

SECTION 1.

NEW AGE OF MODERN LEGAL METHODOLOGY IN EUROPEAN JURISPRUDENCE

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NEW DIMENSION OF THE CASE-LAW WITHIN THE ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FREEDOM OF EXPRESSION (DELFI AS V. ESTONIA)

Key words: *European Convention, case-law, human rights.*

Some aspects of the theory. Article 10 guarantees freedom of expression [1; 2; 3], one of the cardinal rights guaranteed under the Convention. The marked importance attached to this right is readily explicable by its close linkage to democracy's political process and its role as an indispensable vehicle for minorities, political opponents, and civil society to foster public debates. Such a constitutional underpinning of freedom of expression lends succour to the consistent assertion of the Court that interference with this right can be justified only by "imperative necessities", and that exceptions to this right must be interpreted narrowly [4; 5; 6, p. 592].

Positive obligations. The Court has departed from its earlier approach of refraining from formulating a general theory on positive obligations and on the extent to which the Convention can be applied to relations between private persons [7]. It has gradually moved to the stance not dissimilar to that adopted in the context of Article 8. Nowadays, its consistent approach is to recognize that states must ensure that private individuals can effectively exercise their right of speech and communication among themselves [8; 9; 10; 11; 12]. There is full recognition that Article 10 rights apply equally to the relations between employers and employees that are governed by private law [6, p. 596; 8; 13].

Incitement to violence. When confronted with remarks liable to incite to violence against an individual, a public official, or the population, the Court's methodology is, as in cases of other hate speech, to recognize the generous protection of the expression rights under the first paragraph and to analyse the encroachments under the second paragraph. However, the Court has repeatedly stated "where ... remarks constitute an incitement to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression" [14; 15].

Even if the impugned words fail to reach the threshold of incitement to violence, they may be curtailed to prevent serious public disturbance and inter-ethnic hatred in a violate region [16; 17]. However, that the interferences with free speech must be subject to the Court's rigorous review can be borne out in some distinct ways. First, the Court has ascertained specific elements such as the position of the applicant, the tone, form, addressees of the contested statement [17; 18; 19], and its impact on the public [20]. Still, when publishing or broadcasting an interview with representatives of organizations that espouse violence, media professionals must assume the 'duties and responsibilities' not to disseminate hate speech or glorification of violence [6, p. 605-607; 14; 21; 22; 23; 24; 25, p. 429-432].

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The applicant company alleged that its freedom of expression had been violated, in breach of Article 10 of the Convention, by the fact that it had been held liable for the third-party comments posted on its Internet news portal.

The applicant company is the owner of Delfi, an Internet news portal that published up to 330 news articles a day at the time of the lodging of the application. Delfi is one of the largest news portals on the Internet in Estonia.

There was a system of notice-and-take-down in place: any reader could mark a comment as leim (Estonian for an insulting or mocking message or a message inciting hatred on the Internet) and the comment was removed expeditiously. Furthermore, comments that included certain stems of obscene words were automatically deleted. In addition, a victim of a defamatory comment could directly notify the applicant company, in which case the comment was removed immediately.

The applicant company had made efforts to advise users that the comments did not reflect its own opinion and that the authors of comments were responsible for their content.

On 24 January 2006 the applicant company published an article on the Delfi portal under the heading "SLK Destroyed Planned Ice Road". Ice roads are public roads over the frozen sea which are open between the Estonian mainland and some islands in winter. SLK provides a public ferry transport service between the mainland and certain islands. At the material time, L. was a member of the supervisory board of SLK and the company's sole or majority shareholder.

On 24 and 25 January 2006 the article attracted 185 comments. About twenty of them contained personal threats and offensive language directed at L.

On 9 March 2006 L.'s lawyers requested the applicant company to remove the offensive comments and claimed 500,000 Estonian kroons (EEK) (approximately 32,000 euros (EUR)) in compensation for nonpecuniary damage.

On the same day the offensive comments were removed by the applicant company. On 23 March 2006 the applicant company responded to the request from L.'s lawyers. It informed L. that the comments had been removed under the notice-and-take-down obligation, and refused the claim for damages.

The court concluded that freedom of expression did not extend to protection of the comments concerned and that L.'s personality rights had been violated. L. was awarded EEK 5,000 (EUR 320) in compensation for non-pecuniary damage.

The Supreme Court upheld this judgement while partly modifying the reasoning.

Merits. Alleged violation of Article 10 of the Convention

The Court considered that the case concerns the “duties and responsibilities” of Internet news portals, under Article 10 § 2 of the Convention, when they provide for economic purposes a platform for user-generated comments on previously published content and some users – whether identified or anonymous – engage in clearly unlawful speech, which infringes the personality rights of others and amounts to hate speech and incitement to violence against them. The Court emphasized that the present case relates to a large professionally managed Internet news portal run on a commercial basis which published news articles of its own and invited its readers to comment on them.

The Court noted that the applicant company's news portal was one of the biggest Internet media publications in the country; it had a wide readership and there was a known public concern regarding the controversial nature of the comments it attracted.

Moreover, the impugned comments in the present case, as assessed by the Supreme Court, mainly constituted hate speech and speech that directly advocated acts of violence. Thus, the establishment of their unlawful nature did not require any linguistic or legal analysis since the remarks were on their face manifestly unlawful.

The applicant company complained that holding it liable for the comments posted by the readers of its Internet news portal infringed its freedom of expression as provided for in Article 10 of the Convention.

Such an interference with the applicant company's right to freedom of expression must be “prescribed by law”, have one or more legitimate aims in the light of paragraph 2 of Article 10, and be “necessary in a democratic society”.

Lawfulness. The Court considers that its task is confined to determining whether the methods adopted and the effects they entail are in conformity with the Convention. Thus, the Court confines itself to examining whether the Supreme Court's application of the general provisions of the Obligations Act to the applicant company's situation was foreseeable for the purposes of Article 10 § 2 of the Convention.

The Court is satisfied on the facts of this case that the provisions of the Constitution, the Civil Code (General Principles) Act and the Obligations Act, along with the relevant case-law, made it foreseeable that a media publisher running an Internet news portal for an economic purpose could, in principle, be held liable under domestic law for the uploading of clearly unlawful comments, of the type in issue in the present case, on its news portal.

The Court accordingly finds that, as a professional publisher, the applicant company should have been familiar with the legislation and

case law, and could also have sought legal advice. The Court observes in this context that the Delfi news portal is one of the largest in Estonia. Public concern had already been expressed before the publication of the comments in the present case and the Minister of Justice had noted that victims of insults could bring a suit against Delfi and claim damages. Thus, the Court considers that the applicant company was in a position to assess the risks related to its activities and that it must have been able to foresee, to a reasonable degree, the consequences which these could entail. It therefore concludes that the interference in issue was “prescribed by law” within the meaning of the second paragraph of Article 10 of the Convention.

Legitimate aim. The parties before the Grand Chamber did not dispute that the restriction of the applicant company’s freedom of expression had pursued the legitimate aim of protecting the reputation and rights of others. The Court sees no reason to hold otherwise.

Necessary in a democratic society. The Court has previously held that in the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public’s access to news and facilitating the dissemination of information in general. At the same time, the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press.

Elements in the assessment of proportionality. The Court observes that, in order to resolve the question whether the domestic courts’ decisions holding the applicant company liable for the comments posted by third parties were in breach of its freedom of expression, the Chamber identified the following aspects as relevant for its analysis:

- 1) the context of the comments,
- 2) the measures applied by the applicant company in order to prevent or remove defamatory comments,
- 3) the liability of the actual authors of the comments as an alternative to the applicant company’s liability,
- 4) the consequences of the domestic proceedings for the applicant company.

1. The context of the comments

As regards the context of the comments, the Court accepts that the Supreme Court concluded that the applicant company had an economic interest in the posting of comments. In the view of the Supreme Court, the fact that the applicant company was not the author of the comments did not mean that it had no control over the comments section.

In sum, the Court considers that it was sufficiently established by the Supreme Court that the applicant company’s involvement in making public the comments on its news articles on the Delfi news portal went beyond that of a passive, purely technical service provider. The Court therefore finds that the Supreme Court based its reasoning on this issue on grounds that were relevant for the purposes of Article 10 of the Convention.

2. Liability of the authors of the comments

In connection with the question whether the liability of the actual authors of the comments could serve as a sensible alternative to the liability of the Internet news portal in a case like the present one, the Court is mindful of the interest of Internet users in not disclosing their identity. Anonymity has long been a means of avoiding reprisals or unwanted attention. As such, it is capable of promoting the free flow of ideas and information in an important manner, including, notably, on the Internet. At the same time, the Court does not lose sight of the ease, scope and speed of the dissemination of information on the Internet, and the persistence of the information once disclosed, which may considerably aggravate the effects of unlawful speech on the Internet compared to traditional media.

According to the Supreme Court's judgment in the present case, the injured person had the choice of bringing a claim against the applicant company or the authors of the comments. The Court considers that the uncertain effectiveness of measures allowing the identity of the authors of the comments to be established, coupled with the lack of instruments put in place by the applicant company for the same purpose with a view to making it possible for a victim of hate speech to bring a claim effectively against the authors of the comments, are factors that support a finding that the Supreme Court based its judgment on relevant and sufficient grounds. The Court also refers, in this context, to the judgment in *Krone Verlag GmbH & Co. KG v. Austria* (no. 4) (no. 72331/01, § 32, 9 November 2006) in which it found that shifting the risk of the defamed person obtaining redress in defamation proceedings to the media company, which was usually in a better financial position than the defamer, was not as such a disproportionate interference with the media company's right to freedom of expression.

3. Measures taken by the applicant company

The Court considers that, when assessing the grounds upon which the Supreme Court relied in its judgment entailing an interference with the applicant company's Convention rights, there is nothing to suggest that the national court intended to restrict its rights to a greater extent than that required to achieve the aim pursued. On this basis, and having regard to the freedom to impart information as enshrined in Article 10, the Court will thus proceed on the assumption that the Supreme Court's judgment must be understood to mean that had the applicant company removed the comments without delay after publication, this would have sufficed for it to escape liability under domestic law.

Consequently, and taking account of the above findings to the effect that the applicant company must be considered to have exercised a substantial degree of control over the comments published on its portal, the Court does not consider that the imposition on the applicant company of an obligation to remove from its website, without delay after publication, comments that amounted to hate speech and incitements to violence, and were thus clearly unlawful on their face, amounted, in principle, to a disproportionate interference with its freedom of expression.

The portal had an automatic system of deletion of comments based on stems of certain vulgar words and it had a notice-and-take-down system in place, whereby anyone could notify it of an inappropriate comment by simply clicking on a button designated for that purpose to bring it to the attention of the portal administrators. In addition, on some occasions the administrators removed inappropriate comments on their own initiative.

Thus, the Court notes that the applicant company cannot be said to have wholly neglected its duty to avoid causing harm to third parties. Nevertheless, and more importantly, the automatic word-based filter used by the applicant company failed to filter out odious hate speech and speech inciting violence posted by readers and thus limited its ability to expeditiously remove the offending comments. The Court reiterates that the majority of the words and expressions in question did not include sophisticated metaphors or contain hidden meanings or subtle threats. They were manifest expressions of hatred and blatant threats to the physical integrity of L. Thus, even if the automatic word-based filter may have been useful in some instances, the facts of the present case demonstrate that it was insufficient for detecting comments whose content did not constitute protected speech under Article 10 of the Convention. The Court notes that as a consequence of this failure of the filtering mechanism these clearly unlawful comments remained online for six weeks.

Having regard to the fact that there are ample opportunities for anyone to make his or her voice heard on the Internet, the Court considers that a large news portal's obligation to take effective measures to limit the dissemination of hate speech and speech inciting violence – the issue in the present case – can by no means be equated to “private censorship”.

Moreover, depending on the circumstances, there may be no identifiable individual victim, for example in some cases of hate speech directed against a group of persons or speech directly inciting violence of the type manifested in several of the comments in the present case. In cases where an individual victim exists, he or she may be prevented from notifying an Internet service provider of the alleged violation of his or her rights. The Court attaches weight to the consideration that the ability of a potential victim of hate speech to continuously monitor the Internet is more limited than the ability of a large commercial Internet news portal to prevent or rapidly remove such comments.

Lastly, the Court observes that the applicant company has argued that the Court should have due regard to the notice-and-take-down system that it had introduced. If accompanied by effective procedures allowing for rapid response, this system can in the Court's view function in many cases as an appropriate tool for balancing the rights and interests of all those involved. However, in cases such as the present one, where third-party user comments are in the form of hate speech and direct threats to the physical integrity of individuals, as understood in the Court's case-law, the Court considers, as stated above, that the rights and interests of others and of society as a whole may entitle Contracting States to impose liability on Internet news portals, without contravening Article 10 of the Convention, if they fail to take

measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties.

4. Consequences for the applicant company

Finally, turning to the question of consequences of the domestic proceedings for the applicant company, the Court notes that it was obliged to pay the injured person the equivalent of EUR 320 in compensation for non-pecuniary damage. It agrees with the finding of the Chamber that this sum can by no means be considered disproportionate to the breach established by the domestic courts.

The Court also observes that it does not appear that the applicant company had to change its business model as a result of the domestic proceedings. According to the information available, the Delfi news portal has continued to be one of Estonia's largest Internet publications and by far the most popular for posting comments, the number of which has continued to increase. Anonymous comments – now existing alongside the possibility of posting registered comments, which are displayed to readers first – are still predominant and the applicant company has set up a team of moderators carrying out follow-up moderation of comments posted on the portal. In these circumstances, the Court cannot conclude that the interference with the applicant company's freedom of expression was disproportionate on that account either.

Conclusion. The Court finds that the domestic courts' imposition of liability on the applicant company was based on relevant and sufficient grounds, having regard to the margin of appreciation afforded to the respondent State. Therefore, the measure did not constitute a disproportionate restriction on the applicant company's right to freedom of expression.

Accordingly, there has been no violation of Article 10 of the Convention [26].

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Judge in respect of Azerbaijan

THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN THE EXECUTION OF ITS JUDGMENTS: NEW APPROACHES

Key words: *European Court of Human Rights, judgment of the Court, execution of judgments, indication of specific measures.*

Under Article 46(1) of the European Convention on Human Rights, “the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties”. In other words, a State that has violated the Convention must fully and timely execute the judgment of the Court. As established under general international law, a judgment of the Court finding a violation of the Convention imposes on the respondent State three types of obligations: 1) to take steps to put an end to the violation, 2) to make reparation to the victim for the violation in order to restore, as far as possible, the situation before the breach (*restitutio in integrum*), 3) to adopt general measures to prevent future similar violations (guarantees of non-repetition). Thus, the obligation of the respondent State to execute a Court’s