



Prager & Oberschlik v. Austria, *Amicus Curiae* Brief by ARTICLE 19 and Interights (1994)

Application No. 15974/90 (European Court of Human Rights)

I. INTRODUCTION

These written comments are submitted by INTERIGHTS, the International Centre for the Legal Protection of Human Rights, and ARTICLE 19, the International Centre Against Censorship, pursuant to the permission granted by the President, Mr. Ryssdal, in accordance with Rule 37 s.2 of the Rules of the Court, by letter dated 25 August 1994. As authorised by that letter, these comments are limited to the provision of relevant comparative materials.

The present comments draw substantially upon the statements of legal experts from seven European countries concerning the laws, in their respective countries, governing the defamation of judges.^{1[1]} Annexed to these comments are statements from each of the seven experts, from Denmark, England, France, Germany, Hungary, the Netherlands and Spain. These comments also refer briefly to the law of the United States.

II. INTEREST OF INTERIGHTS AND ARTICLE 19

INTERIGHTS is a London-based international human rights law centre. It is a registered charity, independent of all ideologies and governments. It provides legal representation in select cases before international human rights fora, advises on legal rights and remedies under international human rights law, and assists lawyers and non-governmental organisations in the preparation of cases before international and regional tribunals.

^{1[1]} Unless otherwise indicated, all references to the law of a specific country are taken from the statements provided by the legal expert from that country, which are annexed hereto.

ARTICLE 19 is a London-based international human rights organisation and a registered charity, independent of all ideologies and governments. It takes its name and mandate from Article 19 of the Universal Declaration of Human Rights, which proclaims the right to freedom of expression, including the right to receive and impart information and ideas. ARTICLE 19 seeks to develop and strengthen the international standards which protect freedom of expression by, among other methods, assisting lawyers involved in litigation before national and international courts, convening consultations of experts on free speech issues, and making submissions to international tribunals.

INTERIGHTS and ARTICLE 19 consider this case to be of particular importance for two reasons. First, because it raises novel questions in the interpretation of Article 10 of the European Convention on Human Rights, and second, because this decision is likely to be viewed as an important precedent in countries around the world. The judgments of this Court have often been cited by national courts, particularly throughout the Commonwealth, as well as by other regional and international tribunals. For example, in a 1988 case from Mauritius concerning whether the publication of an article critical of the judiciary constituted contempt of court, the Supreme Court discussed The Sunday Times Case extensively, and, in obiter dicta, stated that the Mauritian law should be interpreted consistently with Article 10 of the European Convention on Human Rights. (Director of Public Prosecutions v. Mootoocarpn [1989] LRC (Const.) 768, 773).²[2]

The area of law raised in this case is of real importance in many parts of the world, where prosecutions for speech considered insulting to the judiciary constitutes a serious threat to the right to freedom of expression.

Such a threat is well illustrated by several recent examples. For instance, in July of this year in Costa Rica, a newspaper editor, Bosco Valverde, became the first journalist in the history of the country ever to be found guilty of "irreverence" for offending the honour or decorum of a public employee. This crime carries a sentence of six months to three years if the "offended employee" is a judge. Mr. Valverde was convicted for writing a column in which he called three judges "stubborn", and used an expression regarding them found to refer to someone "who does not have the ability required to carry out a chore".³[3]

Similarly, two journalists in Kenya were imprisoned in June 1994 for contempt of court, following the publication of an article which questioned the independence of the Kenyan judiciary. This jailing follows a pattern of harassment, arrest, fines and imprisonment of

²[2] Other examples of cases in which national and regional courts have specifically referred to Article 10 of the ECHR include a case from Papua New Guinea, The State v. NTN Pty Ltd and NBN Ltd, SC, 7 April 1987 (No. SC 323), (1988) 14 CLB 45; and the decision of the Inter-American Court of Human Rights in Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85 of 13 November 1985, Series A No. 5. See also a case from Zimbabwe, Stephen Ncube v. The State, Brown Tshuma v. The State; Innocent Ndhlovu v. The State, SC, Judgment No. 156/87, 14 (1988) 593 in which the Supreme Court of Zimbabwe discussed this Court's judgment in Tyrer v. UK in deciding that the punishment of whipping constituted inhuman and degrading punishment.

³[3] The Tico Times, (San Jose) 15 July 1994 at 5.

journalists, human rights activists and government critics in Kenya.⁴[4] Likewise, in Peru earlier this year, two journalists were charged with contempt after filing reports about the seemingly unusual release from prison of an individual accused of drug trafficking.⁵[5]

For this reason, INTERIGHTS and ARTICLE 19 believe that a clear statement from this Court that a degree of exaggeration must be tolerated, even by judges, so long as the interests of justice in a particular case are not compromised, would provide an important protection for government critics throughout Europe and in many other countries. Conversely, a judgment that endorses the report of the Commission could well be misconstrued by governments as support for prosecutions such as those in Costa Rica, Peru and Kenya described above.

III. THE LEGAL ISSUE

This case concerns the conviction of a journalist and editor for defamation of a judge in Austria. By a vote of 15 to 12, the European Commission of Human Rights concluded that the conviction did not amount to a violation of Article 10 of the European Convention on Human Rights.

The legal issue addressed in these comments is whether the "interference" by the State Party was proportionate to the legitimate aim pursued (protecting the reputation of others and maintaining the authority of the judiciary) and therefore "necessary in a democratic society" within the meaning of Article 10(2). "Proportionality" is discussed in view of the practice of other states. In assessing whether the interference here was necessary, it is recalled that the state's "margin of appreciation" is not identical as regards each of the aims listed in Article 10(2). So while regarding, for example, the "protection of morals" state authorities are held in principle to be in a better position than international judges to give an opinion on the exact content of these requirements,

[p]recisely the same cannot be said of the far more objective notion of the 'authority' of the judiciary. The domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area....Accordingly, here a more extensive European supervision corresponds to a less discretionary power of appreciation. (The Sunday Times Case judgment of 26 April 1979, Series A no. 30, para 59, citations omitted).

⁴[4] Amnesty International, "Kenya: the imprisonment of two prisoners of conscience - Bedan Mbugua and David Makali" 27 July 1994, AI Index: AFR 32/12/94.

⁵[5] International Freedom of Expression Exchange Clearing House, "IFEX Action Alert", July 11 1994, Toronto, Canada.

These comments draw upon an illustrative rather than exhaustive body of comparative case-law, and seek to provide for the Court a review of the laws concerning defamation, particularly of judges (or contempt of court procedures) in several Western democracies.

These comments specifically deal with three points raised by the Commission's decision:

(1) In its decision, the Commission observed that the first applicant's article, taken as a whole, concerned a matter of public interest, namely the proper administration of justice. These comments address the question whether judges warrant treatment different from other public officials in defamation suits, in so far as the statements at issue are not alleged to have interfered with the administration of justice in a particular case or the integrity of a particular judgment. These comments conclude, on the basis of the law in states surveyed, that no such distinction is warranted.

(2) In its decision, the Commission considered three of the statements at issue to be assertions of fact, and two of the statements to be value judgements. These comments discuss how such distinctions are made in the jurisdictions surveyed, and conclude that in the majority of these jurisdictions, courts would be more likely than the Commission to interpret some of the disputed statements as value judgements.

(3) In its decision, the Commission was of the view that informing the public on the relevant issues, including references to single incidents, did not require such a severe attack on the integrity of the "victim". The Commission was further of the view that the applicant had failed to prove he had applied the necessary diligence as a journalist, because *inter alia*, he did not give the "victim" the opportunity to state his views on the matter or otherwise secure a personal impression of the "victim". These comments review the permissible scope for exaggeration of opinion based on substantially true facts, and the requirements of journalistic diligence. These comments come to the conclusion that exaggeration is widely considered permissible, while journalists do have obligations concerning professional diligence.

IV. DISCUSSION

Actions for defamation or contempt of court concerning statements that are critical of members of the judiciary vary in frequency amongst the countries surveyed. Though the French expert cited several such cases in recent years, the Danish⁶ and Dutch experts stated that no relevant cases have been reported in their respective countries. The Danish expert suggests that this may be attributed to the fact that "Danish judges recognize that a democratic society and its exponents must tolerate criticism, even if it is somewhat exaggerated. Freedom of expression including public debate concerning political and other matters of public interest is of utmost importance in a democratic society." (See declaration

⁶ With the exception of the Barfod case, decided by the High Court of Greenland in 1984, and by the ECHR in 1989.

of Mr. Kjaerum at p. 1.) In England, the last successful reported case is from 1931. (See declaration of Lord Williams at § 8.)

In all of the jurisdictions reviewed, however, certain important safeguards exist for those who criticise or insult members of the judiciary. These reflect the view articulated by the German expert that "the proper functioning and administration of criminal justice is in the public interest, indeed, it could be considered a high ranking public concern or interest". (See declaration of Prof. Karpen at p. 8 § 7.)

1. The standard applied in defamation suits concerning the judiciary

In Germany, the Netherlands, and the United States, no distinction is made either by statute or case-law between the showing required to be made by a judge who alleges defamation concerning the discharge of his public functions and other public officials.

As First Amendment experts in the United States have noted, "there is nothing about the work of judges that ought to provide them with any immunity from public criticism not available to any other public official in the country. Indeed, the judiciary loses much more in status when it censors its critics than when it allows those critics to speak."⁷[7]

In England, although there are no separate defamation provisions concerning judges, comment and criticism of the administration of justice is in practice governed by the law of contempt.

According to the experts, judges in Denmark, France, Hungary and Spain are sometimes entitled, either by statute or in practice, to somewhat greater protection against defamation than are other public officials. The main reason for this distinction appears to be that judges, unlike politicians, cannot easily respond to personal attacks. (See declarations of Mr. Errera at p 4, Dr. Frech at p. 7, Mr. Kjaerum at p.3 and Mr. Rodriguez at p. 1.)

However, even judges must tolerate a substantial degree of insult and exaggeration concerning matters of public interest. (See, eg, declaration of Prof. Ulrich Karpen, at § 3, citing 7 FCC 198 at 212 (15.01.1958 (Lueth)). Lord Denning described this balance between the right to criticise the judiciary freely and the special circumstances of the judiciary as follows:

We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man, in Parliament and out of it, in the press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest.

⁷[7] See brief of American Jewish Congress, ARTICLE 19 and individual law professors, Amici Curiae, at 2-3, Standing Committee on Discipline of the US District Court for the Central District of California v. Yagman, US Court of Appeal for the Ninth Circuit (No. 94-55918), 24 August 1994.

Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter public controversy. Still less into political controversy. We must rely on our conduct to be its own vindication...(R. v. Metropolitan Police Commissioner, ex parte Blackburn [1968] 2 All ER 3 319, 320, cited in declaration of Lord Williams at §13.1).

It should be noted that in some countries, judges and other public officials are granted more protection than other citizens. In Spain, defamation of public officials and judges are both covered in the criminal law under the crime of desacato, which demands punishment for slander or defamation of public officials including judges. Desacato is punished more severely than defamation suits concerning private individuals. As such, under Spanish law, the reputations of judges and other public officials are protected to a greater extent than the reputation of ordinary citizens.^{8[8]} (See declaration of Mr. Rodriguez at p. 2.) It should likewise be noted that in the Netherlands, Article 267 of the Criminal Code (though rarely used), provides that defamation of public officials (and, it seems, judges), in the performance of their duties shall be subjected to a higher penalty than defamation against other persons. (See declaration of Mr. Altes at §§ 3, 4.)

2. The distinction between facts and value judgements

In most countries, value judgements are afforded greater protection than are false statements of fact. In the United States, statements of opinion enjoy absolute constitutional protection, because under the First Amendment, there is no such thing as a "false idea". A decision rendered by the Hungarian Constitutional Court in June 1994 [Decision 36/1994. (VI 24) AB], appears to provide similarly powerful protection to value judgements. (See declaration of Dr. Frech at p. 4.) In contrast, in England, if a statement is considered "comment", then the defendant must prove that it was fair, meaning that it was a comment that was capable of being honestly made upon the facts on which it was based. (See Supplementary Report of Lord Williams at § 5.)

(a) How courts decide whether a statement is a fact or a value judgement

In some countries, courts tend to treat statements that include both factual assertions and opinions as value judgements, especially if the exaggeration is obvious and the subject matter is of public interest. For instance, in Germany, courts will err on the side of characterising the statement as a value judgment where a distinction is difficult, recognizing

^{8[8]} According to the Spanish expert, Spanish law has not yet been amended to be consistent with the ruling of this Court in Castells v. Spain.

that often statements of opinion and fact are inseparable. In such situations, freedom of speech protections require that the statement be considered a statement of opinion. (See declaration of Prof. Karpen at p. 4 § 4.) In the United States, the Supreme Court held in Milkovich v. Lorain Co., 497 U.S. 1, 28, 110 S.Ct. 2695 (1990), that if alleged statements cannot "reasonably be interpreted as stating actual facts" they must be considered statements of opinion, and therefore, as a matter of law, they are not defamatory.

Conversely, in England, a statement cannot be claimed to be "comment" (opinion) if it is so mixed up with statements of fact that a reader or listener would not be able to distinguish the two. However, in an action for defamation, where the distinction between fact and comment needs to be made, the judge decides whether a statement is "reasonably capable" of being comment, and the question is then left for the jury to decide. A particular statement will be considered one of comment if a reasonable member of the public would understand the words to be an expression of opinion drawn from facts. In making this determination, it is essential for regard to be had to the wider context in which the statement was made. (See Supplementary Report of Lord Williams at §§ 2, 3.)

(b) The distinction between facts and value judgements in this case

All of the experts who stated an opinion on the point were of the view that courts in their own jurisdictions would be likely to have distinguished between facts and value judgements differently from the manner in which the Commission did so in this case regarding statements one and/or three.^{9[9]} There was broad agreement with the Commission's interpretation that statements two and four were value judgements, although most of the experts who gave their opinion on this matter stated that the statements would most likely be found permissible by the courts of their countries. Most of the experts agreed that statement five should be treated as a statement of fact. (See declarations of Dr. Frech at p. 5, Mr. Altes at §7, Mr. Errera at p. 5, Prof. Karpen at p. 4 § 5 and Supplementary Report of Lord Williams at § 7.)

The Commission concluded that the first statement, "they treat each and every accused as if he were already convicted", was a statement of fact, subject to proof. In contrast, the Hungarian expert was of the opinion that courts in Hungary would be likely to treat the statement as a value judgement as it implies that the judges referred to are biased and impartial, and is a generalization drawn presumably from professional shortcomings identifiable with certain individual judges. The Dutch expert considered that unless this statement very specifically applied to a particular individual, it is too general under Dutch law to give rise to a cause of action for Judge J.

^{9[9]} The Danish expert was unable to assess how a Danish court would view the question due to the absence of relevant case-law in Denmark, and the Spanish expert was of the view that Spanish law is not of interest on this point because it offers less protection than that which is required by Strasbourg law.

The English expert was of the view that although this statement reads on its face as a statement of fact, an English court would be likely to regard it as reasonably capable of being a "comment" based on the material that followed it and possibly other material. The decision would therefore be left for the jury to determine. The German expert was of the view that this statement would be considered a value judgement in Germany.

The Commission also found statement three, "Nothing compared to...the cynical vexations of Judge [J]" to be a statement of fact. However, amongst the experts, there was consensus that within each of their countries, this statement was likely to be regarded as a value judgement. The Dutch, English, German and Hungarian experts all stated that this would be considered a value judgement in their respective jurisdictions, and the French expert considered that the evaluation of this statement would depend on the context.

In sum, according to the experts surveyed, the courts of most of their countries (except perhaps France) would be likely to find statements one through four to be value judgements. Moreover, for the reasons stated in Section 3, below, courts in several countries would be likely to find those four statements protected by freedom of expression guarantees. The courts of at least several countries might find statement five to be a defamatory statement of fact.

3. The right to exaggerate and the obligation of diligence

(a) Some exaggeration, where made in good faith and based on substantially true facts, is permissible.

Most of the experts noted that in their countries, courts permit a degree of exaggeration in criticism, where the criticism has some factual basis and where there is no real issue of the author's good faith. Exaggeration is widely recognized as an inevitable byproduct of uninhibited debate.

In Germany, a defamation defendant is not liable if he or she presents sufficient proof that the facts are true in their essential parts. If the core of the facts is correct, some exaggerations or insignificant falsehoods are permissible (Federal Criminal Court 18, 182). As such, criticism of the conduct of a case by a judge, even criticisms containing sententious exaggeration, are not libelous. (Criminal Court, Frankfurt, *Anwaltsblatt*, 1977, 169). Moreover, it has been held in Germany that, in a time of overwhelming information, value judgements, even if they are not sufficiently supported by facts, must be tolerated because sharp statements and overdrawn criticisms may be the best way to impress legitimate criticisms onto the public (Hanover Court of Appeal, *Goldammer's Archiv (GA)*, 1974 62). (See declaration of Prof. Karpen at p. 8.) As such, the German expert was of the view that, in that country, the first four statements would be considered statements of opinion that are harsh, but not impermissibly exaggerated.

The Dutch expert stated that in the Netherlands, someone who publishes somewhat exaggerated statements made in good faith based upon substantially true facts cannot be held criminally liable. This is especially true for editorial writers and obviously humorous or satirical publications. (See declaration of Mr. Altes at § 8.) The Hungarian expert said that the right to publish opinions concerning public affairs, even where they are stated in an exaggerated manner, must be given priority over other basic constitutional rights, such as the right to human dignity, honour and a good name. (See declaration of Dr. Frech at p. 5.)

Under English law, the defendant must prove that his or her opinion or "comment" was fair, meaning that it was comment that was capable of being honestly made upon the facts on which it was based. (See Supplementary Report of Lord Williams at § 5.) An English case from 1968 dismissing an application for an order that a magazine writer was in contempt of court, recognized that writers must be permitted to make criticisms that may be inaccurate, unfair, off the mark, rumbustious or in poor taste. As Salmon LJ said in that case,

...no criticism of a judgment, however vigorous, can amount to contempt of court, providing it keeps within reasonable courtesy and good faith. The criticism here complained of, however rumbustious, however wide off the mark, whether expressed in good taste or bad taste, seems to me to be well within those limits. (R. v. Metropolitan Police Commissioner, ex parte Blackburn, *id.* 320).

Edmund-Davies LJ added,

...Whether [the author] paid proper respect to the standards of decency, fairness and good taste...may unhappily be open to doubt. But whether his article amounted to contempt involves different and graver considerations...Inaccurate though the article is now acknowledged to be in a material respect, I have no doubt that contempt has not been established. (*id.* at 321. Cited in declaration of Lord Williams at §§ 13.2, 13.3.)

(b) The requirements of journalistic diligence

The requirements for journalists in fulfilling their duty of "diligence" varied in the countries surveyed. In France, legislation and case-law allow the defences of truth and good faith in defamation suits concerning public officials. The defence of "good faith" includes, *inter alia*, the journalist's duty to check sources and seek comments from the people who have been criticized. However, the contours of the duty to seek comments is not applied in a uniform manner but rather is determined on a case by case basis. (See declaration of Mr. Errera at p. 4.)

In Denmark, Article 34 of the Law of Media Responsibility governs "good press ethics": it does not stipulate the exact content of such ethics but refers to a set of rules adopted as the "Guidelines for Good Press Behaviour". The Guidelines provide, *inter alia*, that information which may be damaging, defamatory or libelous must be presented to any person potentially

affected by its contents and that statements of factual information and journalistic comments must be precisely identified as such. (See declaration of Mr. Kjaerum at p. 3,4.)

In Hungary, there would be no criminal responsibility if the court came to the conclusion that the journalist had no knowledge that normally reliable sources had provided untrue facts, and that the journalist could not have revealed the untruth of these facts by careful conduct. (See declaration of Dr. Frech at p. 5.)

In Germany, the use of potentially defamatory statements is only appropriate if the author has fulfilled his duty to check the information carefully. This obligation is of particular import for journalists, because of the wide dissemination of press reports. This is especially true where the name of the victim is published (Stuttgart Court of Appeal, NJW 1972, 2320). The extent of the duty to check information differs according to time constraints and the professional and personal abilities of the author. Likewise, the extent of the interference with the individual honour of the potential victim is relevant to the extent of the duty to check the information. In Germany, however, this requirement may not be so strict as to endanger freedom of speech. Standards must not be so strict as to discourage individuals from making statements due to fear of prosecution. (FCC 03.06.1980, 54, 208 (219) - Heinrich Boell; 22.06.1982, 61, 1, (8) - CSU als NPD Europas; 13.04.1994, 85, 1 (22) NJW 1994, 1779 - Auschwitz-Luege. See declaration of Prof. Karpen at p. 9.)

Taking these considerations into account, the German expert was of the view that a German Court would consider that, because the journalist in this case revealed his sources, and in light of the high ranking public interest in impartial courts, the applicant had fulfilled his duty of diligence in this case. The German expert said that, because of the detailed facts of the applicant's fifth statement, it would have been preferable for the applicant to have given Judge J a chance to give his opinion. However, the German expert felt that since the response or comment seems predictable, it is doubtful that the applicant's failure in this regard would support his conviction, particularly since the statement would be otherwise legitimate under German law. (See declaration of Prof. Karpen at p. 10.)

V. CONCLUSION

This comparative survey of the law of eight European and North American democracies shows that certain important protections exist for those who are charged with defaming or insulting members of the judiciary. In a few countries, no distinction is made between judges and other public officials in the law of defamation. This reflects a recognition that the judiciary, like other democratic institutions, must be open to thorough public scrutiny. Even in countries where judges may be afforded greater protection against defamation than other public officials, they are nevertheless generally obliged to tolerate a high degree of criticism concerning matters of public interest.

Regarding the distinction between assertions of fact and value judgements, most of the experts surveyed who commented on the facts of the present case were likely to view statement one and possibly three as value judgements and thus to give them greater freedom of expression protection than did the Commission.

Finally, though many countries have rules requiring various degrees of journalistic "diligence", in most of the countries reviewed courts expressly recognize that critics are permitted a certain amount of exaggeration where making points based upon substantially true facts, as long as no serious issue of bad faith exists.

In sum, this survey of comparative law suggests that in most of the countries reviewed, the conviction at issue would have been partially or completely invalidated. Moreover, it is respectfully submitted that clear guidance from this Court on the extent of criticism that judges must tolerate will provide an important protection for legitimate criticism of judges and other public officials in countries throughout the world.

Dated: October 1994

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