

European Court of Human Rights: civil liability for publication and hosting of comments on Facebook violates freedom of expression

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In a Chamber judgment of 7 January 2025, the European Court of Human Rights (Fourth Section) held, unanimously, that Article 10 (freedom of expression) of the European Convention on Human Rights (ECHR) had been violated in the case of *Alexandru Pătrașcu v. Romania*. The Romanian courts had found Mr Pătrașcu liable under civil law for publishing and hosting a number of unlawful comments on his Facebook page. The impugned comments, which were posted by the applicant himself and by other users, were of a disparaging nature towards particular individuals and were held by the national courts to have exceeded the limits of freedom of expression.

The applicant was an ardent fan of opera and classical music and a well-known commentator on these topics. He regularly provided commentary on these topics on his Facebook page, in his blog and in magazine articles. In the course of 2016, he provided extensive commentary on a scandal involving the National Opera in Bucharest that had generated divisive opinions and heated debate. Some 400 Romanian members of staff at the National Opera participated in demonstrations and signed a petition, calling for the departure of other members of staff who were either foreigners or who had previously worked abroad. The conflict escalated, with repercussions for managerial practices and for concert performances. It also led to the ending of collaboration with several (renowned) artists and the resignation of the Minister of Culture. Some of Mr Pătrașcu's coverage of these events on his Facebook page and in his blog concerned individuals involved in the protests, such as the *chef d'orchestre*, T.S., and the soprano, I.I. Some of the reactions to that coverage also focused on the same individuals.

T.S. and I.I. took legal action against Mr Pătrașcu to secure: the removal of the various comments they claimed were denigrating, defamatory or insulting towards them; an order to refrain from publishing such comments in the future; and compensation for reputational damage. The court of first instance found that the publications amounted to an unlawful act, triggering civil liability in tort. It ordered Mr Pătrașcu to pay each of the claimants compensation for non-pecuniary damage. It did not attach any importance to the distinction between authorship and hosting of the impugned comments, finding that hosting the comments

constituted the unlawful act. Mr Pătrașcu appealed the decision and the appellate court partly upheld his appeal. It focused on the comments posted on the applicant's page that the lower court had held to have gone beyond the protected limits of freedom of expression. It narrowed those 41 comments down to 22, which it held were not protected under freedom of expression. Four of those comments were written by the applicant and they contained references to, *inter alia*, primates and xenophobes. The appellate court found these comments to be unlawful and it also found the failure of the applicant to act in respect of the other comments posted by third parties to be unlawful. An appeal on points of law by both parties to the Court of Cassation was dismissed.

In its consideration of the case, the European Court of Human Rights recalled a number of its key principles: the right to freedom of expression under Article 10 ECHR covers freedom of artistic expression (*Müller and Others v. Switzerland* (1988)); the right to freedom of expression must be balanced with the right to respect for private life under Article 8 ECHR and a number of factors should be taken into consideration in such balancing. These factors include the contribution to a debate of general interest; the fame and prior conduct of the person concerned; the content, form and consequences of the publication; the method of obtaining the information; and the nature and severity of the sanction imposed (*Von Hannover v. Germany* (No. 2) [GC]; *Axel Springer AG v. Germany* [GC] IRIS 2012-3:1/1). The Court then observed its principles and approach to the liability of operators of online platforms for unlawful content posted by third parties, as developed in its Grand Chamber judgment in *Delfi AS v. Estonia* [GC] (IRIS 2015-7:1/1) and in subsequent case law, such as *MTE and Index.hu Zrt. v. Hungary* (IRIS 2016-3:1/2) and, especially, *Sanchez v. France* [GC] (IRIS 2023-6:1/15). That case involved the criminal liability of a politician for the hateful and discriminatory comments posted by third parties on his Facebook wall. His liability derived from his failure to remove the comments despite having knowledge of them.

The Court examined the two main prongs of the case separately: first, the applicant's civil liability for the comments he made himself, and then his liability for the comments made by third parties on his Facebook page. In respect of the applicant's own comments, the Court noted that the domestic courts did not initially distinguish the applicant's comments from those of the third parties. It further noted that the Romanian Court of Appeal considered the applicant's comments collectively and not individually and failed to conduct any "significant analysis" of the factual context, content and style of the impugned comments. The Strasbourg Court therefore concluded that the national courts had not conducted a proper balancing of the issues at play in order to establish that the applicant's conviction under civil law for his own comments corresponded to a pressing social need and was proportionate to the aim of protecting the rights of others. The Court accordingly found that the interference with the applicant's right to freedom of expression was not necessary in a democratic society.

The Court's examination of the applicant's liability for the third-party comments on his Facebook page turned mainly on the quality of law of the two provisions in the Romanian Civil Code (Articles 1349 and 1357) relied on by the national courts in finding and upholding the applicant's conviction. Neither article gives any indication that the applicant, in hosting his Facebook page, had an obligation to monitor third-party posts on his page. Nor do they specify the circumstances in which the applicant would be expected to conduct such monitoring. The general wording of the articles does not refer to the responsibility of various actors in the audiovisual or electronic domains. The Court acknowledged that laws inevitably contain terms that may be somewhat vague and require (judicial) interpretation, but it pointed to the role of national courts to clarify the meaning of such provisions. In the present case, the national courts had applied different reasoning in finding and upholding the applicant's liability for the comments by third parties. The Court held that the lack of clarity about the legislative provisions, coupled with the interpretative divergence by the national courts, basically meant that the relevant law was not sufficiently clear and precise for the applicant to be aware of his duties and responsibilities or to be able to regulate his conduct accordingly. This meant that his right to freedom of expression was inadequately protected against interference by the authorities. The Court concluded that the criterion of being "prescribed by law" was not met and there was thus a violation of the applicant's right to freedom of expression.

Alexandru Pătrașcu v. Romania, No. 1847/21

