Оригиналан научни рад

342.727
342.7:341.6(4)
doi:10.5937/zrpfns59-55684

*Bojan L. Pajtić*
*University of Novi Sad*
*Faculty of Law Novi Sad*
*B.Pajtic@pf.uns.ac.rs*
*ORCID ID: 0000-0001-7760-1873*

*Aleksandra L. Stefanović*
*University of Belgrade*
*Faculty of Law Belgrade*
*aleksandra.stef97@gmail.com*
*ORCID ID: 0000-0003-0824-0255*

# THE NEW PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS – OR AN EXCEPTION THAT PROVES THE RULE?*

***Abstract:*** *This article places a particular emphasis on the collision between the right to personal dignity and the right to freedom of expression, particularly in cases where the subjects of criticism are holders of public authority. The European Court of Human Rights has established precedents for the so-called "right to extended criticism," particularly in favour of the public, as most commonly represented through the media. In landmark cases on this matter, a clear distinction has been made between the right to express value judgements regarding a public figure, and the assertion of verifiable facts.In adjudicating the 2021 decision analysed in this paper, the judicial panel took a step back by shifting the right to severe criticism, which typically exceeds the usual boundaries, from the media's domain to the realm of public office holders. Furthermore, the judicial panel materially altered the prior case law by misconstruing the right to make value judgements as the right to disseminate untrue factual claims.*

***Keywords****: European Court of Human Rights, freedom of expression.*

* The the first author wrote his part of the paper in the framework of work on the scientific research project "Legal Tradition and New Legal Challenges" at the Faculty of Law, University of Novi Sad, in 2024.

## 1. INTRODUCTION

The European Convention on Human Rights ((ECHR)[1], in Article 8, Paragraph 1, stipulates that everyone has the right to respect for their private and family life. The subsequent paragraph of the same article prescribes that this right can only be limited by the rights and interests of other persons. Simultaneously, pursuant to Article 10, Paragraph 1 of the Convention, everyone has the right to freedom of expression, which includes the freedom to hold opinions, receive and impart information and ideas without interference by public authority and regardless of frontiers. Serbia has ratified the Convention, making it a part of its positive legal framework.[2] Consequently, the Constitution of the Republic of Serbia[3] in Article 23, Paragraph 2 guarantees the inviolability of human dignity and establishes an obligation for all to respect and protect it, while Article 46, Paragraph 1 guarantees the freedom of thought and expression.

A violation of the right to personal dignity may give rise to non-pecuniary damages. Prior to the enactment of the Obligations Act, three legal theories contended in Serbian legal doctrine: the objective theory, which defines non-pecuniary damages as the violation of a personal right or legally protected interest, regardless of the psychological suffering of the injured party; the subjective theory, which emphasises the suffering, i.e., pain or fear, endured by the injured party; and the mixed theory, which allows for the inclusion of personality rights violations even when the injured party does not experience pain or fear but also encompasses cases where such emotions are present.[4] Serbian Obligations Act adopted the pure subjective theory of non-pecuniary damages. Accordingly, Article 200, Paragraph 1[5]

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[1] https://www.echr.coe.int/documents/d/echr/convention_ENG

[2] Ratification of the European Convention on the Protection of Human Rights and Fundamental Freedoms Act, amended in accordance with Protocol No. 11, the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which secures certain rights and freedoms not included in the Convention and its original protocol. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty, Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, and Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms on the abolition of the death penalty in all circumstances, Official Gazette of SCG – International Treaties, No. 9/2003, 5/2005, and 7/2005 – corr. and Official Gazette of RS – International Treaties, No. 12/2010 and 10/2015

[3] Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 98/2006 and 115/2021

[4] Marija Karanikić Mirić, "The Subjective Conception of Non-Pecuniary Damage", – Liber amicorum Aldo Radolović, University of Rijeka, Faculty of Law, 2018, 395-400

[5] Obligations Act, Official Gazette of SFRY, No. 29/78, 39/85, 45/89 – decision of the Constitutional Court of Yugoslavia and 57/89, Official Gazette of FRY, No. 31/93, Official Gazette of

of the Act clearly states that any individual is entitled to non-pecuniary damages due to mental suffering caused by the violation of their reputation and honour. The purpose of non-pecuniary damages is punitive, and any individual who has suffered mental distress as a result of such violations is entitled to it, regardless of whether the violation has caused pecuniary damage.[6]

Unlike the Constitution, which was adopted almost three decades after the Obligations Act, and which addresses the protection of dignity, the Obligations Act sanctions the violation of reputation and honour under the condition that such a violation has caused mental suffering to the injured party. Therefore, the Constitution does not adhere to the terminology of the Obligations Act (a lower-ranking, albeit earlier enacted, legal instrument). Instead of distinguishing between "honour" (defined as an individual's internal perception of their own standing within the broader social community) and "reputation" (referring to the community's perception of said individual), the Constitution employs the generic term "dignity" to encompass both concepts. A question arises as to whether the concepts of "honour" and "reputation" can entirely encapsulate the notion of personal dignity. For instance, an individual may claim non-pecuniary damages due to the reduction of their life activity, even in the absence of injury to their honour or reputation. In severe cases, injured persons may be unable to satisfy even their most basic physiological needs. Their honour and reputation might not have been harmed, but can such a life still be considered dignified? Did the breaching party, by diminishing the injured person's life activity, also inflict mental suffering due to an injury to their dignity, even if their honour and reputation were unaffected? Judicial practice has taken the explicit stance that honour and reputation are integral components of human dignity. This legal dilemma was resolved by rulings of the Appellate Court of Novi Sad in decision Gž 404/12 of 24 May 2012 and the Supreme Court of Cassation in decision Rev. 2163/17 of 24 May 2018. The ruling of the Appellate Court emphasised: "Considering that honour and reputation are moral categories and components of personality that cumulatively constitute human dignity (the inviolability of which is guaranteed by Article 23 of the Constitution of the Republic of Serbia), the violation of both value categories of the claimant's personality has caused the suffering of unified mental distress, which under the law constitutes grounds for non-pecuniary damages." Deeply established case law regards the categories of honour and reputation as cumulative when awarding non-pecuniary damages. To be awarded non-pecuniary damages in civil litigation, it is necessary for both honour and reputation to have been violated. The Public Infor-

Serbia and Montenegro, No. 1/2003 – Constitutional Charter and Official Gazette of the Republic of Serbia, No. 18/2020

[6] Karanikić Mirić 2018, 395-400

mation and Media Act[7] followed this imperative legal standard, which in Article 79, Paragraph 1, paraphrases the aforementioned case law by expanding the category of dignity to include the term "piety"[8]: "The dignity of a person (honour, reputation, or piety) to which the information relates is legally protected."

The next question to consider is which factors influence the assessment of the severity of a violation or the amount of potential compensation. The practice of domestic courts, as well as the European Court of Human Rights (ECtHR), is unanimous. It is generally accepted that a person's reputation is significantly more diminished if the violation occurs through a statement made in printed or electronic media or on widely followed social media platforms rather than in a private conversation among a small circle of people. Today, some YouTube channels achieve viewership levels that exceed those of conventional media outlets, making their influence at times greater than that of television stations or daily newspapers. Since generally known facts do not need to be proven in civil proceedings[9], courts, when assessing the extent of damage, assume that the intensity of mental suffering due to the violation of honour and reputation is proportional to the number of people who witnessed the violation via one of these mass communication channels.[10] This explanation is significant due to a decision of the ECtHR, which inspired the author to write this paper.

In the Constitution of Serbia, as in the European Convention, alongside the right to personal dignity, the right to freedom of thought and expression is highly ranked in the section regulating human rights and freedoms: "Freedom of thought and expression is guaranteed, as well as the freedom to seek, receive, and impart information and ideas by speech, writing, images, or in any other way. Freedom of expression may be restricted by law if necessary to protect the rights and reputation of others, preserve the authority and impartiality of the judiciary, or protect public health, morality, democratic society, and national security of the Republic of Serbia."[11]

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[7] Public Information and Media Act, Official Gazette of RS, No. 83/2014, 58/2015, and 12/2016 – authentic interpretation – according to Article 29 of this Act, media refers to public information outlets that convey editorially shaped information, ideas, and opinions, as well as other content intended for public distribution and an unlimited number of users through words, images, or sound.

[8] Piety represents a feeling of deep respect, gratitude, and devotion towards someone or something; the expression or manifestation of such a feeling, i.e., pious respect for the deceased – see: Ivan Klajn – Milan Šipka, "Great Dictionary of Foreign Words and Expressions," third revised and corrected edition, Novi Sad, Prometej, 2008.

[9] Civil Procedure Act, Official Gazette of RS, No. 72/2011, 49/2013 – Constitutional Court decision, 74/2013 – Constitutional Court decision, 55/2014, 87/2018, 18/2020, and 10/2023 – other law, Article 230, Paragraph 4.

[10] Sanja Savčić, Bojan Pajtić, "Freedom of Expression or Violation of Honor and Reputation?", CM: Communication and Media XVII(2) 201–221 © 2022, 204.

[11] Constitution of the Republic of Serbia, Article 46, paragraphs 1 and 2.

## 2. THE ROLE OF THE ECTHR IN IMPLEMENTING THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The ECtHR serves as the primary institution for interpreting and enforcing the ECHR. Its case law serves as a model for national courts in member states of the Council of Europe, which frequently adopt it as their own, directly citing it in their judgments. This judicial practice has a logical explanation: if a citizen of a member state has exhausted all legal remedies within their national system and remains convinced that their human rights, as guaranteed by the Convention, have been violated, they may file an application against their state before the European Court[12]. The Court's decision is binding on national institutions. It is primarily declarative. Most commonly, if the application is successful, the member state of the Council of Europe is obliged to pay a certain sum of money to the applicant as just satisfaction. However, the Court has also issued decisions requiring member states to take more substantive actions, such as returning property unlawfully seized, releasing individuals unlawfully detained, or even amending legal frameworks to ensure compliance with Convention rights. In such cases, the Committee of Ministers of the Council of Europe oversees the implementation of the Court's decisions.[13] Through its case law, the ECtHR establishes precedents that interpret the Convention, which may arise from a single ruling or be synthesised from multiple cases (the latter being the most common). Legal scholars acknowledge two competing, yet not fully compatible, views on the role of ECtHR case law as a source of law. While the first statement, that neither international law nor European human rights law recognises a system of precedent and thus judgments are solely binding on the parties to the dispute, is commonplace and often routinely asserted, it seems that the second statement is equally valid. The ECtHR adheres to its jurisprudence, which renders prior case law relevant and potentially binding. There are instances where the Court explicitly refers to its previous case law as "precedent." In such circumstances, the case law assumes significantly greater weight. Does the approach to prior case law, based on legal certainty and stability, or otherwise, render it binding to the extent that it constitutes a source of law in itself? Is there any basis in official documents for a doctrine of precedent that mandates the application of existing case law to future cases.[14] In practice, ECHR precedents represent a system-

[12] Please note that in the following text, the term "European Court" or "Court" will be used synonymously with the European Court of Human Rights.

[13] Alastair Mowbray, "An Examination of the European Court of Human Rights' Indication of Remedial Measures", Human Rights Law Review, Oxford, 2017, 452-454

[14] Sanja V. Đajić, "The Concept of Precedent at the European Court of Human Rights and National Responses to the Doctrine with Special Reference to the Constitutional Court of the Republic of Serbia", Harmonisation of Serbian and Hungarian Law with the European Union Law VI. Novi Sad: University of Novi Sad Faculty of Law Publishing Center, 2018, 223-224

atic interpretation of the Convention in identical or similar situations. The Chambers or Grand Chamber frequently refer to specific phrases or textual passages from previous judgments, sometimes quoting them verbatim. These excerpts are referred to as "principles" and can serve as binding precedents that directly determine the outcome of cases. Alternatively, they may serve as part of the reasoning behind a judgment. Unlike common law systems, where precedents are unwritten rules, the ECHR's precedents are codified as "lex scripta".[15]

However, Article 59 of the Statute of the International Court of Justice explicitly denies the binding force of precedent in international law, except for the parties involved in a specific case.[16] Consequently, the prevailing theory in legal doctrine is that of a "de facto" doctrine of precedent, whereby the ECHR's Chambers follow previous rulings in cases with sufficiently similar material facts, adhering to the imperatives of legal certainty (predictability) and stability. Although they are not formally bound to treat previous case law as a source of law, the Chambers generally follow precedents unless there are compelling reasons to rule differently in comparable cases, reflecting the dynamic nature of human rights law. This approach is significant because international law and international courts draw on both civil law and common law systems. The "de facto" precedent doctrine thus reconciles these two legal traditions, avoiding rigid adherence to past rulings while treating them as the most important source of law.[17] Based on these considerations, it is reasonable to agree with the observation that "case law plays a crucial role in ensuring legal certainty and consistency in international and supranational legal systems, reducing the risk of fragmentation as these systems expand, and facilitating coexistence between courts that belong to different legal orders. To meet the need for certainty and consistency, international judges and EU judges have created a dense network of intra- and inter-system references. This tendency has led to the establishment of a kind of 'orderly jurisprudence,' where the same principles or rules are generally interpreted similarly, although not always identically, even when applied by different judges or in different legal systems".[18] To prevent a multitude of applications concerning similar legal issues filed before the ECHR each year, Protocol No. 16 to the European Convention on Human Rights, which came into effect in 2018, introduced an advisory jurisdiction for the Court. This allows the ECHR to provide clear guidance to national courts,

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[15] Rodoljub Etinski, Orderly Development of the Case Law of the European Court of Human Rights, Annals of the Faculty of Law in Belgrade, vol. 72, 27.03.2024, 27-28

[16] Gabrielle Kaufmann-Kohler, "Arbitral Precedent: Dream, Necessity or Excuse?", Arbitration International, Vol 23, 3/2007, 360-361

[17] Đajić 2018, 225

[18] Gian Maria Farnelli, Federico Ferri, Mauro Gatti, Susanna Villani, "Introduction: Judicial Precedent in International and European Law", Italian Review of International and Comparative Law, 2/2022, 263-265

ensuring that contentious issues are resolved at an earlier stage within domestic judicial systems.[19]

## 3. THE RIGHT TO "EXTENDED CRITICISM" IN THE JURISPRUDENCE OF THE ECTHR

When addressing violations of reputation or honour, the Chambers of the ECtHR frequently cite specific sentences or textual sequences from previous judgments. This issue has been addressed in numerous judgments, such as Pfeifer v Austria,[20] Petrina v Romania,[21] and Chauvy and others v France,[22] where the Court protected honour and reputation as guaranteed by Article 8 of the Convention. Additionally, judgments like Denisov v Ukraine,[23] Balaskas v Greece,[24] and De Carvalho Basso v Portugal[25] established the principle that an attack on someone's honour or reputation must reach a certain level of severity and must significantly hinder or prevent the enjoyment of private life for judicial protection to be warranted. Moreover, in the case Putitsin v Ukraine,[26] the Court ruled that the attack must be sufficiently connected to the applicant to be sanctioned.

In some situations, the two rights we are examining in this paper— the right to personal dignity and the right to freedom of expression—come into conflict, particularly when it concerns the public's interest in being informed about the actions of public officials and the right to criticise those actions. According to ECtHR jurisprudence, public figures are required to show a higher degree of tolerance toward criticism of their actions, even when that criticism includes particularly harsh or vulgar value judgements or disqualifications. This rule was established primarily to ensure freedom of expression for journalists, who act as a sort of

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[19] Khrystyna Gavrysh, "Establishing Judicial Precedents Through Advisory Opinions of the European Court of Human Rights", The Italian Review of International and Comparative Law, 2/2022, 267-268

[20] European Court of Human Rights, judgement in the case of Pfeifer v. Austria (Application no. 12556/03), Strasbourg, 15. November 2007; Article 35.

[21] European Court of Human Rights, judgement in the case of Petrina v. Romania (Application no. 78060/01), Strasbourg, 14. October 2008; Article 28.

[22] European Court of Human Rights, judgement in case of Chauvy and others v France (Application no. 64915/01), Strasbourg, 29. June 2004; article 70

[23] European Court of Human Rights, judgement in case of Denisov v. Ukraine (Application no. 76639/11), Strasbourg, 25. September 2018; article 112

[24] European Court of Human Rights, judgement in case of Balaskas v. Greece (Application no. 73087/17), Strasbourg, 5. November 2020; article 40

[25] European Court of Human Rights, judgement in case of De Carvalho Basso v Portugal (Application no. 73053/14), Strasbourg, 4. February 2021; article 43

[26] European Court of Human Rights, judgement in case of Putistin v. Ukraine (Application no. 16882/03), Strasbourg, 21. November 2013; article 40

tribunal of public opinion and who, in certain legal systems, are afforded protections on par with those of public officials. This status for journalists is logically derived from the obligation of public officials to respond not only to inquiries from prosecutorial bodies, relevant inspectors, or judicial institutions but also to questions posed by the media. This obligation is encountered in developed democracies as a societal imperative.

In the case Lingens v Austria, the first ruling that paved the way for the doctrine of the "extended right to criticism," the ECtHR adjudicated the application of journalist Peter Lingens, who had been penalised in a criminal proceeding by Austrian courts for his criticisms of Prime Minister Bruno Kreisky. Lingens had labelled Kreisky as "monstrous," "immoral," and "an opportunist." The Court stated that "the freedom of the press provides the public with one of the best means of discovering and forming an opinion on the ideas and attitudes of political leaders. In general, freedom of political debate is at the very core of the concept of a democratic society, which prevails throughout the Convention. Therefore, the limits of acceptable criticism are broader regarding a politician as such than for a private citizen. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large and must consequently display a greater degree of tolerance."[27] In one of the landmark cases (Surek v Turkey),[28] to which the Court refers when ruling on whether a journalist, in exercising freedom of expression, exceeded the bounds of "extended criticism" toward politicians, it was emphasised that, according to the second paragraph of Article 10, there is little room for restricting political speech or debate on matters of public interest. This is because the permissible limits of criticism are broader with regard to the government than toward a private citizen. In a democratic system, the actions or omissions of the government must be subject to close scrutiny not only by legislative and judicial authorities but also by public opinion. The ruling also included a warning that governments must exercise restraint in criminal proceedings, especially when other means are available to respond to sometimes unjustified attacks and criticisms from their opponents.

The logic of the aforementioned rulings is followed in the case of Lopez Gomes Da Silva v Portugal,[29] decided just a year after the judgment in Surek v Turkey, in which it was particularly emphasised that the freedom of the journalist covers the possibility of resorting to a certain degree of exaggeration or even provocation. However, such an approach, even when considered polemical due to the expressions

[27] European Court of Human Rights, judgement in case of Lingens Austria (Application no. 9815/82), Strasbourg, 8. July 1986; article 42

[28] European Court of Human Rights, judgement in case of Surek v Turkey (Application no. 24735/94) Strasbourg, 8. July, 1999; article 37

[29] European Court of Human Rights, judgement in case of Lopez Gomes Da Silva v Portugal (Application no. 37698/97), Strasbourg, 28. September 2000

used, is not considered an unjustified personal attack if the author supports it with objective reasoning. Nevertheless, this ruling, as well as the judgment in Lingens v Austria, indicates that the right to dignity of politicians or public officials must not be annulled entirely just because they engage in public work. Even in the case of expressing value judgements, there must be a factual basis to support them; otherwise, they will be considered excessive and inadmissible. In the case of Jerusalem v Austria,[30] in paragraph 43, the Court emphasised that even when a statement constitutes a value judgement, the proportionality of interference may depend on whether there is a sufficient factual basis for the contested statement because, without a factual foundation to support it, a value judgement may be excessive.

In addition, when assessing whether the right to extended criticism prevails over the right to personal dignity, judicial panels have also taken into account the circumstances related to the method of obtaining information and its truthfulness in certain rulings (Axel Springer AG v. Germany).[31]

In the case of Castells v Spain,[32] the ECtHR extended the scope of the so-called "extended right to criticism" to opposition members of parliament who criticise representatives of the executive branch. Specifically, the Spanish Senate, at the request of the competent criminal court, lifted the immunity of opposition MP Miguel Castells, who was subsequently subjected to criminal proceedings and sentenced to imprisonment. The ECtHR found that the criminal defamation proceedings and the subsequent prison sentence imposed on a senator who criticised the government's policies violated the right to freedom of expression. Although in this case, the Court's protection was provided to a public figure involved in politics, the logic guiding the judges of the European Court is clear – the protection of the right to freedom of expression must be extended to those public officeholders who have the capacity to threaten or restrict this right, or who may respond repressively to criticism, sanctioning their critics. Although, in this case, the government, as the executive branch, did not directly punish Castells, it is unequivocally clear that it did so indirectly through its influence on the public prosecutor who brought the indictment, as well as on the parliamentary majority, which enabled the prosecution by lifting Castells' parliamentary immunity.

From all previous rulings of the European Court related to the so-called "right to extended criticism" of public figures, particularly public officeholders, two conclusions emerge. The first concerns the subject of protection—it is always the person whose right to expression and right to criticise can be limited or endangered

[30] European Court of Human Rights, judgement in case of Jerusalem v Austria (Application no. 26958/95) Strasbourg, 27. February 2001; article 43

[31] European Court of Human Rights, judgement in case of Axel Springer AG v. Germany (Application no. 39954/08) Strasbourg, 7. February 2012; article 84

[32] European Court of Human Rights, judgement in case of Castells v Spain (Application no. 11798/85), Strasbourg, 23. April 1992

by the one being criticised. The second relates to the fact that "extended criticism" of public figures is permissible if it falls within the realm of value judgements, even if they are extremely harsh (although, as we have seen, they must be supported by sufficient factual basis to be considered admissible and not excessive). However, untrue factual claims do not enjoy protection. The jurisprudence of the ECtHR has made a clear distinction between factual claims and value judgements. Namely, according to the decisions in De Haes and Gijsels v. Belgium,[33] Oberschlick v. Austria,[34] and OOO IVPRESS AND OTHERS v. Russia,[35] factual claims can be verified or proven, which is not the case with value judgments, i.e., opinions about a person that are subjective and do not require proof to be admissible in public discourse. These rulings, along with the decisions in Tammer v. Estonia[36] and Andreas Wabl v. Austria,[37] have established standards for criticising public figures. They imply that public figures, especially public officeholders, must demonstrate a higher threshold of tolerance toward public criticism. However, their right to demand respect for their dignity (honour and reputation) is not suspended. Defamatory statements, whose intent is not to exercise the right to freedom of expression or to satisfy the public's interest in matters of the public sphere but are instead malicious and aimed at dehumanising the public officeholder, do not enjoy absolute protection, even in the context of political competition.

## 4. THE NEW PRECEDENT IN THE JURISPRUDENCE OF THE ECTHR?

This paper pays special attention to a 2021 decision that represents a significant departure from the established jurisprudence of the ECtHR. The case in question, which shares factual similarities with other disputes, could set a new precedent if the court's approach is repeated in future decisions. In the Pajtić v Serbia case,[38] the judicial panel opted to reject the application against the state of Serbia. In brief, in this case, A.M., the person who violated the dignity of the applicant, made several defamatory statements in the media, including accusations

[33] European Court of Human Rights, judgement in case of De Haes and Gijsels v. Belgium (7/1996/626/809), Strasbourg, 24. February 1997

[34] European Court of Human Rights, judgement in case of Oberschlichk v Austria (20834/92), Strasbourg, 1. July 1997; article 33

[35] European Court of Human Rights, judgement in case of OOO IVPRESS AND OTHERS v Russia (33501/04), Strasbourg, 22. January 2013; article 72

[36] European Court of Human Rights, judgement in case of Tammer v Estonia (41205/98), Strasbourg, 19. October 1999; article 62

[37] European Court of Human Rights, judgement in case of Andreas Wabl v Austria (24773/94), Strasbourg, 4. August 1994; article 42

[38] European Court of Human Rights, judgment in the case of Pajtić v. Serbia (33776/20), Strasbourg, 29. November 2021

that "Bojan Pajtić is nothing but a thug and a bully who will stop at nothing to retain illegitimate power in Vojvodina and continue stealing" and that "Bojan Pajtić and Goran Ješić literally kidnapped all Democratic Party representatives and are holding them hostage at the Andrevlje Hotel in Beočin." The judicial panel, by rejecting the application against Serbia, deviated from established practice in two key areas: first, in defining the subject of protection, and second, by erasing the boundary between provable factual circumstances and value judgments, ignoring the fact that some factual assertions made about the applicant were undeniably false and could not be classified as value judgements. Paradoxically, the judicial panel cited previous case law while clearly violating it. It is true that judicial panels are not bound by earlier decisions and may issue different rulings in cases with similar factual circumstances. In this way, they are practically setting a new precedent. However, for the previous precedent to be "overruled" and a new one established (in circumstances where the facts are sufficiently comparable), it is necessary for there to be a change in the very sources the court uses to interpret the Convention. Only in this way is it possible to achieve predictability and legal certainty, as well as equality before the law, which implies equal treatment of parties in the same or similar circumstances.[39] These are values that must be protected, especially in the context of the ECtHR.

For the first time in the Court's practice dealing with similar cases, the right to extended criticism was reserved for a person in a legally and factually superior position to the individual subjected to the defamatory statements. A.M., who made the defamatory remarks, was at the time a senior official of the ruling party in the Serbian Parliament (the head of its parliamentary group), while Pajtić was the head of the regional administration—the only one not "controlled" by the dominant political party to which A.M. belonged. The applicant also submitted reports from the most relevant international entities that monitor media freedom, such as "Freedom House,"[40] and the European Commission,[41] which documented a significant increase in media

[39] Etinski 2024, 29-31

[40] In the Freedom House report, the following explicit assessment of the state of media freedom in Serbia is stated: The independence and professionalism of the media have deteriorated under economic coercion, which, along with the increased dominance of a single political party, has led to more self-censorship. The country's largest political talk show was allegedly cancelled due to political pressure. Verbal and physical attacks on journalists have continued despite calls for better protection of journalists and full investigations into previous cases of violence against them. Several news websites were subjected to cyber-attacks after publishing reports critical of the authorities. The Prime Minister engaged in a verbal dispute with an OSCE official over freedom of speech. Opposition parties claimed they were underrepresented in election campaign reporting due to political pressure from ruling parties on the media. The rating of Serbia's independent media dropped from 4.00 to 3.75. https://freedomhouse.org/country/serbia/nations-transit/2015.

[41] In the European Commission report dated 10 November 2015, on page 17, the following assessments of deficits in freedom of expression in Serbia are provided: A legal package is in place aimed at improving the situation in the media and clarifying the legal framework, particularly

control by A.M.'s party during the year the disputed events occurred, as well as a rise in hate speech promoted by the ruling party. Contrary to the Court's position, A.M. could not have been the subject of protection, nor could his freedom of expression have been threatened—instead, he was part of an organisation that used the majority of the media to defame and demonise political opponents, including Pajtić.

Statements in the panel's decision, such as "the applicant's statements that there is no media freedom in Serbia and that almost all media are 'regime-controlled' were not relevant to the case," represent a logical contradiction and are, from the perspective of the ECHR and the ECtHR's function, unacceptable. This position legitimises not only the denial of the right to honour and reputation for opposition politicians like Pajtić but also undermines the universal presumption of innocence by assuming that such presumption does not apply to him—again contrary to previous jurisprudence, such as in Aksu v Turkey.[42] Moreover, the Serbian judiciary had previously held the position that human dignity is protected by Article 79, Paragraph 1 of the Public Information and Media Act, regardless of whether the individual is a public official or an ordinary citizen. The untrue information harmed the claimant's personal dignity—his honour and reputation—by portraying him as someone involved in criminal activities. These factual allegations were not mere criticism but an unlawful attack on the claimant's dignity. The creation of such a false public image cannot be justified by freedom of expression or public interest."[43]

Furthermore, the political party to which A.M. belongs holds all the instruments of state repression[44] that could be used to limit freedom of expression. Given these circumstances, it was expected that the national courts would side with A.M. – a practically identical position was adopted by the Basic Court in Novi Sad, the

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regarding state funding and media control. However, conditions for the full exercise of freedom of expression are not in place. The new media laws need to be implemented. It remains to be seen whether media privatisation will increase transparency of ownership and financing. Threats and violence against journalists continue to cause concern. Criminal charges and convictions are rare. The overall environment is not conducive to the full realisation of freedom of expression. https://neighbourhood-enlargement.ec.europa.eu/document/download/1ad00c50-6c5d-497f-8d5c-67d54cdd25d3_en?filename=20151110_report_serbia.pdf

[42] European Court of Human Rights, judgment in the case of Aksu v. Turkey (Applications no. 4149/04 and 41029/04), Strasbourg, 15 March 2012, Article 67.

[43] Judgment of the Court of Appeal in Belgrade, Gž 77/2917(3) of 11 May 2017.

[44] In the Progress Report for 2018 (the year in which the domestic court issued a final decision in favour of A.M.), the European Commission regrettably noted that the judiciary in Serbia had not reached the necessary level of independence, stating on page 14 that "pressure on the judiciary (including from authorities within the judiciary itself) remains high. Public comments by government officials, some at the highest levels, on investigations and ongoing judicial proceedings continue and are perceived as pressure on judicial independence." https://neighbourhood-enlargement.ec.europa.eu/document/download/377c86c1-1cb6-49ca-8549-e40be2308643_en?filename=20180417-serbia-report.pdf

Higher Court in Novi Sad, as well as the Constitutional Court of Serbia. The domestic courts' rulings, rejecting Pajtić's claim for non-pecuniary damages, were based on the finding that the claimant's claim did not meet the legal conditions required for compensation, particularly the condition of causation.[45] Judicial institutions of the member states of the Council of Europe, in such matters, have what is known as a "margin of appreciation" when balancing Articles 8 and 10 of the European Convention, that is, the right to personal dignity and the right to freedom of expression. In cases where a conflict arises between the right to human dignity and the right to freedom of expression, the courts are under a duty to reconcile these competing values by applying the principle of proportionality. Proportionality, however, does not constitute the sole guiding principle in determining which of the two values should prevail in a given case. The jurisprudence of the ECtHR, which domestic courts are bound to take into account, establishes a clear distinction between ('permissible') harsh or even offensive value judgments, on the one hand, and ('impermissible') false factual allegations, on the other. Furthermore, the fundamental issue is the very raison d'être of the right to extended criticism: does it serve the protection of freedom of expression, or rather the abuse of media monopoly by an authoritarian regime for the purpose of defaming dissenters? Undoubtedly the former—and nothing but the former.

The ECtHR has, in a manner of speaking, a supervisory role—individuals who believe that their national courts have wronged them can seek justice in Strasbourg. However, given the circumstances of the media and institutional monopoly by the ruling party in Serbia, the decision of the ECtHR panel in Pajtić v Serbia favoured the side that restricts media freedom by using it to attack the political minority. Therefore, the ruling in favour of A.M. cannot be seen as a step toward protecting freedom of expression; on the contrary, it supports the suppression of media freedom. For the citizens of Serbia, the media monopoly of the Serbian Progressive Party over most of the media in the country is a well-known fact which could not have escaped the attention of the panel member from Serbia, but he evidently chose to ignore this fact when voting in favour of dismissing Pajtić's application. This raises the principled question: should judges from the countries against which the applications are filed be part of the panel in such cases? Should we assume that every judge will rise above the situation and vote for a decision that potentially sanctions the state they come from and whose highest officials delegated them to the Strasbourg Court? Or should we adopt a more cautious approach and exclude judges from panels in cases where they are from the respondent country? This case suggests that such a change might be beneficial. The role of a single judge is not decisive in situations where a seven-member panel

[45] Judgment of the Basic Court in Novi Sad, P. 11416/2016 of 4 December 2017, and the Higher Court in Novi Sad, GŽ. 339/2018 of 21 January 2021.

delivers the decision. However, for greater efficiency of the ECtHR,[46] Protocol No. 14 to the Convention introduced the possibility for three-member panels to decide in so-called recurring cases (cases that recur frequently, with identical or similar facts). In such situations, the judge from the respondent country may have a decisive influence, as the other two members might lean toward their colleague's position, assuming that their social context is more familiar to them.

Furthermore, for the first time, the Court expanded the right to criticism to encompass clear defamation based on factual claims. The panel justified its stance by arguing that the claim that the applicant was a "thug and bully" who had committed crimes of theft and false imprisonment did not amount to a violation of the public figure's dignity. This approach puts the Court on precarious ground, entering into the realm of arbitrariness. The ECtHR's decision in De Haes and Gijels v Belgium,[47] paragraph 47, emphasised that the truth of value judgements cannot be proven but that such judgements may be excessive, especially in the absence of any factual basis. The decisions in Lingens v Austria and Jerusalem v Austria similarly held that even a value judgement can be excessive if it is not supported by any factual basis. In the Pajtić v Serbia case, A.M. unquestionably expressed both value judgments (such as calling the applicant a "thug" and "bully") for which even he did not claim to have factual support and false and offensive factual claims, accusing Pajtić of committing crimes of theft and abduction. The conclusion that imposes itself is that deviating from the practice where the differentiation between value judgements and factual claims is crucial in assessing whether there has been a violation of personal dignity is counterproductive. Moreover, it is counterproductive to deviate from the recent judicial practice, which made a clear distinction between value judgements supported by an appropriate factual basis and those that are not. When discussing this, we must particularly bear in mind the landmark judgments of the European Court in Unabhangige Initiative Informationsvielfalt v. Austria[48] and Brosa v. Germany,[49] which emphasise that allegations about the morality of politicians must be clearly distinguished from clear assertions of criminal liability, and the latter cannot be considered permissible. Explicit allegations that the applicant in the case Pajtić v. Serbia committed crimes of theft and abduction, without any doubt, fall under this prohibition. Finally, the judicial panel in the case Standard Verlags GMBH v. Austria[50] acted correctly, in the author's opinion, when it con-

[46] Etinski 2024, 29

[47] European Court of Human Rights, judgement in case of De Haes and Gijsels v. Belgium (7/1996/626/809), Strasbourg, 24. February 1997

[48] European Court of Human Rights, judgement in case of Unabhangige Initiative Informationsvielfalt v. Austria, (28525/95), Strasbourg, 26. February 2002; article 46

[49] European Court of Human Rights, judgement in case of Brosa v. Germany (5709/09), Strasbourg, 17. April 2014; article 48

[50] European Court of Human Rights, judgement in case of Standard Verlags GMBH v Austria (21277/05), Strasbourg, 4. June 2009

cluded that dissemination of false statements is not in the interest of democratic debate in society—quite the opposite. It seems that this stance gains particular significance when such behaviour is the usual modus operandi of the ruling political group, as is the case with the political organisation to which A.M. belongs.

## 5. CONCLUSIONS

The judicial panel in Pajtić v Serbia, by establishing new case law, took a step backwards by transferring the right to severe criticism into the realm of public office holders. Consequently, certain categories of public figures, rather than being primarily the subjects of criticism, became beneficiaries of the "extended right to criticism." Simultaneously, the panel materially altered previous case law by conflating the right to express value judgements with the dissemination of false factual claims. These developments mark a regression, necessitating the objectification of what is considered a factual assertion and situating the focus of protection on safeguarding media freedom and critics of public authority to express themselves critically within a societal framework.

To achieve this goal, it would be necessary to establish an exact criterion for what constitutes a false factual claim that is provable and thus eligible for judicial protection. This would significantly reduce the arbitrariness of judicial panels, which, as in the Pajtić v Serbia case, could invoke previous ECtHR practice while essentially deviating from it. Establishing such clarity is crucial, particularly considering the international composition of the judicial panels in this institution. Namely, to assess whether mental distress has arisen, that is, whether there is a ground for non-pecuniary damages due to the violation of personal dignity, it is necessary for judges to understand the social, political, and historical context of the environment in which the violation occurred. What may be considered an offensive and unacceptable gesture or expression in one society may not be in another. Therefore, the assessment of whether the limits of permissible extended criticism have been exceeded can, by its very nature, be arbitrary. This is why it is so important to emphasise that the previous practice of insisting on the distinction between untrue factual assertions and value judgements was justified and consistent. Hence, it is also important to establish a principle for determining the criteria that would make it indisputable what is considered untrue factual assertions, which do not fall within the "right to extended criticism." It seems that the solution should be sought in the area of criminal law, that is, in universal rules whose application would leave no room for arbitrary interpretations. If someone's right to personal dignity is violated by an allegation that they committed a criminal act that is incriminated in the domestic legal system, protection should be provided to the person being attacked. This would avoid arbitrariness and unequal

treatment of cases that are, by nature, similar to one another. Finally, the presumption of innocence and the principle of legality, implemented as fundamental principles in Article 11 of the Universal Declaration of Human Rights by the United Nations,[51] are adhered to by all member states, including those that are members of the Council of Europe.

It seems that a different structuring of "small judicial panels" in handling applications related to recurring cases so that the judge from the state against which the request is submitted is not its member could ensure a higher degree of judicial independence. There is no doubt that such judges are in a conflict of interest, which should be avoided, just as is done in national legislation across the continent through the institution of judge recusal when there is a reason to doubt their impartiality. In international courts, sovereign states retain control by selecting the judges.[52] In the context of the European Court's work, the judge from the state against which the proceedings are initiated participates in making decisions that affect public officeholders who delegated them to the court in Strasbourg. We have no choice but to agree with the observation that in a legal system where judges are selected by the same states that later become parties in disputes, independence and impartiality may have a different meaning than in national judicial institutions.[53]

This is not the first time that the issue of independence and impartiality of judges has been mentioned in theory, particularly in the context of judges coming from states with increasingly autocratic regimes, which, according to all criteria and findings of relevant international institutions, include Serbia. As some authors point out, as long as there are states where the judiciary is not always independent, there will also be judges in courts who are sometimes in uncertain situations because, in some states, it is in the habitus of the regime to "communicate" with judiciary officials about the desired outcomes of decisions.[54] Based on all of the above, it seems that the adoption of the aforementioned conclusions would significantly contribute to legal certainty and stability, as well as the predictability of the work of the ECtHR.

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[51] https://www.un.org/sites/un2.un.org/files/udhr.pdf

[52] 12. Frédéric Mégret, "International Judges and Experts' Impartiality and the Problem of Past Declarations" 10 LPICT, 2011, 32

[53] Anja Seibert-Fohr, "International Judicial Ethics", The Oxford Handbook of International Adjudication, 2013, 759

[54] Seibert-Fohr, 2013, 263-264

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*Бојан Л. Пајтић*
*Универзитет у Новом Саду*
*Правни факултет у Новом Саду*
*B.Pajtic@pf.uns.ac.rs*
*ORCID ID: 0000-0001-7760-1873*

*Александра Л. Стефановић*
*Универзитет у Београду*
*Правни факултет у Београду*
*aleksandra.stef97@gmail.com*
*ORCID ID: 0000-0003-0824-0255*

## Нова пракса Европског суда за људска права – или изузетак који потврђује правило?[55]

***Сажетак**: Овај рад посебно наглашава колизију права на лично достојанство и права на слободу изражавања, нарочито у случајевима у којима су предмет критике носиоци јавне власти. Европски суд за људска права је у својој пракси успоставио стандарде такозваног „права на проширену критику", нарочито у корист јавности, која се најчешће артикулише посредством медија. У кључним предметима у овој области начињена је јасна разлика између права на изношење вредносних судова о јавној личности и тврдњи о чињеницама које су подложне провери. Међутим, одлучујући у предмету анализираном у овом раду (одлука из 2021. године), судско веће је учинило корак уназад, измештајући право на оштру критику, која по правилу превазилази уобичајене границе, из домена медија у сферу носилаца јавних функција. Поред тога, судско веће је суштински изменило дотадашњу праксу погрешним поистовећивањем права на изношење вредносних судова са наводним правом на ширење неистинитих чињеничних тврдњи.*

***Кључне речи:** Европски суд за људска права, слобода изражавања.*

Датум пријема рада: 25. 12. 2024.
Датум достављања коначне верзије рада: 12. 11. 2025.
Датум прихватања рада: 11. 12. 2025.

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[55] Први аутор је свој део рада написао у оквиру рада на научноистраживачком пројекту „Правна традиција и нови правни изазови" на Правном факултету Универзитета у Новом Саду, 2024. године.