of the 53-strong panel of judges of appeal who did not have a connection with the judge who had made the complaint of defamation. She appealed to the European Court of Human Rights.

The European Court considered that the impugned remarks addressed issues of general interest and that the former judge’s dismissal was not contested. The media had a right to comment on and discuss this, and the wider public has a right to receive this information. However, the Court noted that it had not been proven that the judge had been dismissed because of “dark dealings with criminal circles” on his part. It furthermore considered that the journalist had extensive knowledge of the workings of the justice system in general, and of the disciplinary proceedings against the judge. She should therefore have shown the greatest rigour and caution before publishing the article. The Court considered furthermore that the journalist, in using the words she did, must have known that her article was likely to harm the judge’s reputation. While the Court acknowledged the journalist’s right to discuss the issue of the judge’s dismissal, as an issue of public interest, it held that there was not enough evidence to accuse the judge of dealings with criminal elements.

Therefore, the Court held that the applicant had not acted in accordance with the requirements of professional ethics and good faith.

Criticism by lawyers

- **Karpetas v. Greece** (no. 6086/10), 30 October 2012

This concerned a Greek lawyer who had been convicted for defamation of a prosecutor and an investigating judge who had released on bail someone who had assaulted the lawyer in his office. Mr Karpetas suggested that the prosecutor and judge had taken bribes from his assailant. Both lodged proceedings for defamation, and the lawyer was ordered to pay 15,000 euros (EUR) to the prosecutor (the proceedings concerning the investigating judge are still pending).

The European Court held that this did not constitute a violation of the lawyer's right to freedom of expression: the applicant was an experienced lawyer and he had lodged formal complaints against the prosecutor and judge which had been dismissed. Applicant's accusations had been repeated in the press and spread to a large audience and clearly implied that the judge and prosecutor were corrupt individuals. Applicant had no factual basis for his allegation whatsoever. The Court also took into account that the administration of justice should be protected, and accusations of corruption should not be made lightly.

- **di Giovanni v. Italie** (Application no. 51160/06), 9 July 2013 (formal warning for a judge who had made unfounded allegations of corruption in judicial appointments did not violate right to freedom of expression)

This concerned a judge who had stated, in a newspaper interview, that one of the members of the board of examiners for new judges had used his influence to help a relative. She was found guilty of having failed in her duty of respect and discretion with regard to members of the board of examiners, and was given a formal warning.

The European Court of Human Rights held that the warning did not violate the right to freedom of expression. It stated that the allegation she had made had been very serious and had not had any basis in fact. It noted that members of the judiciary should exercise discretion and not use the media to respond to provocations. It further noted the very light nature of the sanction imposed on the judge.

- **Morice v. France**, application no. 29369/10, 23 April 2015, Grand Chamber (defamation conviction for lawyer who criticised judges violated freedom of expression)

This concerned the conviction of a lawyer for defamation for remarks that he had made about two investigating judges who had been removed from the investigation into the murder of a French judge in Djibouti. The lawyer had been acting for the widow of the murdered judge, and he had criticized the judges for not having handed evidence from the investigation over to the judge who took over from them. He also criticized the judges for being too close to the investigators in Djibouti, which tainted their independence. One of the two judges he criticized also sat in another controversial case in which Mr Morice was involved as well. He also complained about the conduct of the judge in that case. Mr Morice complained to the Minister of Justice about the Djibouti case

and the national newspaper, *Le Monde*, published on the matter. *Le Monde* cited Morice as saying that the behavior of the investigative judges had been “completely at odds with the principles of impartiality and fairness” and that there had been extensive “connivance between the prosecutor [in Djibouti] and the French judges”. The judges filed a criminal complaint against the publication director of *Le Monde*, the journalist who had written the article and Mr Morice, accusing them of defamation. Mr Morice was found guilty of complicity in that offence and ordered to pay a fine of €4,000; € 1,000 to one of the judges for costs; and €7,500 in damages to each of the judges. He was also ordered to publish a notice in *Le Monde* newspaper. A subsequent appeal to the European Court of Human Rights was dismissed, and Mr Morice requested that the case be referred to the Court’s ‘Grand Chamber’ for a review.

The Grand Chamber held that the defamation conviction constituted a violation of Mr Morice’s rights. The Court noted that as a lawyer, Mr Morice had the right to defend his clients through the press – although it held that there was a clear distinction between words spoken by a lawyer inside the courtroom, which had a very high degree of protection, and outside the court room where such heightened protection did not apply. The Court noted that Mr Morice relied furthermore on his right, as a citizen, to contribute to a debate on a matter of public interest. While his role in this was not as a journalist, to whom the Court accords a high degree of protection, the national authorities nevertheless have a duty to protect debate on matters of public interest. The Court also noted that Mr Morice had a strong factual basis for his comments. Mr Morice had acted in his capacity as lawyer in two high-profile cases in which Judge M. was an investigating judge and in both of them shortcomings had been identified by the appellate courts, leading to the judge’s withdrawal of the cases. As to Mr Morice’s remarks, they had a close connection with the facts of the case and had been neither misleading nor gratuitous.

The Grand Chamber noted furthermore that the case had generated intense media attention. The domestic courts had taken this as proof of personal animosity between Mr Morice and one of the two judges. The Grand Chamber disagreed with this assessment and held instead that while the remarks reflected some hostility, they concerned alleged shortcomings in a judicial investigation – a matter to which a lawyer should be able to draw the public’s attention.

The Court stated that generally, judges should tolerate criticism. The limits of acceptable criticism *vis-à-vis* members of the judiciary, part of a fundamental institution of the State, are wider than in the case of ordinary citizens. At the same time, the Court emphasised the need to maintain the authority of the judiciary and to ensure relations based on mutual consideration and respect between the different protagonists of the justice system.

Finally, the Court took into account the nature and severity of the sanctions imposed. It reiterated that even a relatively small fine would still have a chilling effect on the exercise of freedom of expression. Imposing a sanction on a lawyer might also have certain repercussions, particularly as regards their image or the confidence placed in them by the public and their clients.

Taking all this into account, the court held that the defamation judgment against Mr Morice was a disproportionate interference with his right to freedom of expression.

- ***Kincses v. Hungary***, application no. 66232/10, 27 January 2015 (fine imposed on lawyer for calling a judge's professional competence into question did not violate the right to freedom of expression)

This concerned a lawyer who had been fined for criticising the judge sitting on one of his cases. He had filed a motion for bias against the judge alleging his professional incompetence and personal dislike for the respondent party. In the motion, he had stated that, “the judgment reflected the personal opinion of the judge and was not based on any evidence ... we cannot but call into question the professional competence of the sitting judge. His conduct was guided either by sympathy for the plaintiff or a dislike for the respondent.” This earned him disciplinary proceedings and an eventual fine of €570 for infringing the dignity of the judiciary. His appeals were dismissed.

The European Court held that the statements made by the lawyer had indeed belittled the professional competence of the judge and had suggested that the court had circumvented the law. The Court found that the lawyer could have raised the substance of his objection without making these allegations. The Court also noted that the applicant, as a lawyer, was bound by the rules of professional conduct, and that he should be expected to contribute to the proper administration of justice, and thus to maintain public confidence in it. Bearing in mind, finally, that the lawyer was only fined and that no other penalties were imposed, the Court found that the sanction did not violate the right to freedom of expression.

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