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Defamation proceedings against Romanian MEP over anti-corruption comments violated Article 10

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By Ronan Ó Fathaigh and Dirk Voorhoof

On 28 July 2020, the European Court of Human Rights held in *Monica Macovei v. Romania* that defamation proceedings against a sitting Member of the European Parliament violated the politician's right to freedom of expression, under Article 10 of the European Convention on Human Rights. The Court reiterated that there is 'little scope' for restricting political speech, and faulted the national courts for lacking 'convincing reasons' for interfering with an elected official's expression on a matter of public interest. The judgment is a strong reaffirmation of the Court's seminal 1992 *Castells v. Spain* judgment, with the Court applying its strictest test – 'closest scrutiny' – to interferences with a politician's freedom of expression discussing a matter of public interest. It also clarifies that allegations of corruptive practices by members of parliament need to be situated in their context, in particular when they are part of a political debate on how to prevent conflicts of interests and lack of integrity by elected officials.

Facts

The case arose in September 2009, and involved Monica Macovei, a well-known member of Romania's Democratic Liberal Party, who had been elected to the European Parliament just a few months earlier. The case centred on a speech Macovei gave at a summer school, where she advocated for legislation to deal with the situation where members of Romania's parliament could hold other positions as lawyers. During the speech, Macovei referenced politicians from another party, the Social Democrat Party (PSD), stating: 'Take a look at the lawyers in Parliament, there are two youngsters from the PSD for example, who have [signed] contracts worth millions of euros with State companies from the constituencies they represent [in Parliament], money that they get for legal advice. This is a typical act of corruption by political influence. It is not at all different from other acts of corruption'. Macovei argued that '[f]or as long as one is [working as] a member of parliament, one cannot exercise this profession (of lawyer)'. The statement was part of a broader concept that Macovei during her political career had been (unsuccessfully) promoting, namely the introduction of a law rendering the functions of lawyer and member of parliament incompatible. While Macovei had not mentioned the two politicians by name, she later acknowledged she was referring to a Senator ('D.Ș.') and another member of Parliament ('V.P.'), both being associates in the same law firm.

Following publication of media reports of Macovei's speech, the Senator (D.Ş.) initiated defamation proceedings against Macovei over her comments, claiming the reference to 'corruption' had been defamatory, and claimed over 500,000 Romanian lei (around 117,000 euro) in damages. However, the Bucharest County Court dismissed the defamation proceedings, holding that Macovei had 'expressed her opinion' on a 'matter of public interest,' and her criticism had been 'directed at politicians'. The Court held that the statements were mere 'insinuations' and 'suggestions,' and 'formed the content of the right to freely express an opinion', made in the context of Macovei's view on the 'incompatibility between the functions of lawyer and member of parliament'. The Senator appealed the judgment before the Bucharest Court of Appeal, and found for the Senator. The appeal court rejected the reference to corruption had been an opinion, and held instead that Macovei's speech contained an 'untruthful fact,' namely that D.Ş had 'committed an act of corruption in his joint functions of lawyer and member of parliament'. According to the Bucharest Court of Appeal none of the available evidence had proved that Senator D.Ş. had signed any legal-assistance or other contracts with a State-owned company located in the constituency he was representing in Parliament, and that he was neither prosecuted nor convicted for corruption. The Court held that Macovei had 'overstepped the level of acceptable criticism', as freedom of expression 'stopped where the constitutional rights concerning the dignity of others began', and 'everyone had the right to be presumed innocent'. Macovei was ordered to pay damages of 10,000 lei (around 2,300 euro), and to publish the judgment at her own expense in five national newspapers, holding it would 'deter the applicant from committing similar acts in the future'. Finally, the High Court of Cassation and Justice confirmed the findings by the Bucharest Court of Appeal. It dismissed Macovei's appeal, referring to her public statement about 'an untrue fact' and emphasising that the allegation of an act of corruption could have damaged the Senator's political, professional and teaching career, and caused him non-pecuniary damage.

Macovei, – who in 2001 published a book entitled 'Freedom of Expression. A guide to the implementation of Article 10 of the European Convention of Human Rights' -, made an application to the European Court, claiming that the defamation proceedings had violated her right to freedom of expression under Article 10. She argued that (a) her statements had a 'sufficient factual basis', and the appeal courts had 'not taken into account the evidence proving the existence of such a reasonable factual basis'; and (b) the sanctions imposed and 'financial losses suffered by her' had been 'disproportionate'.

The Court began by noting the case centred on Macovei's statements concerning some actions by the Senator (D.Ş.) which 'she perceived as a "typical act of corruption by political influence"'. The Court considered that the statements 'attained the requisite level of seriousness' to be 'capable' of undermining the Senator's right under Article 8 to 'respect for his reputation'. Therefore, the main question was whether the national courts had struck a 'fair balance' between Macovei's right freedom of expression, and the Senator's right to respect for reputation. Where the right to freedom of expression is being balanced against

the right to respect for private life, the relevant criteria laid down in the Court's case-law include: (a) contribution to a debate of general interest; (b) how well known the person concerned is and what the subject of the report was; (c) prior conduct of the person concerned; (d) method of obtaining the information and its veracity; (e) content, form and consequences of the report; and (f) severity of the sanction imposed.

First, the Court accepted that the criticism in Macovei's comments was not directed at the Senator's private activities, but rather his 'conduct in his political capacity, that is, as an elected parliamentary representative', and was 'clearly of legitimate concern to the general public'. Applying the Grand Chamber's unanimous judgment in *Morice v. France*, the Court held that the Romanian authorities had a 'particularly narrow margin of appreciation' in interfering with such expression. Crucially, the Court reiterated that expression on how elected officials carry out official duties, and issues touching their 'personal integrity', are matters of public interest, and there is 'little scope' under Article 10 for restrictions on such political speech. Indeed, the Court reiterated its principle from *Castells v. Spain*, that freedom of expression is 'especially' important for elected officials, and interferences with such expression call for the strictest scrutiny – 'closest scrutiny' – under Article 10.

Applying this scrutiny, the Court examined the national courts' judgments, and in particularly harsh language, criticised the appeal courts for the 'limited scope of their reasoning', and for not providing 'convincing reasons' for their conclusion that Macovei's remarks had been an 'untruthful statement of fact'. The Court stated it was 'not persuaded' by the appeal courts' approach, and 'cannot share their conclusion'. Crucially, the Court held that Macovei's comments contained a 'combination of value judgments and statements of fact', and the 'thrust of her statements' was to use the example of specific conduct by the Senator and the other politician, which 'she regarded as tantamount to a "typical act of corruption by political influence"', in the 'context of the broader concept of conflict of interest as support for an idea that she had been constantly promoting, namely the introduction of a law rendering the functions of lawyer and member of parliament incompatible'.

The question was thus whether a 'sufficiently accurate and reliable factual basis' existed for her comments. The Court accepted that some statements 'could' be considered to 'lack a sufficient factual basis'. However, the Court held the statements and allegations 'were of a collective nature', and were aimed 'merely at providing an example of a system of political corruption consisting in an award of contracts for legal advice by public companies,' rather than 'accusing either [the Senator] and V.P. of genuine corruption'. Indeed, the Court emphasised the information suggested 'V.P. had been both a member of parliament and an associate of the law practice founded by [the Senator] at a time when the law practice had signed lucrative legal-assistance contracts with State-owned companies located in the constituency represented in Parliament by V.P.'. As such, the Court concluded that Macovei's comments did not amount to an 'ill-fated gratuitous personal attack' against the Senator, particularly given the (a) collective nature of the statements and allegations, (b) overall

context reflected by the press reports (promoting the need for legislation establishing an incompatibility between the functions of lawyer and member of parliament), and (c) existence of 'at least a certain factual background' to her statements and allegations taken collectively.

The Court also examined the sanctions imposed, noting that Macovei was ordered to pay 2,300 euro in damages, and publish the judgment at her own expense in five national newspapers (costing 2,205 euro). The Court held that although Macovei had not shown 'whether or not she would struggle to pay the amounts required', the Court considered the sanction imposed was 'capable of having a dissuasive effect on the exercise of her right to freedom of expression'. The Court concluded, by five votes to two, that the interference with Macovei's right to free expression had not been 'necessary in a democratic society', in violation of Article 10.

Comment

The *Macovei* judgment is an excellent application of the Court's case law on political expression targeting elected officials on a matter of public interest. It is also a good illustration of how to apply the criteria as part of the balancing of the right to freedom of expression against the right to respect for private life and reputation. At several occasions the Court has reiterated that there is little scope under Article 10 § 2 ECHR for restrictions on political speech or debate on matters of public interest, and it has emphasised that the manner in which elected officials carry out their official duties and issues touching on their personal integrity are matters of general interest to the community. Therefore, there is a 'particularly narrow margin of appreciation' for national authorities in assessing the need for the interference with freedom of political expression, calling for the closest scrutiny on the part of the Court.

A crucial aspect of the judgment relates to the qualification of value judgments and factual allegations, while the statement at issue, about 'acts of corruption' is indeed a serious allegation that risks damaging a politician's political and professional reputation. In contrast with the findings by Bucharest Court of Appeal and the Court of Cassation and Justice, the European Court considers the allegation at issue not solely as a factual statement: the Court is of the opinion that Macovei's comments contained rather 'a combination of value judgments and statements of fact' and was 'persuaded' that the reference to the specific conduct by D.Ş. and V.P. was meant as an illustration of what Macovei regarded as tantamount to a 'typical act of corruption by political influence'. In earlier cases, the Court has also emphasised that in order to distinguish between a factual allegation and a value judgment it is necessary to take account of the circumstances of the case and the general tone of the remarks, 'bearing in mind that assertions about matters of public interest may, on that basis, constitute value judgments rather than statements of fact' (*Margulev v. Russia* (§ 52)). In *Makraduli v. the former Yugoslav Republic of Macedonia* the Court found that the distinction between factual allegations and value judgments 'is of less significance in cases where the impugned statement has been made in the course of a lively political debate'.

Another crucial aspect is the threshold of evidence that needs to exist in order to accept that an allegation of corruptive practice has a ‘sufficiently accurate and reliable factual basis’, or is at least ‘not devoid of a factual basis’ (see e.g. *Brosa v. Germany* (see our blog post) and *Kasabova v. Bulgaria*). At several occasions the Court has held that ‘a requirement for defendants in defamation proceedings to prove to a reasonable standard that the allegations made by them were substantially true, does not, as such, contravene the Convention’ (*Rumyana Ivanova v. Bulgaria*, § 39). In some recent cases the Court found no violation of Article 10 emphasising the lack of factual basis of defamatory allegations (see e.g. *Ghergut v. Romania*, § 53-54, and *Oleg Mykolayovych Golubenko v. Ukraine (dec.)*, § 33 and 38-41). On several occasions, however, the Court has clarified that a too rigid or overly rigorous application of the burden of proof for the defendant, and the incumbent presumption of falsity, would be unacceptable in some cases, referring to the function of freedom of expression in a democracy and in keeping the public informed on matters of public interest (*Kasabova v. Bulgaria*, § 61-62 and *Bozhkov v. Bulgaria* (§ 51)). In *Margulev v. Russia* (§ 52) the Court observed ‘that the distinction between statements of fact and value judgments is of less significance’ when the impugned statement is made in the course of the debate on a matter of public interest, and where representatives of civil society and journalists should enjoy a wide freedom to criticise the actions of a public authority, ‘even where the statements made may lack a clear basis in fact’. In *Monica Macovei v. Romania* the Court refers to its approach in other recent cases, such as in *Paraskevopoulos v. Greece* and *Makraduli v. the former Yugoslav Republic of Macedonia* (see also *Kurski v. Poland*, § 56 and *Braun v. Poland*, § 50), considering that where defamatory statements have been made in the course of a lively political debate, elected officials should enjoy a wide freedom to criticise government actions, ‘even if the statements made may lack a clear basis in fact’. According to the Court, ‘an applicant clearly involved in a public debate on an important issue is required to fulfil a no more demanding standard than that of due diligence as in such circumstances an obligation to prove the factual statements may deprive him or her of the protection afforded by Article 10’ (§ 75). As there was evidence that V.P. acting as a lawyer had signed lucrative legal-assistance contracts with State-owned companies while being a member of parliament, and as V.P. and D.Ş. were associates in the same law firm, there was indeed some factual basis for the allegations by Macovei, referring to what she called a typical act of corruption by political influence. Hence her statements and allegations were of ‘a collective nature’, and concerned both D.Ş. and V.P. As in other cases, the Court takes the view that the applicant’s allegations and, in particular, the expressions used, ‘albeit perhaps inappropriately strong, could be viewed as polemical, involving a certain degree of exaggeration’. The Court however reiterates ‘that persons taking part in a public debate on a matter of general concern are allowed to have recourse to a degree of exaggeration or even provocation, or in other words to make somewhat immoderate statements’ (§ 92-93, see also *Do Carmo de Portugal e Castro Câmara v. Portugal*, § 43). The qualification by the Romanian courts that Macovei’s statement contained an ‘untruthful fact’ damaging the reputation of Senator D.Ş. as the only and decisive reason to justify the interference with Macovei’s right to freedom of expression in the given circumstances risks stifling political

debate, as indeed it is necessary always to bear in mind that ‘political invective often spills over into the personal sphere; such are the hazards of politics and the free debate of ideas, which are the guarantees of a democratic society’ (§ 95).

It must be also mentioned that two judges dissented, finding that there had been no violation of Article 10. The dissent argued that the Court was acting ‘like a fourth-instance court’, with the Court’s role ‘limited’ to ascertaining whether a national court’s outcome is ‘neither arbitrary nor manifestly unreasonable’. However, this view of the Court’s Article 10 review being limited to a ‘manifestly reasonableness’-type test was completely rejected by the Grand Chamber in its seminal judgment in *Axel Springer AG v. Germany*. Indeed, the dissent in *Axel Springer* had similarly accused the Court of ‘acting as a fourth instance’ court, and argued for a limited review standard of ‘manifestly unreasonable’. But crucially, the Grand Chamber in *Axel Springer*, with a 12-judge majority, which included two Court Presidents (Judge Jean-Paul Costa and Judge Nicolas Bratza), rejected such an approach. And similarly, in the Grand Chamber’s later judgment in *Morice v. France*, the Court unanimously reiterated its review is not ‘limited to ascertaining’ where national courts acted ‘reasonably, carefully and in good faith’. The dissent in *Macovei* only cites one authority for its view, namely a lone admissibility decision in *Hamesevic v. Denmark*. However, *Hamesevic* had nothing to do with Article 10, but instead concerned facts so far removed from *Macovei*: an asylum seeker’s expulsion from Denmark, who was ‘convicted of smuggling’ weapons. At paragraph 43, the Court merely commented that one finding of the Danish High Court was not ‘arbitrary or manifestly unreasonable’. It is very difficultly to read into this passing remark, which cites no case law, that the Court, in an admissibility decision, was laying down a new fundamental test for how the Court should review interferences with freedom of political expression under Article 10, in a case that had nothing to do with free expression.

Finally, the dissent also criticised the Court’s holding the sanction was capable of having a chilling effect, because the Court ‘failed to explain to what extent the sanction, which was not of a penal nature, actually affected the applicant and why in the specific circumstances of the case its consequences were “chilling”’. However, the dissent fails to engage with the case law cited by the Court, and offers no case law as authority for the proposition that there must be evidence of a chilling effect or an applicant being ‘actually affected’. This view has been rejected by the Court for many years, such as in the Grand Chamber’s seminal judgment on defamation, *Cumpănă and Mazăre v. Romania*, where a unanimous Grand Chamber overturned a Chamber judgment which had rejected finding a chilling effect because there had been ‘no practical consequences’ for the journalists. The Grand Chamber emphasised that the chilling effect results from the ‘fear’ of a possible future sanction for engaging in public interest expression, which ‘works to the detriment of society as a whole’, and not just the individual applicant. Similarly, that is why in *Morice v. France* the Grand Chamber again unanimously held that the ‘relatively moderate nature of the fines does not suffice to negate the risk of a chilling effect’, as the expression concerned a ‘matter of public interest’. The same is true outside of defamation, such as in *Sanoma Uitgevers BV v Netherlands*, where a

unanimous Grand Chamber found that a threatened police search of a publisher's office would have a chilling effect, even though 'it is true that no search or seizure took place in the present case'. It was entirely consistent with the Court's case law to find that a fine of 2,300 euro, and publishing a judgment in five newspaper (costing 2,205 euro), for engaging in public interest expression, was capable of having a chilling effect not only on Macovei, but others seeking to engage in similar public interest expression, 'to the detriment of society as a whole'.