ECtHR: *Jezior v. Poland*

IRIS 2020-8:1/10

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In a case concerning Internet liability for third-party comments, the European Court of Human Rights (ECtHR) again delivered an interesting judgment in support of the right to freedom of expression on the Internet. In the case of *Jezior v. Poland*, the ECtHR found that holding the administrator of a local website liable for defamatory third-party comments, which upon notice had been immediately removed, amounted to a violation of the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). As in the case of *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (IRIS 2016-3/2), the ECtHR emphasised that holding the administrator of a website liable merely for allowing unfiltered comments that might be in breach of the law would require excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet.

The applicant in this case, Andrzej Jezior, at the material time, kept a website with news about the town in which he lived. The blog on his website focused on the political campaign surrounding the local elections for the municipal board; Jezior himself was also a candidate. The website was open to comments by users, without registering. It explicitly requested users to only post thoughtful, truthful and non-offensive comments. Users were also invited to subscribe their comments with their real identity, instead of posting them anonymously. Furthermore, the website had a content notification system, but in practice, notifications were rarely monitored. Occasionally, Jezior carried out the surveillance of users' comments and deleted what he considered to be offensive to others. Two weeks before the date of the local elections, an anonymous comment was published on Jezior's website targeting B.K., the sitting mayor and candidate for re-election. The comment was highly defamatory and risked damaging B.K.'s reputation, as it associated him and his family with various criminal acts and illegal activities. Jezior immediately removed this comment from his website, and each time it was reposted, Jezior succeeded in promptly deleting the offensive comments about B.K. Jezior subsequently activated an access control function with a mandatory registration system requiring the users' email address. However, B.K. brought proceedings against Jezior, based on Section 72 of the Polish Law on Local Elections, giving competence to the regional court, in case of the publication of false data or untrue information about the local elections or the candidates, to order the content to be removed and to order an apology and the payment of damages (see also *Brzeziński v. Poland*, Iris 2019-8 :1/1). The

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regional court allowed B.K.’s action: it prohibited Jezior from continuing to publish the comment at issue and ordered him to apologise to B.K. by posting a statement on his website. The court further ordered Jezior to pay PLN 5 000 (EUR 1 250) to a charitable organisation and to reimburse B.K. for legal costs. In essence, the court held that the comments at issue constituted electoral propaganda material, that their content was not proven and that they were detrimental to B.K.'s reputation as a candidate in the elections. It held Jezior responsible for the comments generated by Internet users. The Krakow court of appeal dismissed Jezior’s appeal, holding that Jezior was indeed responsible for the comments that third parties had filed on his website, since he had not prevented them from being posted online. The disclaimer on his website was considered insufficient to exonerate Jezior from liability for third-party comments. The appeal court also found that Jezior could not rely on being exempted from liability as a hosting provider.

Jezior lodged an application before the ECtHR, complaining that the court orders against him amounted to an unjustified interference with his right to freedom of expression. The ECtHR observed that the disputed comments were published on Jezior’s website during a pre-election period and that they were targeting the sitting mayor, who was a candidate for re-election. The national courts qualified these comments as electoral propaganda material which, according to them, contained unproven information about B.K., with allegations that were detrimental to his reputation as a candidate in the elections. Jezior could have foreseen, in principle, that his responsibility for the posting of the comments on his website could be engaged under Article 72 of the Law on Local Elections, combined with Articles 23 and 24 of the Civil Code on the protection of reputation and personality rights. As the interference with Jezior’s right to freedom of expression was prescribed by law and had a legitimate aim, namely the protection of the reputation of others, and more particularly that of B.K. as a candidate in local elections, it remained to be determined whether the interference at issue was "necessary in a democratic society."

First, the ECtHR reiterated that owing to its accessibility and capacity to store and communicate vast amounts of information, the Internet had become one of the principal means by which individuals exercise their right to freedom of expression and information and that websites greatly enhance the public’s access to news on current events and facilitate the dissemination of information in general (see also *Ahmet Yildirim v. Turkey*, Iris 2013-2:1/1). However, at the same time, the ECtHR evoked the risk of harm to the exercise and enjoyment of human rights and freedoms posed by content and communications on the Internet, particularly the right to respect for private life. It also recalled that in carrying out the assessment of balancing the right to freedom of expression against the right to have one’s reputation protected, applied in cases of user-generated content and the role and responsibilities of Internet intermediaries, a certain number of relevant factors

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need to be taken into account. These factors are: the context in which the online comments were made public; the measures adopted by the publication medium to prevent or remove defamatory comments; the question of whether it is the responsibility of the author of the comment that should be retained rather than that of the intermediary; as well as the consequences of the court orders for the publication medium (see also *Delfi AS v. Estonia*, Iris 2015-7:1/1).

Applying these factors to the case at issue, the ECtHR saw no reason to depart from the conclusion reached by the national courts in finding the comments about B.K. defamatory, damaging his reputation as a candidate in local elections. The ECtHR then observed that the website on which the disputed comments were posted was administered by Jezior, free of charge and with a limited local scope. It also noted that Jezior had chosen to allow Internet users to submit comments without registering beforehand, but that he had put in place certain measures, including a notification system, with a view to detecting potentially illegal content. Jezior had also published a message for Internet users on his website, inviting them to comply with the rules of good conduct and to respect the rights of others. Furthermore, Jezior had immediately withdrawn the disputed comments as soon as he had been aware or notified of their presence, and, in addition, he had temporarily established access control and the obligation to register users in advance by means of their email address. The ECtHR disagreed with the finding of the Polish courts that Jezior had not taken sufficiently effective measures to prevent the comments from being posted online. According to the ECtHR, imposing such an obligation of pre-monitoring "would require excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet." Furthermore, B.K. has never undertaken any steps to take action against the author of the comments. The ECtHR found that the cumulative measures against Jezior (order to remove the comments from his website, apology, statement on website, order to pay damages amounting to EUR 1 250 and to pay B.K.'s legal costs) risked having a chilling effect on Jezior and the comment environment of an Internet platform dedicated to topics of importance for the community. The ECtHR concluded that the Polish courts had not struck a fair balance between Jezior's right to freedom of expression and B.K.'s right to have his reputation as a candidate in local elections respected. The interference with Jezior's rights amounted to a disproportionate interference with his right to freedom of expression, and was therefore not necessary in a democratic society. The First Section of the ECtHR, sitting as a Committee composed of three judges, came to the conclusion that Article 10 had been violated.

ECtHR First Section (Committee), Jezior v. Poland, Application no. 31955/11 , 4 June 2020

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