

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

Bulletin VIII: FREEDOM OF EXPRESSION AND CRITICISM OF JUDICIARY

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The leading European Court of Human Rights decisions on the issue of to what extent judges and their functioning can be criticised are *Barfod v. Denmark*, *De Haes and Gijssels v. Belgium*, *Worm v. Austria*, and *Obukhova v. Russia*.

It should be noted at the outset that “maintaining the authority and impartiality of the judiciary” is listed as a separate basis for restricting the right to freedom of expression, under Article 10(2). The European Court of Human Rights has adopted a relatively strict approach and allows States a significant margin of appreciation in the measures taken and sanctions imposed to protect the judiciary, which is seen as an important institution in democracy.

The European Court’s general approach and reasoning as regards criticism of judges and the courts is that the courts have a fundamental role in a State governed by the rule of law and need to enjoy public confidence. They should therefore be protected against unfounded attacks. However, the courts are not immune from criticism and scrutiny. 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 under Article 10.

As regards criticism of particular judgments, the court has held that only those articles that can realistically and objectively prejudice the outcome of a trial may be restricted by way of imposing a very light penalty. This does not mean that all articles that express an opinion on the outcome of a trial can be restricted.

Regarding media reporting on criminal trials we point out to Recommendation of the Committee of Ministers to member states on the provision of information through the media in relation to criminal proceedings available at <https://wcd.coe.int/ViewDoc.jsp?id=51365>

In addition, the Declaration following it is available at:

<https://wcd.coe.int/ViewDoc.jsp?id=51355&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>

The following paragraphs highlight the leading cases.

1. European Court of Human Rights decisions

- *Barfod v. Denmark*, Application No. 11508/85, 22 February 1998

This concerned a journalist who criticised the performance of two lay judges who had heard a case involving the question whether or not Danish nationals who worked on US military bases should pay local taxes. The journalist argued that because the lay judges were also employees of the local authority which collected the taxes, they should have been disqualified for conflict of interest. He questioned their ability to decide impartially in a case brought against their employer, the local government, and suggested that by deciding in its favour the lay judges "did their duty". The journalist was fined for this last remark which was judged to damage the reputation of the lay judges and impair confidence in the legal system.

The journalist appealed the matter to the European Court of Human Rights, which held that the main issue was whether the remark that the lay judges "did their duty" could impair the authority of the judiciary and damage public confidence in the legal system. The Court considered that while journalists should be able to voice their criticism of the judicial system, which was an issue of public interest, they could have done so without attacking the two lay judges personally. Moreover, there was no indication whether the two lay judges had indeed voted against the local government: they had been part of a court of three judges, which had held in favour of the local authority in a two to one vote – but the vote itself had been secret. It therefore held that the fine imposed on the journalist did not violate his right to freedom of expression.

- *De Haes and Gijssels v. Belgium*, application no. 19983/92, 24 February 1997

This concerned a magazine editor and journalist who had published five articles criticising judges who had heard a divorce case and awarded custody of the children to the father, even though he was a self-confessed Nazi who had been prosecuted for child abuse and incest. In their articles, the two had accused the judges of sharing the father's Nazi sympathies; they also referred to medical reports which showed that the children had been raped on visits with their father. Criminal proceedings had been started against the father but these had been aborted. The journalists were prosecuted for defamation. Nominal damages were awarded and an order was made requiring the journalists to publish the judgment in their magazine and pay for it to be published in six other newspapers.

The European Court of Human Rights recalled that the press play an important role in society by informing the public on matters of public interest. At the same time, the Court also recalled that the courts, as guarantors of justice must enjoy public confidence and be protected from unfounded attacks. The Court furthermore recalled that judges are subject to a duty of discretion that precludes them from replying to criticism. Considering the facts of this case, the Court emphasised that while the journalists based their articles on medical and other evidence, some of which they had been unable to produce in court to protect their sources, they were not prosecuted for these factual allegations but for opinions which they based on the factual evidence. While the journalists' criticism was severe, this was commensurate with the "stir and indignation" caused by the issue itself. The

journalists had published their articles at a time when incest and child abuse and the response of the judiciary to these were issues of great public debate in the country. Considering also the freedom of journalists to employ a polemical and even aggressive tone, particularly in the context of a public debate on such an emotional issue, the Court found that the journalists' conviction violated their right to freedom of expression.

- *Worm v. Austria*, application no. 39401/04, Judgment of 18 January 2011

This case concerned a journalist who published more than one hundred articles concerning the criminal trial of a Mr. Androsch, former Vice Chancellor and Finance Minister. The journalist was severely critical of Androsch and stated that the flow of funds in and out of various bank accounts showed definitively that Androsch was guilty of tax evasion. The courts held that the article was clearly capable of influencing the outcome of the criminal proceedings which were still pending and imposed a modest fine.

The European Court held that the media have a duty to comment on issues of public interest, including ongoing court proceedings. This is protected by the right to freedom of expression. However, they must remain within certain bounds and respect the right to a fair trial. Thus, journalists must not make statements that are likely to prejudice the chances of a fair trial or to undermine the confidence of the public in the role of the courts in administering criminal justice. The Court took into consideration the large number of articles that had been published – more than one hundred – and that these had been written in a style that conveyed to the reader that a criminal court could not possibly do otherwise than convict Androsch. The court also took into account that lay judges (i.e. not professionally trained judges) were involved in the trial, and that these lay judges were likely to read the articles and be influenced by them. The Court noted that the public's becoming accustomed to the regular spectacle of pseudo-trials in the news media might in the long term have nefarious consequences for the acceptance of the courts as the proper forum for the determination of a person's guilt or innocence. Taking also into account the modest size of the fine, the Court therefore held that this did not constitute a violation of the right to freedom of expression.

- *Obukhova v. Russia*, application no. 34736/03, judgment of 8 January 2009

This concerned a journalist who had published an article about a civil action for compensation instituted by a judge in connection with a road traffic accident. The article reproduced a letter from the other party's spouse, who alleged that the judge was "taking advantage of her office and connections in the judiciary". The judge responded by suing the newspaper, the journalist who wrote the article as well as the spouse of the other party for defamation. The court hearing the case issued an injunction prohibiting the newspaper from publishing anything relating to the accident or to the court proceedings pending its judgment.

The European Court considered whether the injunction prohibiting any publication of the proceedings constituted a violation of the right to freedom of expression. It noted that the injunction had remained in effect throughout the defamation proceedings as well as the proceedings concerning the actual road traffic accident. However, although the domestic courts had held the injunction to be justified as a means of protecting the reputation of others and maintaining the authority of the judiciary, their reasons for this were inadequate.

As regards the order restraining the publication of information on the factual circumstances of the accident, the Court noted that the newspaper had merely represented the other party's view as one of various possible views of the accident. The domestic court had only justified the injunction by stating that expert evidence had been commissioned, but failed to explain why the publication of any other reports would be prejudicial to the proceedings. The Court also emphasised that since the judge had been involved in the accident as a private individual, the injunction restraining further reports on the accident could not have been for the purpose of maintaining the authority of the judiciary.

As regards the prohibition on further reporting of the claim for damages, the Court accepted that the allegation that the judge had taken advantage of her office and connections in the judiciary could have been damaging to her reputation and to the authority of the judicial system. However, the scope of the injunction was unnecessarily broad and disproportionate: it prevented the publication of any reports on the proceedings. The Court disagreed that such a broad prohibition was "necessary in a democratic society" and emphasised that instead, the injunction had done a disservice to the authority of the judiciary by reducing transparency and raising doubts about the court's impartiality.

The injunction therefore violated the right to freedom of expression.

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