European Court of Human Rights: *Tölle v. Croatia*

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Dirk Voorhoof
Human Rights Centre, Ghent University and Legal Human Academy

The European Court of Human Rights (ECtHR) delivered an interesting judgment in the case of *Tölle v. Croatia* regarding insulting allegations of domestic violence. In a newspaper article a father accused an association of being responsible for his child's abduction by its mother. The president of this association, which provides support for women who are victims of violence, replied in a radio interview that her organisation was not involved in his daughter's abduction and that the man had violently abused his wife - that was also the reason why mother and daughter had fled the country. The association's president was subsequently convicted for the criminal offence of insult. The ECtHR found that this criminal conviction amounted to a violation of the president of the association's freedom of expression under Article 10 of the European Convention on Human Rights (ECHR): the criminal conviction for insult was a sort of censorship which discouraged the promotion of support for victims of domestic violence.

The applicant in this case was Ms Neva Tölle, the president of the Zagreb Autonomous Women's House ("the Association"), an association that supports women who are victims of violence. The Association had intervened in a family dispute between a certain D.O. and his wife C.O. following a request for help from the latter. C.O. and the couple's underage daughter had stayed for several months at the Association's refuge for women, and afterwards C.O. had taken the child abroad. A daily newspaper published an interview with D.O. in which he alleged that the Association was responsible for the fact that his daughter had been kidnapped by her mother. On the same day, Ms Tölle explained the circumstances of the Association's actions in the case and denied its involvement in the kidnapping of the child. She also stated that D.O. had been abusing his wife and that the criticism by D.O. of her association was aimed at presenting the abuser as the victim and the victim as the abuser.

A few weeks later, D.O. brought a private criminal prosecution against Ms Tölle on charges of defamation relating to her allegations that he had abused his wife. Ms Tölle was found guilty of insult; it was held that she had tarnished D.O.'s honour and reputation by alleging that he had abused his wife. The domestic courts were of the opinion that the accusation at issue could not be qualified as defamation, but as insult. By referring to D.O. as an abuser, Ms Tölle had stated a negative opinion of him that was "objectively insulting". Ms Tölle was sanctioned with a judicial admonition and ordered to pay the costs and expenses of the

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proceedings, as well as the expenses incurred by D.O. and his lawyer. Both an appeal before a second instance court and before the Constitutional Court were dismissed. Ms Zölle complained before the ECtHR that her criminal conviction had violated her right to freedom of expression as guaranteed in Article 10 ECHR.

The ECtHR focusses on the question of whether the interference with Ms Tölle's right to freedom of expression could be considered as "necessary in a democratic society" in conformity with Article 10, section 2 ECHR and the Court's case law. It noted that the case at hand concerns a conflict between concurrent rights, namely, on the one hand, D.O.'s right to reputation as part of his private life, and, on the other, MS Tölle's right to freedom of expression. Referring to *Axel Springer AG v. Germany* (IRIS 2012-3/1) and *Couderc and Hachette Filipacchi Associés v. France* (IRIS 2016-1/3), the ECtHR evaluates (1) whether the radio interview at issue was about a matter of public interest; (2) how well known D.O. was, and the subject and context of the interview; (3) the prior conduct of D.O.; (4) the content, form and consequences of the radio interview; and (5) the severity of the sanction imposed on Ms Tölle. The ECtHR considers that the central issue discussed in the radio interview was about violence against women and domestic violence, an issue of important public interest and the subject of a social debate, "both at the material time and today." As D.O. had given an interview in a national daily newspaper, he had entered the arena of public debate, and therefore he should have had a higher threshold of tolerance towards any criticism directed at him. Furthermore, D.O. had publicly accused the Association, managed by Ms Tölle, of a serious criminal act in the media. In such circumstances, and bearing in mind that the right of rectification or of reply falls within the scope of Article 10 ECHR, Ms Tölle could not have been expected to remain passive and not defend the Association's reputation in the same way. The ECtHR finds that, in assessing the nature of the impugned statements, the domestic courts had limited their analysis to the fact that D.O. had never been convicted of domestic violence. The ECtHR reiterates that although a final criminal conviction amounts to incontrovertible proof that a person has committed an offence, it is unreasonable to similarly circumscribe the manner in which allegations about that person's criminal conduct are proved in the context of a defamation or insult case.

The ECtHR also holds that the domestic courts had not embarked on an analysis of whether Ms Tölle had had reasonable grounds to believe that D.O. had actually abused his wife, despite the fact that her association had provided his wife with shelter for several months and that during the criminal proceedings several witnesses had testified that there had been some sort of police intervention and allegations of domestic violence in D.O.'s family. With regard to the nature of the interference with Ms Tölle's freedom of expression, the ECtHR is of the opinion that the penalty imposed on her was mild, but that it nonetheless consisted of a criminal conviction, and consequently, an entry in Ms Tölle's criminal record. The ECtHR recognises that the sanction itself did not prevent Ms Tölle from remaining

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involved in the Association's activity, but it finds that the criminal conviction nevertheless amounted to a sort of censorship which might have discouraged her from promoting the Association's statutory aims in the future (see also *GRA Stiftung gegen Rassismus und Antisemitismus v. Switzerland*, IRIS 2018-6/1). The ECtHR also finds that the criminal conviction strengthened D.O.'s chances of obtaining damages against Ms Tölle in civil proceedings.

The ECtHR concludes that the domestic courts had failed to take into account the fact that Ms Tölle had been exercising her right of reply in relation to a serious accusation made against an association of which she was the president. Nor had the domestic courts carried out an adequate proportionality analysis with a view to assessing the overall context in which the impugned expressions had been used and their factual basis. They had thus exceeded the margin of appreciation afforded to them and had failed to strike a reasonable balance of proportionality between the measures restricting Ms Tölle's right to freedom of expression and the legitimate aim pursued of protecting the reputation or the rights of others. There ha accordingly been a violation of Article 10 ECHR.

Judgment by the European Court of Human Rights, First Section (sitting as a Committee), in the case of Tölle v. Croatia, Application No. 41987/13, 10 December 2020

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