

Slovakia, Constitutional Court II. ÚS 152/08, 15 December 2009

Deciding bodies and decisions

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Area of law

Freedom of expression -defamation and libel

Subject matter

Which is the balance between freedom of expression and reputation in case of press articles?

Summary Facts Of The Case

In 2007, the tabloid weekly magazine Plus 7 published an article addressing the issue of the proportionality between the penalties for defamation awarded by courts vis-à-vis the compensation given to victims of crimes. The opinion presented was that there was a lack of proportionality in favour of the former, which could have the effect of triggering corruption of the judicial system. In particular, one example provided was the one of a judge who at that time awarded a sizeable amount in damages for defamation.

The judge then presented a claim for defamation against the periodical. Although the district court and the Bratislava Regional Court both ruled in favour of the judge with a pecuniary sanction of SKK 250,000 on the periodical, the Slovak Constitutional court reversed the decision.

The Constitutional court established a tight connection between the constitutional protection of freedom of expression by art. 26 and art 10 ECHR and its interpretation by ECtHR.

In particular, the Constitutional Court adopted a proportionality test based on the jurisprudence of the ECtHR, which includes the following criteria: Who criticized/ Who delivered an expression? Who was criticized? What had been said (expressed)? When was it done? Where was it done? How was it done?

The constitutional court provided a detailed analysis of each criteria:

“Who is criticized

The result of the effort to support the discussion about topics interesting for public is the classification of the objects of critique. The degree of permissible critique varies according to the characteristics of the recipient of the critique. Boundaries of acceptable critique are the widest toward politicians as addressees of the criticism and the most strict when the “ordinary” people are criticized. Constitutional Court accepts the trend that is moving the judges, who stand somewhere in between, closer to politicians (...).

Who criticizes

Just as the recipients of criticism, the critics themselves are classified in terms of their importance for the exchange of views in society. It is clear that the privileged group are journalists. The European Court of Human Rights constantly reminds us that the press is democracy watchdog (“public watch dog”) and it plays an important role in the rule of law because it allows the free game of political debate. Journalists have a (social) obligation to provide information and ideas on all matters of public interest and the public has the right to receive such information. Journalists

are even allowed to use some degree of exaggeration and provocation. Based on the abovementioned the ECHR provides the journalists with a higher level of protection compared with other subjects of freedom of expression. The Constitutional Court accepts this approach of the ECHR, and only based on its authority, but mostly because of the fact that the arguments of ECHR are convincing. (...)

What is criticized

The Constitutional Court and ordinary courts must examine the object and form of criticism.

Criticism usually heads towards to judicial decision itself, its reasoning or the process in proceeding or it is headed sprightly towards the personality of the judge. (...)

Where is he/she/it criticized

The place where the expression was orally expressed or published is also useful criterion for assessment of the interference into freedom of expression. Generally speaking, the more distributed the criticism is the higher the protection of personal rights is. However, there is a need to understand the respective matter in connection with the criterion of the author of expression. If the author is a journalist, his or her privileged position partially neutralises the criterion of location. (...)

When is he/she/it criticized

When criticising the judicial decisions it is of importance whether they are criticised during the proceeding, resp. trial, or after the end of it. Timing of criticism should be seen not only in terms of phase of the trial, but also in terms of social timing. The respective magazine concerned the proceeding that was not final as it was decided only by the court of first instance and the decision had been challenged before the court of the second instance (see also the decisions of the Constitutional Court no. II. ÚS 23/00, II. ÚS 13/02 (...)). In this case, it is generally necessary to raise the demands for more accurate reporting. In the present case there was no report about the judicial decision but selected cases and decisions served as the examples to illustrate the current problem of the number of cases before courts initiated by the public figures who were provided high amounts of money as non-pecuniary damage in those cases. The social topicality is linked also to say historical actuality. While building judiciary in the rule of law, the countries in transition can protect judiciary against public discussion with perhaps defamatory aspects or on the other hand they can open discussion about judiciary. The Constitutional Court is inclined to accept the second of these alternatives, taking into account the fact that changes in the judiciary are underway for two decades already. (...)

How is he/she/it criticized

Not only what is said needs to be taken into account. Also how it is said is of an importance in assessment of acceptability of the criticism. In this case the criticism is indirect, genre criticism of respective judicial decisions, and implicitly it is also the criticism of the judge who has been successful in these cases before the courts. The magazine has been published on the last but one page of the magazine under the column "Word of Publisher" with the caricature of prickly hedgehog. This means that it was a commentary, not reporting section of the magazine. A reader hence counts with the value-colouration or polemical text and therefore a reader treats the article more cautiously. The tone of the article can be seen as sarcastic but not as insidious. Form of criticism is therefore the disagreement with the judicial decisions but there are no offensive, incursive or indecent formulations. In overall context the magazine refers to a systematic problem of high satisfactions of non-pecuniary damages granted to judges in the defamation trials. The primary goal is to critique the specific decision-making practice of the courts, which corresponds to the title of the article where there is no name of the applicant mentioned. (...)."

The court, after the thorough evaluation of the six criteria, held that the right to freedom of expression should have prevailed over right to privacy, thus the decisions of the lower courts should be overruled as they were in violation of the freedom of expression of the magazine

(publisher of the magazine).
