

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

Bulletin XLI: FOCUS ON THE RIGHT OF REPLY

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The right of reply allows individuals to have their say in response to information that is incorrect and that has affected their rights. This concerns the right to freedom of expression of the individual concerned, as well as the right to freedom of expression of the journalists and the media that published the original article. This requires a delicate balancing test that provides space to the reader whose rights have genuinely been affected by an article, whilst also respecting the right to freedom of expression of the media outlet concerned.

The main European Court of Human Rights judgments on the right to a reply are the following:

- ***Kaperzyński v. Poland*** (Application no. 43206/07), 3 April 2012: harsh sentence for refusing to publish reply violated right to freedom of expression
- ***Melnychuk v. Ukraine*** (Application No. 28743/03), 5 July 2005: refusal to publish a reply that contained obscene and abusive remarks did not violate the right to freedom of expression
- ***Oktar v. Turkey*** (Application no. 42876/05), 10 May 2011: refusal by a newspaper to publish a reply that was too long did not violate the right to freedom of expression

Furthermore, the Council of Europe's Committee of Ministers has adopted a recommendation detailing how States should implement the right of reply.

European Court of Human Rights judgments

- ***Kaperzyński v. Poland*** (Application no. 43206/07), 3 April 2012: harsh sentence for refusing to publish reply violated right to freedom of expression

This concerned a journalist's conviction for not having published a reply to an article which criticised the authorities' dealing with deficiencies of the local sewage system. He

had been sentenced to 80 hours' community service, suspended, and prohibited from working as a journalist for two years.

The European Court held that the sentence imposed on him had violated his right to freedom of expression. However, the Court also found that, in principle, the right of reply did not violate the right to freedom of expression nor did a requirement that a journalist should provide reasons for not publishing a reply. The Court stated:

“[A] legal obligation to publish a rectification or a reply may be seen as a normal element of the legal framework governing the exercise of the freedom of expression by the print media. It cannot, as such, be regarded as excessive or unreasonable ... [T]he right of reply, as an important element of freedom of expression, falls within the scope of Article 10 of the Convention. This flows from the need not only to be able to contest untruthful information, but also to ensure a plurality of opinions, especially on matters of general interest such as literary and political debate. Likewise, an obligation to inform the party concerned in writing about the reasons for a refusal to publish a reply or rectification is not, in the Court's opinion, of itself open to criticism. Such an obligation makes it possible, for example, for the person who feels aggrieved by a press article to present his reply in a manner compatible with the editorial practice of the newspaper concerned.

However, the sanction imposed on the journalist for not publishing the reply was simply too harsh. The Court stated:

“[A] criminal sentence depriving a media professional of the right to exercise his or her profession must be seen as very harsh. Moreover, it heightens the above mentioned danger of creating a chilling effect on the exercise of public debate. Such a conviction imposed on a journalist can only be said to have, potentially, an enormous dissuasive effect for an open and unhindered public debate on matters of public interest...”

- ***Melnychuk v. Ukraine*** (Application No. 28743/03), 5 July 2005: refusal to publish a reply that contained obscene and abusive remarks did not violate the right to freedom of expression

This concerned a writer whose books had been criticised by a fellow author, in a book review published in a local newspaper. The review doubted the literary and linguistic qualities of the writer. He sent a reply to the newspaper in which he harshly criticised the reviewer, but the newspaper refused to publish his reply. The applicant then instituted defamation proceedings but lost because the courts found that the book reviews were merely the expression of the reviewer's personal opinions about the literary quality of the writer's work. Moreover, the courts found that the newspaper's refusal to publish the reply had been justified because it had contained obscene and

abusive remarks (he had referred to the reviewer, who was a member of the Union of Writers, as the “member” – which is slang for penis; and also called him “subhuman”). The writer then complained to the European Court of Human Rights that the refusal to publish his response had violated his right to freedom of expression.

The European Court found that the refusal did not violate the right to freedom of expression, declaring the application inadmissible as being ‘manifestly ill-founded’. The Court held that while the right of reply was part of the right to freedom of expression, it did not give an unfettered right to have access to the media. As a general principle, private media should be free to exercise editorial discretion in deciding whether to publish or not letters of private individuals. While, in exceptional circumstances, a newspaper could be required to publish a retraction, in the present case no such special circumstances existed. Moreover, the writer went beyond simply replying to the criticism by making obscene and abusive remarks about the critic. He had been invited to modify his reply but had failed to do so.

- *Oktar v. Turkey* (Application no. 42876/05), 10 May 2011: refusal by a newspaper to publish a reply that was too long did not violate the right to freedom of expression

This concerned a newspaper which had refused to publish a reply by a religious leader whose books it had criticised in a humorous manner. The religious leader started proceedings against the newspaper at the local courts, but the judge found that the reply was longer than permitted under Turkish law. The religious leader then complained to the European Court of Human Rights, arguing that his right to freedom of expression had been violated.

The Court held that the religious leader’s right to freedom of expression had not been violated and declared the application “manifestly ill-founded”. It observed that the right of reply is an integral part of the Turkish legal system, but that the Turkish law provides limitations on the exercise of this right – including that a reply should not be disproportionately long. The Court did not find that this was an unreasonable requirement and dismissed the application.

Council of Europe Recommendations

- Recommendation Rec(2004)161 of the Committee of Ministers to member states on the right of reply in the new media environment (Adopted by the Committee of Ministers on 15 December 2004 at the 909th meeting of the Ministers' Deputies)

This Recommendation provides the following general principles on the right of reply:

- Any person should be given a right of reply to react to any information in the media which (1) presents inaccurate facts *and* (2) affects his or her rights.
- A request for a reply should be made within a reasonably short time from the publication of the contested information, and the media should publish the reply public promptly.
- The reply should as far as possible have, as far as possible, the same prominence as was given to the original publication.
- The reply should be made public free of charge for the person concerned.
- The media refuse to publish a reply if:
 - It is disproportionately long
 - It is not limited to a correction of the facts challenged;
 - Its publication would render the media itself liable to criminal or civil liability
 - The individual request a reply cannot demonstrate a legitimate interest;
 - The reply is in a different language different from that in which the contested information was made public;
 - The contested information was part of a truthful report on public sessions of the public authorities or the courts.
- In order to safeguard the effective exercise of the right of reply, the media should make public the name and contact details of the person to whom requests for a reply can be addressed.

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