**Case of Monica Macovei**

**v.**

**Romania**

Date of Judgment: July 28, 2020

Case Number: Application No. 53028/14

Region & Country: Romania, Europe

Judicial Body: European Court of Human Rights (ECtHR)

Type of Law: Civil Law, International/Regional Human Rights Law

Themes: Defamation/Reputation

Tags: Civil Defamation, Honor and Reputation, Public Interest

Mode of Expression: Press/Newspapers

Outcome: Procedurally Admissible, Article 10 Violation Upheld

Status: Closed

**Case Summary and Outcome**

The European Court of Human Rights (“the Court”) found that Romania was in violation of Article 10 of the European Convention on Human Rights (“the Convention”) when its domestic appellate courts found the applicant guilty for damaging the reputation of a member of parliament. The applicant, a politician, made statements alleging corruption directed at certain members of parliament in support of her view of incompatibility of that role with that of lawyer. This led to the filing of general tort law proceedings against the applicant by one of the politicians for damage of reputation and breach of privacy. The Court found that there was no pressing social need for suppressing the applicant’s freedom of expression in the present case. The domestic appellate courts had failed to elaborate on how her comments constituted untruthful statements. They did not examine the context in which the comments had been made, mainly to protect public interest. As a result, the domestic courts exceeded their margin of appreciation by finding the applicant guilty and imposing disproportionate fines on her as punishment, which had a chilling effect on her freedom of expression.

**Facts**

The applicant was a former minister of justice of Romania, an active politician and a member of the European Parliament. (para. 5) She had made certain remarks on two members of parliament (D.Ş. and V.P.), which were published as press articles in two national newspapers. The applicant’s statements targeted the corrupt nature of D.Ş. and V.P. due to an overlap between their functions as both lawyers and members of parliament, since their law firm ([D.]Ş. and Associates) had signed multi-million euro contracts with State-owned companies from their own constituencies.

On 16 October, 2009, D.Ş. brought general tort law proceedings against the applicant. (para. 9) He submitted that the applicant’s misrepresentation of her personal opinions as clear instances of corruption had discredited his reputation in the eyes of the public. He relied on Articles 998-999 of the Civil Code (any person causing damage to another would be liable to make reparation for it) (para. 46), Articles 10 and 30 §§ 1 and 6 of the Constitution (maintaining peaceful relations with other states, inviolability of freedom of expression and that freedom of expression may not damage a person’s honour, dignity, private life or one’s right to one’s image) (para. 47), Article 10 of the Convention and Article 19 § 3 of the International Pact concerning civil and political rights. (para. 9)

The Bucharest County Court delivered the first-instance judgment by dismissing D.Ş.’s action on 18 October, 2010. (para. 10) On examining the context in which the applicant had supported the incompatibility between D.Ş.’s functions as a lawyer and a member of parliament, the County Court found that her statements had not been defamatory. (para. 11) Further, the applicant’s statements could be regarded as insinuations which would not have deteriorated D.Ş.’s image. Thus, the applicant had merely expressed her opinions to criticise a politician in public interest.

D.Ş. appealed against this judgment. The second-instance judgment was rendered by the Bucharest Court of Appeal. It allowed D.Ş.’s appeal after evaluating it from several angles like criticism of politicians in public interest, permissible limits of freedom of expression and harm to the reputation and human dignity of individuals. It found a violation of civil liability as the applicant’s statements went beyond a simple value judgment and were defamatory in nature. A proportional balance had to be struck between the fundamental rights of a person and the dignity of another. Hence, the Court of Appeal ordered the applicant to pay 10,000 Romanian lei to D.Ş. and to publish the court’s judgment at her own expense in three national newspapers having the widest circulation. (para. 17)

The applicant and D.Ş. appealed on points of law against the second-instance judgment to the High Court of Cassation and Justice. The applicant submitted that her statements mainly concerned V.P. because he was a member of parliament along with being a senior partner at “[D.]Ş. and Associates”, when the said law firm secured multi-million euro contracts from State-owned companies. However, D.Ş. had not been a member of parliament at the time when the contracts had been concluded. (para. 25) Thus, the applicant had never stated that D.Ş. had jointly exercised the functions of both a lawyer and a member of parliament. The second-instance court had missed out on the inconsistency in different press reports and had misinterpreted the facts. Furthermore, her statements had been made in good faith and had not been a gratuitous attack. (para. 29) Thereby, the second-instance court had given undue advantage to D.Ş.’s political image over her freedom of expression on a matter of public interest, which was not necessary in a democratic society. However, by a final judgment of 7 November, 2013, the High Court of Cassation and Justice dismissed both appeals on points of law and held that the applicant’s statements had indeed caused damage to D.Ş.’s reputation.

**Decision Overview**

The application was declared admissible. The main issue before the Court was whether the applicant’s right to freedom of expression under Article 10 of the Convention had been violated.

The applicant submitted that the press articles taken into account by the domestic appellate courts had never mentioned “a clear case of corruption”, a phrase that D.Ş. had relied on to show that it had seriously affected his public image. (para. 51) In those press articles, the applicant never claimed that D.Ş. had acted both as a lawyer and a member of parliament; she had merely indicated that he had earned large sums of money while securing contracts from energy companies located in that constituency at a time when V.P. was both a member of parliament and a senior partner at [D.]Ş. and Associates. Thus, the second-instance court had misinterpreted her statement because she held V.P. accountable for acting both as a lawyer and as a member of parliament, and not D.Ş. Her statements only indicated a mutually beneficial relationship between D.Ş. and V.P. who supported each other in a profitable manner. (para. 53) Further, even though the applicant’s public statements concerned both V.P. and D.Ş., the lack of response on part of V.P. indicated that her statements were neither false, nor did they require judicial action. Her statements were made in public interest to mobilize support for a bill that she had been advocating for several years to prohibit the same person from acting both as a lawyer and a member of parliament in order to safeguard public funds. As public officials, both D.Ş. and V.P. were liable to be scrutinized for their actions by journalists and the public. Thus, the financial losses suffered by the applicant due to the erroneous judgments of the domestic courts had disproportionately interfered with her freedom of expression.

The Government submitted that the interference with the applicant’s right to freedom of expression had been provided by law and pursued a legitimate aim of protecting D.Ş.’s right to reputation. The applicant was not a journalist, and lack of any retraction efforts on her part showed that she had consented to the publication of her statements by the press. (para. 59) The domestic courts had not exceeded their margin of appreciation as the applicant’s statements were not backed by reasonable factual basis, and had overstepped the boundaries of permissible limits of criticism. Further, the non-pecuniary damage sought from the applicant had been fair to ensure a balance between competing interests of both sides. The second-instance court had overturned the judgement of the first-instance court in view of the public impact of the applicant’s statements, especially given her position of former minister of justice. (para. 67) Hence, the domestic courts were correct in convicting the applicant because her statements accused D.Ş. of a criminal offence without sufficient basis.

The Court agreed that there was an interference with the applicant’s right under Article 10, but the interference was prescribed by law and pursued a legitimate aim of protecting D.Ş.’s right to reputation. While determining whether the interference was necessary in a democratic society, the Court reiterated that Article 10 also entails expression of ideas that offend, shock or disturb. It should, however, correspond to “a pressing social need”. While states have a margin of appreciation to determine whether such need exists, it goes hand in hand with European supervision. (para. 73) Hence, the Court must determine whether the reasons adduced by the national authorities to justify the interference were “relevant and sufficient” and whether the measure taken was “proportionate to the legitimate aims pursued”. (para. 74)

The Court emphasized upon the need to distinguish between statements of fact and value judgments, since the accuracy of the latter cannot be proven. The requirement to prove the truth of a value judgment itself violates Article 10. (para. 75) However, there must still be some factual basis supporting a value judgment, as upheld in *Pedersen and Baadsgaard v. Denmark*. Thus, while evaluating statements made in public interest, the Court has to analyse the context in which the statements were made, the positions of the parties and that these statements may have been value judgments rather than statements of fact if the applicant is involved in a public debate.

The Court also examined the criteria to balance freedom of expression against right to privacy, as laid down in *Von Hannover v. Germany (no. 2)* and *Axel Springer AG v. Germany*. The criteria 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. (para. 77) The Court also noted that freedom of expression is especially relevant to elected representatives since they defend public interest, and that a politician should observe greater tolerance for criticism. A politician’s right to reputation should not be protected at the cost of open discussions of political issues. At the same time, information conveyed on general public interests should be accurate and reliable, and delivered in good faith. (para. 80)

Applying the above principles to the present case, the Court noted that the applicant was a politician and an elected member of the European Parliament at the time of delivering the statements, which were directed towards both V.P. and D.Ş. The statements made had seriously affected D.Ş.’s political image, and were capable of undermining his right to privacy under Article 8 of the Convention. (para. 85) However, the applicant’s statements concerned D.Ş.’s political conduct, which was of legitimate concern to the public. Hence, the domestic courts had a narrow margin of appreciation in assessing the need for interference with the applicant’s freedom of expression. (para. 87)

Furthermore, the appellate courts did not provide convincing reasons for interpreting the applicant’s statements as untruthful facts that had a prejudicial impact on the public. The Court was persuaded that the applicant’s statements were a combination of value judgements and statements of fact. It found that these statements and allegations were of a collective nature, concerning both D.Ş. and V.P., 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 at accusing either D.Ş. or V.P. of genuine corruption. (para. 91) As observed in *Do Carmo de Portugal e Castro Câmara v. Portugal*, the applicant was justified in using a certain degree of exaggeration or provocation to make immoderate statements as the issue concerned was in public interest. (para. 93) Thus, taking the circumstances into account, the applicant’s statements did not constitute an ill-fated gratuitous personal attack against D.Ş. (para. 94) Moreover, the Court noted that the fine and punishment imposed on the applicant to publish the last-instance court’s judgement at her own expense in five national newspapers, constituted a chilling effect on her freedom of expression. Thus, the domestic courts failed to strike a fair balance between the relevant interests and to establish a “pressing social need” for putting D.Ş.’s reputation (protected by Article 8 of the Convention) above the applicant’s right to freedom of expression (under Article 10 of the Convention). The interference with the applicant’s right to freedom of expression was not “necessary in a democratic society”, and constituted a violation of Article 10. Hence, the Court ordered the respondent state to pay to the applicant EUR 4,505 in respect of pecuniary damage, EUR 2,000 in respect of non-pecuniary damage and EUR 3,000 in respect of costs and expenses. (para. 109)

Judge Wojtycezk (concurring)- The judge opined that the judgment contained a procedural flaw as D.Ş. had not been allowed to plead his own case before the Court. Nonetheless, regardless of procedural flaws, there was a violation of Article 10 in the present case.

Judge Ranzoni (dissenting)- Contrary to the majority opinion, the judge found no violation of Article 10. The statements made by the applicant lacked a sufficient factual basis and had a harmful impact on D.Ş.’s personal and professional life. Corruption is a serious allegation, bordering on criminal offence. As a result, the applicant’s statements could not be justified merely on the pretext of being “exaggerating” or “polemical”. The judges also felt that the Court did not adequately establish a “pressing social need” for giving priority to the applicant’s right to freedom of expression over D.Ş.’s right to privacy and reputation. Further, by failing to provide a sufficient explanation to elaborate how the fines imposed on the applicant had a chilling effect, the Court did not respect the domestic courts’ margin of appreciation.

Judge Mourou-Vikstrom (dissenting)- The judge joined his dissenting opinion with that of Judge Ranzoni’s, and added a few more reasons of his own to show how the applicant’s right under Article 10 had not been violated. He found that the applicant’s statements had exceeded the limits of permissible criticism and constituted serious accusations. These accusations had failed to comply with the following two important rules, which must be satisfied for criticisms to come within the ambit of freedom of expression: (1) to remain as general “value judgements”; and (2) to be truthful. Therefore, the domestic courts were justified in finding the applicant guilty in the present case.

**Decision Direction**

**Expands Expression**

By upholding the applicant’s right under Article 10, the Court expanded the scope of expression under the Convention. The judgment portrays how politicians have to exercise greater tolerance for criticism in matters of public interest. While their right to privacy and reputation is important, this right cannot be protected at the expense of promoting public discussions on political issues. Thus, a distinction needs to be made between ‘statements of fact’ and ‘value judgments’, and the latter does not necessarily require an element of truth in order to constitute permissible criticism. In this manner, the Court reinforced several principles laid down in the Court’s case-law relating to the determination of a “pressing social need” for stifling an individual’s freedom of expression. The affirmation that the domestic courts cannot exceed their margin of appreciation to pronounce judgments having a chilling effect, indicates the Court’s utmost regard for exercising freedom of expression in order to preserve public interest.

1. **Global Perspective**

**Related International and/or regional laws**

* ECtHR, Nicolae Virgiliu Tanase v. Romania, App No. 41720/13 (2019)
* ECtHR, Perna v. Italy, App No. 48898/99 (2003)
* ECtHR, Paraskevopoulos v. Greece, App No. 64184/11 (2018)
* ECtHR, Tuşalp v. Turkey, App Nos. 32131/08 and 41617/08 (2012)
* ECtHR, Lindon, Otchakovsky-Laurens and July v. France, App Nos. 21279/02 and 36448/02 (2007)
* ECtHR, Frisk and Jensen v. Denmark, App No. 19657/12 (2017)
* ECtHR, Pedersen and Baadsgaard v. Denmark, App No. 49017/99 (2004)
* ECtHR, Makraduli v. the former Yugoslav Republic of Macedonia, App Nos. 64659/11 and 24133/13 (2018)
* ECtHR, Lykin v. Ukraine, App No. 19382/08 (2017)
* ECtHR, Axel Springer AG v. Germany, App No. 39954/08 (2012)
* ECtHR, Bédat v. Switzerland, App No. ()
* ECtHR, , App No.56925/08 (2016)
* ECtHR, Von Hannover v. Germany (no. 2), App Nos. 40660/08 and 60641/08 (2012)
* ECtHR, Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland, App No. 931/13 (2017)
* ECtHR, Falzon v. Malta, App No. 45791/13 (2018)
* ECtHR, Castells v. Spain, App No. 1798/85 (1992)
* ECtHR, Lombardo and Others v. Malta, App No. 7333/06 (2007)
* ECtHR, Lewandowska-Malec v. Poland, App No. 39660/07 (2012)
* ECtHR, Milisavljević v. Serbia, App No. 50123/06 (2017)
* ECtHR, Prunea v. Romania, App No. 47881/11 (2019)
* ECtHR, Barata Monteiro da Costa Nogueira and Patrício Pereira v. Portugal, App No. 4035/08 (2011)
* ECtHR, Kurski v. Poland, App No. 26115/10 (2016)
* ECtHR, Sokołowski v. Poland, App No. 75955/01 (2005)
* ECtHR, Kwiecień v. Poland, App No. 51744/99 (2007)
* ECtHR, Sürek v. Turkey (no. 1), App No. 26682/95 (1999)
* ECtHR, Instytut Ekonomichnykh Reform, TOV v. Ukraine, App No. 61561/08 (2016)
* ECtHR, Morice v. France, App No. 29369/10 (2015)
* ECtHR, Jalbă v. Romania, App No. 43912/10 (2014)
* ECtHR, Reznik v. Russia, App No. 4977/05 (2013)
* ECtHR, Rungainis v. Latvia, App No. 40597/08 (2018)
* ECtHR, Do Carmo de Portugal e Castro Câmara v. Portugal, App No. 53139/11 (2016)
* ECtHR, Wille v. Liechtenstein, App No. 28396/95 (1999)
* ECtHR, Nikula v. Finland, App No. 31611/96 (2002)
* ECtHR, Elci and Others v. Turkey, App Nos. 23145/93 and 25091/94 (2003)
* ECtHR, Ghiulfer Predescu v. Romania, App No. 29751/09 (2017)
* ECtHR, Khlaifia and Others v. Italy, App No. 16483/12 (2016)

1. **Case Significance**

The decision establishes a binding or persuasive precedent within its jurisdiction.