

Arlewin v. Sweden: Jurisdiction and Broadcasting Under Swedish National Law and the European Convention on Human Rights

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I. OVERVIEW

TV3, a Swedish commercial television channel, broadcast a well-known program called Insider, premised around investigating potential criminal activity on the air.¹ On April 22, 2004, TV3 broadcast an episode of Insider that identified Mr. Raja Arlewin, a Swedish national and private business owner, as the ringleader of organized crime in various Swedish media and advertising circles.² The show also suspected that Arlewin was guilty of several business-related crimes, including fraud, and aired pictures of Arlewin and his name.³ The Swedish company Strix Television AB produced the show in Sweden and broadcast it via satellite link to a London-based television company, Viasat Broadcasting UK, Ltd., who then transmitted the show to audiences throughout Sweden.⁴ Insider was broadcast from a satellite in the United Kingdom, but the show’s target audience was Sweden, the language spoken throughout the show was Swedish, and Swedish

1. *Arlewin v. Sweden*, App. No. 22302/10 Eur. Ct. H.R. para. 6, HUDOC (Mar. 1, 2016), <http://hudoc.echr.coe.int/eng?i=001-160998>.

2. *Id.*

3. *Id.*

4. *Id.* para. 7.

companies sponsored the program.⁵ The show aired for quite some time and was very popular throughout Sweden.⁶

Sometime after the episode aired, Arlewin filed a lawsuit in the Stockholm District Court against X, host of Insider and Chief Executive Officer of Strix Television AB, for gross defamation and damages.⁷ Arlewin claimed that, among other things, X was liable for defamation damages because, as its anchor, he was responsible for the show's content and for failing to hire an adequate content editor.⁸ The crux of Arlewin's argument relied on chapters 5 and 6 of Sweden's Constitutional Law on Freedom of Expression (*Ytrandefrihetsgrundlagen*) that pertain to liability for offenses to freedom of expression, chapter 5 of Sweden's Penal Code (*Brottsbalken*) regarding defamation, and Article 6 §§ 2, 8, and 13 of the European Convention on Human Rights.⁹ Arlewin further argued that it would be inefficient and nearly impossible for him to bring the action in the United Kingdom since the television show and the events leading to the defamation claim, as well as the damages, all occurred in Sweden.¹⁰

The Stockholm District Court dismissed Arlewin's claims under Sweden's Constitutional Law, holding that because the show was sent via satellite link to Viasat Broadcasting UK, Ltd. in London, the TV program did not emanate from Sweden, and therefore, Britain was responsible for the show's content.¹¹ As such, chapters 1-9 of the Swedish Constitution did not apply, meaning Sweden lacked jurisdiction to oversee the case, and X was not responsible for the show's content under chapter 6.¹² Arlewin appealed, arguing that while Viasat broadcast the show, Swedish courts could review the case under the EU's Brussels I Regulation.¹³ The Swedish Court of Appeals affirmed the District Court's ruling that held chapters 1-9 of the Swedish Constitution inapplicable to the case and stated that Arlewin may have a potentially viable claim in British Court.¹⁴

Arlewin next petitioned to the Supreme Court of Sweden, which rejected his referral request and denied him leave to appeal the case.¹⁵ Following his unsuccessful suit in Swedish court, criminal proceedings

5. *Id.*
6. *Id.* para. 7.
7. *Id.* para. 8.
8. *Id.*
9. *Id.* para. 9.
10. *Id.*
11. *Id.* para. 11.
12. *Id.*
13. *Id.* para. 12.
14. *Id.* para. 13.
15. *Id.* paras. 14-15.

were initiated against Arlewin for a variety of offenses, including those discussed on the television show.¹⁶ Arlewin was then sentenced to five years in prison for aggravated fraud, tax offenses, and bookkeeping offenses.¹⁷ Arlewin then launched a proceeding with the European Court of Human Rights (ECtHR) concerning the Swedish court's failure to comply with Article 6 of the European Convention on Human Rights (ECHR) throughout Arlewin's District Court case.¹⁸ The ECtHR held that Sweden violated Article 6 of the European Convention on Human Rights when it denied Arlewin access to the Swedish courts to present his defamation claim on the basis that the case involved a transborder television broadcast that placed jurisdiction with the *United Kingdom*. *Arlewin v. Sweden*, App. No. 22302/10 Eur. Ct. H.R., HUDOC (Mar. 1, 2016), <http://hudoc.echr.coe.int/eng?i=001-160998>.

II. BACKGROUND

A. EU Law—*The Convention on Human Rights, the Brussels I Regulation, and the Audiovisual Media Services Directive*

Three major pieces of European legislation govern Arlewin's case. The first piece of pertinent legislation is the ECHR, a treaty established to protect the fundamental human rights and freedoms of the people of Europe.¹⁹ The Article applicable to the issues in Arlewin's case is Article 6, which establishes the right to a fair trial, and states that, in both civil and criminal matters, everyone is entitled to present their case publicly before "an independent and impartial tribunal established by law."²⁰ In the landmark case *Golder v. United Kingdom*, the ECtHR established the scope of Article 6 of the ECHR when it held that the definition of a fair trial included access to counsel and the court subject to any proper limitations imposed by national law.²¹ *Golder* examined a human rights claim made by a British prisoner who was denied access to counsel to initiate a civil libel suit.²² The British government argued that denying *Golder* access to an attorney was not a violation of Article 6 of the ECHR since it could only apply to individuals involved in actions already

16. *Id.* para. 17.

17. *Id.*

18. *Id.*

19. See Convention for the Protection of Human Rights and Fundamental Freedoms pmbl., Nov. 4, 1950, E.T.S. no. 5 [hereinafter ECHR].

20. *Id.* art. 6(1).

21. See *Golder v. United Kingdom*, App. No. 4451/70 Eur. Ct. H.R. para. 36, HUDOC (Feb. 21, 1975), <http://hudoc.echr.coe.int/eng?i=001-57496>.

22. *Id.* para. 19.

initiated before a European court.²³ The Court disagreed and held that Article 6's right of access not only included access to the physical court but also access to all the necessary tools, including counsel, to properly litigate a claim.²⁴ However, the ECtHR did make clear that this right of access may be susceptible to, and limited by, procedural regulations found in the national law of a Member State.²⁵

The second piece of applicable legislation is Council Regulation (EC) No. 44/2001 (Brussels I Regulation), which was established to assist courts with determining jurisdiction in cases involving two or more European Union countries.²⁶ The Brussels I Regulation is controlling in all countries in the EU, with the exception of Denmark, and contains sections on general jurisdiction, specific jurisdiction, jurisdiction in conflicts involving insurance, consumer contracts, employment contracts, and exclusion jurisdiction.²⁷ The scope of the Brussels I Regulation applies to all "civil and commercial matters whatever the nature of the court or tribunal" with the exception of "revenue, customs, or administrative matters."²⁸ General jurisdiction is governed by Article 2, which holds that "persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."²⁹ Furthermore, persons domiciled in one state may be sued in another state pursuant to the special jurisdiction rules laid out in sections 2 through 7 of the Regulation.³⁰

The Brussels I Regulation discusses various scenarios where special jurisdictional rules apply that do not follow the domicile of the defendant rule explained above.³¹ It is important to note that the Brussels I Regulation follows the common law concept of domicile as the place of habitual residence for an individual defendant and the statutory seat, central administration, or principal place of business for a company sued in European courts.³² Expanding upon this concept, the Brussels I Convention conveniently establishes a general rule of thumb that a case

23. *Id.* para. 22.

24. *Id.* para. 36. Specifically, the Court held that "Article 6 . . . secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the 'right to a court' of which right of access . . . constitutes one aspect only." *Id.*

25. *Id.* paras. 38-39.

26. *See* Council Regulation No. 44/2001, pmb., 2001 O.J. (L 12) 1 (EC).

27. *Id.* arts. 2, 5, 8, 15, 18, 22.

28. *Id.* art. 1(1).

29. *Id.* art. 2(1).

30. *Id.* art. 3(1).

31. *Id.* arts. 5-7.

32. *Id.* arts. 59(1), 60(1).

involving two European Union countries should be litigated in the defendant's place of domicile but may be extended in a specific or exceptional matter. For example, in matters relating to "tort, *delict* or quasi-*delict*," the Brussels I Regulation holds that a lawsuit may be brought in the location where the "harmful event occurred or may occur."³³ In claims for damages resulting from criminal proceedings, the suit may also be brought in the court conducting the criminal proceedings.³⁴

Finally, along with the general guidelines provided for in the ECHR and the Brussels I Regulation, European courts have adopted the EU Audiovisual Media Services Directive (AV Directive), which establishes a common set of rules for European audiovisual media such as television broadcasts, advertising, and online programs.³⁵ More specifically, the Directive seeks "to ensure freedom to provide television broadcasting services" and to "[lay] down minimum rules for broadcasts which emanate from the Community and which are intended to be received within it."³⁶

Article 2 of the AV Directive discusses jurisdiction, stating that "each Member State shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State."³⁷ The media service provider, or the person editorially responsible for the audiovisual content, dictates the jurisdictional Member State under the AV Directive either by the location of the provider's head office, where a significant part of the work involved occurs or operates, or by the location where major editorial decisions are made.³⁸ In situations where a media service provider does not fall under one of the scenarios enumerated in Article 2, section 3 of the AV Directive, the country where the satellite up-link is located determines jurisdiction.³⁹ Article 4 creates an important distinction for TV shows broadcast via satellite link, by shifting

33. *Id.* art. 5(3).

34. *Id.* art. 5(4).

35. Council Directive 2010/13/EU, 2010 O.J. (L 95) 1.

36. Joined Cases C-34, 35 & 36/95, *Konsumentombudsmannen (KO) v. De Agostini (Svenska) Förlag AB & TV-Shop i Sverige AB*, 1997 E.C.R. I-3843, ¶ 3; *see also* Council Directive 2010/13/EU, *supra* note 35, art. 2(1).

37. Council Directive 2010/13/EU, *supra* note 35, art. 2(1).

38. *Id.* art. 2(3).

39. *Id.* art. 2(4).

jurisdiction onto the country physically responsible for the broadcast when the Member State location is unclear.⁴⁰

B. EU Case Law and Its Application of the Brussels I Regulation and the AV Directive

A variety of cases involving defamation and libel claims pertaining to television broadcasts analyze the jurisdictional discrepancies that occur between national law and the Brussels I Regulation.⁴¹ The European Court of Justice (ECJ) paved the way for determining jurisdiction in tort cases with its ruling in *Shevill and Others v. Presse Alliance*, which established that a victim of libel by a newspaper could bring a claim in the defendant's location, in every contracting state that distributed the paper, or in any state he suffered harm under a proper analysis of the phrase "place where the harmful event occurred."⁴² While the case involved an interpretation of Article 5(3) (Special Jurisdiction Clause) of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, the legislative precursor to the Brussels I Regulation, this ruling was foundational in shifting the jurisdictional burden onto states where the harmful action actually took place and no longer limiting litigation to the courts of the defendant's location.⁴³

The ECJ expanded its *Shevill* ruling with its opinion in the joined cases, *eDate Advertising v. X and Olivier Martinez and Robert Martinez v. MGN Ltd.*, which involved claims of alleged infringement of personality rights against online publishers.⁴⁴ The ECJ again analyzed the Regulation's Special Jurisdiction clause and found that "the place where the harmful event occurs" not only covers the place where any actual damage occurred but also any area involved in the events that gave rise to the harm.⁴⁵ Furthermore, the ECJ found that, while a person most often has the center of his interests in the Member State of his habitual residence, this center may vary based on other factors such as professional connections and personal interests, which may provide a strong link to an otherwise separate Member State.⁴⁶ As such, the ECJ held in both cases that the online infringement actions for liability could be brought before the court of the Member State where the publisher was

40. *Id.*

41. *See* Case C-68/93, *Shevill v. Presse Alliance SA*, 1995 E.C.R. I-415, ¶ 33.

42. *Id.*

43. *See id.*

44. *See* Joined Cases C-509/09 & 161/10, *eDate Advert. GmbH v. X & Martinez v. MGN Ltd.*, [2011] E.C.R. I-10269, ¶¶ 11, 15.

45. *Id.* ¶ 58.

46. *Id.* ¶ 82.

based, the court in the location of the victim's interests, or the courts of each Member State where the content was accessible.⁴⁷ By this holding, the ECJ provided a broad interpretation of the Special Jurisdiction Clause of the Brussels I Regulation, granting admissibility on both the defendant's residency as well as on the locations specifically linked to the merits of the case itself.⁴⁸

The ECJ explicitly addressed the issue of conflicting national procedural rules and the Brussels I Regulation in *Kongress Agentur GmbH v. Zeehaghe BV*.⁴⁹ *Kongress Agentur* was a Dutch case involving a dispute under the European Convention over a contractual warranty among different parties in multiple Member States.⁵⁰ The Court addressed the question of whether national law should apply in its assessment of jurisdiction or whether the provisions of the Brussels I Regulation supersede the procedural limitations of the Member State's national law.⁵¹ The Court held that national procedural rules cannot damage the effectiveness of the Convention and that "a court may not apply conditions of admissibility laid down by national law which would have the effect of restricting the application of the rules of jurisdiction laid down in the Convention."⁵² This decision established the rule that a European court may deny a case under domestic procedural limitations but only if that potentially applicable national law does not hinder the overall effectiveness of the Brussels I Regulation.⁵³

The ECJ examined the question of jurisdiction in audiovisual media cases under the AV Directive's predecessor, the Television without Frontiers Directive of 1989 (1989 Directive) in *KO v. Agostini*.⁵⁴ *Agostini* involved a dispute initiated by a Swedish company over television advertisements, targeted towards young children, that were governed by the rules of the 1989 Directive.⁵⁵ The Court noted that while the Directive included specific information pertaining to advertisements aimed towards children, the Directive's application to the case could only be limited to the information directly contained in the relevant sections.⁵⁶

47. *Id.*

48. *See id.*

49. *See* Case C-365/88, *Kongress Agentur Hagen GmbH v. Zeehaghe BV*, 1990 E.C.R. I-1845, ¶ 8.

50. *Id.*

51. *Id.* ¶¶ 8, 13.

52. *Id.* ¶ 20.

53. *Id.* ¶ 22.

54. *See* Joined Cases C-34, 35 & 36/95, *Konsumentombudsmannen (KO) v. De Agostini (Svenska) Förlag AB & TV-Shop i Sverige AB*, 1997 E.C.R. I-3843, ¶¶ 31-35.

55. *Id.* ¶¶ 17-18.

56. *Id.* ¶¶ 31-34.

The ECJ found the case was not merely limited to the EU provisions housed in the Directive, but that Swedish law could also be applied in situations not adequately described within the Directive itself.⁵⁷ Therefore, the ECJ's decision in *Agostini* explicitly stated that the AV Directive does not govern jurisdiction over audiovisual broadcasts generally; rather, its jurisdiction is partial and limited to the scenarios specifically included within its text.⁵⁸

C. Sweden's Constitution and the Fundamental Law on Freedom of Expression

Swedish national law governs freedom of expression with two documents, the Freedom of the Press Act (*Tryckfrihetsförordningen*) and the Fundamental Law on Freedom of Expression (Fundamental Law), found in the Swedish Constitution.⁵⁹ The Freedom of the Press Act governs printed materials such as books, magazines, and newspapers, while the Fundamental Law applies directly to other forms of media such as radio programs, television shows, film, music, recordings, and web publications.⁶⁰ Jurisdiction over television shows is housed in chapter 1, Article 1 of the Fundamental Law, which states that the document's references to radio programs also apply to television shows.⁶¹ The Fundamental Law further elaborates on jurisdiction for television programs in chapter 1, Article 6, stating that Sweden's Fundamental Law governs radio programs sent by satellite that "emanate from Sweden."⁶² However, pursuant to chapter 1, Article 7 of the Fundamental Law, television shows transmitted via satellite link to Sweden, but not emanating from Sweden, have fewer protections under the national law.⁶³

57. *Id.* ¶ 35.

58. *Id.*

59. See TRYCKFRIHETSFÖRORDNINGEN [TF] [CONSTITUTION] 1:1 (Swed.); YTTRANDEFRIHETSGRUNDLAGEN [YGL] [CONSTITUTION] 1:1 (Swed.).

60. TF 1:1; YGL 1:1.

61. YGL 1:1.

62. The Fundamental Law specifically states that "in the case of [television] programmes transmitted by satellite and emanating from Sweden, the provisions of this Fundamental Law concerning [television] programmes in general apply." *Id.* 1:6; see also *Arlewin v. Sweden*, App. No. 22302/10 Eur. Ct. H.R. para. 23, HUDOC (Mar. 1, 2016), <http://hudoc.echr.coe.int/eng/?i=001-160998> (citing to Proposition [prop.] 1990/91:64 Beskatning av utomlands bosatta [government bill] (Swed.), which defines a transmission emanating from Sweden as one where "the uplink occurs in an area under Swedish jurisdiction or from abroad, following the transmission of the programme from Sweden via landline or radio links.").

63. "In the case of simultaneous and unmodified onward transmission in this country of [television] programmes under Article 6 emanating from abroad or transmitted to Sweden by satellite but not emanating from Sweden," only Articles 3-5 of chapter 1 apply. Some provisions

Most importantly, chapter 1, Article 1 of the Fundamental Law, granting Sweden jurisdiction, does not apply to these television broadcasts that “emanate from abroad,” or originate from foreign satellites and are transmitted into Sweden.⁶⁴

Chapter 6 of the Fundamental Law addresses the question of liability for freedom of expression offenses.⁶⁵ In general, liability for freedom of expression rests with the program’s responsible editor, or those acting on that editor’s behalf.⁶⁶ In the absence of a responsible editor at the time of the offense, liability shifts onto the person tasked with appointing a responsible editor or those acting in that person’s stead.⁶⁷ Chapter 10, Article 2 of the Fundamental Law, which governs radio programs and technical recordings emanating from abroad, contains an important liability defense for freedom of expression offenses.⁶⁸ While Swedish national law generally does not govern television programs broadcast via satellite from outside the country, the Swedish constitutional protection of the freedom to communicate and procure information still applies to these programs should the “communication or procurement take place in Sweden.”⁶⁹

Chapter 10, Article 2 of Sweden’s Fundamental Law has been a point of major contention for Swedish courts and foreign television broadcast companies because it creates a dichotomy between substantive and procedural applications of Swedish national law. This issue was addressed in depth in a 2002 Swedish Supreme Court case *NJA 2002 p. 314*, involving a claim of gross defamation for statements made during a television show broadcast by TV3 Ltd. from a London control center via satellite to Sweden.⁷⁰ In its 2002 ruling, the Swedish Supreme Court established a definitive test for determining whether broadcast-related activities were performed abroad or in Sweden for the Constitutional law to apply.⁷¹ Specifically, the Court determined that the applicable law and location where the case should be litigated is the location where pivotal

under chapters 3, 10, and 12 of the Fundamental Law also apply to broadcasts originating from foreign countries but are not of consequence in the noted case. YGL 1:7.

64. *Id.*

65. *Id.* 6:1.

66. *Id.*

67. *Id.* 6:2.

68. *Id.* 10:2.

69. *Id.*; see also TRYCKFRIHETSFÖRORDNINGEN [TF] [CONSTITUTION] 13:6 (Swed.).

70. See *Arlewin v. Sweden*, App. No. 22302/10 Eur. Ct. H.R., para. 28, HUDOC (Mar. 1, 2016), <http://hudoc.echr.coe.int/eng?i=001-160998>; *Nytt Juridiskt Arkiv [NJA]* [Supreme Court Reports] 2002 p. 314 Ö 3134-00 (Swed.).

71. *Arlewin*, App. No. 22302/10, paras. 30-31.

decisions relating to the broadcast's content occur.⁷² Applying this new rule, the Court found that TV3 Ltd. in London controlled the program's content as it not only transmitted the show to Sweden, but also received a copy of the program prior to the broadcast.⁷³ However, the Court importantly noted that while programs that are controlled outside of Sweden fall outside of the Fundamental Law on Freedom of Expression procedurally, this may not be true substantively, which means based on the merits of the case, the claim would have jurisdiction.⁷⁴ Under chapter 10, section 2, a defendant may be protected as an informant exercising their rights under the tenets of Sweden's freedom of expression.⁷⁵ Procedurally, a broadcast may fall outside the realm of Swedish jurisdiction as it emanates from abroad, yet substantively, a defendant may have a legitimate claim under chapter 10, Article 2, which provides protection against freedom of expression offenses.⁷⁶ As such, the Court concluded that the district court could not dismiss the claim and the proceedings regarding the suit's substantive issues must be resolved by the local courts.⁷⁷

The Swedish Supreme Court extrapolated its 2002 decision in a 2005 ruling when it determined that chapter 10, Article 2's freedom of communication applies to television broadcasts transmitted from outside Sweden and may exclude these content editors from liability.⁷⁸ The 2005 Swedish Supreme Court case involved a similar television broadcast as the 2002 ruling, where the program was transmitted to Sweden via foreign satellite.⁷⁹ While it was established that the program did not emanate from Sweden, the Court was tasked with determining whether the program's host and participants were liable under Swedish law for statements contained within the broadcast under Swedish law.⁸⁰ In order to be afforded protection under chapter 10, Article 2, the defendant had to be a host or participant in the program, the information in question had to be submitted to a receiver for publication pursuant to chapter 1, Article 2 of the Fundamental Law, and the content must have aired via a live broadcast.⁸¹ In meeting all of these requirements, the Constitutional law

72. *Id.*

73. *Id.* para. 31.

74. *Id.*

75. *Id.* para. 29.

76. *Id.* para. 31.

77. *Id.*

78. *Id.* para. 32.

79. *Id.*

80. *Id.*

81. *Id.*

protected the show's host and excluded his liability, despite the program emanating from abroad.⁸² With these two cases, the Swedish Supreme Court revealed an inherent dichotomy in Swedish law—the Court's jurisdictional limitations may procedurally exclude some programs, yet Constitutional protections may still be substantively applicable and afford Constitutional protections to these same programs.⁸³

III. COURT'S DECISION

In the noted case, the European Court of Human Rights found that the Swedish government violated Article 6 of the European Convention on Human Rights and was obligated to grant Arlewin access to the Swedish courts to litigate his defamation claim.⁸⁴ The ECHR reached this conclusion by rejecting the Swedish government's application of the AV Directive and Swedish Constitutional Law in favor of the Brussels I Regulation on jurisdiction.⁸⁵ More specifically, the Court found that Sweden was not relieved of its requirement "to provide the applicant with [legal] possibilities" despite "the fact that another State could provide the applicant with [legal] remedies."⁸⁶ First, the Court established that Article 6, section 1 of the ECHR applied to the circumstances in the complaint because it fell under a question of "civil rights and obligations."⁸⁷ Second, the Court determined that the AV Directive and Swedish Supreme Court precedent were not proper laws to determine jurisdiction over Arlewin's defamation claim but that the Brussels I Regulation dictates jurisdiction in the case.⁸⁸ Finally, the Court found the Swedish government had a *prima facie* obligation to provide Arlewin with access to the Swedish Court system under the Convention, despite Arlewin's potentially viable claim in the United Kingdom.⁸⁹ The Court also conducted a factual analysis of the ties that Arlewin's claim had in both Sweden and England to confirm that, even if the United Kingdom courts had jurisdiction, the nature of the program is almost entirely Swedish and, as such, it should fall under Swedish jurisdiction.⁹⁰ Because the domestic law inhibits the efficiency of the Brussels I

82. *Id.*

83. *See id.* paras. 31-32.

84. *See id.* para. 74.

85. *Id.*

86. *Id.* para. 59.

87. *Id.* para. 60.

88. *Id.* para. 63.

89. *Id.* para. 65.

90. *Id.* para. 72.

Regulation and the Convention, EU law prevails over this claim and national law does not apply.⁹¹

First, the Court analyzed the text of Article 6 of the ECHR and the nature of Arlewin's claim to determine that Article 6, section 1 was applicable to the complaint.⁹² Article 6 states that any matter concerning a litigant's "civil rights and obligations" falls within section 1 of the right to a fair trial.⁹³ The Court held that the defamation proceedings arising out of TV3's broadcast were covered by the scope of Article 6, section 1 as the defamation was a matter of Arlewin's "civil rights and obligations."⁹⁴ As such, any denial of Arlewin's rights would be considered a violation of Article 6, section 1.

Second, the Court rejected the Swedish government's argument that jurisdiction lay with the United Kingdom due to the AV Directive and Swedish legal precedent and instead held that the Brussels I Regulation applied to establish jurisdiction in both Sweden and the United Kingdom for Arlewin's defamation claim.⁹⁵ The Court first addressed the Government's argument which rested on the theory that because Viasat Broadcasting UK Ltd. is a company established in the United Kingdom, Viasat's head office is located in London, and editorial decisions are made in London, the AV Directive's "country of origin principle" applies, giving the United Kingdom jurisdiction.⁹⁶ The Court begins its analysis by noting that while Article 2 of the AV Directive does cover jurisdiction, its scope is limited to more specific issues of law, like whether television broadcasts comply with advertising regulations, registration, and licensing.⁹⁷ The Court goes on to explain that while jurisdiction is specifically provided for in the AV Directive, it is unlikely that the Directive regulates jurisdiction for all matters pertaining to the broadcasting of a television program.⁹⁸ The Court then directs its analysis to the *Agostini* case, which determined that jurisdiction over broadcasters in one State cannot apply generally to matters that are not included within the Television without Frontiers Directive of 1989, the legal predecessor to the AV Directive.⁹⁹ Applying this logic to the AV

91. *Id.* paras. 73-74.

92. *Id.* para. 60.

93. *Id.*; see also ECHR, *supra* note 19, art. 6.

94. *Arlewin*, App. No. 22302/10, para. 60.

95. *Id.* para. 63.

96. *Id.* para. 61.

97. *Id.* para. 62.

98. *Id.*

99. *Id.*; see also Joined Cases C-34, 35 & 36/95, *Konsumentombudsmannen (KO) v. De Agostini (Svenska) Förlag AB & TV-Shop i Sverige AB*, 1997 E.C.R. I-3843, ¶ 27.

Directive, the Court noted that Article 28, which regards damaged name and reputation, merely discusses remedies for defamation, not the proper course of proceedings and resulting claims for damages.¹⁰⁰ The Court thus held that the AV Directive does not determine the country of jurisdiction in cases involving a defamation claim and a request for damages.¹⁰¹

The Court logically follows its rejection of the AV Directive's application by holding that jurisdiction is properly regulated under EU law by the Brussels I Regulation.¹⁰² By applying Article 2 on general jurisdiction and Article 5 on specific jurisdiction, the Court found that both the United Kingdom and Sweden have proper jurisdiction over Arlewin's claim.¹⁰³ Following Article 2 on general jurisdiction, the defendant X is a Swedish national domiciled in Sweden while Viasat Broadcasting is registered and headquartered in London, meaning Viasat's domicile is in the United Kingdom.¹⁰⁴ Specific jurisdiction also applies as the harmful event leading to Arlewin's damaged reputation occurred where the TV show was broadcast in the United Kingdom, or in Sweden where the show was actually viewed.¹⁰⁵ Therefore, the Court held that both countries had viable jurisdictional authority under the Brussels I Regulation and EU law did not bar Swedish jurisdiction.¹⁰⁶

Next, the Court analyzes the relevant domestic law that the Swedish Court applied to determine that the country's obligation to honor the national legislation's procedural bars is superseded by an obligation to provide fair access to the court under EU law.¹⁰⁷ The Court begins its analysis by referring back to Article 1 of the Convention which, combined with the claim's strong connection to Sweden and the fact that the applicant and individual defendant are Swedish nationals, "created a *prima facie* obligation on the Swedish State to secure the applicant's rights, including the right of access to the court."¹⁰⁸ The Court applies the opinion in *Golder* to reiterate the major aim of Article 6, to secure an applicant's right of access to the court while remaining subject to the limitations imposed by national law, so long as the limitations do not

100. *Arlewin*, App. No. 22302/10, para. 62.

101. *Id.* para. 63.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* para. 64.

107. *Id.* para. 65.

108. *Id.*

excessively hinder or reduce the right of access on the individual.¹⁰⁹ More importantly, the Court notes that “this right presupposes that the case brought can be tried on its merits” and that “a limitation will not be compatible with [Article 6] if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.”¹¹⁰

Finally, the Court examines the relevant Swedish law including the Penal Code and the Constitutional Law, which both classify defamation as a criminal offense, with liability resting with the responsible editor of the television broadcast.¹¹¹ Per a textual analysis of the Constitution, the Court determined that the show in question does not emanate from Sweden and therefore Arlewin is not afforded the constitutional recourse provided in chapters 1-9 of the Constitution. However, the Court notes that, like the issue presented in the 2005 Swedish Supreme Court case, the program’s hosts and participants are covered by chapter 10, section 2 of Sweden’s Constitutional Law on freedom of expression, “regardless of the fact that no individual could be held responsible for the program content under Chapter 6 of the law.”¹¹² The Court’s understanding resulted in no legal recourse for Arlewin under the Constitutional Law pertaining to freedom of expression or the Swedish Penal Code, no legally responsible party for the defamation under Swedish law, as well as the court’s improper refusal to review the merits of Arlewin’s case.¹¹³

The Court supplements its understanding with a factual analysis of the case to determine that, even if the United Kingdom had jurisdiction, there are too many viable connections to Sweden to release the country from its responsibility to try the case in domestic court.¹¹⁴ The Court noted that the show was produced by Swedes for Swedish television companies, the show’s spoken language was Swedish, the anchorman was a Swedish national domiciled in the country, the show was viewable on Swedish televisions, and the show was sponsored by Swedish companies.¹¹⁵ While the program was sent via satellite from the United Kingdom, it was only viewable there by a few individuals, if at all.¹¹⁶ Furthermore, the criminal allegations that arose against the applicant

109. *Id.* paras. 66-67; *see also* Golder v. United Kingdom, App. No. 4451/70 Eur. Ct. H.R. paras. 36, 38, HUDOC (Feb. 21, 1975), <http://hudoc.echr.coe.int/eng?i=001-57496>.

110. *See Arlewin*, App. No. 22302/10, para. 67.

111. *Id.* para. 68.

112. *Id.* para. 70.

113. *Id.* para. 71.

114. *Id.* para. 72.

115. *Id.*

116. *Id.*

pertained to the applicant's criminal behavior in Sweden.¹¹⁷ Following its factual analysis, the Court held that "except for the technical detail that the broadcast was routed via the United Kingdom, the [program] and its broadcast were for all intents and purposes entirely Swedish in nature."¹¹⁸

In summation, the Court found that because the show was so connected to Sweden and because under Article 6 of the Convention, the Swedish court has an obligation to hear Arlewin's case on its merits, forcing Arlewin to litigate in the United Kingdom due to procedural bars under Swedish national law violated the ECHR.¹¹⁹ The Court concluded its opinion by stating that it was not a "reasonable and practicable alternative" for Arlewin to argue his case in the United Kingdom court and that "the legal limitations on [his access to Swedish courts] were too far-reaching and cannot, in the circumstances of the case, be considered proportionate" under Article 6 of the Convention.¹²⁰

In his concurring opinion, Judge Silvis argues that, while the majority reached the proper outcome in the noted case, jurisdiction should have been determined under Article 1 of the Convention, not Article 6 regarding fair access to the court.¹²¹ Judge Silvis remarks that the applicant is a Swedish national residing in Sweden who should be afforded the rights and freedoms to pursue a case in his own state.¹²² The overwhelming number of connections to Sweden, including the alleged harm occurring there, are enough to support a finding of jurisdiction under Article 1 of the Convention.¹²³ Furthermore, Judge Silvis addresses the issue of freedom of expression and its opposition to the interests of the applicant.¹²⁴ Judge Silvis agrees with the majority that forcing Arlewin to litigate in the United Kingdom is not a practical alternative for a Swedish national to allege "damage done to his reputation in Sweden."¹²⁵ Not only should European courts take into account the relevant facts of the case, but they should consider important determining factors of "geographical distance, legal resources and costs" when analyzing proper jurisdiction under both domestic and EU law.¹²⁶

117. *Id.*

118. *Id.*

119. *Id.* para. 73.

120. *Id.*

121. *Id.* paras. 2-4 (Silvis, J., concurring).

122. *Id.* para. 3.

123. *Id.*

124. *Id.* para. 3.

125. *Id.* para. 7.

126. *Id.*

IV. ANALYSIS

The ECtHR's decision in the noted case is sound; however, the Court's binding decision to give deference to EU in domestic lawsuits where there are jurisdictional questions may undermine the national law of individual countries and favor the litigant in debates pertaining to forum selection. While the Court's application of the Brussels I Regulation over the AV Directive and Swedish national law does correctly utilize prior ECJ case law, the effective overruling of Swedish legal procedure will have lasting consequences for cases involving transborder television broadcasts and set a binding precedent for European law.¹²⁷ The Court's decision may have negative consequences for national courts and defendants who are now potentially encouraged to litigate in the applicant's court of choice, but the decision does provide a sense of uniformity for European courts struggling with the question of jurisdiction in cases that involve two or more potential forums.¹²⁸ The decision also highlights the major push for domestic European courts to actively recognize and incorporate the ECHR and the relevant individual interests within international, private disputes.¹²⁹

In an online article analyzing the *Arlewin* decision, Athanassios Takis highlights the decision's emphasis on the Brussel's I Regulation and its impact for the right to a fair trial.¹³⁰ Specifically, Takis states that the case "underlin[es] the importance of the systematization of solutions ensured by the Regulation and the criterion of 'strong connections' of a dispute to a country as a jurisdictional basis" and that "the judgment affirms that in general the Regulation observes the right to a fair trial and draws a fair balance between diverging interests."¹³¹ By shifting the scope of jurisdiction to the "causal connection between the damage and the event from which the damage originates," there are two major effects on EU litigation.

First, the ECtHR's decision expands the ECJ's earlier decisions in *eDate*, *Shevill*, and *Kongress Agentur* by effectively submitting transborder broadcasts to the jurisdictional analysis of the Brussels I Regulation, Articles 2 and 5.¹³² These three cases showcase the ECJ's

127. See *id.* paras. 61-64 (majority opinion).

128. *Id.*

129. *Id.* paras. 66-71.

130. Athanassios Takis, *The Libel Law, EU Law and the ECHR: A Comment on Arlewin v. Sweden*, EU L. ANALYSIS: BLOG (Mar. 21, 2016), <http://eulawanalysis.blogspot.com/2016/03/libel-law-eu-law-and-echr-comment-on.html>.

131. *Id.*

132. See *Arlewin*, App. No. 22302/10, para. 67; Joined Cases C-509/09 & 161/10, *eDate Advert. GmbH v. X*; *Martinez v. MGN Ltd.*, [2011] E.C.R. I-10269, ¶ 82; Case C-68/93, *Shevill*

application of the Brussels I Regulation's "place where the harmful event occurred" jurisdictional analysis to various types of media and transborder conflicts beginning with newspapers in *Shevill*, Internet content in *eDate*, and contractual warranties in *Kongress Agentur*.¹³³ The ECtHR applies the holding in *Kongress Agentur*, that the Brussels I Regulation does not govern procedural issues, to create a new rule of thumb for European Courts in matters disputing jurisdiction.¹³⁴ Takis states that the *Arlewin* decision confirms "that a court can reject a case for reasons relating to domestic procedural rules as long as the national procedural law does not impair the effectiveness of the Brussels I Regulation."¹³⁵ By incorporating the special jurisdiction logic utilized in these three ECJ decisions, the ECtHR effectively inducted transborder television broadcast disputes and defamation claims under the umbrella of the Brussels I Regulation's special jurisdiction clause.¹³⁶

By expanding jurisdictional scope to the country in which the offense occurred, or to where the applicant has substantial ties, there is an effective loophole around jurisdictional limitations and the boundaries imposed by national law.¹³⁷ This decision also places a large amount of procedural power in the hands of the litigant, who is now essentially tasked to choose the forum most connected to the merits of his own case and interests.¹³⁸ This ability to choose also relieves claimants of the issues highlighted in Judge Silvis' concurring opinion in the *Arlewin* case, namely, that forcing a litigant to argue his or her case in an alternate forum removed from all the facts and merits proves too burdensome and denies the right of "practical and effective access to the Court" within the litigant's own jurisdiction.¹³⁹ One negative effect of this legislation is that it may put defendants at a disadvantage, forcing litigation into the forum that will most likely benefit the litigant, and may encourage forum shopping among EU Member States.

Second, the decision in the noted case encourages a sense of uniformity by establishing a binding precedent for courts struggling with a jurisdictional analysis that involves two or more Member States.¹⁴⁰ The

v. Presse Alliance SA, 1995 E.C.R. I-415, ¶ 33; Case C-365/88, *Kongress Agentur Hagen GmbH v. Zeehaghe BV*, 1990 E.C.R. I-1845, ¶ 22.

133. See Joined Cases C-509/09 & C-161/10, *eDate Advert. GmbH*, ¶ 82; Case C-68/93, *Shevill*, ¶ 33; Case C-365/88, *Kongress Agentur Hagen GmbH*, ¶ 22.

134. Takis, *supra* note 130.

135. *Id.*

136. *Arlewin*, App. No. 22302/10, paras. 61-74.

137. *Id.*

138. *Id.*

139. See *id.* para. 7 (Silvis, J. concurring); Takis, *supra* note 130.

140. *Arlewin*, App. No. 22302/10, paras. 61-74 (majority opinion).

Court's push towards a Brussels I Regulation analysis in cases with transborder disputes enables domestic courts to actively oversee litigation in a forum that benefits both parties and provides a solution in cases that bar litigation under domestic, procedural limitations.¹⁴¹ This decision also actively enforces human rights law and provides a viable solution to potential human rights problems that stem from procedural barriers and inconsistencies among national laws. The Court's ruling establishes a legislative safeguard to prevent ECHR Article 6 violations by providing domestic courts with an alternative method to procure proper jurisdiction by turning to the facts surrounding the case and the interests of the individual litigant.¹⁴²

V. CONCLUSION

The ECtHR's jurisdictional analysis of cross-border private disputes presents both positive and negative results for future EU domestic cases. *Arlewin's* case provides plaintiffs both in Sweden and in other EU Member States an effective remedy to procedural bars in situations that would otherwise be costly and difficult to litigate abroad. Furthermore, the case presents a more optimistic outlook for individual litigants by actively incorporating the ECHR into national law. However, the decision presents some difficulties for defendants who may be forced to litigate in less favorable forums under this binding interpretation of EU regulations. Negatives put aside, the *Arlewin* decision should encourage and fortify individual litigants faced with the troubling decision of whether to pursue an international, transborder dispute abroad. With the ECtHR's focus on individual rights, and its application of EU regulation to national law, individuals potentially may be able to litigate in more convenient, cost-efficient forums, where their individual interests will be better represented and rewarded.

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141. *Id.*

142. *Id.*

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