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

Bulletin XVI: FOCUS ON ECHR AND "INSULT"

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The European Court of Human Rights has considered numerous cases in which it had to judge whether a conviction for publishing an insult violated the right to freedom of expression. In considering these cases, it takes into account several factors, including the following:

- That the right to freedom of expression protects statements that offend as well as inoffensive language;
- Whether or not the statement constitutes a gratuitous personal attack; and
- The importance of debate on issues of public interest.

The Court has found that the use of some words, such as "fascist" or idiot", when used to describe a politician who has made provocative remarks, is nearly always justified. Similarly, convictions for 'insulting' the government or a head of state have been found to violate the right to freedom of expression. However, insulting language directed at a politician's wife, particularly when it is not clear how those remarks contribute to a debate on an issue of public interest, has not been deemed acceptable. The following judgments provide examples of how the European Court of Human Rights has ruled in these matters.

1. European Court of Human Rights judgments in 'insult' cases

- *Skalka v. Poland* (application no. 43425/98), judgment 27 May 2003) (eight month prison sentence for insulting letter of complaint about a judge violated right to freedom of expression)

The applicant had sent a letter of complaint to a court in which he referred to the judge who had handled his case as a "cretin", an "irresponsible clown", and a "fool" who should take his frustrations out on his dog or his mistress. He was convicted for insult and sentenced to eight months imprisonment. The European Court held that "that the tone of the letter as a whole was clearly derogatory … It should be noted that the applicant did not formulate any concrete complaints against the [judge]. He expressed his anger and frustration, but did not take reasonable care to articulate clearly why, in his view, the [judge] complained of deserved such a strong reaction." It held furthermore that the authority of the judiciary must be upheld, and that in principle this "was important enough to justify limitations on the freedom of expression." However, it held that

imposing a sentence of eight months imprisonment was disproportionate and violated the right to freedom of expression.

- *Castells v. Spain* (application no. 11798/85), 23 April 1992 (article which complained of government supporting attacks in the Basque region was not insulting):

The applicant was convicted of insulting the government through an article accusing the government of supporting or tolerating attacks on Basques by armed groups. In the context of political murders that had gone unpunished, the applicant had referred to the government as including fascist organisations who were responsible for this impunity. The domestic courts did not identify any specific words that were insulting but deemed the entire article to be an insult to the government. The article did not use any potentially offensive words other than the word 'fascist'.

The European Court of Human Rights held that the conviction violated the right to freedom of expression. The applicant's article had been clearly political in nature and did not overstep the mark: "Mr Castells began by denouncing the impunity enjoyed by the members of various extremist groups, the perpetrators of numerous attacks in the Basque Country since 1977. He thereby recounted facts of great interest to the public opinion of this region, where the majority of the copies of the periodical in question were sold. [While] he levelled serious accusations against the Government, which in his view was responsible for the situation which had arisen … The article must be considered as a whole …

- "*Oberschlick v. Austria* (No. 2) application no. 20834/92, judgment 1 July 1997 (conviction for calling a politician an 'idiot' violated the right to freedom of expression):

The applicant had called a politician a "trottel" (idiot) in the context of a newspaper article criticising one of his speeches. The European Court held that while offensive, the use of the word was justified when taken in context. The Court held that the politician had "clearly intended to be provocative and consequently to arouse strong reactions … [T]he applicant's words … may certainly be considered polemical, [but] they did not on that account constitute a gratuitous personal attack as the author provided an objectively understandable explanation for them derived from the politician's speech …". The word "idiot" "[did] not seem disproportionate to the indignation knowingly aroused" by the politician in his speech. The conviction of the journalist was therefore in breach of the right to freedom of expression.

- *Tammer v. Estonia* (application 41205/98), judgment 6 February 2001 (conviction for insulting wife of government minister did not violate freedom of expression, no public interest justification made out):

The applicant had published an article in which he had referred to the wife of a government minister as someone who had broken up a marriage ("abielulõhkuja" in Estonian) and an unfit and careless mother deserting her child ("rongaema" in Estonian).

The European Court held that the conviction did not violate the right to freedom of expression. It considered that while the person at whom the insults were directed was married to a prominent politician, it had not been established that the statement served any public interest or related to a matter of general concern. The applicant could also have expressed his negative opinion without

using offensive language. In view of the small fine imposed, the Court concluded that the national courts had appropriately balanced the interests at stake, namely the protection of the reputation of others and a journalist's right to impart information on problems of public interest.

- *Constantinescu v. Romania* (application no. 28871/95), judgment 27 June 2000 (use of insulting term accusing teachers of fraud not justified)

The applicant had used the term "delapidatori" to describe certain teachers suspected of fraud. He was convicted for having offended and libelled the teachers. The European Court held that this conviction did not violate the right to freedom of expression: the term "delapidatori" was normally used to refer to persons convicted of fraud, and the persons referred to by the applicant had not been convicted of fraud. While he had used the term in the context of a debate on a matter of public interest (fraud in schools), he could have expressed his criticism without using this term.

- *Colombani and others v. France* (application 51279/99), judgment 25 September 2002 (conviction for insulting foreign head of state breached right to freedom of expression):

The applicants, a newspaper director and a journalist, had been convicted of insulting a foreign head of state in an article which had questioned the determination of the Moroccan authorities, and in particular the King, to combat drug trafficking in their country. The domestic courts had held that accusations of duplicity, artifice and hypocrisy by the Moroccan king were insulting. No specific words were held to be insulting but rather the article and allegations made therein as such.

The European Court of Human Rights held that the conviction violated the right to freedom of expression. Whilst acknowledging the strong, polemical language used, it pointed out that the Convention protected information or ideas that offended, shocked or disturbed. The restriction imposed on the applicants was accordingly found to be disproportionate to the aim pursued. Moreover, the Court pointed out that the offence of insulting a head of state was out of step with the notion of modern democracy, stating that "the offence of insulting a foreign head of State is liable to inhibit freedom of expression without meeting any "pressing social need" capable of justifying such a restriction."

- *Porubova v. Russia* (application no. 8237/03), judgment of 8 October 2009 (conviction for vague assertion of homosexual relationship violated the right to freedom of expression)

A journalist had written an article criticising misappropriation of state funds. In the course of the article, he had vaguely suggested that a politician and a public servant involved in the misappropriation had a homosexual relationship. The domestic courts convicted the journalist of insult, stating that the suggestion of a homosexual relationship between the two was insulting particularly taking into account the Russian mentality. The European Court of Human Rights held that this violated the journalist's right to freedom of expression. It stated that "the Court is unable to discern any such pejorative or rude terms in the text of the original article. Even the word "homosexual" – which may appear to be the most objectionable term in the article – was employed in a rhetorical question without reference to either [the politician or the public servant]."

- *Birol v. Turkey* (application no. 44104/98), judgment 1 March 2005 (conviction for use of strong words, including the words 'bloodstained fascist', at a demonstration violated the right to freedom of expression)

The applicant had been convicted after giving a speech at a demonstration in which she had said: "They appoint bloodstained fascists Minister of Justice. They put fascists and murderers in charge of the government." He was convicted for insult. The European Court of Human Rights held that this violated the right to freedom of expression. It noted that the speech, although hostile to the Minister of Justice, had not contained any kind of incitement to violence or insurrection and had not been hate speech. The comments had been made at an outdoor demonstration, preventing the applicant from rewording, perfecting or retracting them. In nature and severity the penalties imposed were disproportionate to the aim pursued.

- *Mengi v. Turkey* (Applications nos. 13471/05 and 38787/07, 27 November 2012) (conviction for referring to law scholar involved in law reform as a bigot violated the right to freedom of expression)

The applicant had written an article in which he had referred to a scholar involved in law reform as "so obsessed and [having] a discriminatory attitude as regards criminal provisions concerning women and children … instead of having elderly legal scholars, we should now have young lawyers working at the Justice Commissions … Those who … are aware that discriminatory attitudes have become out of date." The domestic court considered that the above passages were insulting.

The European Court held that the conviction violated the right to freedom of expression, stating that "the author disseminated her views, coloured by her own political opinions and perceptions, by using an informal style … [T]he domestic courts [did not] set the impugned remarks within the context and the form in which they were expressed … [O]ffensive language may fall outside the protection of freedom of expression if it amounts to wanton denigration, for example where the sole intent of the offensive statement is to insult … However, the use of vulgar phrases in itself is not decisive in the assessment of an offensive expression, as it may well serve merely stylistic purposes. For the Court, style constitutes part of communication as a form of expression and as such is protected together with the content of the expression".

- *Tuşalp v. Turkey* (applications nos. 32131/08 and 41617/08), judgment 21 February 2012 (conviction for insulting prime minister violated right to freedom of expression)

The applicant was convicted for insult for a newspaper article in which he had written that, "The Prime Minister and his men are continuing to be stable in creating their absurdities … He does not know what crime or punishment are …. He doesn't read, he doesn't learn. He is content with what entered his head … when he was 12-13 years old."

The European Court of Human Rights held that the conviction violated the right to freedom of expression. It stated that "the author chose to convey his strong criticisms, coloured by his own political opinions and perceptions, by using a satirical style … [Although] offensive language may fall outside the protection of freedom of expression if it amounts to wanton denigration, for example where the sole intent of the offensive statement is to insult … the use of vulgar phrases in itself is not decisive in the assessment of an offensive expression as it may well serve merely stylistic

purposes. For the Court, style constitutes part of communication as a form of expression and is as such protected together with the content of the expression. [In] the instant case, the domestic courts … omitted to set the impugned remarks within the context and the form in which they were expressed … Consequently, the … strong remarks contained in the articles in question and particularly those highlighted by the domestic courts could not be construed as a gratuitous personal attack against the Prime Minister …"

- *Uj v. Hungary* (application no. 23954/10), 19 July 2011 (conviction for insult in relation to criticism of wine produced by State-owned company violated freedom of expression)

The applicant had been very critical of Hungarian wine produced by a state-owned company. He wrote that "1,000 [Hungarian forints] per bottle, that represents the world's best wine region, the Hungarian National Pride and Treasure... [and that could make me cry]. Not only because of the taste – although that alone would easily be enough for an abundant cry: sour, blunt and over-oxidised stuff, bad-quality ingredients collected from all kinds of leftovers, grey mould plus a bit of sugar from Szerencs, musty barrel – but because we are still there ...: hundreds of thousands of Hungarians drink [this] shit with pride, even devotion... our long-suffering people are made to eat (drink) it and pay for it at least twice ([because we are talking about a] State-owned company); it is being explained diligently, using the most jerk-like demagogy from both left and right, that this is national treasure, this is how it is supposed to be made, out of the money of all of us, and this is very, very good, and we even need to be happy about it with a solemn face. This is how the inhabitants (subjects) of the country are being humiliated by the skunk regime through half a litre of alcoholised drink …" He was convicted of insult.

The European Court of Human Rights held that the conviction violated the right to freedom of expression. It stated that, "[T]he expression used by the applicant is offensive. Nevertheless, the subject matter of the case is not a defamatory statement of fact but a value judgment or opinion, as was admitted by the domestic courts. The publication in question constituted a satirical denouncement of the company within the context of governmental economic policies and consumer attitudes … the applicant's primary aim was to raise awareness about the disadvantages of State ownership rather than to denigrate the quality of the products of the company in the minds of the readers. The opinion was expressed with reference to government policies concerning the protection of national values and the role of private enterprise and foreign investment. It dealt therefore with a matter of public interest … [T]he domestic courts failed to have regard to the fact that the press have possible recourse to a degree of exaggeration or even provocation, or in other words to make somewhat immoderate statements … the wording employed by the applicant was exaggerated but made in a public context; the expression used is, regrettably, a commonly used one in regard of low-quality wine and its vulgarity thus constituted a forceful part of the form of expression."

- *Andrushko v. Russia* (application no. 4260/04), judgment 14 October 2010 (conviction of politician for insulting another politician in an election leaflet violated the right to freedom of expression)

The applicant, a politician, had published a leaflet during an election campaign which had referred to another politician as "that terrible man [whose] fortune was made from our tears … whatever he undertakes is damned". The rival politician sued for insult and won, the domestic courts holding that

the statements were clearly insulting and were formulated in cynical terms. The European Court of Human Rights held that the conviction violated the right to freedom of expression, stating that "[a] clear distinction must … be made between criticism and insult … [P]olitical invective often spills over into the personal sphere … The Court accepts that certain expressions used in the leaflet could be considered to be polemical. They do not, however, amount to insult or constitute a gratuitous personal attack because the authors supported them with an objective explanation. Although the comments contained in the leaflet were without doubt severely critical, they nevertheless appear proportionate to the frustration and indignation caused by Mr K.'s behaviour …"

- *Gavrilovici v. Moldova* (application no. 25464/05), judgment 15 December 2009 (conviction for calling someone a fascist violated the right to freedom of expression)

The applicant had been convicted for calling someone a 'fascist', which was deemed to be insulting. The applicant asserted he had not used this word. The European Court of Human Rights held that the conviction violated the right to freedom of expression. It stated that "even assuming that the applicant called I.M. a "fascist", the domestic courts failed to address the crucial issue of whether the utterance attributed to him was capable of being a value judgment, the veracity of which, unlike a statement of fact, is not susceptible of proof. It recalls that it has previously found that terms such as "neo-fascist", and "Nazi" do not automatically justify a conviction for defamation on the ground of the special stigma attached to them … the generally offensive expressions "idiot" and "fascist" may be considered to be acceptable criticism in certain circumstances … calling someone a fascist, a Nazi or a communist cannot in itself be identified with a factual statement of that person's party affiliation."

- *Bodrožić v. Serbia* (application no. 32550/05), judgment 23 June 2009 (conviction for using the words "fascist" and "idiot" violated the right to freedom of expression)

The applicant had referred to someone as a "fascist" and "idiot". The domestic court concluded that the applicant's article had had the sole aim of insulting. The European Court held that the conviction violated the right to freedom of expression. It stated that "in criticising J.P. the applicant used harsh words which, particularly when pronounced in public, may often be considered offensive. However, his statements were given as a reaction to a provocative interview and in the context of a free debate on an issue of general interest for the democratic development of his region and the country as a whole. Their content did not in any way aim at stirring up violence … Moreover, Article 10 protects not only "information" or "ideas" that are favourably received or regarded as inoffensive, but also to those that offend, shock or disturb".

- *Długołęcki v. Poland* (application no. 23806/03), judgment 24 February 2009 (conviction for insulting politician violated right to freedom of expression)

The applicant had criticised a politician in a newsletter, stating that he "had already as mayor reached his level of incompetence a few years ago, but this blunder [had] not put him off and he [was] crawling up again to another level". The domestic court held that this "amount to proffering insult because the use of those words, particularly the word 'crawling' are undoubtedly pejorative…"

The European Court held that this conviction violated the right to freedom of expression. It stated that "[t]he domestic court adopted a narrow definition of what could be considered acceptable

criticism, excluding from it all statements expressing "contempt and disrespect" … In doing so the court did not take into consideration the fact that the impugned statements had been made in the context of a heated political debate. Moreover, it failed to notice that the applicant was exercising his right to impart information and ideas on political questions and on other matters of public interest and in so doing might have recourse to a degree of exaggeration. The statements in question were limited to an assessment of the professional sphere of the life of Mr A.W. and denounced his alleged lack of ability as a politician. The Court notes that although political invective often spills over into the personal sphere, in the instant case the applicant's critical comment did not concern the private or family life of that politician."

- *Lepojić v. Serbia* (application no. 13909/05), judgment 6 November 2007

The applicant had published a leaflet that described a politican as "near-insane" (sumanuto). The domestic courts deemed that this implied mental illness and convicted the applicant of insult.

The European Court held that the conviction violated the right to freedom of expression. It stated that "[t]he target of the applicant's criticism was the Mayor, himself a public figure, and the word "sumanuto" was obviously not used to describe the latter's mental state but rather to explain the manner in which he had allegedly been spending the money of the local taxpayers … [T]he applicant … clearly had some reason to believe that the Mayor might have been involved in criminal activity and, also, that his tenure was unlawful. In any event, although the applicant's article contained some strong language, it was not a gratuitous personal attack and focused on issues of public interest rather than the Mayor's private life, which transpired from the article's content, its overall tone as well as the context."

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