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THE EUROPEAN COURT OF HUMAN RIGHTS: PRINCIPLES OF THE INTERPRETATION OF FREEDOM OF EXPRESSION AND THEIR IMPACT ON THE LEGAL SYSTEM OF UKRAINE

Key words: freedom of expression, human rights, the legal system of Ukraine

Summary

In the article the author has identified the principles of interpretation of the freedom of expression elaborated by the European Court of Human Rights. On the basis of the obtained results the influence of juridical practice of European Court of Human Rights on the application of law in civil and criminal matters in Ukraine was presented. Special emphasis was placed on the role of freedom of mass media for the development of democratic society.

The basic instrument for the European guarantees of the protection of human rights, including freedom of speech, is the activity of the Court. According to Article 32 of the European Convention on Human Rights and Freedoms (hereinafter: the Convention) 'the jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto.' 'The court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto' (Article 34).

However, the Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken (article 35).

In the Recommendation of the Council of Europe 1506 (2001) 'Freedom of expression and information in the media in Europe' it is outlined that European states must implement the Court practice in the field of freedom of expression into

their internal legislation as well as provide with necessary qualification level of the judges.

The Law of Ukraine 'On the execution of decisions and application of the European Court of Human Rights practice' states, that 'courts while hearing the case apply the provisions of the Convention and the Court practice as the source of law' (Article 17).

During the period of its functioning, the Court heard a vast number of cases concerning the protection of the freedom of expression[1], including cases against Ukraine.[2]

The Court in its decisions gives the interpretation of the main provisions of the Convention, national state law as well as the circumstances of the case. In such a way, by exercising its judicial powers, the Court develops the case law and carries out its primordial function that lies in safeguarding the protection of human rights.

As a result, the Court has introduced a range of principles applicable to ensure the interpretation of the Convention. Concerning the freedom of expression those principles have been specified in the case 'Lyashko vs. Ukraine' (of 10.08.2006). We will examine them.

1. Freedom of expression is one of the fundamental priniciple of the democratic society, besides, it forms one of the principal prerequisites for its development and self-actualization of each individual.

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[1] Case Vides Aizsardzibas Klubs v. Latvia; case „Albert-Engelmann-Gesellschafft MBH" v. Austria"; case "A\S Diena and Ozolins v. Latvia"; case "GLAS NADEZHDA EOOD and Anatoliy Elenkov v. Bulgaria"; case "Tonsbergs Blad AS" and Haukom v. Norway"; case "Verein gegen Tierabriken Schweiz (VgT) v. Switzerland"; case "Azevedo v. Portugal"; case Amihalachioaie v. Moldova; case „Brasilier v. France"; case 'Busuioc v. Moldova'; case *"Vajnai v. Hungary";* case "Veraart v. the Netherlands"; case "Newspaper „Potik" vs. Moldova (№ 2)"; "Flux v. Moldova (№2)"; case Hrico v. Slovakia; case Grinberg v. Russia; Judgment in the Case of Goussev and Marenk v. Finland; case "Dabrovski v. Poland"; case „Dammann v. Switserland"; case *"Stoll v. Switzerland";* case „Erbakan v. Turkey"; case Ernst and Others v. Belgium; case „Giniewski v. France"; case *"July and Sarl Liberation v. France";* case "Campos Damaso v. Portugal"; case „Karman v. Russia"; case *"Katrami v. Greece";* case "Kwiecien v. Poland"; case "Klein v. Slovakia"; case „Kommersant Moldovy" v. Moldova"; case "Krasula v. Russia"; case "Kulis v. Poland"; case Cumpana and Mazare v. Romania; case "Leempoel & S.A. ED. Cine Revue v. Belgium"; case "Lindon, Otchakovsky-Laurens and July v. France"; case „Malisiewicz-Gasior v. Poland"; case "Mamer v. France"; case „Monnat v. Switserland"; case "Ormanni v. Italy"; case „Paturel v. France"; case „Raichinov v. Bolgaria"; case Steur v.the Netherlands; case „Stoll v. Switzerland"; case "Filatenko v. Russia"; case "Flux and Samson v. Moldova"; case *"Foglia v. Switzerland". The translation from English and elaboration of the abovementioned decisions was made in Lviv Laboratory of human rights National state Institute of city planning and administration M. Yu. Pryshlyak, P. M. Rabinovych, T. T. Polyanskyy, Y. I. Dudash*.

[2] Case Ukrainian Media Group v. Ukraine, N 72713/01, 29.03.2005; case «Lyashko v. Ukraine», № 21040/02, 10.08.2006; case 'Myrskyy vs. Ukraine', № 7877/03, 20.05.2010; case 'Gazeta Ukraina-Tsentr vs. Ukraine', № 16695/04, 15.07.2010; case 'Siryk vs. Ukraine' № 6428/07, 31.03.2011; case 'Editorial Board of Pravoye Delo and Shtekel vs. Ukraine', № 33014/05, 05.05.2011.

2. The mass-media play an important role in the democratic society. The mass-media have an obligation to inform the public on all matters of public interest, including issues related to activities of the judicial branch of power. However, when performing that duties, the media should not cross the defined borders, which implies among other things the necessity to protect the conflicting rights of the individuals involved, especially the right to reputation, as well as the need to preclude the disclosure of confidential information. With the responsibility on the part of the mass media to transmit reliable information corresponds the right of the public to receive it. Otherwise, the media would become unable to perform their main function of 'the watchdog' in the democratic society. Article 10 of the Convention protects not only the gist (sense) of an imparted idea or information, but also a form of its expression.

In the case *Newspaper 'Potik' vs. Moldova (№2)* of 03.07.2007, the Court took into account that the presented material was prepared by a journalist. In connection with that fact, the Court emphasized the priority position the mass-media occupy in the democratic society as far as transmitting information, ideas and opinions on political issues and affairs of general public interest. Consequently, the Court admitted that the freedom of journalistic activity involves a possibility to resort to exaggeration, or even provocation.

In the case *A\S Diena and Ozolins vs. Latvia* of 12.07.2007, the Court pointed out that the applicant which was a publisher of a well-known newspaper, and the journalist involved played a role of 'the watchdog', that is recognized as an indispensable role of the mass-media in the democratic society. Such a role requires the obligation to turn public attention to the cases of potential malpractices or abuse of law on the part of municipal or governmental authorities.

In the case *Foglia vs. Switzerland* of 06.12.2007 the Court also confirmed the specific status enjoyed by the journalists in democratic society, when exercising their functions of 'the watchdog'. Besides, the Court took the view that the freedom of press includes a right to exaggerate or even to provoke the reader.

European organizations, *inter alia* the Council of Europe, within their functions adopted a number of documents concerning issues of freedom of expression, the role of the mass-media and the protection of journalists in the course of their professional activities.

After the declaration of independence of Ukraine the whole range of documents concerning the importance of press in democratic society was enacted. The Criminal Code of Ukraine (2001) stipulates the criminal liability for an interference with the conduct of lawful professional activity of journalists (art. 171).

3. The freedom of mass media constitutes a crucial instrument availabl to the public to form and divulge public opinion on the views and actions of of politi-

cal leaders. In the interpretation of the Convention the freedom of political debate forms the core of the notion 'democratic society'. The margin of a licit criticism directed to politicians is broader than in the case when its target private individuals. Unlike private individuals, politicians, when assuming their responsibilities, become exposed to the legitimate attention on the part of the society, in particular on the part of journalists, drawn to every word and action related to their official functions. That is why they are expected to accept a higher level of tolerance and forbearance.

In the decision of 12. 07. 2007 in the case *A\S Diena and Osolins vs. Latvia* the Court stated that the articles in question affected Mr. S as a public person. The Court pointed out that the strict lines for a licit criticism in such a case are broader in comparison to negative pronouncements on a private individual. Concluding, the abovementioned politician should have been more tolerant to the respective comments.

In the decision of 07.11.2006 (case *Mammer vs. France*) the Court reiterated its previous conclusion that the persons taking part in the debates concerning matters of general interest have the right to irrepressible (to some degree) expressions.

In the decision of 11.04.2006 (case *Brasilie vs. France*) the Court, when assessing the character of expressions, stated that they undoubtedly had a serious negative hue of animosity. Nevertheless, the respective observations were connected to the matter of holding the elections, and therefore had a substantial significance for the proper functioning of the democracy in general. The Court emphasized that the freedom of expression obtains a special meaning in the context of political debates. The Court summed up that the political commentaries should not be restricted without weighty causes.

The statements, which are referred to in the case, were directed against an individual who was a Member of Parliament, the major of Paris and simultaneously the major of the 5th District of Paris. Since he is an outstanding figure in the political sphere, he must be a target of a continuous attention on the part of the mass media. The Court took into consideration that the candidates to the official post have to be conceded an opportunity to express their views on whether the elections have been conducted in conformity to the relevant regulations. Furthermore, in the course of the electoral campaign the higher sharpness of commentaries is acceptable than it is the case of pronouncements in different contexts.

In the decision of 20.07.2004 (case *Griko vs. Slovakia*) the Court pointed out that the level of the acceptable criticism regarding a judge who is engaged in political activity should be broader than it would be the case of criticism directed to an ordinary judge. The Court emphasized that Article 10 of the Convention protects both the offensive or shocking views and exaggeration.

In the decision of 21.07.2005 (case Grinberg vs. Russia) it is stated that the summary of the Court was influenced by the fact that the relevant allegations were made in connection to the of freedom of mass media in Ulianovskiy region, a question that undoubtedly is to be qualified as a matter of public interest. The article of the applicant covered the criticism directed to the governor of the region, elected by its residents. In other words, the journalistic evaluation referred to the professional politician. The Court reiterated that levels of acceptable criticism towards the politician are higher than those directed towards a private individual. The facts that formed the evidence for such an evaluation were indisputable, even if the applicant expressed his views in an offensive manner.

4. Level of acceptable criticism could be higher when it is directed to state officials who exercise their powers, than those directed to private individuals. However, it cannot be presumed that public servants thoroughly assess their each and every word and action as it is done by the politicians; accordingly, in estimating their activity they should be treated in the same way. The officials must be endowed with public trust provided that they exercise their responsibilities properly, in compliance with principles of transparency and appraisal. That is why at the time of the performance of their duties the necessity to protect them from offensive words and bad-mouthed speeches may arise.

In the decision of 20.04.2006 (case *Raychinov vs. Bulgary*) the Court claimed that the volume of criticism, directed against an official, is much broader than that directed against private individuals. The Court drew attention to the fact, that the comments of the applicant were said before a small audience, i.e. at a closed session. Therefore, the commentaries of the applicant on no account could prevent or threaten the performance by the official concerned of their duties.

5. A clear distinction between assertion about facts and evaluative judgements should be made. While the occurrence of the alleged facts is verifiable, the credibility of evaluative judgements cannot be proven. The requirement to prove the credibility of evaluative judgements would be impossible to meet. Such a demand violates the freedom of thought by itself, which appears to be the basic legal element, comprised in Article 10 of the Convention.

In the decision of 19.01.2006 (case *Albert-Engelmann-Gesellschafft MBH' vs. Austria)* the Court proclaimed that credibility of evaluative judgements is impossible to prove. However, even if observations (assertions) amounted to evaluative judgements, it should be still ascertained whether they are founded on the sufficient facts. The evaluative judgements which do not have a factual ground may be considered excessive.

In the decision of 27.03.2008 (case *Azevedo vs. Potrugal*) the Court ruled that the conviction of the applicant for defamation connected to his critical remarks

included in an academic work amounted to the violation of Article 10 of the Convention. At the same time the commentaries of the applicant were qualified as evaluative judgements, which means that they should be exempted from evidence.

In the case of 21.12.2004 (case *Busuiok vs. Moldova*) the Court pointed out that the expressions referring to S. M. were not assertions of facts but the evaluative judgements.

In the decision of 21.07.2005 (case *Grinberg vs. Russia*) the Court repeated the conclusions reached in previous cases that the existence of facts can be proven, while the credibility of evaluative judgements cannot be subject to evidence. The demand to prove the credibility of evaluative judgements was impossible to satisfy. Such a requirement constituted the violation of the freedom of thought – the fundamental part of law, guaranteed in the Article 10 of the Convention.

The Court admitted that the contested allegation was a paradigmatic example of evaluative judgements. The Court decision concerning the liability of the applicant for injury to reputation was based on the fact that the journalist was incapable of proving that there was a lack of shame.

In the decision of 06.12.2007 (case *Fohlia vs. Switzerland*) the Court found the violation of Article 10 of the Convention which resulted in the conviction of the applicant for badmouthing that supposedly challenged moral qualities and professional skills of a judge. The applicant used in his comment the word "*forswear" (break an oath) and* the word "*karagiozis*" that stands for the comic marionette in the Greek puppet theatre, which conveys a negative meaning and is employed to communicate that the depicted person is funny or that he or she is a clown. The Court pointed out that the words used by the applicant were mere evaluative judgements that do not have to be proved. However, Greek courts did not take that into account and adopted the view that particularly these words injured honour and dignity of the judge in question.

It should be noted that the principle according to which we are able to make a clear distinction between the assertions (allegations) of facts and evaluative judgements can also be also traced in the legislative activity and application of law in Ukraine.

In the Civil Code of Ukraine there is a provision that sets forth that 'an individual has the right to respond and also to dispose of such an information that violates his personal non-property rights as a result of unreliable information divulged about him or (and) his family members' (Article 277, part 1). In the Court Plenum Decree of 27.02.2009 №1 on the court practice in matters concerning the protection of honour and dignity of an individual as well as of the business reputation of an individual and a legal entity there is a rule pursuant to which in case hearings courts are obliged to apply precisely and unequivocally the provisions of the Constitution

of Ukraine, the Civil Code of Ukraine, Acts of 16.11.1992 on Press in Ukraine and the Act of 02.10.1992 on Information, as well as other legislative acts which regulate the defined public relations.

Furthermore, taking into consideration the provision of Article 9 of the Constitution of Ukraine and the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 alongside with its Protocols N 1, 2, 4, 7, 11 in connection with the adoption of the Act on the Execution of Decisions and Application of the Practice of the European Court of Human Rights, the courts are obliged to apply the provisions of the Convention and judgments of the Court as valid source of law.

Besides, the Supreme Court of Ukraine Plenum stated that considering a question of whether the divulged information was untrustworthy courts should define the character of such information and make a distinction of whether it is an allegation of facts or an evaluative judgement. According to Article 471 part 2 of the Act on Information, the evaluative judgements are defined as pronouncements that do not comprise factual data, but rather convey criticism and assessment of actions. A decisive factor is the usage of the linguistic tools such as hyperbole, allegory or satire. However, offensive and defamatory acts of expression are not covered by this definition.

Evaluative judgements cannot be challenged and examined as to their credibility; according to Article 277 of the Civil Code evaluative judgements, thoughts, beliefs, critical assessment of certain facts which, despite being an expression of a subjective thought and view of a defendant, cannot be examined as to their correspondence to the facts (in comparison with the examination of facts) and therefore are not a subject-matter of judicial protection.

6. The type and severity of punishments are also the factors which should be taken into account while making an assessment of proportionality of an interference with the freedom of expression.

In the decision of 20.04.2006 (case *Raychinov vs. Bulgary*) the Court pointed out that whoever has the power occupies a dominant position in the society. Such a position obliges them to limit themselves in resorting to criminal action with a view to defend their own reputation. This statement refers mostly to those cases, in which 'softer' measures are available that could be used as a reaction to unjustified criticism.

In the decision of 06.12.2007 (case *Foglia vs. Switzerland*) the Court, having recalled that the city court convicted Mr. Katrami, stated that such a punishment cannot be considered as a proportional limitation of the right to freedom of expression exercised by the journalist.

Moreover, the judge mentioned in the article written by the applicant could have protected his reputation by suing in civil proceedings. The Court adopted the view that appropriate balance between the applied restrictions to the expression of views and interests of the local court was not struck. The Court did not accept the argument that the imposition of a criminal penalty on Mr. Katrami was necessary in order to protect the reputation of the judge and guarantee unhampered administering of justice.

A positive legal phenomenon is also the fact that Ukraine has decriminalized a some types of conduct connected to the freedom of expression, This measure corresponds to the position of the European Court of Human Rights[3]. The Criminal Code of Ukraine (2001), in contrast to the Criminal Code of Ukraine (1960), does not provide the criminal liability for such actions. However, it still penalizes the offence or discretion of state bodies and NGOs (art. 66-1); defamation (art. 125), insult (art. 126), pursuit of individuals for criticism (art. 134-1), contempt of a judge (176-3), insult of the representative of a state authority and an insult of a representative of the public who protects public order (art. 189); insult of the servant of a body dealing with internal affairs, insult of a member of public bodies for the protection of public order, insult of a military servant (art. 189-1); insult of the employee by the employer and vice averse (art. 237).

Legal interpretation developed in the course of the judicial activity of the Court concerning the protection of the freedom of expression and other human rights exert a considerable influence on the legal system of Ukraine. As it has already been mentioned, the Act on the Execution of Decisions and Application of the Practice of the European Court of Human Rights and the Supreme Court Plenum Decree of 27.02.2009 №1 on the Court Practice in Matters concerning the Protection of Honour and Dignity of an Individual and the Business Reputation of an Individual and of a Legal Entity sets out a rule that the decisions of the Court are the source of law, which means that in cases concerning the protection of freedom of expression the domestic courts of Ukraine are obliged to apply the provisions of the Convention and the principles elaborated by the Court.

It should be emphasized that the first case in which the Convention was applied in Ukraine concerned the freedom of expression, and the first judge who applied it was Vasyl Paliyuk. In 2000 the panel of judges in civil department of the Mykolaiv Regional Court (nowadays – the Court of Appeal) was the first judicial body in Ukraine that applied the provision of Article 10 of the Convention and the

[3] The decision of Zhovtnevyy court, city of Kharkiv from 29.06.2011 (case № 2-628) – Web source: http://reyestr.court.gov.ua.; The decision of Chortkivskyy court, Ternopil region from 13.12.2010 (case № 2 – 1461/10) – Web source: http://reyestr.court.gov.ua.; The decision of Solomyanskoho court, city of Kyiv from 10.04.2009 (case № 2-470/2009) - Web source: http://reyestr.court.gov.ua

principles established in the decision of the Court in the case *Lingens vs. Austria* (1986). This has been positively aknowledged by the conclusion of the European Council monitoring committee. Afterwards, in 2001 the court of appeal under the joint project of Ministry of Justice of Ukraine and Organization of Security and Cooperation in Europe (OSCE) became an 'experimental' court for the enforcement of the provisions of the Convention in Ukrainian court practice. It should also be noted that the positive practice of the court of appeal was mentioned in the decisions 'Ukrainian press group' vs. Ukraine' (2005) and 'Yefimenko vs. Ukraine' (2006)[4].

Summing up, we arrive at the conclusion that the Court, when acting for the benefit of the protection of freedom of expression is guided by the following principles: Freedom of expression constitutes one of the foundations of democratic society. Mass media play a irreplaceable role in forming political opinions and views by the citizens. Levels of acceptable criticism towards politicians, public leaders and, under certain circumstances, towards public servants (officials) are higher than it the case of criticism directed towards individuals. Tthe credibility of evaluative judgements cannot be proved. The type and severity of punishment are the factors which should be taken into account while assessing the proportionality of an interference with the right to freedom of expression. Legal interpretation as well as legal enforcement activity of the Court concerning the protection of freedom of expression and other rights of the subjects of law has a substantial impact on the legal system of and in consequence on judicial practice in Ukraine.

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ZASADY INTERPRETACJI WOLNOŚCI WYPOWIEDZI W ORZECZNICTWIE EUROPEJSKIEGO TRYBUNAŁU PRAW CZŁOWIEKA I ICH WPŁYW NA SYSTEM PRAWNY UKRAINY

Słowa kluczowe: wolność wypowiedzi, prawa człowieka, system prawny Ukrainy

Streszczenie

Artykuł omawia zasady interpretacji wolności wypowiedzi wypracowane przez Europejski Trybunał Praw Człowieka oraz ich wpływ na stosowanie prawa i praktykę orzeczniczą w sprawach cywilnych i karnych na Ukrainie. W szczególności omówiono znaczenie wolności mass mediów dla społeczeństwa demokratycznego.