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DEFAMATION RULING THE NATION

A Case Study of How the Jurisprudence of the European Court of Human Rights Affects Defamation Suits in Iceland

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Abstract

This paper examines freedom of the press as it is displayed through defamation suits in Iceland, in the light of the jurisprudence of the European Court of Human Rights. It introduces the general legal framework of the freedom of expression, both under Icelandic law and under the European Convention of Human Rights. The central analysis focuses on two recent decisions of the European Court against Iceland for limiting the freedom of the press in sentencing two journalists for defamation. Moreover, it examines a more recent domestic case to determine whether the Icelandic courts have incorporated the instructions of the Strasbourg decisions into their jurisprudence.

1. Introduction

Freedom of expression is one of the most cherished human rights in democratic societies.[1] It is also one of their oldest recognized rights, constantly developing towards ever more freedom.[2] The right however, will most likely never become an unlimited one, as it must be balanced against the rights of others, in particular their rights to privacy.[3]

This paper explores freedom of expression in the context of journalistic freedom in Iceland, as limited by defamation suits within the country. Two recent such cases became subject to scrutiny by the European Court of Human Rights (ECHR) in the context of Article 10 of the Convention.[4] It is a cause for concern however, that the judiciary in Iceland does not appear to have taken the criticism of the ECtHR fully to heart, as a subsequent ruling in a case similar to those addressed by the European Court, showed little signs of improvement.[5] The central question of this paper is therefore to determine whether the judicial development in the young Icelandic democracy can be said to fulfil the requirements of freedom of expression in a democratic society.

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[1] Pieter van Dijk, Fried van Hoof, Arjen van Rijn, Leo Zwaak, *Theory and practice of the European Convention on Human Rights*. 4th ed. Antwerpen: Intersentia, 2006.
p. 774.
[2] Sanne Takema, *Understanding Dutch Law*, den Haag: Boom Juridische Uitgevers, 2004, p. 76.
[3] *Chauvy and Others v. France*, (Application no. 64915/01), para. *70; Cumpănă and Mazăre v. Romania* (Application no. 33348/96*)*, para. 91*; Pfeifer v. Austria*, (Application no. 12556/03), para. 35; *Polanco Torres and Movilla Polanco v. Spain*, (Application no. 34147/06), para. 40.
[4] *Erla Hlynsdóttir v. Iceland*, (Application no. 43380/10); *Björk Eiðsdóttir v. Iceland*, (Application no. 46443/09), July 10, 2012.
[5] The Supreme Court, *Jón Snorri Snorrason v. Ingi Freyr Vilhjálmsson et al.* (Case no. 314/2012), December 6, 2012.

1.1 The Purpose of this Paper

The topic was chosen because of the importance of the development of freedom of expression in modern democracies.[6] In that context, the freedom of the press is one of the most fundamental aspects of this right, functioning on two levels; the right to disseminate information and; the right of the public to receive said information.[7] The judgments of the domestic courts in the chosen defamation suits against journalists have therefore been cause for concern in Iceland, as they might be seen as limiting journalistic freedom beyond what is necessary or even acceptable in a democratic society.[8] That in turn, could have the effect of deterring journalists from publishing certain stories for fear of punishment which could prove detrimental to the quality and efficiency of the press in its role as „public watchdog".[9]

Furthermore, as States Party to the ECHR, Iceland and its courts, are bound to take note of the decisions of the ECtHR when dealing with rights ensured by the Convention.[10] As a result, reviewing whether said judgments are actually implemented in domestic jurisdictions is an important tool to further the adherence of the rights ensured by the Convention. Most importantly, such an analysis serves as an excellent research question for a paper centred on international human rights case law.

1.2. Methodology, Sources and Structure

Considering its subject, the paper´s methodology will focus on basic legal analysis and comparison of the two jurisdictions. Sources used will include Icelandic law related to freedom of expression and the relevant domestic jurisprudence on the subject.[11] Moreover, Icelandic literature on the subject will be examined.[12] Translations of the titles of the literature from Icelandic will be provided in the bibliography but excluded from the main body. Any legislation cited however will be translated into English. Concerning European case law, the jurisprudence of the ECtHR will be consulted as well as academic literature concerning both Icelandic and European jurisprudence on freedom of the press.

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[6] *Handyside v. The United Kingdom, (Application no. 5493/72),* para. 49; *Oberschlick v. Austria,*(Application no.11662/82), para. 57; *Castells v. Spain,*(Application no. 11798/85),para. 42; *Lingens v. Austria, (*Application no. *9815/82),* para. 41.
[7] ECHR, Article 10 (1); *Lingens v. Austria,* para. 42.
[8] Páll Þórhallsson, "Frelsi til að fjalla um nektardansstaði", *Newsletter of the Icelandic Bar Association,* September 12, 2012, available at: www.logfraedingafelag.is/um-felagid/frettabref/nr/342/.
[9] *Björk Eiðsdóttir v. Iceland,* para. 65; *Erla Hlynsdóttir v. Iceland* para. 59.
[10] ECHR, Articles 32 and 46.
[11] Icelandic case law will be cited as is traditional in Icelandic jurisprudence and literature; referring only to case numbers and their date.

The paper is structured into seven sections, the first section being the current introduction, after which the second will introduce the legal framework of freedom of expression in Iceland, including a brief introduction to its defamation laws. Its third section will describe freedom of expression as it has developed in the jurisprudence of the ECtHR. The fourth section will address the chosen decisions of the domestic court posterior to which, the corresponding decisions of the European Court will be addressed in section five. Section six will consider a more recent decision of the high Court and analyse whether the high Court has addressed the shortcomings identified by the European Court in the previous judgments. Finally, section seven will offer some conclusions.

2. Freedom of Expression in Iceland: A Legal Framework

2.1. The Historical Development of the Right

The first instance of a law ensuring the freedom of expression within Iceland dates back to the constitution of 1874 where, modelled after the constitution of Iceland´s Danish colonial rulers, its Article 53 ensured freedom of the press.[13] The clause remained fundamentally the same, ensuring only the freedom of the press until 1995, when the Constitution was amended and considerable additions were made to its human rights chapter.[14] In its current form Article 73 of the Icelandic Constitution ensures the right to freedom of expression and when translated, reads as follows:[15]

Article 73

Everyone has the right to freedom of opinion and belief.

Everyone shall be free to express his thoughts, but shall also be liable to answer for them in court. The law may never provide for censorship or other similar limitations to freedom of expression.

Freedom of expression may only be restricted by law in the interests of public order or the security of the State, for the protection of health or morals, or for the protection of the rights

[13] Eiríkur Jónsson, "Hinn kennilegi grundvöllur 73. gr. stjórnarskrárinnar", *Timarit Lögfræðinga,* Vol. 2, 2007, p. 108.
[14] Eiríkur Jónsson, "Hinn kennilegi grundvöllur 73. gr. stjórnarskrárinnar", p. 109.
[15] *Constitution of the Republic of Iceland* (official translation), No. 33, 17 June 1944, as amended 30 May 1984, 31 May 1991, 28 June 1995 and 24 June 1999, (The Constitution), available at: http://www.government.is/constitution/.

or reputation of others, if such restrictions are deemed necessary and in agreement with democratic traditions.

As can be seen, the right was extrapolated to include the right to freedom of opinion and belief and permissible restrictions to its usage were set.

2.2. Permissible Restrictions

Article 73 (3) sets forth three cumulative requirements for the lawful limitation of the right to freedom of expression. First, the limitation must be required by law. Second, it must be aimed at one of the purposes mentioned in the subparagraph, *e.g.* in the interests of public order. Finally, the limitation must be necessary and in agreement with democratic traditions.[16] Moreover, any punishment envisioned as a result of a breach of such a limitation must be proportionate to the aim being pursued.[17] The last criterion is also the most debated in Icelandic jurisprudence and it is most often thereunder that the actual evaluation of the lawfulness of limitations to the freedom of speech takes place.[18]

2.3. Other Relevant Legislation

Traditionally being the right balanced against the freedom of expression, the right to privacy is ensured by Article 71 of the Constitution. [19] Defamation laws are an important tool to protect this right, found in Articles 234 -236 of the Penal Code of Iceland.[20] Although allowing for a maximum punishment of up to two years imprisonment, precedent shows that the courts only apply fines when violations of these articles are found.[21] Additionally, Article 241 of the PC is of relevance as it allows for defamatory comments to be declared null and void. Finally, it should be mentioned that Article 15 of Law no. 57 (April 10, 1957) on Printing Rights, proclaims that journalists are judicially liable for the content they post under their name.

[16] Supreme Court, 2002, p. 1485 (461/2001), II.
[17] Gunnar G. Schram, *Stjórnskipunarréttur*, Reykjavík, 1999, p. 571.
[18] Vilhjálmur Þór Svansson, "Um tjáningarfrelsi og meiðyrði: Mál Bjarkar Eiðsdóttur og Erlu Hlynsdóttur gegn íslenska ríkinu fyrir Mannréttindadómstól Evrópu" (LLM Thesis), p. 10.
[19] Björg Thorarensen, "Vernd Stjórnarskránnar á Friðhelgi Einkalífs og Meðferð Persónuupplýsinga- Ráðstefna um nýjar ógnir við friðhelgi einkalífs og meðferð persónuupplýsinga, October 19. 2012, pp. 3-5.
[20] Hildigunnur Hafsteinsdóttir. „Hvaða lög gilda um meiðyrði á Íslandi og hvernig er mönnum refsað fyrir þau?". *Vísindavefurinn*8.5.2006. Available at: http://visindavefur.is/?id=5866. Iceland´s General Penal Statute, Act No. 19 of Febuary 12, 1940: Translation is cited in *Erla Hlynsdóttir v. Iceland*, (Application no. 43380/10), para. 19.
[21] Supreme Court. 18. október 2012 (Case No. 673/2011); „Hvaða lög gilda um meiðyrði á Íslandi og hvernig er mönnum refsað fyrir þau?".

3. Freedom of Expression in the ECHR

3.1. The Development of the Right

Article 10 of the European Convention is considered amongst the Articles most important to the proper functioning of a democratic society and a vast body of jurisprudence on its limitations and requirements can be found in the decisions of the European Court.[22] Yet it was not until 1976 that the first formative judgment of the Court on this issue was given in *Handyside v. The United Kingdom.*[23] In it, the Court had to deliberate on the legality of censoring a controversial book, *The Little Red Schoolbook,* on the basis of protecting public morals.[24] At the time, the Court did not consider the removal of the book to violate the publisher´s right under Article 10.[25] Since then however, the Court´s conception of the content of the right has widened considerably and undergone extensive development.[26] Most notably, the Court has developed a set of criteria that need to be fulfilled to allow limitation of the right and can be said to have narrowed the notion of which constrictions can be considered necessary in a democratic society.[27]

3.2. Permissible Restrictions to the Freedom of Expression

Article 10 (2) sets forth three cumulative criteria that need to be fulfilled should States Parties wish to limit an individual´s freedom of expression. Thus, the limitation must be required by law, aimed at a specific purpose mentioned in the Article and that such restrictions be necessary in a democratic society.

3.2.1. Prescribed by Law

In the first instance, limitations to the freedom of expression must be prescribed by law.[28] More commonly however, the European Court considers whether the relevant restriction

[22] *Handyside v. The United Kingdom*, para. 49; *Oberschlick v. Austria,* para. 57; *Castells v. Spain*, para. 42; *Lingens v. Austria,* para. 41.
[23] *Theory and practice of the European Convention on Human Rights, p. 774.*
[24] *The Little Red Schoolbook* was written by two Danish Schoolteachers, Søren Hansen (b. 28 Mar 1940) and Jesper Jensen in 1969 and is enthusiasticly recommended by the author to the reader as it is an immensly entertaining and informative read.
[25] *Handyside v. The United Kingdom,* para. 67.
[26] *Theory and practice of the European Convention on Human Rights,* pp. 787-783.
[27] See *inter alia: Jersild v. Denmark*, (Application no. 15890/89) para. 31; *Janowski v. Poland* (Application no. 25716/94) para. 30, *Nilsen and Johnsen v. Norway* (Application no. 23118/93, para. 43; *Lindon, Otchakovsky-Laurens and July v. France* (Application nos. 21279/02 and 36448/02 para. 45.
[28] ECHR, Art. 10 (2).

fulfils the criteria of accessibility and foreseeability under this heading. It is on rare occasions that the Court finds a violation of this requirement but not unheard of.[29]

3.2.2. Legitimate Aim

Article 10 (2) lists nine legitimate aims capable of justifying a limitation to freedom of expression. While these are considered exhaustive they are vaguely worded and usually inclusive enough for an examination under this criterion to be rendered a mere formality.[30] Nevertheless, it should not be disregarded completely as the aim being pursued serves a purpose when determining whether a limitation can be considered necessary in a democratic society.[31]

3.2.3. Necessary in a Democratic Society

The most disputed requirement for the legitimacy of a limitation is whether it proves necessary in a democratic society. In many a case, the European Court has established that when determining the necessity of a limitation they will examine:

"Whether the interference complained of corresponded to a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court."[32]

Moreover, the Court will not limit itself to supervising national courts merely to ascertain whether the margin of appreciation granted to the State was exercised "reasonably, carefully or in good faith".[33] Rather, the Court evaluates the limitation in question considering the case as a whole, the content of the comment in dispute and the context in which they were made.[34] Additional considerations of the Court are whether the measure taken was proportionate to the

[29] For instance, in *Kruslin v. France,* (11801/8524), April 24th 1990, where the Court determined that French legislation regarding phone tapping was not forseeable enough and did not provide French citizens with the protection required in a democratic society and found a violation of Article 8.2. ECHR as a result. See also RTBF v. Belgium, (50084/06), March 29, 2011 where a Belgian regulation on injunction was not considered to fulfill the forseeability requriement.

[30] *Theory and practice of the European Convention on Human Rights,* p. 793.
[31] *Ibid.*
[32] *Erla Hlynsdóttir v. Iceland,* para. 56 (citing *Pedersen and Baadsgaard v. Denmark* (Application no. 49017/99), See also *Perna v. Italy* (Application no. 48898/99), para. 39, and *Association Ekin v. France,* (Appication no. 39288/98), para. 56.
[33] *Erla Hlynsdóttir v. Iceland,* para. 56. See also *News Verlags GmbH & Co. KG v. Austria,* (Application no. 31457/96), para, 52.
[34] *Ibid.*

aim being pursued and whether the reasoning the State resorts to is "relevant and sufficient" to justify the limitation.[35]

3.3. Freedom of the Press in European Jurisprudence

Whereas any restriction to the freedom of expression must be justified convincingly by the interfering authority, [36] additional considerations apply when restricting freedom of the press because of its essential function in a democratic society.[37] In particular, the press must be able to disseminate and the public must be allowed to receive information on "all matters of public interest".[38] In that vein, the press should also be able to exaggerate to some extent or to provoke in the information it imparts, to fully execute its role as "public watchdog".[39]

Nevertheless, the press does not enjoy unlimited freedom, it is limited in particular by the rights of others to private life under Article 8 of the Convention, which also protects their reputation.[40] To trigger the scope of Article 8 however, the attack on someone´s reputation must reach a threshold of seriousness impairing the "personal enjoyment of the right to respect for private life".[41] The level of scrutiny and criticism capable of impairing the enjoyment of the right depends also on the nature of the person under attack; should they knowingly have entered into the public domain their claims to private life under Article 8 diminish accordingly.[42]

Nevertheless, journalists must take great care should they attack the reputation of an individual, to act in good faith and on the basis of precise and reliable information.[43] The press can only be dispensed from such obligations on special grounds, which depend on "the

[35] *Chauvy and Others v. France*, (Application no. 64915/01), para. 70.
[36] *Jersild v. Denmark*, para. 31; *Janowski v. Poland*,(Application no. 25716/94), para. 30; N*ilsen and Johnsen v. Norway*, (Application no. 23118/93), para. 43;; *Lindon, Otchakovsky-Laurens and July v. France* (Application nos. 21279/02 and 36448/02), para. 45.
[37] *Björk Eiðsdóttir* v. *Iceland*, para. 65.
[38] *Ibid.*
[39] *Björk Eiðsdóttir v. Iceland*, para. 65; *Bladet Tromsø and Stensaas v. Norway* (Application no. 21980/93), paras. 59 and 62; *Tønsbergs Blad A.S. and Haukom v. Norway*, (Application no. 510/04) para. 82.
[40] *Chauvy and Others v. France*, (Application no. 64915/01), para. 70; *Cumpănă and Mazăre v. Romania* (Application no. 33348/96), para. 91; *Pfeifer v. Austria*, (Application no. 12556/03), para. 35; *Polanco Torres and Movilla Polanco v. Spain*, (Application no. 34147/06), para. 40.
[41] *A. v. Norway*, (Application no. 28070/06), para. 64; *Sidabras and Džiautas v. Lithuania*, (Application nos. 55480/00 and 59330/00), para. 49.
[42] *Steel and Morris v. the United Kingdom*, (Application no. 68416/01),para. 94; *Timpul Info-Magazin and Anghel v. Moldova*, (Application no. 42864/05), para. 34.
[43] *Björk Eiðsdóttir v. Iceland*, para 70; *McVicar v. the United Kingdom*, (Application no. 46311/99), para. 73; *Pedersen and Baadsgaard v. Denmark* (Application no. 49017/99), para. 78.

nature and degree of the defamation in question and the extent to which the media can reasonably regard their sources as reliable with respect to the allegations".[44]

4. The Chosen Domestic Decisions

The findings of defamation against the journalists Erla Hlynsdóttir and Björk Eiðsdóttir both took place in 2009 and were issued by the district court of Reykjavík and the Supreme Court of Iceland (the former was denied appeal to the Supreme Court).[45] Both were subject to a defamation suit for publishing the statements of others made in interviews with a third party.[46] Moreover, both women were charged by owners of strip clubs in Reykjavík city.[47] At the time, strip clubs were subject to considerable public scrutiny within Icelandic society.[48] Mostly, the discourse focused on whether such clubs should be allowed to operate within Iceland, in particular due to the growing concern of the public and the police that such clubs were harbouring prostitution.[49] In both instances, the Icelandic judiciary found the journalists guilty of defamation under Article 235 of the PC, for reproducing (and to some extent, paraphrasing) statements made about the plaintiffs by named sources in a newspaper and, respectively, a magazine.[50] The following subsections will address each case as it appeared before the Icelandic courts in more detail.

4.1. The Case of Björk Eiðsdóttir

Björk Eiðsdóttir published an interview with a stripper in the Icelandic magazine *Vikan ("The Week")* on August 23d, 2007.[51] The Stripper L, contacted Björk because she had been outraged by a previous coverage of the magazine where three strippers gave an interview in which they spoke highly of their carrier as strippers and indicated their profession was a glamorous one.[52] In response, L wished to share her experiences of the same work, presenting a different side than previously featured.[53] Björk taped the interview and reproduced its

[44] *Björk Eiðsdóttir v. Iceland,* para. 70; *McVicar*, para. 84, *Bladet Tromsø and Stensaas*, para. 66; *Pedersen and Baadsgaard*, para. 78.
[45] District Court of Reykjavík, (Case no. E-5265/2009), December 21, 2009; Supreme Court, (Case no. 328/2008) March 5, 2009. *Erla Hlynsdóttir v. Iceland,* para. 17.
[46] Case no. 328/2008, I.
[47] *Ibid.*
[48] *Erla Hlynsdóttir v. Iceland* para. 64.
[49] *Björk Eiðsdóttir v. Iceland,* para. 67.
[50] Case no. E-5265/2009, IV ; Case no. 328/2008, II.
[51] Case no. 328/2008, I.
[52] *Björk Eiðsdóttir v. Iceland,* para. 40.
[53] *Ibid.*

content *in verbatim* aside from a few minor adjustments for coherence and editing purposes.[54] The product was then sent to L who approved its contents, after which it was published.[55]

In the interview, L maintained that Ásgeir Davíðsson, owner of the strip club *Goldfinger* was involved in a range of illegal activities. She claimed that prostitution was the rule rather than the exception in the club and that Ásgeir pressured girls in his employment to sell their bodies.[56] Moreover, she held that foreign girls who worked in the club on a three month temporary working visa were being held indoors against their will and that their conditions while working for the club could be likened to a prison.[57] The reason she said, was that some foreign girls had tried to find customers from outside the club, therewith depriving Ásgeir of his usual commission.[58] Asked to comment on these allegations, Ásgeir rejected them as false.[59]

Ásgeir Davíðsson filed suit against Björk, the editor of Vikan, and L the stripper for defamation before the district court of Reykjavík.[60] He claimed that the article contained statements of fact rather than opinion, which accused him of socially reprehensible crimes and were unsubstantiated. As a result, his reputation had been unduly prejudiced by the article.[61] Before the trial however, Ásgeir and L reached a judicial settlement, so the charges against her were dropped.[62] The district court found in favour of Björk and her editor, stating that Björk had only reproduced the statements of L after necessary adjustments such as adding headings and clarifying the language and could therefore not be held responsible for the words of L.[63]

Ásgeir appealed the decision to the Supreme Court, which turned the district court decision on its head.[64] The court held that the content of L´s statements had been changed considerably and that Björk, could therefore be seen as equally responsible for the statements as L.[65] The statements were seen as defamatory, in the sense that they were statements of fact which accused the plaintiff of serious crimes which, according to the Court, Björk could not

[54] Case no. 328/2008, I.
[55] *Ibid.*
[56] *Ibid.*
[57] *Ibid.*
[58] Case no. 328/2008, I.
[59] *Ibid.*
[60] *Ibid,* II.
[61] *Ibid.*
[62] *Ibid,* I.
[63] *Ibid* I.
[64] *Ibid,* II. *Note:* A full translation of the *ratio decidendi* of the Supreme Court can be found in para. 19 of the corresponding case before the European Court.
[65] *Ibid.*

substantiate.[66] The court reached this conclusion despite Björk´s submissions of various news articles and a report from the U.S. embassy in Iceland suggesting that prostitution was indeed taking place within *Goldfinger.*[67]Whilst acquitting her editor, Björk was found guilty of defamation under Article 235 of the PC and made to pay damages to Ásgeir as well as the costs of publishing the judgment and that of the legal proceedings.[68]

4.2. The Case of Erla Hlynsdóttir

In 2009, Erla Hlynsdóttir a journalist for the newspaper DV (*Dagblaðið Vísir*) was contacted by the owner of a strip club, Viðar Már Friðfinnsson, who claimed that his rival Ásgeir Davíðsson had sent his two sons along with a well-known violent offender (Davíð Þór Helenarson) to his club *Strawberries* for the purpose of "beating him up".[69] Viðar demanded that Erla publish an article about the skirmish and became upset when she relayed to him that she would have to contact the men he was accusing for their comment on the issue.[70] Nevertheless, Erla contacted the other men and published an article wherein she reproduced the results of her interviews with all three men.[71]

The article was titled: "Strípakóngar takast á" ("Stripkings clash") and in the main text, comments from Ásgeir, Viðar and Davíð were reproduced.[72] Once the article was published, Viðar filed a defamation suit against Erla because of comments made by Davíð, stating that Viðar was spreading rumours all over town that: -"no one came with an attitude to his club because the Lithuanian mafia spent their time there".[73] Furthermore, Viðar complained of a subheading made by Erla titled "Orðrómur um Mafíuna" ("Rumour about the Mafia") as being defamatory as well.[74]

Viðar claimed that the statements indicated that he was involved with a criminal organisation and that he was using these connections to threaten an undefined number of people.[75] He further held that there was no evidence to support these allegations. That on the contrary he was a legitimate businessman who had suffered great personal dishonour because the article

[66] *Ibid.*
[67] *Ibid.*
[68] *Ibid.* The damages were: ISK 500,000 (approximately 3,000 euros (EUR)) in compensation for non-pecuniary damage and ISK 400,000, plus interest, for his costs before the District Court and the Supreme Court.
[69] Case no. E-5265/2009, I.
[70] *Ibid.*
[71] Case no. E-5265/2009, II.
[72] *Ibid,* II.
[73] *Ibid,* II.
[74] *Ibid.*
[75] *Ibid,* III.

accused him of criminal behaviour.[76] Moreover, he pleaded that since Erla had adduced no evidence to support that he was in any way affiliated with the Lithuanian mafia, the remarks were clearly defamatory and should be declared null and void.[77]

To her defence, Erla cited Article 73 of the Constitution as well as Article 10 of the ECHR.[78] In that connection, she referred to the practice of the Court to evaluate whether such restrictions were "necessary in a democratic society". In that vein, she held it paramount to a well-functioning democracy that the press should not be silenced or supressed for addressing sensitive issues of concern to the public. Moreover, she held that Viðar should expect public scrutiny in light of the nature of his business, hotly debated within Icelandic society at the time.[79]

Most importantly perhaps, Erla pointed out that Viðar was not being accused of criminal behaviour; merely of spreading such a rumour about himself.[80] Not only that, but Viðar himself had originally approached Erla and accused several men of criminal behaviour, he should expect that Erla would seek their comments on such accusations as well.[81] Finally, Erla pleaded that owners of strip clubs recurrently had recourse to defamation suits against journalists who wrote about their business, expressly in order to mute any discourse not in their favour.[82] Such practice was particularly reprehensible because the comments complained of were a direct quote from a third party, the recordings of which had been submitted to the court.[83]

The District Court referred to a recentof the Supreme Court, where it had been established that a journalist publishing an interview under her name would be considered the author of its content in the meaning of Article 15 II of the Printing Law, regardless of whether they were a direct quote from someone else.[84] With respect to the defamatory nature of the comments, the court held that they could potentially impress upon the readers of the newspaper that Viðar had connections to an international criminal organisation.[85] Moreover, that since Erla could not provide any evidence to support this impression, the remarks were of a defamatory nature

[76] *Ibid.*
[77] *Ibid.*
[78] *Ibid.*III A.
[79]*Ibid.* III A.
[80] Case no. E-5265/2009, III C.
[81]*Ibid*, III A.
[82] *Ibid.*
[83] *Ibid*, III C.
[84] *Ibid*, IV
[85] *Ibid.*

in the sense of Article 235 PC. Consequently, the remarks were declared null and void and Erla was sentenced to pay Viðar damages, the costs of the proceedings and to fund the publishing of the judgment.[86]

5. The Corresponding Decisions of the European Court

The European Court decided on the admissibility and merits of the complaints of both Erla and Björk simultaneously but separately.[87] As both cases had similar facts, the reasoning employed by the European Court is identical in some respects. However there are noticeable differences as well, justifying the separation of the two.

5.1. The Case of Björk Eiðsdóttir v. Iceland

Having found that there had been an interference in Björk´s right to freedom of expression, and further, that Icelandic defamation laws were a legal basis serving a legitimate purpose, the Court proceeded to determine whether it had been necessary in a democratic society.[88]

In her complaint, Björk argued that it had not been her intention to spread defamatory comments about Ásgeir, rather she had intended to participate in public debate on a controversial social issue.[89] Moreover, Björk claimed that she had in fact produced sufficient evidence to support the allegations made in the article, she referred to several sources supporting the claim that prostitution went on within *Goldfinger*, including a televised interview with Ásgeir himself, although no definitive proof existed as to his personal profit from the activity.[90] In that connection, she held that by requesting that she produce further evidence to support the claims of the woman she interviewed, the authorities had imposed on her an "unreasonable, if not impossible task".[91] Finally, relying on *Selistö v. Finland*,[92] Björk asked the Court to consider that Ásgeir was a highly controversial person owning a very controversial business and that concern for his reputation should not outweigh the importance of open public debate.[93]

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[86] *Ibid.*
[87] *Erla Hlynsdóttir v. Iceland*, para.63.
[88] *Björk Eiðsdóttir v. Iceland,* para. 28-29.
[89] *Ibid,* para. 33.
[90] *Ibid,* para. 36-37.
[91] *Ibid. Note*; Björk was citing a previous decision rendered against Iceland in the same context: *Thorgeir Thorgeirson v. Iceland, (Application no. 13778/88)* para. 65.
[92] *Selistö v. Finland* (Application no. 56767/00).
[93] *Björk Eiðsdóttir v. Iceland,* para. 41.

In contrast, whilst the government recognised that the issues of strip clubs and prostitution were indeed of public concern, they disputed that Björk´s article had been a necessary contribution thereto.[94] This was so, because the interview had included allegations against the applicant, that he was personally profiting from prostitution and also, that he had deprived women in his employment of their freedom, both of which are criminal offences for which he had neither been charged nor convicted.[95] The government rejected the applicant´s claims that due to the nature of Ásgeir´s business, he could be subject to harsher criticism than other citizens and that rather, they should be seen as evidencing bad faith on her behalf towards him.[96] Finally, the government maintained that Björk had not taken sufficient care to verify the claims made in the interview, and although not required to adduce evidence beyond reasonable doubt, her lack of effort had contravened the standards for responsible journalism set out in ECtHR jurisprudence.[97]

Whilst the Court saw no reason to question the Supreme Court´s evaluation that the comments in questions were defamatory and that the finding thereof served the legitimate purpose of protecting Ásgeir´s reputation, it had its reservations as to whether this reasoning was sufficient to fulfil the requirements of Article 10 of the Convention.[98] To that end, the Court criticised the Supreme Court for not considering the wider context of the ongoing public debate on strip clubs and issues surrounding them, in its decision.[99] Moreover, the Court concurred with Björk´s claims that Ásgeir had, by running his controversial business, "knowingly entered the public domain" and consequently widened the limits of criticism he could allowably be subject to.[100]

The Court held that the Supreme Court´s Judgment was capable of discouraging the press to participate in discourse on socially pertinent issues.[101] Punishing a journalist for citing a third person in an interview could not be justified absent strong motivations which were apparently absent in the present case, and regrettably not addressed by the Supreme Court.[102]

It further held that it was doubtful whether Björk had been afforded a real opportunity to absolve herself by ascertaining the truth, in particular because the defamatory statements had

[94] *Ibid*, paras, 49-50.
[95] *Ibid*, para. 50.
[96] *Ibid*, paras. 53-54.
[97] *Ibid*, para. 55.
[98] *Ibid*, para. 66-67.
[99] *Ibid*, para. 67.
[100] *Ibid*, para. 68.
[101] *Ibid*, para. 69.
[102] *Ibid*, para. 79.

been made by L who was no longer party to the proceedings.[103] Moreover, it considered that Björk had indeed diligently verified the veracity of L´s comments and that she had allowed Ásgeir to respond to the allegations, allowing for some balance in the reporting.[104] Consequently, the Court found in favour of Björk, as the Supreme Court had not demonstrated "a reasonable relationship of proportionality" between the restrictions imposed on her freedom of expression and the "legitimate aim pursued" thus rendering the restriction unnecessary in a democratic society.[105]

5.2. The Case of Erla Hlynsdóttir v. Iceland

In most respects, the arguments of the parties of the dispute and that of the Court were identical to those presented in *Björk Eiðsdóttir v. Iceland, mutadis mutandis.* A notable difference however, was that in this case, the district court had not only convicted Erla for recorded statements of a third party, but also for *innuendo,* that is to say not a statement of fact but rather one that would leave upon the readers of her article the impression that Viðar was affiliated with the Lithuanian mafia.[106] This fact rendered the district court´s ruling particularly reprehensible in the eyes of the European Court, especially since no evaluation on the fundamental difference between factual assertions and value judgments had been conducted.[107]

Moreover, the Court took issue with the fact that the actual author of the impugned comments had not been sued by Viðar and that he himself had contacted Erla with serious allegations towards the author.[108] The fact that the district court had not taken these facts into account in its deliberations was lamented by the Court, which stated that therewith, Viðar had "knowingly exposed himself to criticism and should therefore display a greater degree of tolerance in this respect".[109] Most importantly however, the Court held that by failing to consider the wider context of the article, namely its place within the public discussion of the issues surrounding strip clubs in Iceland, the district court had not shown that the restriction of Erla´s right to expression had served a legitimate purpose.[110] As a result, the European Court found there had been a violation of Article 10 of the Convention, as it had not been

[103] *Ibid*, para. 76.
[104] *Ibid*, paras. 78-79.
[105] *Ibid*, para. 83.
[106] *Björk Eiðsdóttir v. Iceland,* para. 62.
[107] *Ibid*, para. 66.
[108] *Ibid*, para. 69.
[109] *Ibid.*
[110] *Ibid*, paras. 62 and 64.

shown nor sufficiently considered that the relevant restriction was necessary in a democratic society.[111]

6. The Case of Jón Snorri Snorrason v. Ingi Freyr Vilhjálmsson et al

Approximately 6 months after the rulings of the European Court in the cases of Erla and Björk, the Supreme Court rendered a judgment against the editors of the newspaper DV for publishing a series of articles about the suspected illicit activities of Jón Snorri Snorrason.[112] Jón Snorri was a lecturer of business at the University of Iceland and the CEO and large shareholder of a company named *Sigurplast ehf.* which declared bankruptcy in the fall of 2010.[113] Shortly thereafter, it was announced in national media that one of the companies creditors, *Arion* bank had submitted a complaint to the police charging the previous owners of the company (Jón Snorri included) for misuse of company funds.[114] Moreover, a separate complaint was submitted by another creditor of the company; *Vesturland hf.* Subsequently, the trustee of the *Sigurplast* estate contracted the accounting firm *Ernst & Young* to investigate the financial accounts of the company, after which the estate reported various discrepancies found in the report to the police.[115]

The newspaper DV published a series of articles based on the report made by *Ernst and Youn*g. Jón Snorri instigated a defamation suit against DV, in particular impugning the headlines: "Lektor flæktur í lögreglurannsókn" (Lecturer involved in a police investigation).[116] The articles often featured pictures of Jón Snorri (fourteen times in total) and repeatedly stated that he was: "subject to a police investigation" because of his suspected involvement in embezzling funds from the company.[117]

Jón Snorri claimed that at the time, no such investigation was taking place; that he had not been approached for comment by the reporters from DV and; that by repeatedly publishing photographs of him alongside these statements injured his reputation unlawfully.[118] To his support, he cited an email received from the economic crimes division of the prosecution stating: "I can confirm that the economic crimes division of the police has received an

[111] *Ibid*, para. 74.
[112] Supreme Court, (Case No. 314/2012.) December 6, 2012.
[113] *Ibid*, I.
[114] District Court of Reykjavík, (Case No. E-1996/2011) March 5, 2011, I (The Supreme Court judgment basically only confirmed the ruling of the district court).
[115] *Ibid.*
[116] *Ibid*, II.
[117] *Ibid.*
[118] *Ibid.*

announcement […] from the estate" and later on, that they had received two records of charges against the owners of the company. Moreover, the prosecutor stated that "the trustee report was being examined by the police. No formal decision has been taken for a police investigation and the charges have not been defined."[119]

The DV editors, claimed that a police investigation into the actions of Jón Snorri were inevitable as the police is bound by law to investigate any reports of the nature sent by *Sigurplast ehf* creditors.[120] Whether or not such an investigation had formally started was therefore an irrelevant formality and that furthermore, the normal use of the word "investigation", included the meaning of "examining".[121] Both the Reykjavík district court and the Supreme Court of Iceland found in favour of Jón Snorri however, claiming that as no investigation had formally started into Jón Snorri´s alleged mistreatment of company funds when the article was published, and since Jón Snorri´s attempts to have these remarks corrected by the paper were rejected by its editors, the remarks were of a defamatory nature, stating an unsubstantiated fact. DV was sentenced to pay damages to Jón Snorri, the legal costs and that of publishing the judgment. [122]

6.1. Discussion of the reasoning of the Courts

The facts of the case and its circumstances are in many respects different from the cases previously addressed. However, just as strip clubs had been subject to fierce debate in Iceland, so had various malpractices of companies and banks during the so-called boom preceding the Icelandic economic melt-down. Yet, the domestic courts made no mention of the wider context the articles were written in, that is to say, the wide and ongoing public debate about widespread misuse of company and public funds leading up to the crash, disregarding the pleas of the DV editors to examine this issue.

In fact, the reasoning used by the district court, later confirmed by the Supreme Court, related only to the legal definition of the term "investigation", appearing not to consider at all whether declaring said comments null and void and sentencing the editors for defamation could be considered necessary in a democratic society as required by the European Court. Whereas the information disseminated in the article was not based on an interview with a third party such as in the above cases, it was nevertheless based on reliable information,

[119] Case No. E-1996/2011, II.
[120] *Ibid*, III.
[121] *Ibid.*
[122] *Ibid* IV.

namely the *Ernst and Young* report, confirmation by sources, as well as the knowledge that Jón Snorri had been reported to the police for illegal activities by three entities. The police was therefore legally bound to investigate Jón Snorri, regardless of whether or not that process had formally started.

Indeed, the European Court has confirmed, that in order to perform its role as "public watchdog" the media must be allowed to exaggerate or shock with its reporting, provided it is based on reliable information. Claiming that Jón Snorri was involved in a police investigation, could perhaps be considered an exaggeration, as it had not formally begun, but was nevertheless a true statement, as a matter of law, the police was bound to conduct it. The courts found that DV should have used the term "examine" rather than "investigate" in their reporting on Jón Snorri.[123] The meaning of the words overlap however in their common usage and it is strange to say the least that the courts take their value judgment of what the word should mean and impose it on journalists in their reporting, the word censorship does come to mind.

In fact, the official police investigation against Jón Snorri had started around the time the case was being adjudicated before the Supreme Court but could not be verified in written form at the time.[124] It should be noted however, that since then, Jón Snorri has been sentenced to 6 months' probation by the district court of Reykjavík, for embezzling funds from his company, *Sigurplast ehf*.[125] As the articles can be said to have contributed to public discourse on perhaps the most discussed topic of Icelandic history: the business practices leading up to the economic meltdown: it is highly reprehensible that the courts did not address the social significance of the articles at all. Consequently, it can be said that the reasoning of the court for limiting the freedom of the press in this case can-not be considered sufficient or proportional and therefore not necessary in a democratic society,

7. Conclusion

The cases of *Erla Hlynsdóttir v. Iceland* and *Björk Eiðsdóttir v. Iceland* can be considered landmark cases to the protection of the freedom of the press in Iceland. Nevertheless, the Icelandic courts appear not to have taken in the message from Strassbourg. The deficiencies pointed out by the European Court are still present in Icelandic jurisprudence. That is to say,

[123] Case No. E-1996/2011, IV.
[124] Ingi Freyr Vilhjálmsson, "Ég get staðfest, DV, December 7, 2012. " http://www.dv.is/leidari/2012/12/7/sannleikur-haestarettar/
[125] "Jón Snorri dæmdur fyrir Skilasvik", DV, February 21, 2013, http://www.dv.is/frettir/2013/2/21/jon-snorri-daemdur-fyrir-skilasvik/.

their *ratio decidendi* does not include important considerations required by ECtHR jurisprudence, such as examining the nature and context of the comments, their social significance and the necessity of restricting freedom of the press in a democratic society. It is however essential, that a young democracy such as Iceland, one that is recovering from considerable social unrest due to practices that long went unreported by the media, should not deter its journalists from reporting socially pertinent issues.

One means of ensuring the quality and openness of the press is to conduct detailed and thorough judicial reasoning when any restriction to their freedom to disseminate information is proposed. At present, it cannot be said that the Icelandic courts ensure freedom of the press as envisioned by Article 10 of the Convention and European jurisprudence. For that to happen, the domestic courts must start to take into consideration the various definitions and requirements elaborated by the ECtHR and incorporate that into their deliberations in any defamation case against journalists. Because should journalists have to fear being sentenced for exercising their role as public watchdog, they might just give up on that role and turn to reporting on comfortable topics such as gardening or cooking, leaving Icelandic citizens without real access to information as promised by Article 10 of the European Convention of Human Rights.

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