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Freedom of expression under the criminal law of Ukraine and Poland

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Freedom of expression under the criminal law of Ukraine and Poland

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The publication is devoted to the criminal law protection of freedom of expression as one of the fundamental freedoms recognized by democratic societies. It consistently reveals the issues of legal regulation of freedom of expression, the limits of its implementation, including those established by the criminal law of Ukraine and Poland. Particular attention is paid to finding an adequate balance between criminal liability for abuse of freedom of expression, as well as criminal law protection the freedom of expression in these states. As a result, useful considerations are given on the public evaluation of the freedom of expression realisation in Ukraine and Poland, as well as conclusions are drawn about the main differences and common features of legal regulation.

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Introduction

The notion of freedom of expression became the matter of utmost importance and concern in Ukraine back in 1991, when it declared itself independent from the Soviet Union, of which Ukraine had formerly been a part. In any contemporary State, the freedom of expression is crucial, as it contributes greatly to the ability of citizens to effectively exercise their right to self-governance, and is paramount to the personal development of all individuals, as well as ensuring and protecting their natural rights. Furthermore, the right to freedom of expression acts as a safeguard against discriminatory propaganda and government censorship, thus providing for a more democratic society, in which human rights are respected and the political pluralism is ensured.

This comparative study aims to evaluate different ways of developing the right to freedom of expression in its criminal law aspect in Poland and Ukraine.

Consistent presentation of the material from the point of view of the law of Poland and Ukraine – this structure of the study seemed to be the most interesting and receptive for comparison. Therefore, the reader can perceive and personally draw conclusions about the state of legal regulation of these relationships.

The Ukrainian report

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1. How is the freedom of expression regulated in your national legislation?

The freedom of delivering one's thoughts and opinions to the public without the fear of being punished or charged a penalty is one of the fundamental human rights, which is de facto known as freedom of expression. Being a natural and inalienable right, the right to freedom of expression is enacted and ensured by the legislature of all civilised societies and democratic States and is protected by a variety of legal instruments, including specific laws, coercive measures of a State towards offenders and by fair justice.

Considering a crucial role the right to freedom of expression plays in a contemporary democratic society, it has been recognised and enshrined in several international documents, such as the Universal Declaration of Human Rights (UDHR)[1], the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[2] and the International Covenant on Civil and Political Rights (ICCPR)[3].

Accordingly, Art. 19 of the International Covenant on Civil and Political Rights provides that everyone has the right to hold any kind of opinions or views, including political, religious, etc., without interference with the freedom of expression, including the freedom to seek, receive, collect and spread any information, regardless of the national borders, orally, in writing, in print or in the form of art, or by any other means they deem sufficient.

Art. 9 of the Constitution of Ukraine provides that international treaties in force previously approved by the *Verkhovna Rada* (Supreme Council) are the part of the national legislation of Ukraine[4]. Hence, by becoming a signatory to the international human rights treaties and conventions, Ukraine has

[1] Universal Declaration of Human Rights 1948 <https://www.un.org/en/universal-declaration-human-rights/> accessed 7 August 2020, art 19 (UDHR).

[2] European Convention for the Protection of Human Rights and Fundamental Freedoms 1953 <https://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 7 August 2020, art 10 (ECHR).

[3] International Covenant on Civil and Political Rights 1966 <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> accessed August 7 2020, art 19 (ICCPR).

[4] Constitution of Ukraine 1996 <https://zakon.rada.gov.ua/laws/show/254к/96-вр/ed20200101> accessed 1 June 2020, art 9, §1 (Constitution of Ukraine).

undertaken to guarantee and protect the rights and freedoms of individuals, in particular the freedom of expression and press, within its territory.

At the national level, the right to freedom of expression of an individual is enshrined in Arts. 34–36, 39 and 54 of the Constitution of Ukraine. The freedom of thought and speech and the right to freely express one's views and beliefs[1], as well as the right to collect, store and share information[2], is guaranteed by Art. 34 of the Constitution, which is a verbatim adoption of Art. 19 of the ICCPR. The rights to freedom of religion and association in political parties and non-governmental organisations are encompassed in Arts. 35[3] and 36[4] respectively. Additionally, Art. 54 provides for the freedom of creation (literary, artistic, scientific, technical, etc.)[5].

It is noteworthy that Art. 34 of the Constitution provides for both freedom of speech in its broadest sense (freedom of speech for the general public) and freedom of press as a narrower concept, since it presupposes the rights and freedoms of the specified subject – the media – and the press in particular.

The Laws of Ukraine 'On Information', 'On Printed Mass Media (Press) in Ukraine' and 'On Access to Public Information', together with the Constitution of Ukraine and the Civil Code, are the leading legislative instruments governing the right to freedom of expression and freedom of speech as its component.

Pursuant to Art. 302 of the Civil Code of Ukraine, all individuals enjoy the right to freely collect, store, use and share information[6]. However, collecting, storing, using and sharing information about private persons is prohibited unless such actions have been approved by the person concerned[7]. Prior to sharing any kind of information, an individual is obliged to make sure that the information is truthful and trustworthy[8], safe for the occasions when it

[1] Constitution of Ukraine 1996 <https://zakon.rada.gov.ua/laws/show/254к/96-вр/ed20200101> accessed 1 June 2020, art 9, §1 (Constitution of Ukraine). art 34, §1.

[2] ibid, art 34, §2.

[3] ibid, art 35, §1.

[4] ibid, art 36, §1.

[5] ibid, art 54, §1.

[6] The Civil Code of Ukraine 2003 №435-IV <https://zakon.rada.gov.ua/laws/show/435–15> accessed 21 March 2020, art 302 (Civil Code of Ukraine).

[7] ibid, art 302, §1(2).

[8] ibid, art 302, §2(1).

has been obtained from an official source (State bodies, governmental agencies, local authorities, etc.)[1] Protection of personal data collected by means of automatic processing is governed by the Strasbourg Convention, which was adopted in 2010[2].

The Law of Ukraine 'On Information' defines a general direction of State policy regarding information, with the equal right of every individual and organisation to access and exchange information without any restrictions at its core[3]. The Law also defines 'mass information' as the kind of information that can reach an unlimited number of individuals[4] and, consequently, the 'mass media' as an instrument, intended for the unrestrained exchange of printed or audio-visual information among members of the general public[5].

Art. 2 of the Law of Ukraine 'On Printed Mass Media (Press) in Ukraine' establishes that the freedom of speech and expression in printed form is guaranteed by the Constitution of Ukraine and reinforces the right of everyone within the borders of Ukraine to freely and independently search, receive, record, store, use and share any information through the printed media[6].

In addition to the recognition of the principles of freedom of expression and, consequently, press by the Ukrainian legislature, such freedoms are further protected by the prohibition of censorship and any interference in the activities of the media and its representatives, as pertains to Art. 15 of the Constitution[7].

Interfering with the professional activity of journalists, gaining control over the information published, in particular with an intention of spreading

[1] The Civil Code of Ukraine 2003 №435-IV <https://zakon.rada.gov.ua/laws/show/435–15> accessed 21 March 2020, art 302, §2(2).

[2] Convention for the Protection of Individuals With Regard to Automatic Processing of Personal Data 1981 №994_326 <https://zakon.rada.gov.ua/laws/show/994_326> accessed 7 August 2020, art 7 (Strasbourg Convention).

[3] The Law of Ukraine 'On Information' 1992 №2657-XII <https://zakon.rada.gov.ua/laws/show/2657–12> accessed 29 May 2020, art 3, §1(1) (Law 'On Information').

[4] ibid, art 22, §1.

[5] ibid, art 22, §2.

[6] The Law of Ukraine 'On Printed Mass Media (Press)' 1993 №2782-XII <https://zakon.rada.gov.ua/laws/show/2782–12> accessed 30 May 2020, art 2, §1 (Law 'On Printed Mass Media (Press)').

[7] Constitution of Ukraine, art 15, §3.

or preventing certain information from spreading, as well as concealing information that may constitute a matter of public interest or concern is strictly prohibited[1]. Prohibiting coverage of sensitive topics, criticism of subjects of authority or political figures[2], any wilful obstruction of the lawful professional activity of journalists and/or persecution of journalists for performing their professional duties is punishable under the law of Ukraine[3]. In the case № 761/37180/17 the *Verkhovnyi Sud* (the Supreme Court) of Ukraine has made a clear distinction between merely expressing criticism directed at public figures and accusing them of having committed a criminal offense prior to the commencement of court proceedings, which contradicts the presumption of innocence and is inadmissible[4].

Additionally, the Law of Ukraine 'On Printed Mass Media (Press) in Ukraine' prohibits the establishment and financing of any State bodies, institutions, organisations or offices intended to facilitate mass censorship[5].

The legislation in force also provides for the freedom of the professional activity of journalists and their subsequent rights that have to be protected to enable comprehensive and unbiased coverage of anything happening within or outside national borders[6].

Nowadays, there is no specific legislation providing for the right to freedom of expression when using the Internet. Sharing information via the global web is a subject for separate norms of the Laws of Ukraine 'On Telecommunications', 'On Copyright and Related Rights', 'On Information', 'On Printed Mass Media (Press) in Ukraine', 'On Television and Radio Broadcasts', 'On Information Agencies', 'On Protection of Personal Data', 'On Access to Public Information', etc.

Ukrainian legislation has provided the following clarifications on the determination of respondents in cases arising from spreading inaccurate and/or inappropriate information via the Internet: 'The appropriate respondent

[1] Law 'On Information', art 24, §2.

[2] ibid.

[3] ibid, art 24, §3.

[4] Decision of the Supreme Court of Ukraine in the case №761/37180/17 from 16.05.2019. <http://www.reyestr.court.gov.ua/Review/81753060> accessed 7 August 2020.

[5] Law 'On Printed Mass Media (Press)', art 2, §2.

[6] Law 'On Information', art 25, §1–7.

in the case of spreading the contested information via the Internet is the author of the relevant publication and the owner of the website whose identities the claimant must establish and stipulate in the statement of claim.'[1] If the author of the publication is unknown or his identity and/or place of residence cannot be established, the owner of the website is the appropriate respondent[2]. Providing there is no data regarding the identities of both the author of the publication and the owner of the website, the court will deny the relief thought by the claimant[3].

Despite the active development and rising in popularity of the online media, their legal status is yet to be determined by the national legislation. The Law of Ukraine 'On Copyright and Related Rights' only contains a basic definition of a website[4] and does not clearly establish the distinction between the media-related and other kinds of websites.

2. What are the limitations to the freedom of expression in your national legislation?

Protecting freedom of expression is one of the foundations and guarantees in a democratic society. The level of freedom of expression is directly correlated with the level of development of democratic institutions in the state and provides public control over public authorities. However, the abuse of a right is relevant to the same extent as its unlawful restriction. That is why, in occasions of such abuse, rights and freedoms should be restricted by law. Such restrictions must pursue a legitimate aim and meet the criterion of "necessity

[1] Decision of the Plenum of the Supreme Court of Ukraine №1 'On judicial practice in cases concerning the protection of the honour and dignity of a natural person as well as the business reputation of a natural and legal person' 2009 №v_001700–09 <https://zakon.rada.gov.ua/laws/show/v_001700-09> accessed 5 June 2020, art 12, §1 (Decision of the Plenum №1).

[2] ibid, art 12, §2.

[3] Decision of the Supreme Court of Ukraine in the case №742/1159/18 from 10.10.2019. <http://reyestr.court.gov.ua/Review/84845516> accessed 7 August 2020.

[4] The Law of Ukraine 'On Copyright and Related Rights' 1993 № 3792-XII <https://zakon.rada.gov.ua/laws/show/3792–12> accessed 6 June 2020, art 1, §5 (Law 'On Copyright and Related Rights').

in a democratic society". Freedom of expression refers to the fundamental human freedoms. Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention) states that everyone has the right to freedom of expression. This right includes freedom to hold opinion and receive or impart information without interference by public authority and regardless of frontiers.

The execution of the right to freedom of expression may be restricted by law in the interests of national security, territorial integrity or public order in order to prevent riots or criminal offenses, protect public health or reputation, prevent the disclosure of confidential information or maintain authority and impartiality of justice[1].

Articles 1 and 3 of ***the Law of Ukraine 'On Access to Public Information'*** provide that public information is open, except cases established by law. The right to access public information is guaranteed by the obligation of information providers to produce and distribute information as prescribed by law[2].

Thus, the concept of 'right to freedom of expression' in the Constitution of Ukraine and other Laws is stated as "the right to freedom of thought and speech, free expression of views and beliefs". Conditions for restriction of the mentioned right, under Art. 34 of the Constitution of Ukraine coincide with those specified in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Moreover, it is worth mentioning that while the Convention provides for possible restrictions that can be imposed on a right to protection of morals, the Constitution of Ukraine does not specify any.

The execution of the right to information must not violate public, political, economic, social, spiritual, environmental and other rights, freedoms and legitimate interests of a private person or legal entity (Part 2).

According to Article 6 (Part 2) of the Law 'On Information', the right to information may be limited by law in the interests of national security, territorial integrity or public order to prevent riots or criminal offenses, protect public health and reputation, preclude from disclosure of confidential

[1] Constitution of Ukraine, art 34, §2.

[2] The Law of Ukraine 'On Access to Public Information' 2011 №2939-VI <https://zakon.rada.gov.ua/laws/show/2939–17> accessed 8 June 2020, art 1, 3 (Law 'On Access to Public Information').

information, maintain the authority and impartiality of justice. Article 7 of this law stipulates that the right to information is protected by law. Article 27 of the Law 'On Information' foresees disciplinary, civil, administrative or criminal liability for violation of its provisions. According to this Law, despite a staunch legal framework for freedom of speech in Ukraine, not all information can be accessible to the public. It bears upon indisputable segments of national and public security.

The grounds for relief of liability for violation of the Laws on information are specified under Article 30 of the above mentioned Law: No one can be prosecuted for making evaluative judgments (Part 1). Evaluative judgments, with the exception of defamation, are statements that do not contain factual data, criticism, evaluation of actions, as well as statements that cannot be interpreted as containing factual data, in particular given the nature of the use of linguistic and stylistic means (use hyperbole, allegory, satire). Evaluation judgments are not subject to refutation and proving their veracity (Part 2). Individuals shall not be held liable for disclosure of information with limited access, if the court finds that this information is of a high social necessity (Part 3). Additional grounds for relief of liability in the media are established by the laws of Ukraine 'On printed mass media (press) in Ukraine', 'On television and radio broadcasting', 'On news agencies' and others.

The law also emphasises on the inadmissibility of right to information abuse: 'information cannot be used to call for the overthrow of the constitutional order, violation of Ukraine's territorial integrity, propaganda of war, violence, cruelty, incitement to ethnic, racial, religious hatred, terrorist acts, persecution of human freedom (Article 28 of the Law 'On Information')[1].

All in all, the State's guarantees freedom of speech as one of the fundamental human rights. However, conditions for its restrictions and liability for its violations or abuse are to be interpreted in every particular case.

The execution of these rights and freedoms may be restricted in the following cases:

1) In the interests of national security, territorial integrity or public security

The Law that prescribes the procedure for restricting human rights in a bid to national security is the ***Law of Ukraine "On Sanctions"*** as of Novem-

[1] Law of Ukraine 'On Information', art 28.

ber 9, 2017 N 2195-VIII. It states that the priorities of national policy of Ukraine are, in particular, guaranteeing constitutional rights and freedoms, protection of state sovereignty, territorial integrity and inviolability of state borders, prevention of interference in the internal affairs of Ukraine, development of equal mutually beneficial relations with other countries in the interests of Ukraine. This Law was adopted as an immediate and effective response to existing and potential threats to the national security of Ukraine, including hostilities, armed attacks committed by other states or non-state entities, harm to life and health, hostage-taking, expropriation of state property, the task of property losses and the creation of obstacles to sustainable economic development, the full exercise by citizens of Ukraine of their rights and freedoms. Article 1 of the mentioned Law specifies the purpose of sanctions, as well as objects against which they can be applied.

Article 3 of the Law sets the grounds and principles for the application of such sanctions, such as hostile actions of a foreign State, foreign legal entity or natural person that pose real and / or potential threats to national interests, national security, sovereignty and territorial integrity of Ukraine, promote terrorist activities and / or violate rights and freedoms of man and citizen, the interests of society and the state, lead to the occupation of territory, expropriation or restriction of property rights, property losses, creating obstacles to sustainable economic development, full implementation of Ukrainian citizens' rights and freedoms (paragraph 1, part 1 of Art. 3 of the Law 'On Sanctions'). The reason for the application of sanctions may also be the case when such actions are committed by an entity under the control of a foreign legal entity or natural person – non-resident, a foreigner, a stateless person, as well as entities engaged in terrorist activities (Part 3 of Article 3 of the Law)

Types of sanctions are specified in Article 4 of the Law. These, in particular, include: ban on the use of radio frequency resources of Ukraine; restriction or termination of the provision of telecommunications services and the use of public telecommunications networks; other sanctions that comply with the principles of their application established by this Law (paragraphs 8, 9.25, part 1, Article 4 of the Law).

The procedure for imposing sanctions is provided by Article 6 of the Law 'On sanctions'[1].

Ukrainian legislation provides administrative and criminal liability for violations of Laws regarding information. Thus, ***the Code of Ukraine on Administrative Offenses*** contains a rule enshrined in Article 212–2 'Violation of legislation on state secrets'. Part 2 of the Article establishes administrative liability for violation of legislation on state secrets, namely: revelation of information about the environment, the quality of food and household items; about accidents, catastrophes, dangerous natural phenomena and other emergencies that have occurred or may occur and threaten the safety of citizens; on the state of health of the population, its standard of living, including food, clothing, housing, medical care and social security, as well as on socio-demographic indicators, law and order, education and culture of the population; about the facts of violations of human and civil rights and freedoms; about illegal actions of state authorities, local self-government bodies and their officials; other kinds of information, which in accordance with the laws and international agreements, the binding consent for which was given by the Verkhovna Rada of Ukraine, cannot be revealed; unjustified revelation of information[2].

Criminal liability for illegal restriction of rights and abuse of rights is established by the ***Criminal Code of Ukraine***[3].

The Criminal Code of Ukraine contains norms that provide for penalties for illegal restriction of rights and for illegal collection and dissemination of certain information.

As noted earlier, the information cannot be used to call for the overthrow of the constitutional order, violation of the territorial integrity of Ukraine, propaganda of war, violence, cruelty, incitement to ethnic, racial, religious hatred, terrorist acts, encroachment on human rights and freedoms

[1] The Law of Ukraine 'On Sanctions' 2014 №1644-VII <https://zakon.rada.gov.ua/laws/show/1644–18> accessed 8 June 2020, art 6, §1(25) (Law 'On Sanctions').

[2] Code of Ukraine on Administrative Offenses 1984 № 8073-X <https://zakon.rada.gov.ua/laws/show/80731–10> accessed 8 June 2020, art 212–2, §2 (Code of Ukraine on Administrative Offenses)

[3] The Criminal Code of Ukraine 2001 №2341-III <https://zakon.rada.gov.ua/laws/show/2341–14> accessed 8 June 2020, (Criminal Code of Ukraine).

(Article 28 Law "On Information"). The use of information in these cases entails criminal liability.

Article 109 of the Criminal Code of Ukraine entrenches liability for actions aimed at ***forcible change or overthrow of the constitutional order or the seizure of state power***. Part 2 of this Article mentions that public calls for overthrow of the constitutional order are illegal. Dissemination of materials calling for such actions is considered a criminal offense as well.

Article 110 of the Criminal Code of Ukraine establishes liability for ***encroachment on the territorial integrity and inviolability of Ukraine***, in particular for public appeals or dissemination of materials calling for such actions committed to change state borders in violation of the Constitution of Ukraine. Part 2 provides for liability for the same acts if they are committed by a person who is a representative of the authorities, either repeatedly or by prior conspiracy by a group of persons, or combined with incitement to national or religious hatred.

Such criminal offenses are classified as criminal offenses against the fundamentals of national security of Ukraine. The same group of criminal offenses concerning encroachment include criminal offenses under Article 111 of the Criminal Code of Ukraine (treason) and 114 (espionage), which establish criminal liability for the transfer or collection for transfer to a foreign state, foreign organization or their representatives of information constituting a state secret, depending on whether these actions were committed by a citizen of Ukraine (treason) or a foreigner or a stateless person (espionage).

Additionally, there are Articles 436 and p436–1 of the Criminal Code of Ukraine, which refer to criminal offenses against peace, security of mankind and international law and provide criminal liability for ***propaganda of war*** – public appeals to aggressive war or to resolve military conflict, as well as the production of materials with calls for such actions for the purpose of their distribution or distribution of such materials (Article 436) and production, distribution, as well as public use of symbols of communist, national-socialist (Nazi) totalitarian regimes, including the form of souvenirs, public performance of anthems of USSR, Ukrainian SSR, other autonomous Soviet republics or their fragments throughout Ukraine, except as provided for in parts two and three of Article 4 of the Law of Ukraine 'On Condemnation of Communist

and National Socialist (Nazi) Totalitarian Regimes in Ukraine and Prohibition propaganda of their symbols' (Article 436–1).

According to Article 258–2 of the Criminal Code of Ukraine, public appeals to commit a terrorist act, as well as distribution, production or storage for the purpose of disseminating materials with such appeals are viewed as a criminal offense. The qualifying feature provided for in part 2 of this Article is the commission of such acts by the media.

Article 295 of the Criminal Code of Ukraine provides for criminal liability for ***appeals to acts threatening public order*** – public appeals to riots, arson, destruction of property, seizure of buildings or structures, forcible eviction of citizens threatening public order, as well as distribution, manufacture or storage of for the purpose of distributing materials of such content

Article 34 of the Constitution of Ukraine provides that the execution of rights may be restricted by law, inter alia, to protect the reputation or rights of others, prevent the disclosure of confidential information or maintain the authority and impartiality of justice.

Article 50 of the Constitution of Ukraine stipulates that everyone is guaranteed to enjoy free access to information about environmental conditions, the quality of food and household items. Such information cannot be classified by anyone. Liability for concealment or distortion of information about the ecological condition or morbidity of the population is provided by Article 238 of the Criminal Code of Ukraine.

2) Responsibility for abuse of the right to information that affects reputation and rights of others:

Rules setting forth liability for bullying are among the recent innovations. Thus, in 2019 the Verkhovna Rada of Ukraine adopted the Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine on Combating Bullying (Harassment)', Article 173–4 of which introduced the legal concept of bullying by in "educational process"[1]. This norm establishes administrative responsibility for bullying (harassment), i.e. the actions of participants in

[1] The Law of Ukraine 'On Amendments to Certain Legislative Acts of Ukraine on Combating Bullying' 2018 № 2657-VIII <https://zakon.rada.gov.ua/laws/show/2657–19> accessed 8 June 2020, art 1, §1(2) (Law 'On Amendments to Certain Legislative Acts of Ukraine on Combating Bullying)'

the educational process, which consist of psychological, physical, economic, sexual violence, including the use of electronic means of communication committed against a minor or such person in relation to others participants of the educational process, as a result of which the mental or physical health of the victim may or has been harmed. Such actions may be conducted via the Internet.

The Criminal Code of Ukraine contains norms that describe the components of criminal offenses against life and health of a person (Articles 120, 145 of the Criminal Code of Ukraine), personal rights and freedoms (dignity, personal and private life, etc.). The following articles can also be distinguished: Article 120 of the Criminal Code of Ukraine – driving to suicide; Article 145 – illegal disclosure of medical secrets; Article 161 – violation of equality of citizens depending on their race, nationality, religious beliefs, disability and other grounds; Article 163 – violation of the secrecy of correspondence, telephone conversations, telegraph or other correspondence transmitted by means of communication or computer; Article 176 – infringement of copyright and related rights; Article 182 – violation of privacy.

3) Confidential information is also under the lee of the Criminal Code of Ukraine.

The concept of information with limited access is set forth in Article 21 of the Law 'On Information'. Thus, Article 21 provides that "restricted information" is confidential, secret and official information (Part 1). Confidential information is information about an individual, as well as information to which access is restricted by a natural person or legal entity, except for the authorities. Confidential information may be disseminated at the request (consent) of the person concerned in the manner and under conditions prescribed by him or specified by law. (Part 2) In accordance with Article 29 of the ***Law 'On Information'***, restricted access may be disseminated if it is in the public interest, so that the public's right to know this information outweighs the potential harm from its dissemination.

Articles providing for liability for violation of the rules regarding information with limited access: Article 182 of the Criminal Code of Ukraine – violation of privacy; Article 231 – illegal collection for the purpose of using or using information that constitutes a trade or banking secret; Article 232 –

disclosure of trade or banking secrets; Article 232–1 – illegal use of insider information.

Norms related to the restriction of the right to self-expression, adopted to ***maintain the authority and impartiality of the court*** can also be grouped which includes the provisions of Articles 376, 377, 387 of the Criminal Code: Article 376 – interference in the judiciary; Article 377 – threat or violence against a judge, lay judge or jury; Article 387 – disclosure of data of operative-search activity, pre-trial investigation Article 398 – threat or violence against the defender or representative of the person.

4) Threats to commit certain illegal acts and criminal offenses:

A group of criminal offenses involving threats or violence (offline and online), for example, ***Article 266 – threat of abduction or use of radioactive materials.***

A separate group of criminal offenses is related to the objective party – threat or violence, but differs in the identity of the victim: ***Article 345*** – threat or violence against a law enforcement officer; ***Article 346*** – threat or violence against a statesman or public figure; ***Article 350*** – threat or violence against an official or a citizen performing a public duty.

In Ukraine, a criminal case was recently tried under Part 2 of Article 28 Part 1 of Article 346 of the Criminal Code of Ukraine against a member of the Verkhovna Rada of Ukraine and a volunteer of the Joint Forces Operation who, according to law enforcement agencies, threatened to assassinate the President of Ukraine. In addition, it is recommended to pay attention to the next feature. Actus reus of Article 346 of the Criminal Code provides for the threat of murder, harm to health, destruction or damage to property to a certain group of persons. Article 129 of the Criminal Code of Ukraine sets forth criminal liability for the threat of murder in the presence of an additional feature – obvious grounds for fear of the threat. In addition, sanctions under Article 346 par. 1 are severer than those under Article 129 par. 1. Thus, the responsibility for an unjustified threat to a public figure is much harsher than for an objectively justified threat to the life of an ordinary citizen. This may indicate, on the one hand, the peculiarity of the object and, on the other hand, some imbalance in the degree of protection among different groups of individuals under the Criminal Code of Ukraine.

As we have seen, national legislation correlates with international legislation in the regulation of the right to freedom of expression. Ukrainian Laws do not contradict European ones which means that at least legal maintenance of freedom of expression conforms the European standard. The list of the above-mentioned articles from the Constitution of Ukraine, the Criminal Code of Ukraine and other national Laws and international legal documents is not exhaustive, but it shows a legislative trend towards the establishment of a secure information area. For example, the Criminal Code of Ukraine also restricts freedom of expression: ***Article 300*** – violence and discrimination propaganda; ***Article 301*** – pornography distribution.

3. Does the breach of the limitations to the freedom of expression constitute the body of criminal offense in your national legislation?

In the scope of the legal research, we consider it important to analyse how the criminal offenses in the field of the interests of national and public security, territorial integrity, crime prevention, for the protection of the public order, health or morals limit the freedom expression in the Ukrainian legislation.

Finding a balance between the right to freedom of expression and the protection of national interests, territorial integrity and public security is not an easy task for any State. It is necessary to learn to reconcile the right to freedom of expression, on the one hand, and the interests of national security, territorial integrity, combating riots and criminal offenses, ensuring public order, on the other[1].

In this chapter we would like to draw attention to the breach of the limitations of the freedom of expression which constitute the body of criminal offense in our national legislation.

[1] Burmagin O. O., Opryshko L. V., Opryshko D. I. 'Freedom of expression in the condition of armed conflict. The review of ECHR practice'. (Kyiv: Public Organisation 'Platform of human rights', 2019) 112

To give a detailed description we will use criteria that are based on formalities, conditions, restrictions or sanctions prescribed by law and are necessary in a democratic society: national security, territorial integrity or public security, health or morals, to protect the reputation or rights of others, prevent the disclosure of confidential information or maintain the authority and impartiality of the court.

3.1. Interests of national security, territorial integrity

According to the **art. 109 of the Criminal Code of Ukraine,** public appeals to violent change or overthrow of the constitutional order or take-over of government, and dissemination of materials with any appeals to commit any such actions constitute the body of criminal offense[1]. Regarding **art. 110 of the Criminal Code of Ukraine,** where public appeals or distribution of materials with appeals to change the boundaries of the territory or state border of Ukraine in violation of the procedure established by the Constitution of Ukraine are criminally punishable[2]. The constitutional order is the structure of the State and society, as well as their institutions in accordance with the norms of the Constitution. The formal functioning of the constitutional order makes it possible to realise society's desire for a just and stable social order based on a combination of individual and social relations. Calls for forcible change or overthrow of the constitutional order or for the seizure of state power, entrenched in part 2 of Art. 109 of the Criminal Code, must be public, proclaimed openly, in the presence of an indefinite number of persons (these appeals may be at meetings, rallies, demonstrations, etc.). Therefore, based on the above, public appeals to forcible change of the constitutional order should be understood as appeals that take place in the presence of the public, i.e. many individuals, publicly, openly, in a public place where a large audience gathers (for example, at meetings, rallies, in the theatre, at conventions, at the stadium, etc.). Publicity is an evaluative concept and the question of the presence of such a feature should be decided in each case, taking into

[1] Criminal Code of Ukraine – art 109
[2] Criminal Code of Ukraine – art 110

account the specific circumstances of the case (time, place, method, circumstances, etc.) of such actions, i.e. this action involves active influence on an indefinite number of people. The public danger of this criminal offense is characterised by the ability of this act to cause significant damage to public relations, providing conditions for the protection of the constitutional order from public appeals for its violent overthrow or the threat of such damage to these public relations. According to the art. 10 of the ECHR, the freedom of expression shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers[1]. It is important to mention that in the process of creating the Criminal Code, some scholars and experts have expressed the view that Art. 110 of the Criminal Code should provide for liability only for public calls for violence, as the inclusion in this Article of calls for non-violence creates threats to the right to freedom of expression. The events in Crimea and Eastern Ukraine in 2014 confirmed that calls for action to non-violently unconstitutionally change the borders of Ukraine are also socially dangerous[2]. Analysing the provisions of this Article and its connection with freedom of expression, we consider it necessary to review existing legislation in the field of information and develop transparent mechanisms for assessing content for their threat to national security instead of disproportionately prohibiting broad categories of expression. Only actions that pose a real threat to society should entail criminal liability, which should be proportional to the gravity of the criminal offense committed. Non-violent acts of freedom of expression should not be punishable by imprisonment. In our opinion, it is necessary to amend the Criminal Code of Ukraine. Namely, to define by law:

1) a public appeal – as "bringing to the notice of a significant number of people in any form of information, the content of which is aimed at causing people to want to encroach on the territory of Ukraine";

2) materials with appeals – as "any media, the content of which is aimed at causing a person who gets acquainted with it, the desire to encroach on the territory of Ukraine".

[1] European Convention on Human Rights – art 10

[2] M. A. Rubashchenko. 'Criminal liability for trespass against territorial integrity and inviolability of Ukraine' (Monography Kharkiv 2018) 108

According to the case of Shtepa v. Ukraine, the court found a violation conducted by Ukraine against former mayor of Slovyansk Nelia Shtepa, accused of encroaching on the territorial integrity and inviolability of Ukraine. As to the decision, the ECtHR received 3,600 EUR compensation for limitations and violations of rights[1].

Such definitions specify the limits of prohibitions and indicate the connection of these actions with the right to information, which immediately raises the issue of observance of the constitutional rights provided for in Art. 34 of the Constitution of Ukraine while bringing a private person to criminal responsibility for this criminal offense[2].

The vast majority of cases against Ukraine before the European Court on alleged violations of freedom of expression involve interferences with that right. Protection of Article 10 rights in these cases is sometimes referred to as being a negative obligation of the State, because in these cases Article 10 limits the scope of restrictions that States may impose on the right[3]. Examples of this are articles prohibiting certain kinds of expressions, or measures taken by State authorities to limit the right, such as mentioned in the art. 109 and 110 of the Criminal Code. According to the case of Razvozzhayev v. Russia and Ukraine[4], the court found that both Russia and Ukraine were liable for a substantial violation of Mr Razvozzhayev's rights. The court finds that during the rally against the alleged falsification of the parliamentary and presidential elections, the applicant's conduct and his appeal to the public remained peaceful at all stages. None of the applicant's allegations called for the use of physical force or acts of a destructive nature. On the contrary, he repeatedly urged participants to remain calm and friendly.

Governments have a duty to prohibit hateful, insightful speech but many abuse their authority to silent peaceful dissent by passing laws criminalising freedom of expression. However, the relevant public authority must show that the restriction is 'proportionate', so to say, appropriate and no more than

[1] Shtepa v. Ukraine App no 16349/17 (ECHR, 24 October 2019)

[2] Constitution of Ukraine – art 34

[3] Toby Mendel 'Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights' <https://rm.coe.int/16806f5bb3 > accessed 11 June 2020

[4] Razvozzhayev v. Russia and Ukraine App no 75734/12 (ECHR, 19 November 2019)

necessary to address the issue concerned. This refers to the abovementioned articles and also **art. 111**, where treason, that is an act willfully committed by a citizen of Ukraine in the detriment of sovereignty, territorial integrity and inviolability, defence capability, and state, economic or information security of Ukraine: joining the enemy at the time of martial law or armed conflict, espionage etc[1]. State security is the absence of a threat, condition of protection of vital interests of the state from internal and external threats in all the above areas of state life. Among other concepts used in the disposition of Art. 111 to define the object of this criminal offense, the concept of "state security" is the broadest, as it covers the absence of threat to sovereignty, territorial integrity and inviolability, defence capabilities of the state. The most notorious violation of Article 111 freedom of expression was when nationalist radicals attacked journalists for their work in eastern Ukraine. Among the positive trends is the decision of the Court of Appeal, which acquitted journalist and blogger Ruslan Kotsaba, accused of treason for calling to boycott mobilization[2].

Part 1 of Art. **338** of the Criminal Code of Ukraine[3] establishes that criminal liability for insulting the State Flag of Ukraine, the State Emblem of Ukraine or the National Anthem of Ukraine occurs only if such insult was committed in public. Thus, public abuse should be considered an abuse that took place in the presence of others and was directed at the public. Here arises a question: how to qualify the actions of a person who, for example, painted the State Flag of Ukraine for further public use, during a protest etc.? As a result, the restriction of the right to freedom of expression in this case contains a formal corpus delicti. However, the disadvantage of national legislation lies in the fact that the liability arises only for the violation of state symbols. In addition, the violation of the anthem of a foreign State in the national criminal law is not criminalised at all, while Part 1 of Art. 338 of the Criminal Code of Ukraine establishes liability for similar actions concerning the National anthem of Ukraine.

[1] Criminal Code of Ukraine – art 111

[2] Kyryliuk O. 'Freedom of expression in times of conflict: UKRAINIAN REALITIES' (2017) 14 <https://cedem.org.ua/wp-content/uploads/2017/08/Freedom-of-Expression_Report_Ukraine_DDP_UKR.pdf>

[3] Criminal Code of Ukraine – art 338

Article 339 of the Criminal Code sets forth responsibility for illegal raising of Ukrainian the state flag on a river or sea vessel without the right to this Flag. Raising or not raising the flag as a symbol of the State could be considered as a form of expression. The analogy could be made with the ECHR case *Norwood v. the United Kingdom* where a poster had been considering as a form alleged violation of Article 10 of the ECHR. According to Article 20 of the Constitution of Ukraine, the state flag is one of the state symbols.

With regards to the Criminal Code of Ukraine, public calls to commit a terrorist act, as well as distribution, production or storage for the purpose of disseminating materials with such calls (Article 258–2 of the Code) and public calls to aggressive war or to resolve a military conflict are prohibited (Article 436).

Article 114–1. Obstruction of lawful activity of the Armed Forces of Ukraine and other military formations

1. Obstruction of lawful activity of the Armed Forces of Ukraine and other military formations in a special period –

Obstruction of the lawful activities of the Armed Forces and other military formations can be expressed in two main types: intellectual and physical.

Intellectual type can be expressed in threats to both military staff and members of their families in order to force the former to abstain from certain actions. Intellectual hindrance can also be viewed as the actions of individuals who take advantage of the unstable situation in society and persuade military to give up their duties allegedly for humanistic reasons. Another type of intellectual obstruction can be considered the actions of persons who disseminate personal data about military staff who performed combat missions, with a call to condemn such actions to avenge the Armed Forces and other military formations for the activities they performed. Indeed, the actions of such persons lead to tension in society, the formation of the negative treatment of individuals who performed their military duty in the Armed Forces, as well as the formation sustainable preconditions for further refusal of military to perform their duties during a special period due to fears for their fate and the fate of their relatives and friends. The obligatory feature of the objective side of the criminal offense is the situation of the criminal offense, which means the objective conditions in which the criminal offense is committed. The situ-

ation in which the criminal offense is committed is a mandatory feature of a criminal act only in cases where it is specified in the disposition of the Article of the Special Part of the Criminal Code of Ukraine. As for the discussed article, a mandatory feature of the objective side of this criminal offense is the – a special period. In accordance with para. 11 Art. 1 of the Law of Ukraine "On Defence of Ukraine", a special period – the period following the announcement of the decision on mobilization (except for the target) or bringing it to the executors of covert mobilization or from the moment of imposition of martial law in Ukraine or in its separate localities and covers the time of mobilization, wartime and partially the reconstruction period after the end of hostilities. Obstruction of the lawful activity of the Armed Forces and other military formations in the absence of a legal regime of a special period does not constitute a criminal offense under Art. 114–1 Criminal Code of Ukraine.

3.2. The protection of the reputation or rights of others

Moving towards **Article 346** of the national criminal law, we observe the establishment of criminal liability for violating restrictions on freedom of expression. This Article criminalises the threat of murder, damage to health, destruction or damage to property, as well as kidnapping or imprisonment of the President of Ukraine, People's Deputy of Ukraine, etc. in connection with their state or public activities[1]. There is an opinion that considers this criminal offense through the prism of other criminal offenses with a threat to a special subject. Consequently, a mandatory feature of the threat is that it is associated with state or public activities of the figure. This means that individuals become direct victims of the criminal offense of freedom of expression in the performance of their professional duties.

For States in conflict, freedom of expression is far from a top priority. Protecting people's lives and national security are becoming determinants of state policy in times of instability. The last three years of the conflict with Russia, accompanied by complex transformation processes, geopolitical reorientation, human losses and sometimes contradictory reforms, have become a kind of test for Ukraine's statehood and identity. In developing

[1] Criminal Code of Ukraine – art 346

any new legislation, Ukraine should be guided by the recommendations and comments of specialised international bodies and institutions on freedom of expression. The value of freedom of expression is particularly marked and critical in times of conflict, when access to certain territories of the state and the truth remains limited. Ukraine can serve as a vivid example of trial and error in public policy in this area.

Article 159 of the Criminal Code[1] sets forth responsibility for the breach of a secret ballot principle. Criminally punishable action includes deliberate violation of the secret ballot during the election or referendum in the form of disclosure of the content of citizens' will who participated in an election or referendum. It could be concluded that the subject of the criminal offense is general as there is no specific person who could possibly commit the criminal offense determined in the article. The second part of the Article 159 describes the same action as more severe if it is committed by a member of the election or referendum commission or another official if they involve the use of an official position. Number of pre-trial investigations was extremely low (only 1 as to the official information provided by the NGO 'Opora' in 2016)[2]. The proposed well-timed amendment to the Article 159 of the Criminal Code adds to the list of the criminally punished actions photography or videography of the ballot paper and strengthening the responsibility for 'intentional violation of the secrecy of voting'[3] .

As a part of the right to impart information and ideas without interfe-rence by public authorities Article 163 of the Criminal Code[4] entrenches responsibility for the breach of the secrecy of correspondence, telephone conversations, telegraph or other correspondence transmitted by means of communication or computer. For the same criminal offenses committed repeatedly or in relation to statesmen or public figures, a journalist, or committed by an official, or with the use of special means intended for the secret removal of information provided more serious punishment. The

[1] Criminal Code of Ukraine – art 159

[2] Olga Kotsyuruba, Oleksandr Klyuzhev, Olga Shevchuk-Klyuzhev. 'Investigation of crime against electoral right on local regular elections in 2015. Final report'. <https://opora.lviv.ua/wp-content/uploads/2018/06/Rozsliduvannya-zlochyniv-proty-vyborchyh-prav-na-chergovyh-mistsevyh-vyborah-2015-roku.pdf≥ accessed 28. May 2020, 8

[3] Ibid, 150

[4] Criminal Code of Ukraine – art 163

recent case involved alleged violation of the Article 163 of the Criminal code includes the criminal proceedings about the alleged breach of Article 163 because of the submission of a journalist request to the MP about his possible involvement in the case of impeachment of the US President, namely about possible connections with the personal advocate of the head of the USA[1].

3.3. Protection of health

Article 145 of the Criminal code sets forth responsibility for the deliberate disclosure of the medical secret. Similarly, as in the Article 132 the subject of this criminal offense could be a person who discovered a medical secret in connection with the performing of official duties. However, such activity becomes criminally punishable only when the act has caused serious consequences.

The right to the medical secret and to the secret of applying for the medical care diagnosis is guaranteed to the individual by Article 286 of the Civil Code.

Prohibition of the disclosure of the medical secret is also provided for in the Law of Ukraine "Fundamentals of Ukrainian legislation on health care". This Law defines that the medical secret includes the information about the illness, medical examination, check-up and their results intimate and family aspects of a citizen's life. Contrary to the Civil and Criminal Laws the legislator instead of the term 'individual' uses the term 'citizen'[2].

One of the raised issues related to the Article 145 of the Criminal Code was the disclosure of the medical secret by a medical staff during the criminal proceedings. The disclosure of the medical secret during the criminal proceedings is permitted by the Criminal Procedure Code but lacks definite clarification of the allowed margins which as a result endanger secure protection of the medical secret[3].

[1] 'The editor-in-chief of 'Slidstvo.info' has been called on a questioning to police due to a request to Dubinskiy'. (Institute of mass-media. 08 May 2020) <https://imi.org.ua/news/golovredku-slidstva-info-vyklykaly-na-dopyt-u-politsiyu-cherez-zapyt-dubinskomu-i33004> accessed 29 May 2020

[2] The Law of Ukraine 'Fundamentals of the Legislation of Ukraine on Health Care' <https://zakon.rada.gov.ua/laws/show/2801–12> accessed 29 May 2020

[3] Victor Moroz, 'Unguarded secret'. (Yurydychna Gazeta, 17 May 2018) <https://yur-gazeta.com/dumka-eksperta/neohoronyuvana-taemnicya.html> accessed 29 May 2020

3.4. The protection of morals

Article 299 of Criminal Code[1] provides the criminal responsibility for the animal cruelty. The act which is criminally punishable could be inter alia in the form of the public appeals to commit acts of cruelty to animals, as well as the dissemination of materials calling for such acts. Possible aggravating circumstances provided by this Article include the commitment of such actions in the presence of a minor, or with a special cruelty, or repeatedly, or with a group of persons, or committed in an active way.

3.5. Public safety and the prevention of disorder or crime

Article 293. Group violation of public order

Organisation of group actions that have led to a severe violation of public order or a significant violation of the transport, enterprise, institution or organisation, as well as active participation in such actions.

The object of this criminal offense is public order. The order of the behaviour in public places of groups of people presupposes the presence of written and unwritten (moral, customary) rules of conduct, which should be followed in a large crowd, and also the result of compliance with these rules. They cover the need to comply with legal requirements representatives of government and administration of enterprises, institutions, organizations, where mass events take place, damage to the normal operation of trade, culture, sports, transport, government agencies, and also work, rest, movement of other persons, etc[2]. Moreover, there is deliberative approach that the group violation of the public order does not encroach the basis of the authority[3].

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[1] Criminal Code of Ukraine – art 299

[2] Roman Oliynychuk, 'Problems of differentiation of group breach of public order and seizure of state or public buildings or structures' [2017] (4(12)) Actual problems of jurisprudence <http://dspace.tneu.edu.ua/bitstream/316497/6895/1/%D0%9E%D0%BB%D1%96%D0%B9%D0%BD%D0%B8%D1%87%D1%83%D0%BA%20%D0%A0..pdf> accessed 19 August 2020 p. 253–255

[3] Roman Oliynychuk , 'Differentiation of group breach of the public order and the mass disturbances' [2016] (1/2016) Actual problems of jurisprudence <http://dspace.tneu.edu.ua/bitstream/316497/6895/1/%D0%9E%D0%BB%D1%96%D0%B9%D0%BD%D0%B8%D1%87%D1%83%D0%BA%20%D0%A0..pdf> accessed 19 August 2020

Article 294. Mass disturbances

Organization of mass disturbances, accompanied by violence against any person, riotous damage, arson, destruction of property, seizure of buildings or construction, forceful eviction of citizens, resistance to authorities with weapons or other objects used as weapons, as well as active participation in mass riots.

Object of both Articles 293 and 294 is public order, namely regulated by law and placed under the protection of law about criminal law responsibility public relations in the field of ensuring normal conditions of rest, welfare and tranquillity of people[1].

There is no distinctive understanding of the "public" even in the judicial practice. There were cases when even ten people were considered as a "public" ("mass") event[2].

Article 258. Terrorist act

Terrorist act[3], use of a weapon, commission of an explosion, arson or other actions that endangered human life or health or caused significant property damage or other serious consequences, if such actions were committed to violate public safety, intimidate the population, provocation military conflict, international complication, or in order to influence decisions or acts or omissions of public authorities or local governments, officials of these bodies, associations of citizens, legal entities, or to draw public attention to certain political, religious or other views of the perpetrator (terrorist), as well as the threat of committing these acts for the same purpose.

Terrorism is usually understood as intimidating the population of the authorities in order to fulfil illegal intent. It consists in the threat of violence, the maintenance of a state of constant fear in order to achieve certain political or other goals, induce certain actions, draw attention to the identity of a terrorist or the organisations he represents[4]. Causing or threatening to cause harm is a kind of warning about the possibility of causing more serious

[1] ibid

[2] ibid

[3] Criminal Code of Ukraine – art 258

[4] Milevskiy M.O. 'A look at criminal offenses related to terrorism. International legal announcer: a collection of scientific works of National university of State Tax Service of Ukraine. 2016'. Second edition. Pages 85–92. <http://nbuv.gov.ua/UJRN/muv-nudp_2016_2_15> accessed 30 May 2020

consequences if the demands of terrorists are not accepted. A characteristic feature of terrorism is its openness, when the purpose of causing harm or threat, the requirements are made public.

Article 258–2. Public incitement to commit a terrorist act[1]

1. Public incitement to commit a terrorist act, as well as distribution, manufacture or possession for distribution of materials with such incitements.

2. The same actions committed with the use of the media, –

The main direct object of the criminal offense under the Article 258–2 of the Criminal Code of Ukraine is public safety by calling others to commit a terrorist act, the perpetrator encroaches on public safety, security of society, as a whole and individuals, their lives, health, socio-political stability in society, thereby violates the security of many spheres of human life.

The objective side of the criminal offense under Article 258–2 of the Criminal Code of Ukraine contains signs of several acts, which are divided differently in the legal literature. Thus, accordingly to Commentary to the Criminal Code of Ukraine there are two forms of illegal act: 1) public appeals to commit a terrorist act; 2) distribution of materials with such appeals[2].

Public calls for a terrorist act involve an open appeal to an indefinite or to a significant circle of persons, in which ideas, views or demands are expressed, aimed at ensuring that by disseminating them among the population or its individual categories to persuade a certain number of people to certain actions.

Article 436. Propaganda of war[3]

Public appeals to aggressive war or to the resolution of a military conflict, as well as the production of materials calling for such actions for the purpose of their dissemination or distribution of such materials. The object of the criminal offense is peace as a component of the international legal order.

The objective side of the criminal offense is characterized by actions in the following forms:

1) public appeals to aggressive war or to the resolution of military conflict;

2) production of materials with appeals to aggressive war or to the resolution of military conflict;

[1] Criminal Code of Ukraine – art 258–2

[2] 'Freedom of expression and the Internet' (Publishing House of Europe Council) <https://rm.coe.int/168059936a> accessed 30 May 2020

[3] Criminal Code of Ukraine – art 436

3) distribution of such materials.

Due to the fact that this this criminal offense is international and its object is world peace, the individual bears responsibility under Art. 436 of the Criminal Code for propaganda of aggressive war or military conflict between Ukraine and other States. Aggressive war and military conflict are types of acts of aggression that differ from each other, in particular, scale of action, and provide for the use of armed forces by the state or on its behalf the first against the sovereignty, territorial integrity or political independence of another state or people (nation). In this case, any dispute that arises between the two states and causes the entry into force of the armed forces is a military (armed) conflict, regardless of its duration, consequences or the fact of denial by one of the parties.

Analysing the above mentioned legislative provisions, we can conclude that, on the one hand, everyone is guaranteed the right to freedom of thought and speech, to freely express their views and beliefs, on the other – such freedom of expression should not be expressed in calls for aggressive war or resolution of military conflict and other actions prohibited by national and international law[1].

Article 295. Calls for actions that threaten public order[2]

Public appeals to massacre, arson, destruction of property, seizure of buildings or structures, forcible eviction of citizens threatening public order, as well as distribution, production or storage for the purpose of disseminating materials of such content.

The object of the criminal offense is public peace. The proclamation of calls to take actions that threaten public order creates an atmosphere of anxiety and even panic in the population; disorganises the work of government, leads to a violation of the normal regime of work, study, recreation of the general population[3].

[1] Pekar P. V. 'Some problems of determining the content of the concept of "publicity" in the crime under Article 436 of the Criminal Code of Ukraine' Pravo.ua. 2017. № 1. 140–145. <http://nbuv.gov.ua/UJRN/pravo_2017_1_27> accessed 31 May 2020

[2] Criminal Code of Ukraine – art 295

[3] Roman Olijnychuk. 'Differences between group violation of public order and calls to take actions that threaten public order'. **Actual problems of jurisprudence**, [S.l.], n. 2, p. 107–111, nov. 2017. ISSN 2664–5718. URL: <http://appj.tneu.edu.ua/index.php/appj/article/view/149> accessed 31 May 2020

The objective side of the criminal offense includes one mandatory feature – the act itself. It is expressed only by active behaviour – Action, which may consist of:

1) public appeals to massacre, arson, destruction of property, seizure of buildings or structures, forced eviction of citizens;

2) distribution of materials of such content;

3) manufacture of such materials;

4) their storage.

The criminal offense is completed from the moment of proclamation of appeals or from the moment of the beginning of distribution, production or storage of the corresponding materials.

States are obliged to prohibit content that is subject to expressions prohibited by international law: direct and public incitement to commit genocide (to protect the rights of affected communities)

Article 442. Genocide

1. Genocide, an act intentionally committed with the intent to destroy, in whole or in part, any national, ethnic, racial or religious group by depriving the members of that group of life or causing them grievous bodily harm, creating full or partial living conditions for the group its physical destruction, reduction of births or prevention in such a group or by forcible transfer of children from one group to another[1], –

2. **Public appeals to genocide, as well as the production of materials with appeals to genocide for the purpose of their distribution, or the distribution of such materials, –**

The criminal offense of direct and public incitement to commit genocide, like the criminal offense of genocide, requires the intent to destroy, in whole or in part, a national, ethnical, racial or religious group[2].

To conclude, the Criminal Code of Ukraine establishes limitations to the freedom of expression that constitute the body of criminal offense in

[1] Criminal Code of Ukraine – art 442

[2] Pidgorodynskiy V. M. 'Significance for the criminal law of Ukraine of the decisions of the European Court of Human Rights on issues of honor and dignity of human (on criticism of public figures). Actual problems of policy: collection of scientific works'(Odesa National Law Academy, South Ukrainian Centre of Gender Problems, Odesa, 2009. Edition 36.) 110–119.

national legislation and express the interests of national and public security, territorial integrity, and criminal offense prevention, for the protection of the public order; health or morals limit the freedom expression in the Ukrainian legislation.

4. What criminal liability measures are provided in national legislation for the breach of the limitations on the freedom of expression?

For the criminal offenses and misdemeanours listed in the third part of the work Articles of the Criminal Code of Ukraine foresee the following types of punishment in such frequency: community service – 2 times, correctional labour – 7 times, arrest – 8 times, restraint of liberty – 12 times, imprisonment for a determinate term – 23 times, life imprisonment – 2 times – as for the primary punishments; forfeiture of property – 10 times – as for additional punishments. Fine (10 times) and deprivation of the right to occupy certain positions or engage in certain activities (4 times) may be imposed as either primary or additional punishments.

Primary punishments are community service, correctional labour, service restrictions for military servants, arrest, restriction of liberty, custody of military servants in a penal battalion, imprisonment for a determinate term, and life imprisonment. Additional punishments are revocation of a military or special title, rank, grade or qualification class, and forfeiture of property.

Service restrictions for military servants and custody of military servants in a penal battalion (primary punishments) are not used at all. The revocation of a military or special title, rank, grade or qualification class (an additional punishment) is not provided for by any sanction of an Article in the Special Part of the Criminal Code of Ukraine; it can be applied at the discretion of the court and only when convicting a person for a grave or special grave offense.

As we can see from the statistics listed above, imprisonment for a determinate term is the most frequently used punishment by the legislator. However, as a practical matter, according to paragraph 1 of Article 69 of the Criminal Code of Ukraine, in presence of several circumstances a court

may, by providing the reasons for its judgment, impose a primary punishment lower than the lowest threshold prescribed by a sanction of an Article (a sanction of a paragraph of an article) in the Special Part of the Code, or change to another, milder type of primary punishment, which is not prescribed by a sanction of the Article (a sanction of a paragraph of an article) concerned with this offense or not to impose an additional punishment, which is defined as a mandatory punishment by a sanction of an article, unless the criminal offense is a corruption offence.

Under the Criminal Code of Ukraine fine, forfeiture of property and liquidation are criminal law measures against legal entities. They can be applied by a court for the breach of the limitations on the freedom of expression if the legal entity's authorized person commits any of the criminal offenses provided for in Articles 109, 110, 258, 258–2, 436, 442 of the Criminal Code of Ukraine. Such offences (except for Articles 258, 258–2) have to be committed in the interests of a legal entity, which means they led to its illegal benefit or created the conditions for such benefit, or were aimed at evading liability under the law.

In 2020 the institution of misdemeanours became a novelty in the criminal legislation of Ukraine influencing the sanctions of certain articles of the Criminal Code of Ukraine, which set forth liability for the breach of the limitations on the freedom of expression. Thus, Art. 132, paragraph 1 of Art. 162, paragraph 1 of Art. 163, Art. 295, 299 and 339 due to these changes, have been transformed from criminal offenses into misdemeanours, which provide a fine of no more than three thousand tax-free minimum incomes of citizens or the other types of punishment not related to imprisonment as the primary punishment.

As a matter of fact, penalisation is an integral part of the criminal law policy of the State and is a process and result of the legislator's determination of punishments for certain criminal offenses in order to provide regulatory means to combat criminal offense[1]. There are some essential problems it faces:

– *As a rule, a primary punishment is more severe that an additional. Despite that there are many cases when the legislator combines less severe primary punishment with*

[1] Yuriu Ponomarenko, 'Basic rules of some crimes penalization according to the current criminal code of Ukraine' [2009] 15(3) Visnyk natsional'noyi akademiyi prokuratury Ukrayiny 47

more severe additional one in a sanction of Article. For example, under the sanctions of Articles 132, 145, paragraph 2 of Article 159 a fine as a primary punishment is combined with a revocation of the right to occupy certain positions or engage in certain activities as *an additional punishment. According to scientists, there is necessity to review such sanctions where a* revocation of the right to occupy certain positions or engage in certain activities should be considered as a primary punishment and a fine as an additional one[1].

– The limits of punishment prescribed by the sanctions are often extremely broad[2]. For example, there is imprisonment for the term of 5 to 10 years (paragraph 2 of Article 110, paragraph 1 of Article 258); a fine of 100 to 300 tax-free minimum incomes (paragraph 2 of Article 159); or of 1000 to 4000 tax-free minimum incomes (Article 145), etc. It all may lead to unlimited judicial discretion that seems very unreasonable in a State with an extremely high level of corruption and distrust of the court. Therefore, in most cases, the court of appeal or cassation may change the verdict of the court of first instance on the grounds of inconsistency of the sentence with the gravity of the case and the convict[3].
– There are a lot of sanctions that almost do not have any alternative to imprisonment (Article 110, 111, paragraph 2 of Article 163, Article 258, paragraph 2–3 of Article 299 and Article 346, paragraph 2 of Article 442). It may undermine the principles of justice and equality before the law[4].

Additionally, Articles of the Criminal Code of Ukraine on criminal liability measures for the breach of the limitations on the freedom of expression provide some incentive norms. Their peculiar feature is a positive incentive method that encourages socially useful behaviour in the sphere of criminal legal relations[5].

Thus, under paragraph 2 of Article 111 a citizen of Ukraine shall be discharged from criminal liability where, he has not committed any acts

[1] Ibid, note 3

[2] O.O. Dudorov, and M.I. Havronyuk, *Criminal law: Educational handbook.* (Vaite 2014) 355–356

[3] O.O. Dudorov, and M.I. Havronyuk, *Criminal law: Educational handbook.* (Vaite 2014) 355–356.

[4] Ibid., 336–337

[5] P.V. Khryapinsky, 'Doctrinal Understanding of Incentive Norms in Criminal Law' [2017] 77(1) Visnyk LDUVS im. E.O. Didorenka 97–107

requested by a foreign state, a foreign organisation or their representatives and voluntarily reported his contact with them and the task given to government authorities. In practice such provision is almost impossible to apply for a number of reasons: first of all, establishing a contact with a foreign state, a foreign organisation or their representatives and obtaining a criminal task from them with a direct intent to high treason is a preparation for a high treason (without such an intent – only the expression of the intent). Therefore, if the citizen of Ukraine, having established the contact and having received the criminal task, has not done any actions and voluntarily refused to continue the realisation of the intent, irrespective of whether they have reported their contact to government authorities or not, – there is no legal grounds for criminal liability under Article 111. Secondly, a citizen who committed high treason on their own initiative, without a corresponding task of a foreign state, foreign organisation or their representatives, must be held liable under Article 111. The provision of paragraph 2 of Article 111 does not apply to such a citizen. Thirdly, in case of consummated high treason, a person must also be held liable under Article 111. High treason considers being a consummated crime not from the moment of establishing the contact with a foreign state, foreign organisation or their representatives or from the moment of obtaining a criminal task from them, but from the moment of committing certain specific actions to the detriment of Ukraine (e.g. joining the enemy at the time of martial law or armed conflict, espionage, assistance in subversive activities against Ukraine). If we consider the moment of establishing this connection being the moment of the end of the crime, so the acts committed by a citizen of Ukraine on their own initiative will go beyond the crime. Thus, a citizen may not be prosecuted unless they have not committed another offence. So the provision of paragraph 2 of Article 111 shall be applied only in case when a citizen of Ukraine, having obtained a criminal task from a foreign state, foreign organisation or their representatives, voluntarily reported their contact and the criminal task to government authorities and, although a citizen has not committed any acts requested by a foreign state, a foreign organisation or their representatives, but has not refused the realisation[1].

[1] M. I. Melnyk and M. I. Khavronyuk, *Scientific and practical commentary on the Criminal Code of Ukraine* (11 edn, Dakor 2018) 337

According to paragraph 6 of Article 258 a person shall be discharged from criminal liability for a threat to commit an act of terrorism if a person voluntarily informed the law enforcement agency about the criminal offense, assisted with its termination or disclosure, provided this and the measures taken have been sufficient to avert the danger to human life or health or the infliction of significant property damage or other serious consequences, unless a person has committed another offence.

Article 49 of the Criminal Code of Ukraine contains discharge from criminal liability due to a limitation period. Punishment imposed after the end of limitation period is an unjust act incompatible with the principle of humanism[1]. The provisions of Article 49 are applicable to every offence, but there are some exceptions under paragraph 5 which prescribes that the statute of limitation shall not apply where any criminal offense against national security of Ukraine as provided for in Articles 109 through 114–1 and against the peace and humanity and paragraph 1 of Article 442 of this Code.

Summary of court verdicts in 2018–2019 on the articles that were the subject of our research shows that the most often committed offence was under Article 162 while the criminal offenses under Articles 145, 159, 258–2, 436, 442 and misdemeanours under Articles 132, 295 and 339 were not committed at all. According to court practice, imprisonment for up to 5 years and a fine are the most common types of punishment for researched Articles. The practice of discharging convicts from punishment and from serving it is also widespread (for more information – see Table 1).

In conclusion, taking everything mentioned into account in our final analysis we can say that the penalisation that was carried out during the adoption of the Criminal Code of Ukraine in 2001 generally corresponds to the current science progress of criminal law and meets the needs of practice. At the same time, a number of provisions of the Code indicate that such factors as inconsistency and groundlessness of punishments provided for certain criminal offenses were significantly manifested in the penalisation[2]. Therefore, they need to be carefully revised and refined by the legislator.

[1] Ibid, 144

[2] *Supra* note 5

Table 1

Article	The number of convicted persons		Discharged from punishment and from serving it		The most frequent punishment	
	2018	2019	2018	2019	2018	2019
109(2)	3	5	3	4	-	imprisonment for a determinate term
110	80	168	73	159	imprisonment for a determinate term	imprisonment for a determinate term
111	8	6	3	0	imprisonment for a determinate term	imprisonment for a determinate term
114	-	0	-	-	-	-
132	-	-	-	-	-	-
145	-	-	-	-	-	-
159	-	-	-	-	-	-
161	3	4	0	0	fine	fine
162	182	220	65	63	fine	fine
163	4	1	4	1	-	-
258	9	6	0	1	imprisonment for a determinate term	imprisonment for a determinate term
258–2	-	-	-	-	-	-
295	-	-	-	-	-	-
299	15	26	11	18	arrest	arrest
338	4	4	1	1	fine	fine

Article	The number of convicted persons		Discharged from punishment and from serving it		The most frequent punishment	
	2018	2019	2018	2019	2018	2019
339	-	-	-	-	-	-
346	1	-	1	-	-	-
436	-	-	-	-	-	-
436–1	3	2	2	2	fine	-
442	-	-	-	-	-	-

5. Is the freedom of expression protected by the criminal law?

To answer this question we should analyse tasks of Criminal Code. According to the Article 1, the Criminal Code of Ukraine has the task of providing legal protection of human and civil rights and freedoms, property, public order and public safety, environment, constitutional system of Ukraine from criminal encroachments, ensuring peace and security of mankind, as well as criminal offense prevention. In addition, the rights and freedoms of citizens are established by other Laws of Ukraine. Criminal protection of certain human and civil rights and freedoms is applied in the presence of a public need for such protection.

The tasks of the Criminal Code of Ukraine, including the protection of freedom of expression, are carried out, in particular, by identifying socially dangerous acts that are criminal offenses and imposing punishments that are applied to persons who have committed these criminal offenses. However, the content of Part 2 of Article 1 should not be understood in the sense that the Criminal Code contains only descriptions of specific criminal offenses and penalties provided for them. A significant number of criminal legal provisions have the character of universal rules that apply not only to a particular criminal offense, but also to any criminal offense under the Criminal Code.

These universal (general) norms are systematised in fifteen sections of the General Part of the Criminal Code. Descriptions of specific criminal offenses are placed in twenty sections of the Special Part of the Criminal Code[1].

Thus, in order to answer the question whether the freedom of expression is subject to criminal law protection, it is necessary to analyse criminal offenses in the Special Part of the Criminal Code of Ukraine for the protection of the above object.

It is worth to mention that the Criminal Code of Ukraine does not explicitly provide for liability for violation of the right to freedom of expression. However, it protects this right indirectly, using such formulations.

We propose to consider several division criminal offenses depending on the subject whose right to freedom of expression is being infringed. In particular, in the Criminal Code, these may be journalists, public associations and political organisations, as well as persons holding rallies, street demonstrations.

The most obvious component aimed at protecting freedom of expression is the criminal offense provided for in Article 171 of the Criminal Code of Ukraine, obstruction of the lawful professional activity of journalists. This Article determines that it is illegal to seize collected, processed, prepared by the journalist materials and technical means used by him in connection with his professional activity, illegal denial of access to information to the journalist, illegal prohibition of coverage of certain topics, showing individuals, criticism of the subject of power powers, as well as any other intentional obstruction of a journalist's legitimate professional activity. It should also be added that the second part of the above mentioned Article stipulates that influencing journalists in any way to prevent them from performing their professional duties or harassing journalists in connection with their lawful professional activities is prohibited[2].

As we noted earlier, this rule does not specify for what kind of violation of freedom of expression a person can be prosecuted. However, we should pay attention to this norm, as it is aimed at protection of the legitimate activities of a journalist who implements the constitutional right of to freedom of

[1] Scientific and practical commentary on the Criminal Code of Ukraine by M.I. Melnik M.I. Havronyk (Kyiv, 2018) 8

[2] Scientific and practical commentary on the Criminal Code of Ukraine, 532

thought and speech, the right to freely express their views and beliefs or freely collect, store, use and disseminate information necessary[1]. To summarise, the above mentioned relationships are the object of protection which established in Article 171 Criminal Code of Ukraine.

The objective side of this criminal offense is expressed in obstruction of lawful activity of journalists and persecution of the journalist for performance of professional duties or for the criticism expressed by it during performance of the official duties. It is important to understand that liability will arise only in the event of obstruction or harassment of a journalist's lawful activities. That is, obstruction of illegal activity will not be considered a criminal offense[2]. In our opinion, legal activity should be considered as such activity that is allowed in accordance with the Constitution of Ukraine and the Law of Ukraine on Journalistic Activity.

Obstruction of the lawful professional activity of journalists is the unlawful creation of obstacles, restrictions, prohibitions on the receipt, use, dissemination and storage of information by an individual journalist (journalists) or the mass media. It may involve forcing the dissemination of certain information or refusing to "disseminate, censor, illegally withdraw the circulation of printed materials, withdraw a broadcast, prevent a journalist from attending a press conference, unreasonably refuse to accredit a media outlet or an individual journalist. Additionally, it includes deprivation of a journalist or mass media of the opportunity to exercise the right to receive information, unreasonable refusal to satisfy a request for access to official documents or provision of written or oral information, violation of ownership of information, intentional concealment of information, unjustified refusal to disseminate certain information, etc.

Such obstruction can be carried out through threats, physical violence, deception, blackmail, damage or destruction of property, bribery, etc.

If the obstruction was carried out by threatening to kill or destroy property, use of physical violence, destruction or damage to property, bribery of an official, committed on the grounds, should be further qualified[3]. In this example, one can perfectly trace such a feature of law as consistency.

[1] ibid

[2] ibid, 533

[3] Scientific and practical commentary on the Criminal Code of Ukraine, 534

This means that if an act that is aimed at obstructing the lawful activities of a journalist has the characteristics of another criminal offense, it will be qualified as a whole. From this we can conclude that in fact each can be aimed at protecting freedom of expression.

Chase may consist of physical or mental influence on the journalist, his relatives or friends, destruction or damage to his property, restriction or deprivation of his rights or legitimate interests (deprivation of bonuses, significant reduction of fees, dismissal or transfer to another job, refusal to publish materials prepared by him). A necessary feature of such actions to qualify them under Part 2 of Article 171 is the causal conditionality of such chasing by a journalist's performance of professional duties or his criticism of individuals (not necessarily the perpetrator himself) or legal entities[1].

Next Article related to freedom expression is 345–1 threat or violence against a journalist. The threat of murder, violence or destruction or damage to property of a journalist, his close relatives or family members in connection with the journalist's legitimate professional activity is punishable. It is also worth noting that this Article includes attacks on close relatives and family members of the journalist.

The objective side of the criminal offense can be expressed in: 1) threat; 2) infliction of beatings, as well as bodily injuries – light, medium or severe. Liability occurs when there has been a threat of murder, violence or destruction or damage to property. Such a threat must be real and real. The threat may be expressed in a statement (orally, in writing, using technical means), in gestures, as well as in other actions by which the perpetrator intimidates the victim by committing murder, using violence or destroying his property. To qualify the actions of the perpetrator the threat of violence should be understood as the threat of beating, bodily injuries and other acts of violence against the journalist or his family, relatives. The obligatory sign of a threat as a part of this criminal offense is that; it is committed in connection with the performance of his duties by a journalist[2].

All in all, to some extent the Article resonates with Art. 171 of the Criminal Code of Ukraine, simply details in more detail such type of encroachment

[1] ibid, 531

[2] Scientific and practical commentary on the Criminal Code of Ukraine, 1056

as threat of violence or use of violence to the journalist, his family, relatives, in connection with his professional activity.

The following Article is also to some extent similar to the previously analysed article, as it specifies one of the types of encroachment, in particular intentional destruction or damage of journalist's property (Art. 347–1). Similar to the previous encroachment, the objective side involves the destruction of a journalist's personal property (telephone, camera, car, apartment, etc.) as pressure or revenge for disseminating certain information; destruction of property of close relatives or family members as pressure on a journalist or revenge against him for his professional activities.

The actions provided for in Article 347–1 of the Criminal Code of Ukraine do not cover the destruction of the property of the media. For example, if an attacker breaks a TV camera or breaks a microphone on the studio's balance while filming a storey, such actions should not fall under Article 347–1, but should be qualified as one of the ways to hinder journalistic activity under Article 171 of the Criminal Code of Ukraine. It is another matter when the same microphone or other equipment belongs personally to the journalist[1].

It should be noted that courts do not always pay attention to the question of who owns the damaged equipment. For example, in the verdict of September 21, 2016 in the case № 295/1778/16-k Bohunsky District Court of Zhytomyr considered damage to the journalist's property not only damage to clothes, but also damage to the microphone[2].

Thus, it is possible to be convinced that absolutely all journalist' property which can be encroached by the malefactor in order to interfere with performance of professional duties will be subject to protection. This prevents journalists from a free expression of their views and thus ensures the right for whole society.

The following types of criminal offenses are similar, as by their nature they will also simply clarify the encroachments in order to impede the performance of professional duties, which in turn restricts the freedom of expression.

[1] Scientific and practical commentary on the Criminal Code of Ukraine, 1061

[2] Judgment of 21.09.2016 in the case № 295/1778/16-k. <http://reyestr.court.gov.ua/Review/61482835> accessed 10 June 2020

Generally speaking, we need to explore protect of journalist life in the understanding of Criminal Code of Ukraine. We know, that life – it is a fundamental right every human. But when we talk about encroachment on life of journalists we should understand, that this is so especial category of protect, because journalists speak for human. Consequently, the right to life is in connection in freedom of expression. Thus, encroachment on the life of a journalist is criminally punishable, which includes the murder or attempted murder of a journalist, his close relatives or family members in connection with the journalist's legitimate professional activities (Art.348–1).

In addition, we should protect the rights of journalists to freedom of expression, since they need special attention. For example, separate provisions of Criminal Code of Ukraine say us, that the taking of a journalist as a hostage, which includes the direct taking or holding hostage of a journalist, close relatives or family members in order to induce that journalist to take or refrain from taking any action as a condition of the release of the hostage (Art. 349–1)[1]. As a conclusion, that journalists play a very important role for implementation of the right to freedom of expression, that is why criminal defence is very important to guarantee their possibilities in this sphere.

Finally, object of criminal defence also can be expressed through the accompanying actions of the court regarding the activities of journalists. However, the Criminal Code itself criminalises court actions related to the illegal ruling of a court decision with the aim of obstructing the journalist's legitimate professional activities (part 2 Article 375). By the way it is very important to notice, that according to the decision of the Constitutional Court of Ukraine from 11 of June 2020 this Article recognised as unconstitutional and will be deleted from criminal Code of Ukraine. The Constitutional Court of Ukraine explains this decision as the establishment of criminal liability for the issuance of a "knowingly unjust" court decision creates risks and opportunities to influence the courts due to the vagueness and ambiguity of the provision of Article 375 of the Code. Furthermore, the Constitutional Court of Ukraine considers that based on the principle of independence of judges guaranteed by the Constitution of Ukraine, the disputed provisions of the Code, which define acts that are criminal

[1] Criminal Code of Ukraine – art 349–1

offenses committed by a judge, should be formulated by the legislator so that able to use them as a means of influencing a judge and interfering with the administration of justice.

The next important group of subjects subject to criminal protection are public organisations and political parties. Such protection is reflected in Article 170 of the Criminal Code of Ukraine. Therefore, the disposition of this Article provides for criminal liability for intentional obstruction of the lawful activities of trade unions, political parties, public organisations or their bodies. Obstruction of illegal activity of the specified associations does not form structure of this criminal offense. Obstruction of legitimate activities of political parties or their bodies should be recognised; unlawful interference, including on the part of officials of state authorities and local self-government bodies, in the establishment and internal activities of political parties and their local branches; granting privileges or assistance to the activities of some parties and oppression of others by officials of state authorities or local self-government bodies; unreasonable prohibition of a political party, annulment of the registration certificate or restriction of the activity of the party or its bodies in the exercise of the rights granted by law; creating obstacles for the political party or its bodies to exercise their powers in the property, financial and other spheres; unjustified bringing of leaders or other members of the party to legal responsibility in order to reduce the efficiency or terminate the activities of the party, etc.

Obstruction of lawful activity of public organisations or their bodies may be manifested in any actions, including those described above, which are aimed at creating obstacles in the performance of public organisations or their bodies of their statutory tasks, the implementation of rights, including the right to property and funds acquired as a result of economic and other commercial activities, restrictions on the rights and freedoms of citizens their belonging or non-belonging to associations of citizens[1].

Obstruction may also be expressed in threats, violence or other unlawful influence on the leaders or other members of trade unions, political parties or public organisations and their bodies in order to prevent them from ex-

[1] Scientific and practical commentary on the Criminal Code of Ukraine, 532

ercising their powers or to obtain an illegal decision by this representative or trade union body[1].

Of a great importance is the consideration of criminal law protection of persons holding rallies, rallies, street demonstrations. In particular, reference should be made to Article 340 of the Criminal Code. It becomes obvious that unlawful obstruction of the organisation or holding of rallies, rallies, street marches and demonstrations is a criminal offence under national criminal law. Obstruction means creating obstacles, preventing the organisation or holding of such peaceful events. Its methods can be a decision to ban them, the threat of use of their organisers or participants in violence or its actual use, an attempt to bribe the organisers of the event or their deception, and so on. This directly affects the right to express views, especially when it concerns a certain group with certain views[2].

Last Article to be presented in this research is Art. 180 of Criminal Code of Ukraine 'Obstruction of religious rites'. Objective side of this unlawful act consists of 1) illegal obstruction of the performance of a religious rite that disrupted or threatened to disrupt a religious rite; 2) forcing a priest to perform a religious rite.

A religious rite is a set of individual or collective actions of believers determined by internal church precepts and rules, aimed at establishing mutual relations between man and supernatural objects. Religious rite is a component of religious activity, which also includes worship, religious ceremonies, processions, other individual or collective actions related to the confession and dissemination of the chosen faith. Religious rites are performed both inside and outside the cult room. The actions of believers of an organisational or economic nature do not belong to religious rites. Obstruction of the performance of a religious rite consists in the creation of any obstacles that significantly complicate or make it impossible to perform it. It may be carried out through threats, physical violence, deception or in any other way and consists, in particular, in preventing believers from entering the place of a religious ceremony, knowingly falsely reporting a threat to the life or health of its members, unreasonable refusal to request

[1] ibid, 529

[2] Scientific and practical commentary on the Criminal Code of Ukraine 530

issuance of a permit for public ceremony, illegal seizure of cult objects that are necessary for the ceremony, etc. Obstruction should be considered illegal if it is committed; 1) in respect of a religious rite which is performed on legal grounds and is not accompanied by a violation of the law; 2) pickling ways. According to this, the obstruction of the performance of a religious rite does not constitute a criminal offense under Part 1 of Art. 180 when it is carried out: a) with a gross violation of the requirements of applicable law (without appropriate permission, provided that it is necessary to obtain it or combined with harm to health or sexual immorality, etc.); b) religious organizations whose activities have been terminated by a court in accordance with the law[1].

Freedom of expression is protected by the Criminal Code of Ukraine. However, there are some peculiarities. First of all, it is protected implicitly. Secondly, it is protected through prohibiting of act that may obstruct freedom of expression.

6. Has your country reached the adequate balance in establishing criminal responsibility for the breach of the limitations to the freedom of expression? If not, what needs to be changed?

Limitations to the freedom of expression are contained in Article 10 (2) of the European Convention: The exercise of these freedoms (…) may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or criminal offense, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary[2].

[1] Scientific and practical commentary on the Criminal Code of Ukraine, 558

[2] European Convention on Human Rights – art 10(2)

Thereby, Article 10 (2) establishes a three-part test for assessing restrictions on freedom of expression, as follows:

1. The restriction must be prescribed by law.

2. The restriction must protect one of the interests listed in Article 10(2).

3. The restriction must be "necessary in a democratic society" to protect that interest[1].

The most difficult is the third part of the test, namely the definition of the word 'restriction necessary in a democratic society'. In Cumpăn ă and Maz ă re v. Romania[2] the ECHR concluded that to justify the interference measure taken by the national authorities should be:

1 'Relevant', i.e. logically justify the restriction.

2. 'Sufficient', i.e. weighty enough to do so.

3. 'Proportionate to the legitimate aims pursued', i.e. corresponds in degree to the harm done to freedom of expression.

4. Depends on all of the circumstances of the case.

When analysing the conformity of the provisions of the Criminal Code of Ukraine with the test enshrined in Article 10 (2), it is necessary to analyse the interest protected by the norm and find out if a criminal penalty is necessary in such a case. As for the first part of the test (the restriction must be prescribed by law), the term "law" should be understood as both the rules established by written law and the ones contained in case law. The law must meet the quality requirements of accessibility and predictability. As all the analysed provisions establishing criminal responsibility are contained in the Criminal Code of Ukraine – a code that prohibits retroactive interpretation and is officially published, the first provision can be considered fulfilled.

In addition, it is also necessary to take into account the differences between the restrictions on freedom of expression imposed on journalists and individuals. In the ECtHR case law, some principles have been worked out regarding maintaining a balance between the freedom of expression of the press and the interests enshrined in Article 10 (2).

[1] Toby Mendel, 'Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights' (2001) <https://rm.coe.int/16806f5bb3 > accessed 28 May 2020, 33

[2] Cumpănă and Mazăre v. Romania App no 33348/96 (ECHR, 17 December 2004)

Firstly, the Court considers that the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence[1].

Secondly, issuing a ban on working as a journalist, albeit subject to a time-limit and presented as a preventive measure of general scope, contravened the principle that the press must be able to perform the role of a public watchdog in a democratic society[2].

Thirdly, penalty of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so[3].

For further analysis, we divide the articles of the Criminal Code of Ukraine, establishing criminal liability for the breach of the limitations to the freedom of expression, into groups according to the interest protected in them, as enshrined in Article 10 of the ECHR.

6.1. Interests of national security, territorial integrity

The provisions of the Criminal Code of Ukraine, which protect the interests of national security, territorial integrity, are as follows:

1) Article 109 (2). Public appeals to violent change or overthrow of the constitutional order or take-over of the government as well as dissemination of materials with any appeals to commit any such actions.

2) Article 110 (1). (…) Public appeals or distribution of materials with appeals to commit willful actions to change the territorial boundaries or national borders of Ukraine in violation of the order provided for in the Constitution of Ukraine.

3) Article 111. High treason.

4) Article 114. Espionage.

5) Article 328. Disclosure of a state secrets.

[1] Cumpănă and Mazăre v. Romania App no 33348/96 (ECHR, 17 December 2004)

[2] ibid

[3] Jersild v. Denmark App no 15890/89 (ECHR, 23 September 1994)

6) Article 339. Illegal hoisting of the National Flag of Ukraine at a river or sea vessel.

The maximum penalty for these offences is set in the form of: 1) a fine of up to 50 tax-free minimum incomes, or 2) arrest for a term up to 6 months, or 3) restraint of liberty for a term up to 5 years, or 4) imprisonment for a term up to 15 years, or 5) life imprisonment; as well as with the possibility of imposing additional penalties in the form of: 6) confiscation of property, or 7) deprivation of the right to occupy certain positions or engage in certain activities for a term up to 3 years.

Given the fundamental importance of protection of such interests as national security and territorial integrity for the existence of Ukraine as an independent State, these penalties are proportionate and necessary, because the appropriate level of protection could not be achieved through less severe measures.

Relevant acts are also considered offences in other jurisdictions, for example in Germany (Articles 81–86 of the German Penal Code), where the maximum penalty is also set in the form of life imprisonment[1].

6.2. Public safety and the prevention of disorder or criminal offense

The provisions of the Criminal Code of Ukraine, which protect the interests of public safety and prevent the disorder or criminal offense, are as follows:

1) Article 258. Act of terrorism, and also a threat to commit an act of terrorism.

2) Article 258–2. Public incitement to commit a terrorist act, in particular committed with the use of the media.

3) Article 295. Public calls to commit actions that pose a threat to the public order (riotous damage, arson, destruction of property, taking control of buildings or constructions, forceful eviction of citizens).

5) Article 436. Propaganda of war (public calls to an aggressive war or an armed conflict).

[1] German Criminal Code (Strafgesetzbuch) 1998 <https://www.gesetze-im-internet.de/englisch_stgb/> accessed 11 June 2020

6) Article 436–1. Production, dissemination of communist, Nazi symbols and propaganda of communist and national socialist totalitarian regimes.

7) Article 442. Genocide, and also public calls to genocide.

The maximum penalty for these offences is set in the form of: 1) a fine of up to 50 tax-free minimum incomes, or 2) correctional labour for a term up to 2 years, or 3) arrest for a term up to 6 months, or 4) restraint of liberty for a term up to 5 years, or 5) imprisonment for a term up to 15 years, or 6) life imprisonment; as well as with the possibility of imposing additional penalties in the form of: 7) confiscation of property, or 8) deprivation of the right to occupy certain positions or engage in certain activities for a term up to 3 years.

Prosecution for propaganda, incitement to violence, discrimination against a certain group of the population can be considered necessary in a democratic society or disproportionate depending on the specific act, in particular the ability of these statements to cause harm (Sürek v. Turkey; Leroy v. France; Karataş v. Turkey; Vejdeland and Others v. Sweden; Jersild v. Denmark)[1].

For certain offences, the penalty is more severe than for offences that violate the interests of national security and territorial integrity, which does not meet the criterion of proportionality.

To prevent negative consequences of such offences as, for example, calls to actions that pose a threat to the public order or propaganda of communism, in a democratic society it would be sufficient to establish a less severe punishment. Also disproportionate is the establishment of the same penalty for an offence and public calls to commit such an offence.

It is necessary to consider in more detail the action provided for in Article 436–1, namely the production, distribution, and public use of symbols of communist, National Socialist (Nazi) totalitarian regimes, including in the form of souvenirs, public performance of anthems of the USSR, USSR, other union and autonomous Soviet republics (…), which is punishable by restrain of liberty for up to 5 years or imprisonment for the same term, with or without confiscation of property[2].

[1] Khilyuk S. V. 'Criminal limits of freedom of expression: standards of the ECHR'. (The principles of functioning of criminal justice, Khmelnytskiy, May 2019)

[2] Criminal Code of Ukraine – art 436–1

In the case of Vajnai v. Hungary the applicant was convicted of the offense of displaying a totalitarian symbol (a five-pointed red star)[1]. The ECHR found that such a decision of the local court was contrary to Article 10 of the Convention. The main arguments were as follows:

1. The fact that the passage of time had led to a strengthening of Hungarian democracy, along with membership in the European Union.

2. The Hungarian Government have not referred to any instance where an actual or even remote danger of disorder triggered by the public display of the red star had arisen in Hungary. The containment of a mere speculative danger, as a preventive measure for the protection of democracy, cannot be seen as a "pressing social need".

3. As to the link between the prohibition of the red star and its totalitarian ideology, the Court stresses that the potential propagation of that ideology cannot be the sole reason to limit it by way of a criminal sanction.

4. The Court did not agree that the uneasiness amongst past victims and their relatives would alone set the limits of freedom of expression and justify its banning[2].

Thus, the position of the Court is such that the criminal penalty for demonstrating the symbols of totalitarianism is not proportional and necessary and accordingly violates Article 10 of the Convention.

6.3. Protection of health

The provisions of the Criminal Code of Ukraine, which protect health, are as follows[3]:

1) Article 132. Disclosure of information on medical examination for HIV or any other incurable contagious disease.

2) Article 145. Unlawful disclosure of confidential medical information.

The maximum penalty for these offences is set in the form of: 1) a fine of up to 100 tax-free minimum incomes, or 2) correctional labour for a term up to 2 years, or 3) community service for a term of up to 240

[1] Toby Mendel, 'Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights' (2001) <https://rm.coe.int/16806f5bb3 > accessed 28 May 2020, 53

[2] Vajnai v. Hungary App no 33629/06 (ECHR, 8 July 2008)

[3] Criminal Code of Ukraine – art 132, 145

hours, or 4) restraint of liberty for a term up to 3 years; as well as with the possibility of imposing additional penalties in the form of: 5) deprivation of the right to occupy certain positions or engage in certain activities for a term up to 3 years.

Analysing these penalties, one can conclude that they are: 1) relevant, as they logically justify the restriction; 2) sufficient, as they prevent the disclosure of medical information; 3) proportional, as they serve to protect sensitive information that can be used to harm, and at the same time characterizes these offences as minor or medium grave ones. Thus, these penalties are necessary in a democratic society.

6.4. The protection of morals.

The provisions of the Criminal Code of Ukraine, which protect morals, are as follows[1]:

1) Article 299. Cruelty to animals, and also public calls to commit cruelty to animals.

2) Article 300. Importation, making or distribution of works that propagandize violence and cruelty, racial, national or religious intolerance and discrimination.

3) Article 301. Importation, making, sale or distribution of pornographic items.

The maximum penalty for these offences is set in the form of: 1) a fine of up to 150 tax-free minimum incomes, or 2) arrest for a term up to 6 months, or 3) restraint of liberty for a term up to 5 years, or 5) imprisonment for a term up to 8 years.

The case law of the ECtHR established that criminal prosecution for inciting religious or national intolerance is incompatible with Article 10 of the Convention (Pavel Ivanov v Russia, Belkacem v Belgium, Norwood v United Kingdom)[2].

For Article 301 the establishment of criminal liability in such amounts is disproportionate and does not meet the criterion of necessity in a democratic

[1] Criminal Code of Ukraine – art 299, 300, 301

[2] Khilyuk S. V. 'Criminal limits of freedom of expression: standards of the ECHR'. (The principles of functioning of criminal justice, Khmelnytskiy, May 2019)

society. In addition to the fact that the harm caused by such an offence does not correspond to the severity of the penalty, it is practically impossible to disclose the corresponding offence (the distribution of pornographic items) on the Internet. Thus, this Article is ineffective, since it cannot provide the same level of protection of legitimate interest offline and online.

6.5. The protection of the reputation or rights of others.

The provisions of the Criminal Code of Ukraine, which protect the reputation or rights of others, are as follows[1]:

1) Article 159. Intentional violation of the secrecy of voting.

2) Article 162. Violation of security of residence.

3) Article 168. Disclosure of the secrecy of adoption.

4) Article 182. Violation of personal privacy, that is illegal collection, storage, use or dissemination of confidential information about a person without his/her consent (in addition to public notification of information about the commission of a criminal or other offense).

The maximum penalty for these offences is set in the form of: 1) a fine of up to 500 tax-free minimum incomes, or 2) correctional labour for a term up to 2 years, or 3) restraint of liberty for a term up to 3 years, or 4) imprisonment for a term up to 7 years; as well as with the possibility of imposing additional penalties in the form of 5) deprivation of the right to occupy certain positions or engage in certain activities for a term up to 3 years.

The Criminal Code of Ukraine of December 28, 1960, which expired on September 1, 2001, also enshrined two other corpus delicti[2]:

1) Article 125 (1-2). Defamation, that is the dissemination of knowingly false fabrications that discredit another person, and defamation in a printed or otherwise reproduced work, in an anonymous letter, as well as committed by a person previously convicted of defamation.

2) Article 126. Insult, that is the intentional humiliation of honour and dignity of a person, expressed in an obscene manner.

[1] Criminal Code of Ukraine – art 159, 162, 168, 182

[2] The Criminal Code of Ukraine 1960, №2001–05 <https://zakon.rada.gov.ua/laws/show/2001–05> accessed 13 June 2020, art 125, 126 (Criminal Code of Ukraine)

With the expiration of the Criminal Code, these two acts were decriminalized for failing to strike a balance between the interest of the victim of defamation or insult and the right to freedom of expression of the subject.

Interestingly, both acts are still mentioned in Article 80 of the current Constitution of Ukraine: Deputies of Ukraine are not legally responsible for the results of voting or speaking in parliament and its bodies, except for liability for insult or defamation[1].

6.6. Preventing the disclosure of information received in confidence.

The provision of the Criminal Code of Ukraine, which prevent the disclosure of information received in confidence, is the disclosure of commercial or bank secrets (Article 232)[2].

Prosecution for receiving and transmitting information with limited access generally meets the standards of Article 10 of the Convention. However, the state must comply with a number of requirements regarding the legal regime of the relevant information (Observer and Guardian v. United Kingdom; Hadjianastassiou v. Greece)[3].

Penalty for this offence is set in the form of a fine of up to 3000 tax-free minimum incomes with or without the deprivation of the right to occupy certain positions or engage in certain activities for a term up to 3 years. Such penalties of middle gravity offences are seen as proportionate because of the importance of preventing the disclosure of information received in confidence. However, it should be noted that it is necessary to test the proportionality and balance of interests in each case separately.

Thus, it can be concluded that the adequate balance in establishing criminal responsibility for the breach of the restrictions on freedom of expression has not been reached in Ukraine. Despite some changes for the better achieved with the adoption of the new Criminal Code in 2001, the

[1] Constitution of Ukraine – art 80

[2] Criminal Code of Ukraine 2001 – art 232

[3] Khilyuk S. V. 'Criminal limits of freedom of expression: standards of the ECHR'. (The principles of functioning of criminal justice, Khmelnytskiy, May 2019)

protection of the right to freedom of expression needs more modern and effective regulation.

First of all, it is necessary to bring Ukrainian legislation in line with the practice of the ECtHR, including in matters relating to the criminalization of the propaganda of communism and Nazism. It is also of a high importance to ensure that criminal sanctions for an act (for example, genocide) and public calls to it meet the proportionality criterion.

7. What circumstances should be taken into account in criminalization of the freedom of expression?

Criminalization is the legal recognition of certain acts as criminal offenses and the establishment of criminal liability for their commission[1]. It can be carried out not only by including new rules in the Special Part of the Criminal Code, but also by expanding the boundaries of at least one of the elements of existing corpus delicti.

The public danger of certain acts is the decisive factor for the legislator to classify them as criminal. Public danger is inherent in a criminal offense, which consists in the fact that it (the criminal offense) causes serious damage to the existing law and order in society or puts the law and order at risk of causing such harm. In fact, public danger does not depend on the position of the legislator. This is an objective characteristic inherent in the corresponding behaviour, aimed at the relevant social relations. Public danger is not a static characteristic. Depending on the stage of development of society, it may increase or, conversely, decrease and even disappear altogether. In addition, the expediency of applying criminalization to combat a particular type of action should be also recognized as the criteria that determines the criminalization. The solution to the issue of expediency is connected with the statement that it is impossible to combat the relevant type of anti-social behaviour by other

[1] M.L. Vanchak, ' The Concept of Lawmaking Mistakes in Criminal Law ' [2011] 3(2) Naukovyy Visnyk of Lviv State University of Internal Affairs 258–266

(non-criminal) means. Criminal law policy aims at the legislator to refrain from applying criminal liability in all cases without exception, when it is unable to serve the purpose of reducing the level of crime of this type[1].

Furthermore, the necessity to fulfil the obligations under the treaties on the protection of human rights ratified by the Verkhovna Rada of Ukraine (such as European Convention on Human Rights (Article 10), the International Covenant on Civil and Political Rights (Article 19)) is considered to be one more crucial circumstance that should be taken into account in criminalization of the freedom of expression.

There are two terms in the text of European Convention of Human Rights used to denote offenses of a criminal nature. In articles that establish human rights in the criminal law sphere the term "criminal offense" is used (e.g. Art.6 'Right to a fair trial'). However, a number of provisions (including Part 2 Art. 10 'Freedom of expression') of the Convention, which enshrine relative human rights, include an indication of the prevention of crime as the permissible restriction. These two concepts must not be considered as identical so it necessary to emphasize that the concept of criminal offense has autonomous meaning (i.e. in each specific case the ECtHR determines on its own discretion guided by the established criteria which offense is criminal from the point of view of the Convention) while the concept of crime is used in its national interpretation (i.e. in the sense in which they are defined and understood by the State concerned)[2].

European Court of Human Rights has repeatedly emphasized that it is a matter to be determined by a State which acts are criminally punishable. However, there also are precedents where the criminalization of certain acts was found to be a violation of the standards of the Convention, and accordingly the prosecution of individuals was a disproportionate restriction of the rights provided by the Convention.

A striking example is the practice of applying Article 10 of the Convention, which provides for the right to freedom of expression. In the following case the

[1] P.L. Frys, 'Criminalization and decriminalization in the criminal legal policy' [2014] 1(2) Visnyk Asotsiatsiy of Criminal Law of Ukraine 19–28

[2] P.M. Rabinovich, 'Fundamental concepts of criminal law: interpretation of the Strasbourg Court' [2011] 11 Yurydychna Ukrayina 4–7

establishment of criminal liability was assessed by European Court of Human Rights as unjustified interference in the right provided for in the Convention:

– Criminal law ban from the use of communist symbols.

In Vajnai v. Hungary European Court of Human Rights was mindful of the fact that the well-known mass violations of human rights committed under communism discredited the symbolic value of the red star. However, in the Court's view, it cannot be understood as representing exclusively communist totalitarian rule, as the Government have implicitly conceded. It is clear that this star also still symbolises the international workers' movement, struggling for a fairer society, as well certain lawful political parties active in different member States[1].

These legal provisions are particularly relevant for Ukraine in view of the amendments to the Criminal Code of Ukraine, Article 436–1 "Production, dissemination of communist, Nazi symbols and propaganda of communist and National Socialist (Nazi) totalitarian regimes".

Thus, as we see, the scope of the state's discretion to establish criminal liability for certain acts is not unlimited, as the Convention in the interpretation of the ECtHR outlines a certain framework for the state[2].

In conclusion, taking everything mentioned into account in our final analysis we can say that the current Criminal Code is "overloaded" as the scope of criminal law prohibition is unjustifiably expanded. That is why there is the need for decriminalization, narrowing down the sphere of criminal law regulation[3]. The negative aspect of excessive criminalization is in gross violation of the principle of economy of criminal repression. With regard to the standards of the European Convention of Human Rights in resolving issues of criminal offense and punishment in Ukraine, it should be noted that certain provisions of the criminal law and/or the practice of its application violate the guarantees provided by the Convention; especially it applies to the amendment of the Criminal Code of Ukraine, Art. 436–1.

[1] Vajnai v. Hungary App no 33629/06 (ECHR, 8 July 2008)

[2] S. Khyliuk, 'The crime and punishment in the convention for the protection of human rights and fundamental freedoms' [2015] 8(4 (29)) Chasopys of the Academy of Advocacy of Ukraine 108–125

[3] *Supra* note 2

8. How can you evaluate public opinion about freedom of expression in your country in general?

Freedom of expression directly depends on the political and socio-economic climate within the country. That is why the changing realities of peacetime, the annexation of Crimea and the protracted nature of the conflict in eastern part of Ukraine have led to a deterioration of the national position in the universal rankings. Almost every week there are protests on the streets of Ukrainian cities with using various illegal prohibited means; complete openness reigns on the Internet; national media appeal to criticism, sensational facts and publish controversial articles. Freedom of expression as a fundamental human right is reflected in major international human rights instruments of global and regional importance. According to the Art. 34 of the Constitution of Ukraine "everyone is guaranteed the right to freedom of thought and speech, to free expression of views." Similar provisions are contained in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, paragraph 3 of Article 19 of the International Covenant on Civil and Political Rights. People use the inalienable right to freedom of expression, because no one can decide who can speak and who should stay silent. Undoubtedly, in modern Ukrainian realities, the greatest amount of free expression concerns the socio-political sphere. We infer that through people elected to parliament, everyone expresses their will, intentions, make claims and make suggestions. And a democratic society presumes that the responsibility and hope expressed in elected politicians will pay off. Therefore, the starting point of democracy is a two-way relationship between the government and the people, through which they can control and direct each other. To a large extent, ensuring this connection depends on the freedom and completeness of the information that the people can operate[1]. For the research I conducted a survey of the perception of freedom of voice by the youth of Ukraine with a list of answer options: We are completely free

[1] Protsenko O. 'Law and guarantees of freedom of thought and freedom of mass information' [2018] Entrepreneurship, Economy and Law 342

to share any thoughts and discuss every issue. Even though we are rather free in our public statements, some sort of restrictions does exist. It is not completely safe to share unauthorized thoughts on specific issues. We are highly limited in our public voice, since different sanctions are imposed. The survey was conducted among the population of the 19–24 age group and for residents of all regions of the country. 51.6 percent of respondents feel completely free to speak, 41.9 percent feel quite free, sometimes choosing statements cautiously, 9.7 percent of respondents believe that it is not safe enough to express their thoughts and views completely freely. It should be remembered that subjective vision does not always coincide with reality or statistics. Ukraine has 62 points out of 100 possible in the ranking of global democracy Freedom House and considered to be partly free. There is a practice of bringing persons to administrative or criminal responsibility by classifying their actions as having the characteristics of a criminal offense or misdemeanour. Ideological diversity means the free implementation in society of various political and other views, schools, ideas, as well as the ability to freely promote their views, ideas through the media, as well as publicly defend their ideological views[1].

In return, Ukrainian freedom of speech is characterized is guaranteed until a person begins to "dig too deep." In such cases, measures used to deter a person from disseminating "unfavourable" information often cross the line. The journalistic activity of political investigations into criminal offenses of Ukrainian and foreign officials related to separatism, organized criminal offense, and corruption seems to be especially dangerous. Journalists continue to face the threat of violence and intimidation in 2019, and Ukraine's courts and law enforcement agents often fail to protect their rights. In May, 2019, Vadym Komarov, a journalist in the city of Cherkasy, was attacked with a hammer in broad daylight in the centre of the city. Komarov fell into a coma, dying 40 days later without regaining consciousness. The case was classified by authorities as an attempted murder in connection with his journalistic work; at year's end the police had yet to publicly name suspects. The independ-

[1] Slinko T. M. 'Constitutional and legal guarantees of freedom of speech in Ukraine' (Legal doctrine – the basis for the formation of the legal system of the state: materials International. scientific-practical conf., dedicated. 20th anniversary of the National Academy of Sciences of Ukraine Kharkiv, November 2013)

ent Institute of Mass Information recorded 226 media-freedom violations from January to early December 2019, including Komarov's murder. Other violations included 20 beatings, 16 cyber-attacks, 93 incidents of interference, 34 incidents of threats, and 21 cases of restricting access to public information. The overall figures as for the 4 August 2020 correspond to the following figures: Thus, since the beginning of the year, IMI has recorded a total of 125 violations of freedom of speech, 69 cases of obstruction, 14 cases of beatings and 12 cases of threats.

During armed conflict on the territory of hostilities, in frontline zone, and in the rest regions of the country the number of obstacles to freedom of expression threatens the safety of journalists[1]. Democracy in the occupied Crimea is experiencing difficult times nowadays. Journalists and publicists are persecuted, forcibly deported from the peninsula, and unable to enter its territory. The Russian government has identified any statements about Crimea in favour of Ukraine as a manifestation of separatism and considers them criminal offenses. Ukrainian journalists are deprived of the opportunities to cover the news about the occupied territories of Donbass region due to a serious threat to their physical security. In the same way, residents of occupied territories of Ukraine have a restricted access to Ukraine sources of information, dozens of news editions have been blocked in these areas, which is a serious crackdown on freedom of speech and violation of international norms. In general, intimidation still occurs in separatist-controlled areas[2].

Six months ago, the Ukrainian political department that regulates the media presented the concept of a future Law on the media, which should introduce a number of new concepts and regulatory provisions. But certain theses of the proposed concept lay the groundwork for restricting freedom of opinion in Ukraine. It is a matter of announced criminal liability for journalists for spreading misinformation. Applying sanctions to violators of the

[1] Ukraine Profile, Freedom in the World 2017 (Freedom House, 1 January 2018) <https://freedomhouse.org/report/freedom-world/2017/ukraine> accessed 12 June 2020

[2] Kyryliuk O. 'Freedom of expression in times of conflict: UKRAINIAN REALITIES' (2017) 14 <https://cedem.org.ua/wp-content/uploads/2017/08/Freedom-of-Expression_Report_Ukraine_DDP_UKR.pdf> accessed 12 June 2020

"media calm" of Ukrainian society would be justified in terms of combating overtly anti-Ukrainian content. But the issue of identifying such violators is not clearly regulated by law and leaves room for maneuver in the fight against undesirable media. The nature and severity of the punishment are factors that should be taken into account when determining the proportionality of the intervention. Moreover, the dominant position of the Government forces it to resort more prudently to criminal proceedings, in particular when it is possible to resort to other means in response to unjustified attacks or criticism from its opponents or the media. Controversial interference should also be seen in the context of the main role of the press in ensuring the proper functioning of the system of political democracy. The press must not exceed the limits set, in particular, for the protection of vital state interests, it is obliged to disseminate information and ideas on political issues, including controversial issues, and the public has the right to receive this information. It should be emphasized that the duties and responsibilities that accompany the exercise of the right to freedom of expression by members of the media are of particular importance in tense and conflict situations. But it is obvious that in the practice of criminal prosecution for expressing views in social networks, state interference in the exercise of freedom of expression is disproportionate. As S. Shevchuk rightly pointed out, the principle of proportionality must be used to establish a "fair balance": restrictions on the freedoms guaranteed by the Convention must be "proportionate to the legitimate aim to which these restrictions apply."[1]

Conclusions

Heated exchanges in the media and cases of violence against those expressing views considered controversial are not uncommon, likely contributing to self-censorship among ordinary people. At present, it is extremely important for Ukraine to strengthen guarantees for the protection of freedom expressions of views and adhere to balance between everyone's freedom to speak and be heard

[1] Shevchuk S. 'European Convention for the Protection of Human Rights and fundamental freedoms: application practices and principles interpretation in the context of modern Ukrainian legal understanding'. <http: //eurocourt.in.ua/Article.asp?AIdx=416> accessed 13 June 2020

and to ensure the national security of the state. Instead of introducing legislation that threatens to become a convenient tool for censorship, the authorities may focus on providing a thorough study of the nature and means of disseminating misinformation and its impact, the results of which should form the basis of effective countermeasures, and support and promote public broadcasting from local media, which should become a quality alternative to any information manipulation. Murders and attacks on journalists, lack of proper investigation such cases lead to a decrease in civic activity and create an atmosphere of fear and self-censorship. Government must ensure the existence of true freedom of speech and pluralism of opinion in Ukraine, even if it sometimes hurts party ratings. Democracy should work to increase the percentage of perception of freedom of speech as an inalienable and safe right for each citizen, regardless of his type of activity and decrease the number of persecutions for verity. Despite this, the feeling of security prevails among young people studied. The public is fighting for individual rights and the rights of the whole society. This imitates the feeling of being "in the same boat" and the principle of "one for all and all for each other." Nevertheless, public feelings about this issue are mixed, but in my opinion, only an active public position gives the government a push to eradicate the phenomenon of government opposition to freedom of expression in democracy.

Conclusion

In Ukraine, the freedom of expression is ensured by the number of national legislative acts, as well as various international instruments it has adopted as a signatory, such as the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). The bases of the right to freedom of expression are enshrined in Art. 34 of the Constitution of Ukraine, as well as Art. 300 of the Civil Code. Additionally, the Constitution also lists the instances in which the right to freedom of expression cam be legitimately limited as prescribed by law in the best interests of the State and its citizens, e.g. when national security, territorial integrity, or public order are concerned, for the purposes of preventing

disturbances or crimes, and for supporting the authority and impartiality of justice. Furthermore, the freedom of expression may be limited in case of a potential breach to the rights natural persons and legal entities possess, e.g. foreseeable damage to the person's honour or business reputation of an enterprise if certain information were to be published or otherwise disseminated. Disclosure of information which has been acquired confidentially is proscribed by Art. 34 of the Constitution and is further prohibited under specified legislation, the Law of Ukraine "On protection of personal Data", the Law of Ukraine "On Banks and Banking".

As a country strongly committed to maintaining gender, racial, ethnic and religious equality within its borders, Ukraine strives to eradicate discrimination in any shape and form. Thus, Arts. 161 of the Criminal Code expressly prohibit "hate speech", that is, "intentional acts aimed at incitement to national, racial or religious hatred or to humiliate national honor and dignity or the image of feelings of citizens in connection with their religious beliefs." Art. 300 of the Criminal Code provides for punishment for those importing into, manufacturing, and distributing in Ukraine works (including film and video products) promoting a "cult of violence and cruelty, racial, national or religious intolerance and discrimination."

In addition to the freedom of expression having been granted to the general public, Ukraine has also developed a legislative framework providing for the right to freedom of expression on professional bases for those employed in the mass-media industry, namely journalists and reporters (prohibition of persecuting or interfering with the professional activity of journalists when being engaged into in an appropriate manner), e.g. the Law of Ukraine "On information", the Law of Ukraine "On Printed Mass-Media (Press)". The aforementioned laws also govern the operation of mass-media in Ukraine. For instance, they prohibit governmental censorship.

Despite the fact that a relatively developed legislative framework has been enacted in Ukraine with the objective of ensuring and protecting the freedom of expression, there is still much room for improvement. Many important aspects of exercising the right to freedom of expression are still beyond the Law's grasp. Any legislative instrument concerned with the freedom to express one's views online is yet to be introduced.

The 2020 World Press Freedom Index, generated by Reporters Without Borders, has ranked Ukraine 96th (with North Korea, one of the most totalitarian and oppressive regimes in the world as of today, ranked 180th)[1], which may be considered a noteworthy achievement compared to 2019, since Ukraine has managed to advance by four positions (ranked 102nd in 2019)[2]. Even still, as many as 235 cases of violations of freedom of speech were reported in Ukraine in 2018, among the most affected regions are Kyiv, Mykolaiv and Dnipro[3]. The majority of these cases (175) were reported as assaults against journalists[4].

Currently, rather than underdeveloped or flawed legislative framework, the biggest challenge Ukraine has yet to overcome in terms of achieving tangible results in ensuring the right to freedom of expression, is the absence of the adequate enforcement mechanism and the resulting inability to make use of the numerous legislative provisions.

[1] 2019 World Press Freedom Index, Reporters Without Borders, <https://rsf.org/en/ranking> accessed 10 December 2020

[2] 2020 World Press Freedom Index, Reporters Without Borders,<https://rsf.org/en/ranking/2020> accessed 10 December 2020

[3] *235 Violations of Freedom of Press Were Registered in Ukraine in 2018 – IMI Research,* Institute of Mass Information, <https://imi.org.ua/monitorings/235-porushen-svobody-slova-zafiksovano-v-ukraini-u-2018-rotsi-doslidzhennia-imi-i28320> accessed 9 December 2020

[4] *Ibd.*

Table of legislation

Provision in Ukrainian language	Corresponding translation in English
Частина 1 статті 9 Конституції України: Чинні міжнародні договори, згода на обов'язковість яких надана Верховною Радою України, є частиною національного законодавства України.	**Part 1 of the Article 9 of the Constitution of Ukraine:** International treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine.
Частини 1, 2 і 3 статті 15 Конституції України: Суспільне життя в Україні ґрунтується на засадах політичної, економічної та ідеологічної багатоманітності. Жодна ідеологія не може визнаватися державою як обов'язкова. Цензура заборонена.	**Parts 1, 2 and 3 of the Article 15 of the Constitution of Ukraine:** Social life in Ukraine is based on the principles of political, economic and ideological diversity. No ideology shall be recognised by the State as mandatory. Censorship is prohibited.
Частини 1 і 3 статті 34 Конституції України: Кожному гарантується право на свободу думки і слова, на вільне вираження своїх поглядів і переконань. Здійснення цих прав може бути обмежене законом в інтересах національної безпеки, територіальної цілісності або громадського порядку з метою запобігання заворушенням чи злочинам, для охорони здоров'я населення, для захисту репутації або прав інших людей, для запобігання розголошенню інформації, одержаної конфіденційно, або для підтримання авторитету і неупередженості правосуддя.	**Parts 1 and 3 of the Article 34 of the Constitution of Ukraine:** Everyone is guaranteed the right to freedom of thought and speech, and to the free expression of his or her views and beliefs. The exercise of these rights may be restricted by law in the interests of national security, territorial indivisibility or public order, with the purpose of preventing disturbances or criminal offenses, protecting the health of the population, the reputation or rights of other persons, preventing the publication of information received confidentially, or supporting the authority and impartiality of justice.

Provision in Ukrainian language	Corresponding translation in English
Частина 1 статті 109 Кримінального кодексу України: Дії, вчинені з метою насильницької зміни чи повалення конституційного ладу або захоплення державної влади, а також змова про вчинення таких дій, – караються позбавленням волі на строк від п'яти до десяти років з конфіскацією майна або без такої.	**Part 1 of the Article 109 of the Criminal Code of Ukraine:** Actions aimed at forceful change or overthrow of the constitutional order or take-over of government, and also a conspiracy to commit any such actions, shall be punishable by imprisonment for a term of five to ten years with forfeiture of property or without it.
Частина 1 статті 110 Кримінального кодексу України: Умисні дії, вчинені з метою зміни меж території або державного кордону України на порушення порядку, встановленого Конституцією України, а також публічні заклики чи розповсюдження матеріалів із закликами до вчинення таких дій, – караються позбавленням волі на строк від трьох до п'яти років з конфіскацією майна або без такої.	**Part 1 of the Article 110 of the Criminal Code of Ukraine:** Wilful actions committed to change the territorial boundaries or national borders of Ukraine in violation of the order provided for in the Constitution of Ukraine, and also public appeals or distribution of materials with appeals to commit any such actions, – shall be punishable by imprisonment for a term of three to five years with forfeiture of property or without it.
Частина 1 статті 111 Кримінального кодексу України: Державна зрада, тобто діяння, умисно вчинене громадянином України на шкоду суверенітетові, територіальній цілісності та недоторканності, обороноздатності, державній, економічній чи інформаційній безпеці України: перехід на бік ворога в умовах воєнного стану або в період	**Part 1 of the Article 111 of the Criminal Code of Ukraine:** High treason, that is an act wilfully committed by a citizen of Ukraine in the detriment of sovereignty, territorial integrity and inviolability, defence capability, and state, economic or information security of Ukraine: joining the enemy at the time of martial law or armed conflict,

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збройного конфлікту, шпигунство, надання іноземній державі, іноземній організації або їх представникам допомоги в проведенні підривної діяльності проти України, – карається позбавленням волі на строк від дванадцяти до п'ятнадцяти років з конфіскацією майна або без такої.	espionage, assistance in subversive activities against Ukraine provided to a foreign state, a foreign organization or their representatives, – shall be punishable by imprisonment for a term of twelve to fifteen years with forfeiture of property or without it.
Частина 1 статті 114 Кримінального кодексу України: Передача або збирання з метою передачі іноземній державі, іноземній організації або їх представникам відомостей, що становлять державну таємницю, якщо ці дії вчинені іноземцем або особою без громадянства, – караються позбавленням волі на строк від десяти до п'ятнадцяти років з конфіскацією майна або без такої.	**Part 1 of the Article 114 of the Criminal Code of Ukraine:** Providing information on state secrets or collecting such information in order to provide to a foreign state, a foreign organization or their representatives, where these actions are committed by a foreign national or stateless person, – shall be punishable by imprisonment for a term of ten to fifteen years with forfeiture of property or without it.
Частина 1 статті 114–1 Кримінального кодексу України: Перешкоджання законній діяльності Збройних Сил України та інших військових формувань в особливий період – карається позбавленням волі на строк від п'яти до восьми років.	**Part 1 of the Article 114–1 of the Criminal Code of Ukraine:** Wilful preclusion of legal activities of Armed Forces of Ukraine and other military formations in special period – shall be punishable by imprisonment for a term of five to eight years.
Стаття 132 Кримінального кодексу України: Розголошення службовою особою лікувального закладу, допоміжним працівником, який самочинно здобув	**Article 132 of the Criminal Code of Ukraine:** Disclosure – by a medical officer, an auxiliary employee who obtained the information without authorization, or

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інформацію, або медичним працівником відомостей про проведення медичного огляду особи на виявлення зараження вірусом імунодефіциту людини чи іншої невиліковної інфекційної хвороби, що є небезпечною для життя людини, або захворювання на синдром набутого імунодефіциту (СНІД) та його результатів, що стали їм відомі у зв'язку з виконанням службових або професійних обов'язків, – карається штрафом від п'ятдесяти до ста неоподатковуваних мінімумів доходів громадян або громадськими роботами на строк до двохсот сорока годин, або виправними роботами на строк до двох років, або обмеженням волі на строк до трьох років, з позбавленням права обіймати певні посади чи займатися певною діяльністю на строк до трьох років або без такого.	a member of medical profession – of information on medical examination for HIV, or any other incurable contagious disease dangerous to the person's life, or AIDS and its results that became known to them in connection with their official or professional duties, – shall be punishable by a fine of 50 to 100 tax-free minimum incomes, or community service for a term up to 240 hours, or correctional labor for a term up to two years, or restraint of liberty for a term up to three years, with or without deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.
Стаття 145 Кримінального кодексу України: Умисне розголошення лікарської таємниці особою, якій вона стала відома у зв'язку з виконанням професійних чи службових обов'язків, якщо таке діяння спричинило тяжкі наслідки, – карається штрафом до п'ятдесяти неоподатковуваних мінімумів доходів громадян або громадськими роботами на строк до двохсот сорока годин, або позбавленням права обіймати	**Article 145 of the Criminal Code of Ukraine:** Wilful disclosure of confidential medical information by a person to whom it was available in connection with his/her professional or official duties, where such disclosure caused any grave consequences, – shall be punishable by a fine up to 50 tax-free minimum incomes, or community service for a term up to 240 hours, or deprivation of the right

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певні посади чи займатися певною діяльністю на строк до трьох років, або виправними роботами на строк до двох років.	to occupy certain positions or engage in certain activities for a term up to three years, or correctional labour for a term up to two years.
Частина 1 статті 159 Кримінального кодексу України: Умисне порушення таємниці голосування під час проведення виборів або референдуму, що виявилося у розголошенні змісту волевиявлення громадянина, який взяв участь у виборах або референдумі, – карається штрафом від ста до трьохсот неоподатковуваних мінімумів доходів громадян або виправними роботами на строк до двох років, або обмеженням волі на строк до трьох років.	**Part 1 of the Article 159 of the Criminal Code of Ukraine:** Wilful violation of secrecy of voting during the election or referendum, which resulted in disclosure of the will of a citizen who took part in elections or referendum, – shall be punishable by a fine of one hundred to three tax-free minimum incomes, or correctional labour up to two years, or restraint of liberty for up to three years.
Частина 1 статті 161 Кримінального кодексу України: Умисні дії, спрямовані на розпалювання національної, расової чи релігійної ворожнечі та ненависті, на приниження національної честі та гідності, або образа почуттів громадян у зв'язку з їхніми релігійними переконаннями, а також пряме чи непряме обмеження прав або встановлення прямих чи непрямих привілеїв громадян за ознаками раси, кольору шкіри, політичних, релігійних та інших переконань, статі, інвалідності, етнічного та соціального походження, майнового стану, місця проживання, за мовними або іншими ознаками –	**Part 1 of the Article 161 of the Criminal Code of Ukraine:** Wilful actions inciting national, racial or religious enmity and hatred, humiliation of national honour and dignity, or the insult of citizens' feelings in respect to their religious convictions, and also any direct or indirect restriction of rights, or granting direct or indirect privileges to citizens based on race, color of skin, political, religious and other convictions, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics, – shall be punishable by a fine of 200 to 500 tax-free minimum incomes,

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караються штрафом від двохсот до п'ятисот неоподатковуваних мінімумів доходів громадян або обмеженням волі на строк до п'яти років, з позбавленням права обіймати певні посади чи займатися певною діяльністю на строк до трьох років або без такого.	or restraint of liberty for a term up to five years, with or without the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.
Частина 1 статті 162 Кримінального кодексу України: Незаконне проникнення до житла чи до іншого володіння особи, незаконне проведення в них огляду чи обшуку, а так само незаконне виселення чи інші дії, що порушують недоторканність житла громадян, – караються штрафом від п'ятдесяти до ста неоподатковуваних мінімумів доходів громадян або виправними роботами на строк до двох років, або обмеженням волі на строк до трьох років.	**Part 1 of the Article 162 of the Criminal Code of Ukraine:** Unlawful entry into residence or any other property of a person, or unlawful examination or search thereof, and also unlawful eviction or any other actions that violate the security of a citizen's residence, – shall be punishable by a fine of 50 to 100 tax-free minimum incomes, or correctional labor for a term up to two years, or restraint of liberty for a term up to three years.
Частина 1 статті 163 Кримінального кодексу України: Порушення таємниці листування, телефонних розмов, телеграфної чи іншої кореспонденції, що передаються засобами зв'язку або через комп'ютер, – караються штрафом від п'ятдесяти до ста неоподатковуваних мінімумів доходів громадян або виправними роботами на строк до двох років, або обмеженням волі до трьох років.	**Part 1 of the Article 163 of the Criminal Code of Ukraine:** Violation of privacy of mail, telephone conversations, telegraph and other correspondence conveyed by means of communication or via computers, shall be punishable by a fine of 50 to 100 tax-free minimum incomes, or correctional labor for a term up to two year, or restraint of liberty for a term up to three years.

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Частина 1 статті 168 Кримінального кодексу України: Розголошення таємниці усиновлення (удочеріння) всупереч волі усиновителя (удочерителя) – карається штрафом до п'ятдесяти неоподатковуваних мінімумів доходів громадян або громадськими роботами на строк до двохсот сорока годин, або виправними роботами на строк до двох років.	**Part 1 of the Article 168 of the Criminal Code of Ukraine:** Disclosure of the secrecy of adoption against the will of an adopter, – shall be punishable by a fine up to 50 tax-free minimum incomes, or community service for a term up to 240 hours, or correctional labor for a term up to two years.
Частина 1 статті 258 Кримінального кодексу України: Терористичний акт, тобто застосування зброї, вчинення вибуху, підпалу чи інших дій, які створювали небезпеку для життя чи здоров'я людини або заподіяння значної майнової шкоди чи настання інших тяжких наслідків, якщо такі дії були вчинені з метою порушення громадської безпеки, залякування населення, провокації воєнного конфлікту, міжнародного ускладнення, або з метою впливу на прийняття рішень чи вчинення або невчинення дій органами державної влади чи органами місцевого самоврядування, службовими особами цих органів, об'єднаннями громадян, юридичними особами, міжнародними організаціями, або привернення уваги громадськості до певних політичних, релігійних чи інших поглядів винного (терориста),	**Part 1 of the Article 258 of the Criminal Code of Ukraine:** An act of terrorism, that is the use of weapons, explosions, fire or any other actions that exposed human life or health to danger or caused significant pecuniary damage or any other grave consequences, where such actions sought to violate public security, intimidate population, provoke an armed conflict, or international tension, or to exert influence on decisions made or actions taken or not taken by government agencies or local government authorities, officials and officers of such bodies, associations of citizens, legal entities, or to attract attention of the public to certain political, religious or any other convictions of the culprit (terrorist), and also a threat to commit any such acts for the same purposes, –

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а також погроза вчинення зазначених дій з тією самою метою – караються позбавленням волі на строк від п'яти до десяти років з конфіскацією майна або без такої.	shall be punishable by imprisonment for a term of five to ten years with forfeiture of property or without it.
Частина 1 статті 258–2 Кримінального кодексу України: Публічні заклики до вчинення терористичного акту, а також розповсюдження, виготовлення чи зберігання з метою розповсюдження матеріалів з такими закликами – караються виправними роботами на строк до двох років або арештом на строк до шести місяців, або обмеженням волі на строк до трьох років, або позбавленням волі на той самий строк з конфіскацією майна або без такої.	**Part 1 of the Article 258–2 of the Criminal Code of Ukraine:** Public incitement to commit a terrorist act, as well as distribution, manufacture or possession for distribution of materials with such incitements, – shall be punishable by correctional labor for a term up to two years or imprisonment for a term up to six months, or restraint of liberty for a term up to three years or deprivation of liberty for the same term with forfeiture of property or without it.
Стаття 295 Кримінального кодексу України: Публічні заклики до погромів, підпалів, знищення майна, захоплення будівель чи споруд, насильницького виселення громадян, що загрожують громадському порядку, а також розповсюдження, виготовлення чи зберігання з метою розповсюдження матеріалів такого змісту – караються штрафом до п'ятдесяти неоподатковуваних мінімумів доходів громадян або арештом на строк до шести місяців, або обмеженням волі на строк до трьох років.	**Article 295 of the Criminal Code of Ukraine:** Public calls to riotous damage, arson, destruction of property, taking control of buildings or constructions, forceful eviction of citizens, where these actions pose a threat to the public order, and also distributing, making or storing any material of such content, – shall be punishable by a fine up to 50 tax-free minimum incomes, or arrest for a term up to six months, or restraint of liberty for a term up to three years.

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Частина 1 статті 299 Кримінального кодексу України: Жорстоке поводження з тваринами, що відносяться до хребетних, у тому числі безпритульними тваринами, що вчинене умисно та призвело до каліцтва чи загибелі тварини, а також нацьковування тварин одна на одну чи інших тварин, вчинене з хуліганських чи корисливих мотивів, публічні заклики до вчинення діянь, які мають ознаки жорстокого поводження з тваринами, а також поширення матеріалів із закликами до вчинення таких дій – караються арештом на строк до шести місяців або обмеженням волі на строк до трьох років.	**Part 1 of the Article 299 of the Criminal Code of Ukraine:** Abuse of vertebrate animals based on cruel or hooligan motives, and also setting such animals against one another based on hooligan or mercenary motives, – shall be punishable by an arrest for a term up to six months or restraint of liberty for a term up to three years.
Частина 1 статті 338 Кримінального кодексу України: Публічна наруга над Державним Прапором України, Державним Гербом України або Державним Гімном України – карається штрафом до п'ятдесяти неоподатковуваних мінімумів доходів громадян або арештом на строк до шести місяців або позбавленням волі на строк до трьох років.	**Part 1 of the Article 338 of the Criminal Code of Ukraine:** Public outrage against the National Flag of Ukraine, the National Coat of Arms of Ukraine or the National Anthem of Ukraine, – shall be punishable by a fine up to 50 tax-free minimum incomes, or arrest for a term up to six months, or imprisonment for a term up to three years.
Частина 1 статті 346 Кримінального кодексу України: Погроза вбивством, заподіянням шкоди здоров'ю, знищенням або	**Part 1 of the Article 346 of the Criminal Code of Ukraine:** Threats of murder, impairment of health, destruction or impairment of

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пошкодженням майна, а також викраденням або позбавленням волі щодо Президента України, Голови Верховної Ради України, народного депутата України, Прем'єр-міністра України, члена Кабінету Міністрів України, Голови чи члена Вищої ради правосуддя, Голови чи члена Вищої кваліфікаційної комісії суддів України, Голови чи судді Конституційного Суду України або Верховного Суду України чи вищих спеціалізованих судів України, Генерального прокурора, Директора Національного антикорупційного бюро України, Уповноваженого Верховної Ради України з прав людини, Голови або іншого члена Рахункової палати, Голови Національного банку України, керівника політичної партії України, а також щодо їх близьких родичів, вчинена у зв'язку з їх державною чи громадською діяльністю, – карається обмеженням волі на строк до п'яти років або позбавленням волі на той самий строк.	property, kidnapping or confinement made in respect of the President of Ukraine, the Chairman of the Verkhovna Rada (Parliament) of Ukraine, a National Deputy (Member of Parliament) of Ukraine, the Prime Minister of Ukraine, a member of Cabinet of Ministers of Ukraine, the Chairman or a member of the Supreme Council of Justice, the Chairman or a member of the Supreme Qualification Commission of judges of Ukraine, the Chairman or a judge of the Constitutional Court of Ukraine or the Supreme Court of Ukraine or High Specialized Courts of Ukraine, the Procurator General of Ukraine, the Chairman of the National Anti-Corruption Bureau of Ukraine, the Human Rights Commissioner of the Verkhovna Rada of Ukraine, the Head of the Accounting Chamber, the Chairman of the National Bank of Ukraine, or a leader of a political party, committed in relation to their government or public activity, – shall be punishable by restraint of liberty for a term up to five years, or imprisonment for the same term.
Частина 1 статті 350 Кримінального кодексу України: Погроза вбивством, заподіянням тяжких тілесних ушкоджень або зни-	**Part 1 of the Article 350 of the Criminal Code of Ukraine:** Threats of murder, grave bodily injury or destruction or impairment

Provision in Ukrainian language	Corresponding translation in English
щенням чи пошкодженням майна загальнонебезпечним способом щодо службової особи чи її близьких або щодо громадянина, який виконує громадський обов'язок, застосована з метою припинення діяльності службової особи чи громадянина, який виконує громадський обов'язок, або зміни її характеру в інтересах того, хто погрожує, – карається арештом на строк до шести місяців або обмеженням волі на строк до трьох років, або позбавленням волі на строк до двох років.	of property by a generally dangerous method, made in respect of an official or his close relatives or a citizen who performs his/her public duty, where these acts are committed to preclude the activities of the official or the citizen who performs his/her public duty, or to change their nature in the interests of the persons who makes such threats, – shall be punishable with arrest for a term up to six months, or restraint of liberty for a term up to three years, or imprisonment for a term up to two years.
Стаття 436 Кримінального кодексу України: Публічні заклики до агресивної війни або до розв'язування воєнного конфлікту, а також виготовлення матеріалів із закликами до вчинення таких дій з метою їх розповсюдження або розповсюдження таких матеріалів – караються виправними роботами на строк до двох років або арештом на строк до шести місяців, або позбавленням волі на строк до трьох років.	**Article 436 of the Criminal Code of Ukraine:** Public calls to an aggressive war or an armed conflict, and also making of materials with calls to any such actions for distribution purposes or distribution of such materials, – shall be punishable by correctional labour for a term up to two years, or arrest for a term up to six months, or imprisonment for a term up to three years.
Частина 1 статті 436–1 Кримінального кодексу України: Виготовлення, поширення, а також публічне використання символіки комуністичного, націонал-соціалістичного (нацистського) тоталітарних	**Article 1 of the Article 436–1 of the Criminal Code of Ukraine:** Production, distribution and public use of symbolism of communist, national-socialist (Nazi) totalitarian regimes including as a souvenir

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режимів, у тому числі у вигляді сувенірної продукції, публічне виконання гімнів СРСР, УРСР (УСРР), інших союзних та автономних радянських республік або їх фрагментів на всій території України, крім випадків, передбачених частинами другою і третьою статті 4 Закону України "Про засудження комуністичного та націонал-соціалістичного (нацистського) тоталітарних режимів в Україні та заборону пропаганди їх символіки", – карається обмеженням волі на строк до п'яти років або позбавленням волі на той самий строк, з конфіскацією майна або без такої.	production, public performance of anthems of USSR, UkrSSR, other union or autonomous soviet republics or their fragments on the whole territory of Ukraine except cases, provided by parts 2 and 3 of the Article 4 of the Law of Ukraine "On condemnation of communist and national-socialistic (Nazi) totalitarian regimes in Ukraine and prohibition of propaganda of their symbolism", – shall be punishable by restraint of liberty for a term up to five years or imprisonment for the same term, with forfeiture of property or without it.
Частина 1 статті 442 Кримінального кодексу України: Геноцид, тобто діяння, умисно вчинене з метою повного або частково-го знищення будь-якої національної, етнічної, расової чи релігійної групи шляхом позбавлення життя членів такої групи чи заподіяння їм тяжких тілесних ушкоджень, створення для групи життєвих умов, розрахованих на повне чи часткове її фізичне знищення, скорочення дітонародження чи запобігання йому в такій групі або шляхом насильницької передачі дітей з однієї групи в іншу, – карається позбавленням волі на строк від десяти до п'ятнадцяти років або довічним позбавленням волі.	**Part 1 of the Article 442 of the Criminal Code of Ukraine:** Genocide, that is a wilfully committed act for the purpose of total or partial destruction of any national, ethnic, racial, or religious group by extermination of members of any such group or inflicting grave bodily injuries on them, creation of life conditions aimed at total or partial physical destruction of the group, decrease or prevention of childbearing in the group, or forceful transferring of children from one group to another, – shall be punishable by imprisonment for a term of ten to fifteen years, or life imprisonment.

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Частина 1 статті 94 Цивільного кодексу України: Юридична особа має право на недоторканність її ділової репутації, на таємницю кореспонденції, на інформацію та інші особисті немайнові права, які можуть їй належати. Особисті немайнові права юридичної особи захищаються відповідно до глави 3 цього Кодексу.	**Part 1 of the Article 94 of the Civil Code of Ukraine:** Legal entity shall have a right to its business standing immunity, a secrecy of correspondence, information and other personal non-property rights it may own. Personal non-property rights of a legal entity shall be protected according to Chapter 3 of this Code.
Частина 1 статті 302 Цивільного кодексу України: Фізична особа має право вільно збирати, зберігати, використовувати і поширювати інформацію. Збирання, зберігання, використання і поширення інформації про особисте життя фізичної особи без її згоди не допускаються, крім випадків, визначених законом, і лише в інтересах національної безпеки, економічного добробуту та прав людини.	**Part 1 of the Article 302 of the Civil Code of Ukraine:** A natural person shall be entitled to freely collect, store, use and disseminate information. Collecting, storage, use and dissemination of information on private life of a natural person without his/her consent shall be inadmissible, except for the cases established by the law and only to the benefit of the national security, economic welfare and human rights.
Частина 2 статті 212–2 Кодексу України про адміністративні правопорушення: Засекречування інформації: про стан довкілля, про якість харчових продуктів і предметів побуту; про аварії, катастрофи, небезпечні природні явища та інші надзвичайні події, які сталися або можуть статися та загрожують безпеці громадян;	**Part 2 of the Article 212–2 of The Code of Ukraine on Administrative Offences:** Classification of information about the environment, the quality of food and household items; about accidents, catastrophes, dangerous natural phenomena and other emergencies that have occurred or may occur and threaten the safety of citizens; on the

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про стан здоров'я населення, його життєвий рівень, включаючи харчування, одяг, житло, медичне обслуговування та соціальне забезпечення, а також про соціально-демографічні показники, стан правопорядку, освіти та культури населення; про факти порушень прав і свобод людини і громадянина; про незаконні дії органів державної влади, органів місцевого самоврядування та їх посадових осіб; іншої інформації, яка відповідно до законів та міжнародних договорів, згода на обов'язковість яких надана Верховною Радою України, не може бути засекречена; безпідставне засекречування інформації	state of health of the population, its standard of living, including food, clothing, housing, medical care and social security, as well as on socio-demographic indicators, law and order, education and culture of the population; about the facts of violations of human and civil rights and freedoms; about illegal actions of state authorities, local self-government bodies and their officials; other information, which in accordance with the laws and international agreements, the binding consent of which was given by the Verkhovna Rada of Ukraine, cannot be classified; unjustified classification of information.
Частина 1 статті 1 Закону України «Про доступ до публічної інформації»: Публічна інформація – це відображена та задокументована будь-якими засобами та на будь-яких носіях інформація, що була отримана або створена в процесі виконання суб'єктами владних повноважень своїх обов'язків, передбачених чинним законодавством, або яка знаходиться у володінні суб'єктів владних повноважень, інших розпорядників публічної інформації, визначених цим Законом.	**Part 1 of the Article 1 of the Law of Ukraine: «On Access to Public Information»:** Public information shall mean information that is reflected and documented by any means and information medium and which was received or created in the process of performance by subjects of public authority of their duties envisaged in the legislation in force or which is in possession of the subjects of public authority, other administrators of public information determined by this Law.

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Частина 3 статті 1 Закону України «Про доступ до публічної інформації»: Право на доступ до публічної інформації гарантується: 1) обов'язком розпорядників інформації надавати та оприлюднювати інформацію, крім випадків, передбачених законом; 2) визначенням розпорядником інформації спеціальних структурних підрозділів або посадових осіб, які організовують у встановленому порядку доступ до публічної інформації, якою він володіє; 3) максимальним спрощенням процедури подання запиту та отримання інформації; 4) доступом до засідань колегіальних суб'єктів владних повноважень, крім випадків, передбачених законодавством; 5) здійсненням парламентського, громадського та державного контролю за дотриманням прав на доступ до публічної інформації; 6) юридичною відповідальністю за порушення законодавства про доступ до публічної інформації.	**Part 3 of the Article 1 of the Law of Ukraine «On Access to Public Information»:** The right of access to public information shall be guaranteed by: 1) duty of information administrators to provide and publish information, except for instances envisaged by the law; 2) designation by the information administrator of special structural units or officials, who organize access to public information in its possession according to the established procedure; 3) maximal simplification of the procedure for submitting requests and obtaining information; 4) access to meetings of collective subjects of public authority, except for instances envisaged by legislation; 5) exercise of parliamentary, public and state control over observance of rights of access to public information; 6) legal liability for violation of legislation on access to public information.
Частина 5 статті 1 Закону України «Про авторське право і суміжні права»: Веб-сайт – сукупність даних, електронної (цифрової) інформації, інших об'єктів авторського права і (або)	**Part 5 of the Article 1 of the Law of Ukraine: «On Copyright and Related Rights»:** website – a set of data, electronic (digital) information, other objects of copyright and (or) related rights, etc.

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суміжних прав тощо, пов'язаних між собою і структурованих у межах адреси веб-сайту і (або) облікового запису власника цього веб-сайту, доступ до яких здійснюється через адресу мережі Інтернет, що може складатися з доменного імені, записів про каталоги або виклики і (або) числової адреси за Інтернет-протоколом	, related to each other and structured within the address of the website and (or) the account of the owner of this website. a site accessed through an Internet address, which may consist of a domain name, directory or call records, and (or) a numeric Internet Protocol address
Частини 2 і 3 статті 1 Закону України «Про інформацію»: Захист інформації – сукупність правових, адміністративних, організаційних, технічних та інших заходів, що забезпечують збереження, цілісність інформації та належний порядок доступу до неї; Інформація – будь-які відомості та/або дані, які можуть бути збережені на матеріальних носіях або відображені в електронному вигляді.	**Parts 2 and 3 of the Article 1 of the Law of Ukraine «On Information»:** Protection of information – a set of legal, administrative, organizational, technical and other activities to ensure storage and integrity of information and a proper access to it; Information – any info and/or data that may be stored on material media or retrieved in electronic format;
Частина 1 статті 21 Закону України «Про інформацію»: Інформацією з обмеженим доступом є конфіденційна, таємна та службова інформація.	**Part 1 of the Article 21 of the Law of Ukraine «On Information»:** Information with limited access is confidential, secret and business information.
Частини 1 і 2 статті 22 Закону України «Про інформацію»: Масова інформація – інформація, що поширюється з метою її доведення до необмеженого кола осіб. Засоби масової інформації – засоби, призначені для публічного поширення друкованої або аудіовізуальної інформації.	**Parts 1 and 2 of the Article 22 of the Law of Ukraine «On Information»:** Media – info disseminated to outreach unlimited number of persons. Media means – means to public disseminate printed and audiovisual info.

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Частина 2 статті 24 Закону України «Про інформацію»: Забороняються втручання у професійну діяльність журналістів, контроль за змістом поширюваної інформації, зокрема з метою поширення чи непоширення певної інформації, замовчування суспільно необхідної інформації, накладення заборони на висвітлення окремих тем, показ окремих осіб або поширення інформації про них, заборони критикувати суб'єкти владних повноважень, крім випадків, встановлених законом, договором між засновником (власником) і трудовим колективом, редакційним статутом.	**Part 2 of the Article 24 of the Law of Ukraine «On Information»:** Meddling with professional activities of journalists, control of info content is prohibited, specifically to disseminate or not to specific info, hushing of socially needed info, embargoing some themes, lime lighting some persons or disseminating info about them; prohibition to criticize authorities, except the cases set by law, labour agreement between owner and collective, editorial charter.
Частини 1–7 статті 25 Закону України «Про інформацію»: Під час виконання професійних обов'язків журналіст має право здійснювати письмові, аудіо- та відеозаписи із застосуванням необхідних технічних засобів, за винятком випадків, передбачених законом. Журналіст має право безперешкодно відвідувати приміщення суб'єктів владних повноважень, відкриті заходи, які ними проводяться, та бути особисто прийнятим у розумні строки їх посадовими і службовими особами, крім випадків, визначених законодавством.	**Parts 1–7 of the Article 25 of the Law of Ukraine «On Information»:** When performing his duties, a journalist may take notes, record, video-record using technical means, except the cases set by law. A journalist may uninhibitedly enter the premises occupied by authorities, open events they host, and be invited to confer by incumbents within reasonable term, except the cases set by law. A journalist has a right not to disclose an info source or the info that might lead to source disclosure, except the cases when he is bound to by the court decision or under law.

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Журналіст має право не розкривати джерело інформації або інформацію, яка дозволяє встановити джерела інформації, крім випадків, коли його зобов'язано до цього рішенням суду на основі закону. Після пред'явлення документа, що засвідчує його професійну належність, працівник засобу масової інформації має право збирати інформацію в районах стихійного лиха, катастроф, у місцях аварій, масових безпорядків, воєнних дій, крім випадків, передбачених законом. Журналіст має право поширювати підготовлені ним матеріали (фонограми, відеозаписи, письмові тексти тощо) за власним підписом (авторством) або під умовним ім'ям (псевдонімом). Журналіст засобу масової інформації має право відмовитися від авторства (підпису) на матеріал, якщо його зміст після редакційної правки (редагування) суперечить його переконанням. Права та обов'язки журналіста, працівника засобу масової інформації, визначені цим Законом, поширюються на зарубіжних журналістів, працівників зарубіжних засобів масової інформації, які працюють в Україні.	After having produced a professional ID document, a media man may gather info at sites of calamity, disaster, accidents, public disorder, military engagements, except the cases set by law. A journalist may disseminate his materials (audio-, video, notes, etc.) signed (authorship) or penname signed. A journalist may refuse his authorship (signature) to the material if its redacted content counters his beliefs. The rights and obligations of journalist, media man, set by this law, shall be valid for foreign journalists, foreign media staff who work in Ukraine.

Provision in Ukrainian language	Corresponding translation in English
Частини 1 і 2 статті 2 Закону України «Про друковані засоби масової інформації (пресу) в Україні»: Свобода слова і вільне вираження у друкованій формі своїх поглядів і переконань гарантуються Конституцією України і відповідно до цього Закону означають право кожного вільно і незалежно шукати, одержувати, фіксувати, зберігати, використовувати та поширювати будь-яку інформацію за допомогою друкованих засобів масової інформації, крім випадків, визначених законом, коли обмеження цього права необхідно в інтересах національної безпеки, територіальної цілісності або громадського порядку з метою запобігання заворушенням чи злочинам, для охорони здоров'я населення, для захисту репутації або прав інших людей, для запобігання розголошенню інформації, одержаної конфіденційно, або для підтримання авторитету і неупередженості правосуддя. Друковані засоби масової інформації є вільними. Забороняється створення та фінансування державних органів, установ, організацій або посад для цензури масової інформації.	**Parts 1 and 2 of the Article 2 of the Law of Ukraine: «On Printed Mass Media (Press) in Ukraine»:** Freedom of speech and free expression of his or her views and beliefs in a printed form is guaranteed by the Constitution of Ukraine and according to this Law it implies that everyone is entitled to be free and independent when searching for, receiving, recording, using and disseminating any information through printed media unless otherwise envisaged by the low, when restriction of such right is required to ensure national security and territorial integrity or public order and in order to prevent disturbances or criminal offenses, to ensure public medical care, to protect reputation or rights of other people, to prevent disclosure of information which was received confidentially or to support the authority and detachment of justice Print media shall be free. Establishing and funding authorities, institutions, organizations or positions to censor information in mass media shall be prohibited.

Provision in Ukrainian language	Corresponding translation in English
Частина 12 Постанови Пленуму Верховного Суду України «Про судову практику у справах про захист гідності та честі фізичної особи, а також ділової репутації фізичної та юридичної особи»: Належним відповідачем у разі поширення оспорюваної інформації в мережі Інтернет є автор відповідного інформаційного матеріалу та власник веб-сайта, особи яких позивач повинен установити та зазначити в позовній заяві.	**Part 12 of the Decision of the Plenum of the Supreme Court of Ukraine 'On judicial practice in cases concerning the protection of the honour and dignity of a natural person as well as the business reputation of a natural and legal person':** The appropriate respondent in the case of spreading the contested information via the Internet is the author of the relevant publication and the owner of the website whose identities the claimant must establish and stipulate in the statement of claim.

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The Polish report

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Introduction

Freedom of expression in Poland is one of the fundamental human rights and has a unique relationship with the notion of democracy. The protection of freedom of expression is guaranteed by many polish and international legislative acts. However, to be a firm foundation of the freedom of society, it must be respected by the State, which should draw a clear line between freedom of expression and inflicting harm to another human being.

1. How is the freedom of expression regulated in your national legislation?

The fight for freedom of expression is an ever ongoing issue in democratic Poland.

Poland, being a post-communist country, has suffered a great deal of hardship due to widespread censorship. The development of laws concerning freedom of expression and freedom of speech was strongly impeded by censorship imposed by the government from 1945 until 1989. Glowny Urzad Kontroli Prasy, Publikacji i Widowisk (The Main Office of Control of Press, Publications and Shows, hereinafter referred to as GUKPPiW) not only destroyed books, but also prohibited publications and black-listed writers. The public did not have access to any data, not even i.a. statistical data about coffee drinking in Poland[1]. As pointed out by M. Kledzik, the amendment of Press Law in June 1989 was the beginning of change happening inside the press market. Only after the liquidation of GUKPPiW and the abolishment of communism, as well as censorship laws in 1990, could the freedom of expression be truly exercised by the people. New laws granted permission for every citizen to start their own newspaper, which resulted in a few thousands of new newspapers and press companies being registered in 1990[2], making it even clearer that freedom of expression is a basic human right desired and deserved by every citizen.

[1] Rutecki, Kamil. «O cenzurze w PRL-u» (PDF). Warmińsko – Mazurska Biblioteka Pedagogiczna w Elblągu. p. 7. Archived from the original (PDF) on 2014-08-08.

[2] M. Kledzik, Cenzura…, op. cit., s. 184.

When speaking about how freedom of expression is regulated in Poland, it needs to be understood that those regulations can be discussed on two levels – firstly, on a national level and secondly, on an international level, as Poland is a signee of many international treaties, as well as a member of the European Union.

1.1. National Legislation

1.1.1. The Constitution

Firstly, the freedom of expression and freedom of speech is regulated by The Constitution of the Republic of Poland, more specifically by articles 14, 25, 49, 53, 54 and 73.

Article 14 constitutes the freedom of press, mass media and any other means of mass communication. Article 25 grants religious freedom, as well as the freedom to express any philosophical beliefs; it also establishes the separation of state and church. Article 49 grants the freedom of privacy and communication. Article 53 grants the freedom of conscience and religion to everyone; it states that parents have the right to raise their children according to their own convictions and provides that everyone has the right to publicly express their religion. Article 54 grants everyone the freedom to express their opinions and to acquire and disseminate information, at the same time prohibiting preventive censorship of the means of social communication and licensing of the press. Article 73 provides the protection of artistic creation and scientific research freedom as well as the dissemination of the products of that work. It also grants the freedom to teach and enjoy the products of culture[1] .

Freedom of expression, according to the aforementioned articles, can be restricted by statute in only a few instances, those instances being: a threat to national security or public order; protection of the natural environment, protection of public health or public morals and protection of the right of others, however, limitations must not violate the essence of the freedoms and rights.

[1] The Constitution of the Republic of Poland of 2nd April, 1997, published in Dziennik Ustaw No. 78 item 483

That being said, sometimes what can be deemed a threat to public order or morals can be highly debatable. There are laws restricting freedom of expression which can be interpreted liberally and past convictions have proven that. While being regulated by the Constitution, freedom of speech and its criminal components, such as the thin line between free speech and hate speech or insulting one's religious beliefs is still a concept left to be interpreted however one wants. Specifically, there is a troubling dissonance between freedom of expression and the aim to protect religious feelings. Two high-profile cases dealing with this have notably captured the attention of the public. Those two cases, discussed together, show that laws regarding freedom of expression in Poland can sometimes be understood in a contradictory way.

The first case is the case of Adam Darski (stage name Nergal), a polish death metal singer. In 2007 Nergal was charged with insulting religious feelings of the public after he destroyed a Bible during his concert in Gdynia. He tore pages from the Bible and threw them at the audience, telling them to burn them. Furthermore, he called the Bible 'a deceitful book' and called the Catholic Church a „criminal sect". Such acts, potentially offending one's religious feelings, are proscribed in Article 196 of the Polish Criminal Code ('anyone who offends the religious feelings of others by publicly blaspheming an object of religious worship or a place dedicated to the public celebration of religious rites is liable to a fine, the restriction of liberty or imprisonment for up to two years'[1]). He was acquitted of the charges as judge Krzysztof Wieckowski in his ruling deemed his actions to be 'artistic expression' consistent with his band's style[2]. Moreover, the verdict said that the concert took place in a closed venue, therefore making it impossible for people not present at the concert to be offended. The concert was a 'closed' event dedicated to adult audience acquainted with this type of art and prepared for the controversial behaviour of the musical group's members, especially that of its leader. The artist won the case and after it was appealed two times, it was eventually heard by The Supreme Court. Nergal was acquitted again[3].

[1] Polish Criminal Code of 6 June 1997 r. (Dz.U. tłum. gb Nr 88, poz. 553)
[2] Wyrok Sądu Rejonowego w Gdyni z dnia 3 czerwca 2013 r.
[3] Wyrok SN z dnia 5 marca 2015 r., Sygn. akt III KK 274/14

On the other hand, Nergal's ex-partner, Dorota Rabczewska (stage name Doda), a Polish pop star, was charged with the same offence (art. 196 of the Polish Criminal Code) and lost. In 2009 during an interview she said that he 'believed in dinosaurs more than in the Bible,' because – in her opinion – 'it's very hard to believe in that which was written by someone who was drunk and smoking some herbs.' When she was asked about whom she was talking, she added, 'about all those people who wrote all those insane stories.' She was found guilty of offending the religious feelings of Roman Catholics and fined, even though what she said was considered 'spontaneous and not malicious' and that her tendency to shock was just part of her artistic image. The court ruled that she was fully aware of what she was saying and that her statement was provoking in its nature. Later she lodged a constitutional complaint to the Constitutional Tribunal in Poland, stating that Article 196 of the Polish Criminal Code is not constitutional, infringing her beliefs. The Constitutional Court, however, found the provision to be compatible with Article 54 of the Constitution[1]. Following that, Dorota Rabczewska filed an application with the European Court of Human Rights under Article 10 of the European Convention of Human Rights[2].

1.1.2. Further regulations

Besides the Constitution, there are many legislative acts and documents regarding and or protecting the freedom of expression in some way. Freedom of speech is certainly closely related to – or at least should be tied to – free media. And regarding that issue, the Act of January 26 1984 on Press Law[3] constitutes that, on the basis of The Constitution, the press in Poland uses freedom of expression and practices citizens' rights to reliable and fair informing, transparency of public life and the control and criticism of the public. Furthermore, this act grants every citizen the right to inform the press about anything, according to personal freedoms, freedom of speech and the right to criticism. The right to report to the press is also a key component of maintaining transparency and the safety of the public, as well as exercising personal rights and freedoms.

[1] Judgment of the Constitutional Court of Poland of 6 October 2015, case SK 54/13
[2] Rabczewska v. Poland, application no. 8257/13
[3] Ustawa z dnia 26 stycznia 1984 r. Prawo prasowe

Regulations concerning freedom of expression and freedom of speech are also expressed in the Civil Code of April 23 1964. Article 23 of the Civil Code states that personal interests of a human being, in particular: health, freedom, dignity, freedom of conscience, name or pseudonym, image, privacy of correspondence, inviolability of home, and scientific, artistic, inventive or improvement achievements are protected by civil law, independently of any other provisions expressed in the aforementioned act. Article 24 deals with means of protection of said personal interests. On its basis, it is illegal to threaten those freedoms. A victim of that may demand that the actions be ceased unless they are not unlawful, they may also demand that the person guilty of that perform any actions necessary to remove its effects. On the terms provided by the Civil Code, they may also demand monetary compensation.

The Act of February 4 1994 on Copyright and related right[1] permits free of charge use of works which have been disseminated, for purposes of private use without the permission of the author. This provision is very important in regards to distribution of works of any kind and their availability.

1.2. International Legislation

Poland had signed and ratified most of the core international human rights acts and is therefore bound by them to protect freedom of expression and freedom of speech.

To start with, the most important act regarding freedom of expression is The Universal Declaration of Human Rights (hereinafter referred to as UDHR). This document was proclaimed by the United Nations General Assembly in Paris on December 10 1948 and since then, it is a global road map for freedom and equality. In terms of freedom of expression, the most significance is held by Article 19 of UDHR which states that 'everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers'[2] Article 18 also grants everyone the right to freedom of thought, conscience

[1] Ustawa z dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych

[2] The Universal Declaration of Human Rights, via <https://www.un.org/en/universal-declaration-human-rights/>

and religion and to manifest their religion or belief in teaching, practice, worship and observance.

The next act is The International Covenant on Civil and Political Rights (hereinafter referred to as OHCHR), adopted on 16 December 1966. Article 18 of OHCHR articulates universal freedom of thought, conscience and religion. Article 19 states that everyone is entitled to have the right to hold opinions without interference, the right to freedom of expression. This freedom, mentioned in section 2 of said article, includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, in all available forms[1]. What's interesting is that freedom of expression in the meaning of this act constitutes certain responsibilities mentioned along with the freedoms. It means that freedom of expression can be subjected to restrictions for respect of the rights or reputations of others and or for the protection of national security of public order, public health or morals. It is understood therefore, that freedom of expression is not of ultimate value within the meaning of those provisions.

When it comes to European regulations regarding freedom of expression, perhaps the most important one is the Convention for the Protection of Human Rights and Fundamental Freedoms (more widely known as the European Convention on Human Rights), adopted on November 4 1950 in Rome. While Article 9 of this act mentions freedom of thought, conscience and religion, Article 10 deals directly with the freedom of expression. Its contents and meaning are very similar to those expressed in Article 19 of OHCHR. Article 10, too, mentions certain restrictions of freedom of expression and the grounds on which they could be implemented, broadening the list a little bit more than Article 19 of OHCHR. Section 2 states that 'the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protec-

[1] International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976

tion of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

Other documents recognised by courts are the rulings of the European Court of Human Rights (hereinafter referred to as ECHR) as some of its judgments are legally binding for Polish courts. ECHR has also pointed out certain groups whose freedom of expression should be protected in particular. Among those groups are civil servants[1] and journalists[2]. The protection of journalists' freedom of expression is particularly widespread, as should be in order to guarantee free media.

To summarise, laws granting and protecting freedom of expression are present in many polish legislative acts. As for the national legislation, the most important acts are: The Constitution of the Republic of Poland, Press Law, The Civil Code and Copyright Law. International legislative acts, of which Poland is a signee, are The Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights and European are Convention for the Protection of Human Rights and Fundamental Freedoms and rulings of The European Court of Human Rights.

2. What are the limitations to the freedom of expression in your national legislation? Are they prescribed in the criminal law?

2.1. Freedom of expression and its limitations under the European Convention on Human Rights

According to the words of the great Polish lawyer – prof. Ewa Łętowska – a modern legal system is multicentric[3]. As a consequence of such a perspective, an analysis of the problem of limitations to the freedom of expression in Polish legal order should start with a broadened, international perspective.

[1] Vogt v. Germany (1996) 21 EHRR 205, (no. 17851/91)

[2] Nagla v. Latvia (2013), (no. 73469/10)

[3] E. Łętowska, Multicentryczność współczesnego systemu prawa i jej konsekwencje, PiP, 2005/4/, s. 3–10.[Polish]

Thus, the starting point of my considerations will be the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention), which was ratified by Poland on 19th January 1993.

Under art. 10 paragraph 1 of the Convention, "everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.". As we can clearly see, the scope of the freedom of expression determined by the provisions of the Convention is wide and contains situations beyond the freedom of speech[1].

Undoubtedly, this particular freedom has a unique relation with the idea of democracy and has a fundamental meaning in the light of other human rights. In its Handyside v. The United Kingdom case judgement, the European Court of Human Right stated that "freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man**.** Subject to paragraph 2 of Article 10 (art. 10–2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness (…)[2]". Regarding that, there is no freedom of assembly and association or freedom to manifest one's religion or beliefs without the freedom to hold opinions. Furthermore, there is no right to self-defence during the trial without the right to be silent.

But how to set the accurate restrictions on the freedom of such importance?

[1] J. Sobczak, Swoboda wypowiedzi w orzecznictwie Europejskiego Trybunału Praw Człowieka w Strasburgu. Część 1., IN 2007, nr 2–3, p. 5. [Polish]

[2] <https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22\%22CASE%20OF%20HANDYSIDE%20v.%20THE%20UNITED%20KINGDOM\%22%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001–57499%22]}≥ (access: 15.07.2020)

As we can deduce from preparatory materials on the Convention, one of the main difficulties was to determine the limitations to the freedom of expression[1]. The final version of the art. 10 in part states as follows:

"The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." Thus, the freedom of expression is not of absolute character. However, any restrictions on this freedom must meet the conditions expressly indicated in the quoted provision.

2.2. Freedom of expression and its limitations under the Constitution of the Republic of Poland of 2 April, 1997[2]

The equivalent of art. 10 §1 of the European Convention on Human Rights[3] in Polish legal order is art. 54 of the Constitution of the Republic of Poland (Polish Constitution). According to this provision:

"1. The freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone.

2. Preventive censorship of the means of social communication and the licensing of the press shall be prohibited. Statutes may require the receipt of a permit for the operation of a radio or television station."

As for the limitation conditions, art. 31 paragraph 3 of Polish Constitution states that "any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a demo-

[1] Collected Edition of the "Travaux préparatoires" of the European Convention on Human Rights, volumes 1–8, the Hague 1975–1985.

[2] Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. uchwalona przez Zgromadzenie Narodowe w dniu 2 kwietnia 1997 r., przyjęta przez Naród w referendum konstytucyjnym w dniu 25 maja 1997 r., podpisana przez Prezydenta Rzeczypospolitej Polskiej w dniu 16 lipca 1997 r., Dz.U. 1997 Nr 78 poz. 483. [Polish]

[3] <https://www.echr.coe.int/pages/home.aspx?p=basictexts> (access: 13.07.2020)

cratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights." The most important consequence of the provision mentioned above is providing Polish legal system with the principle of proportionality[1]. Any collisions between the indicated rights and freedoms are settled on the basis of the principle of proportionality which consists of three specific rules that form the so-called proportionality test:

1. The first of them is the principle of necessity;
2. The second is the principle of the mildest measure;
3. The third element of the principle of proportionality is the principle of proportionality *sensu stricto*. "It involves weighing two or more conflicting rules and indicating which of them takes precedence in given factual and legal circumstances[2].".

2.3. Limitations to the freedom of expression in the Polish Criminal Code of 6 June 1997[3]

Keeping in mind the rules regarding the limitations of the freedom of expression presented above, we will move to the analysis of the limitations to the freedom of expression provided in Polish Criminal Code. As the freedom of expression is not absolute, restrictions of this freedom are permissible in order to protect other essential values. That is why the next section of this analysis will be divided into parts corresponding to the particular objectives of limiting the freedom of expression adopted by the Polish legislator.

2.3.1. Protection of the personal freedom

In art. 190[4], Polish Criminal Code takes under its protection the freedom of an individual and his or her personal sense of security. According to this

[1] P. Tuleja, Konstytucja Rzeczypospolitej Polskiej. Komentarz, do art. 31–3, WKP 2019 [Polish]

[2] P. Tuleja, Konstytucja…, do art. 31–3, WKP 2019. [Polish]

[3] Ustawa z dnia 6 czerwca 1997 r., Kodeks karny, Dz.U.1997 Nr 88 poz. 553. [Polish]

[4] Art. 190 states as follows: § 1. Whoever makes a threat to another person to commit an offence detrimental to that person or detrimental to his next of kin, and if the threat causes in the threatened person a justified fear that it will be carried out shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years. § 2. The prosecution shall occur on a motion of the injured person.

article, it is forbidden to make a threat to another person or his or her next of kin. The threat must be related to commission of a crime to the addressee or a person closest to him or her. Moreover, it is required that the threat raised justified concerns of the victim, that it will be fulfilled. It may be expressed not only orally, but also in writing, gesture or facial expression. In particular, according to the Supreme Court, a threat may be expressed by driving too close to the victims, sudden braking or acceleration of the car or by doing the 'circling' near the children[1].

Another important Article is art. 190a, related to stalking. It may take many different forms: telephone calls, SMS or e-mail messages, gifts, etc. It is required that such behaviour occurs multiple times.

2.3.2. Protection of the sexual liberty and decency

Art. 200b and 202 of the Polish Criminal Code provides limitations to the freedom of expression in order to protect sexual liberty and decency. According to the art. 200b, publicly promoting or praising pedophile behaviour is prohibited. Under this provision, it is considered unacceptable to create an image of pedophilia in society as a phenomenon allegedly having a positive side, a phenomenon not harmful to the physical and mental development of children, a phenomenon that deserves tolerance as a special type of sexual minority or a phenomenon that is to play a positive social role in the sexual "education" of minors[2].

In addition, under art. 202 §1 it is forbidden to publicly present pornographic material in such a manner that it is imposed upon a person who may not wish so. Moreover, §3 of this Article prohibits production for the purpose of dissemination or import or propagation of pornographic material in which minors under the age of 15 participate, or pornographic material associated with the use of violence or the use of an animal.

2.3.3. Protection of the freedom of conscience and religion

The first provision that needs to be mentioned is art. 196 of the Polish Criminal Code, situated in Chapter XXIV titled "Offences against Freedom

[1] Judgement of the Supreme Court of 3 April 2008, IV KK 471/07, LEX nr 388595 [Polish]

[2] M. Bielski, Komentarz do art. 200b, [w:] W. Wróbel (red.), A. Zoll (red.), Kodeks karny. Część szczególna. Tom II. Część I. Komentarz do art. 117-211a, WKP 2017. [Polish].

of Conscience and Religion". Indicated provision is aimed at protecting the freedom of conscience and religion from offence.

Art. 196 of Polish Penal Code states as follows: "Whoever offends religious feelings of other persons by profaning in public an object of religious worship or a place dedicated to the public celebration of religious rites, is subject to a fine, the penalty of limitation of liberty or the penalty of deprivation of liberty for up to 2 years.". Thus, the constitutive elements of this provision are: 'public outraging', 'object of religious worship' and 'place of religious worship'.

Starting from the problem of outranging in public an object of religious worship or a place dedicated to the public celebration of religious rites, it has to be emphasized, that "insulting the subject of religious worship may consist of abusive statements about the person of God or the Mother of God, parodying with the intention of humiliating gestures considered to be celebrating the Eucharist, using images or images considered sacred in a derogatory way[1]."

The object of religious worship is understood as God, symbol, photo, specific words or names, which according to the doctrine of a religious community are surrounded by worship and are considered holy, worthy of the highest respect due to their relationship with transcendence.

Moving to the next problem, it has to be clarified that by the place dedicated to the public celebration of religious rites we understand a place adapted to perform worship or religious acts in the presence of other people, particularly church or chapel.

Consequently, an offence of religious feelings can take the form of verbal or written statements as well as be expressed through the images or gestures. Such a behavior is characterised by an intention to humiliate or ridicule and cannot be equated with a simple disregard, lack of respect or negative evaluation. What is important, indicated provisions do not penalise a criticism of the religious dogmas or assumptions.

2.3.4. Protection of human dignity and honour

The next provisions that need to be mentioned are art. 212 and 216 of Polish Criminal Code, both related to the protection of honour.

[1] W. Wróbel (red.), Komentarz do art. 196, W. Wróbel (red.) A. Zoll (red.), Kodeks karny. Część szczególna. Tom II. Część I. Komentarz do art. 117-211a, WKP 2017. [Polish]

According to art. 212[1] it is prohibited to import to another person, a group of persons, an institution or organisational unit not having the status of a legal person, such conduct, or characteristics that may discredit them in the face of public opinion or result in a loss of confidence necessary for a given position, occupation or type to activity. Generally, this crime can be committed by any behaviour aimed at providing another person with the defamatory information. It may occur not only orally, but also in writing, print, image, caricature or even facial expression[2]. In addition, quoting someone else's statements may also present defamatory character. What is important, such defamatory information should be expressed in the presence of another person capable of understanding the offensive nature of the behaviour (e.g. language of a statement).

Paragraph 2 of art. 212 establishes a qualified form of defamation which is related to using the mass media to spread the defamatory statement. *Ratio legis* of this solution is taking into account the role of mass media in creating and shaping the public opinion[3].

As for Article 216[4], it prohibits insulting another person by presenting a contempt for his or her dignity. Similar to art. 212, this crime may be com-

[1] Art. 212 states as follows: 1. Whoever imputes to another person, a group of persons, an institution or organisational unit not having the status of a legal person, such conduct, or characteristics that may discredit them in the face of public opinion or result in a loss of confidence necessary for a given position, occupation or type to activity shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year.

[2] J. Raglewski, Komentarz do art. 212 kodeksu karnego [w:] W. Wróbel [red.], A. Zoll [red.], Kodeks karny. Część szczególna. Tom II. Część II. Komentarz do art. 212-277d, WKP 2017. [Polish]

[3] Sosnowska M., Uwagi o kwalifikowanym typie przestępstwa zniesławienia, [w:] Nowa kodyfikacja prawa karnego, t. XI, Warszawa 2002, s. 85. [Polish]

[4] Article 216 states as follows: § 1. Whoever insults another person in his presence, or though in his absence but in public, or with the intention that the insult shall reach such a person, shall be subject to a fine or the penalty of restriction of liberty. § 2. Whoever insults another person using the mass media, shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year. § 3. If the insult was caused by the provocative conduct of the insulted person, or if the insulted person responded with a breach of the personal inviolability or with a reciprocal insult, the court may waive the imposition of a penalty. § 4. In the event of a conviction for the offence specified in § 2, the court may decide to impose a compensatory payment to the benefit of the injured person, the Polish Red Cross or towards another social cause indicated by the injured person. § 5. Prosecution shall be by private accusation.

mitted by every behaviour, but in contrast to the Article presented above, it is not required to provide another person with a statement of informatory character. What is important, according to the Polish judiciary, "only behaviour that is generally considered offensive may be an insult[1]" Moreover, under this provision it is possible to:

1. Insult another person in the presence of an insulted person (so-called direct insult);

2. Insult another person in the absence of the offended person, but in public;

3. Insult another person in the absence of the insulted person and in private, but with the intention of the perpetrator to reach that person (the so-called default insult).

Provisions indicated above relate only to the true or false statements, not opinions.

2.3.5. Protection of democratic public order

Provisions of the Chapter XXXII of the Polish Criminal Code are devoted to the offences against public order. Among them we find art. 256[2] which relates to promoting a fascists or other totalitarian regime. According to this provision, public presentation of a fascist or other totalitarian regime aimed at persuading other people is prohibited[3]. What is more, it is forbidden to call for hatred on the basis of national, ethnic, racial or religious differences. Moreover, under §2 of indicated provision, it is prohibited to purchase, import, store, own, transport or transmit a print, recording or other item containing the content or carrying the symbol of fascist, communist or other totalitarian regimes. Despite this, the perpetrator of the prohibited act described in §2 does not commit a crime,

[1] Judgment of the Court of appeal in Lublin of 6 June 2011, II AKa 91/11, LEX no. 895936.

[2] Article 256 §1 states as follows: Whoever publicly promotes a fascist or other totalitarian system of state or incites hatred based on national, ethnic, race or religious differences or for reason of lack of any religious denomination shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years.

[3] Resolution of the Polish Supreme Court of 28 March 2002, I KZP 5/02, OSNKW 2002/5–6, 32.

if he or she has committed this act as part of an artistic, educational, collector's or scientific activity.

In addition, the Polish legislator decided to introduce art. 257[1] in order to prohibit insulting in public a person or a group of individuals because of their national, ethnic, race or religious affiliation. The notion of 'insult' shall be understood according to the clarification made above (see part related to the art. 212 and 216). It needs to be emphasized that the protection of human dignity and honour is only an indirect purpose of this provision.

What is interesting, the Polish Criminal Code provides a prohibition of insulting the monument or place commemorating a historic event or person (art. 261[2]) and prohibition of insulting a corpse, human ashes and place of repose of the dead (art. 262 §1[3]).

Another provision aimed at protection of the public order is art. 255 which prohibits incitement or commendation in public to the commission of a crime. The notion of 'incitement' shall be understood as summoning unspecified number of people to commit a crime[4]. In particular, it may take the form of a speech in front of people gathered during the demonstration, issuing an appeal or even presenting posters. As for praising the crime, it will take the form of expressing approval for the commission of the crime. It is irrelevant whether the crime was or is to be committed by the perpetrator himself or by another person.

Furthermore, in order to protect public order and due to the international action against terrorism[5], Polish legislator penalised dissemination or public presentation of content that may facilitate the commission of a crime of

[1] Article 257. Whoever publicly insults a group within the population or a particular person because of his national, ethnic, race or religious affiliation or because of his lack of any religious denomination or for these reasons breaches the personal inviolability of another individual shall be subject to the penalty of deprivation of liberty for up to 3 years.

[2] Article 261 states as follows: Whoever insults a monument or other public place commemorating a historic event or honour a person shall be subject to a fine or the penalty of restriction of liberty.

[3] Article 262. § 1. Whoever profanes a corpse, human ashes or a place of repose of the dead shall be subject to a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years.

[4] Z. Ćwiąkalski, Komenatrz do art. 255 kodeksu karnego [w:] W. Wróbel [red.], A. Zoll [red.], Kodeks karny. Część szczególna. Tom II. Część II. Komenatrz do art. 212-277d, WKP 2017. [Polish].

[5] Council of Europe Convention on the Prevention of Terrorism, 16 May 2005, No 196

terrorist character. The purpose of such dissemination or presentation must be the commission of such a crime.

Concluding considerations presented above, Polish legislator provided a Polish legal order with numerous limitations to the freedom of expression aimed at protection of other constitutional values. Any restriction of the freedom of expression should meet the requirement of the European Convention on Human Rights and Polish Constitution.

3. Does the breach of the limitations to the freedom of expression constitute the body of crime in your national legislation?

3.1. Introduction

In the following work, I will focus on offences which are committed in the case of breach of the freedom of expression. In the description of each crime I will try to present the most important aspects of this crime, including the penalty which can be imposed for this particular offence.

All of the offences presented below are intentional (under the Criminal Code, the offence can be committed unintentionally only if it is established verbally in the regulation), thus a perpetrator can commit them only if he wants to commit (dolus directus) or foresees the possibility of its commission and accepts it (dolus eventualis)[1]. The perpetrator's intent consists of two elements: the awareness of all elements of the offence and the will to commit this offence. If a perpetrator is in error (e.g. he is not aware of possibility that the thing taken by him belongs to someone else) or a perpetrator does not want to commit this crime and does not accept its commission, the intentional offence will not be committed[2].

[1] Art. 9. § 1. A prohibited act is committed intentionally if the perpetrator intends its commission, i.e. wants to commit it or, foreseeing the possibility of its commission, accepts it. Tłumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

[2] Zoll A., Wróbel W., Kodeks Karny. Część Ogólna. Tom I. Część I. Komentarz do art. 1–52. Wyd. V, <https://sip.lex.pl/#/commentary/587276762/510473/wrobel-wlodzimierz-red-zoll-andrzej-red-kodeks-karny-czesc-ogolna-tom-i-czesc-i-komentarz-do-art…?cm=URELATIONS>

3.2. Defamation

3.2.1. Art. 212–216 – Defamation

Of course, the most important regulation penalising the breach of freedom of expression is art. 212 of the polish Criminal Code, which establishes the crime of defamation[1]. This provision protects human dignity in the external sense, which is the value that a person / legal body has in the eyes of other people (the dignity in the internal sense is protected by Art. 216 of the Penal Code, which will be presented below)[2], therefore this regulation is not protecting the dignity of dead people (a simile, it is not protecting the reputation of no longer existing legal bodies). The provision includes all possible ways of expression, such as writing, caricature or even gestures[3]. The offence belongs to the category of formal offences, and therefore the commission of this act does not require the occurrence of the result of degrading public opinion or the loss of behaviour, but only performing the act. It is an intentional crime that can be committed with dolus directus or dolus eventualis.

Paragraph 2[4] of this Article establishes the qualified form of the offence of defamation, which is committed by means of mass communication. In these cases, the norm also authorises the court to impose a penalty of up to 1 year of imprisonment. Both crimes (basic offence from § 1 and qualified from § 2) belong to the category of misdemeanours.

In order to rightfully understand the elements of the crime of defamation we have to include in our interpretation art. 213 of the Criminal Code. This regulation divides this crime into two categories: public defamation and

[1] Art. 212 § 1: Whoever imputes to another person, a group of persons, an institution, a legal entity or an organisational entity without a legal personality, such conduct or characteristics that may degrade them in public opinion or expose them to the loss of confidence necessary to occupy a given position, practise a given profession or operate a given type of activity, is subject to a fine or the penalty of limitation of liberty. Tłumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

[2] Wyrok Sądu Najwyższego z dnia 17 marca 2015 roku o sygnaturze : V KK 301/14, <https://sip.lex.pl/#/jurisprudence/521757529?cm=DOCUMENT>

[3] Wyrok Sądu Najwyższego z dnia 20 listopada 1933 roku o sygnaturze III K 1037/33, <https://sip.lex.pl/#/document/520481385?cm=DOCUMENT>

[4] Art. 212 § 2: If the perpetrator commits the act referred to in § 1 via means of mass communication, he is subject to a fine, the penalty of limitation of liberty or the penalty of deprivation of liberty for up to one year. Tłumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

non-public defamation. According to the ruling of the Supreme Court issued under the previous penal code, public defamation occurs when the perpetrator's behaviour is or can be perceived by an unspecified number of people[1]. The Article 213 § 1[2] is interpreted in that way that the elements of non-public defamation include the falsehood of the accusation, understood as its inconsistency with the objective state of affairs and therefore non-public defamation by means of a true accusation is not unlawful behaviour at all. The regulation of paragraph 2[3] constitutes only the justification for a defamation committed publicly. It provides that a real allegation made in public is not unlawful if it concerns the conduct of a person holding a public office or if it serves to defend a socially justified interest. In conclusion, under polish Criminal Code, defamation by a false allegation is always penalised (regardless of whether it is made publicly or not). As for defamation by a genuine allegation, it will be unlawful only if it is made in public and does not concern a person holding a public office, nor is it intended to protect a socially legitimate interest.

According to official data published by the Ministry of Justice of the Republic of Poland, there were 219 people convicted of the offence established in art. 212 § 1 in 2018. Courts imposed a fine in 170 cases, a limitation of liberty in 48 cases (in one case the court decided to impose only penal measures). Moreover, there were 116 convictions of the offence from paragraph 2 of this regulation and courts in those cases imposed 90 fines, 21 limitations of liberty and 5 deprivations of liberty[4]. However, those statistics do not include public indictment (there were two people convicted of the of-

[1] Uchwała Sądu Najwyższego z dnia 20 września 1973 roku o sygnaturze VI KZP 26/73, <https://sip.lex.pl/#/jurisprudence/520112333?cm=DOCUMENT>

[2] Art. 213 § 1: The crime provided for in art. 212 § 1 is not committed if the allegation that has not been made in public is true. Tłumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

[3] Art. 213 § 2: The perpetrator of the act referred to in art. 212 § 1 or 2 does not commit the crime if he publicly raises or broadcasts a true allegation: 1) regarding the conduct of a person performing a public function or 2) aimed at protecting a socially justified interest. If the allegation regards personal or family life, a proof of truth is admissible only if the allegation is aimed at preventing a danger to human life or health, or demoralisation of a minor. Tłumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

[4] Informator statystyczny wymiaru sprawiedliwości, Skazania prawomocne z oskarżenia prywatnego – dorośli – l. 2013–2018, <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/>

fence established in art. 212 § 1 with public indictment and two more people convicted of the offence established in art. 212 § 2)[1].

Besides the external sphere of human dignity, polish Criminal Code protects also the internal sphere. It is a protected provision of Art. 216[2] of the Criminal Code. It is worth noting that this is not the only regulation penalising insult, because in the event of insulting a person with special characteristics, other provisions of the Penal Code will be used. I will present these regulations below. Art. 216 provides a penalty of a fine or restriction of liberty for this act. However, if the insult occurs through the mass media, the court will also have the power to impose an imprisonment up to 1 year. Similarly to art. 212, the court may also order an excess in favour of the red cross, the victim or other organization, and the crime is prosecuted on a private bases[3]. A unique institution is provided by paragraph 3[4] of this article, which highlights the dynamics of the situation in which the insult occurs.

In 2018, there were 386 people convicted of the offence established in art. 216 § 1. Courts imposed a fine in 306 cases, a limitation of liberty in 79 cases and a deprivation of liberty in 1 case. There were also 33 convictions of the offence from art. 216 § 2 and courts in those cases imposed 26 fines, 6 limitations of liberty and 1 deprivations of liberty[5]. Similarly to art. 212,

[1] Informator statystyczny wymiaru sprawiedliwości, Skazania prawomocne z oskarżenia publicznego – dorośli – wg rodzajów przestępstw i wymiaru kary w l.2008–2018, <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/>

[2] Art. 216 § 1: Whoever insults another person in this person's presence, as well as in this person's absence but publicly or with the intent that the insult reaches this person, is subject to a fine or the penalty of limitation of liberty. § 2. Whoever insults another person via means of mass communication, is subject to a fine, the penalty of limitation of liberty or the penalty of deprivation of liberty for up to one year. Tłumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

[3] Art. 216 § 4: While sentencing for the crime provided for in § 2, the court may impose punitive damages for the benefit of the harmed party, the Polish Red Cross or another community purpose designated by the harmed party. Tłumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

[4] Art. 216 § 3: If the insult has been induced by the harmed party's provocative behaviour, or if the harmed party responded with a violation of the personal inviolability or with a reciprocal insult, the court may waive the imposition of a penalty. Tłumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

[5] Informator statystyczny wymiaru sprawiedliwości, Skazania prawomocne z oskarżenia prywatnego – dorośli – l. 2013–2018, <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/>

this data also does not include cases with public indictments (there were 21 people convicted of the crime provided by an art. 216 § 1 and only 1 person convicted of a crime established in art. 216 § 2)[1].

As I have mentioned above, there are a lot of qualified types of defamation established in the Criminal Code. I will shortly present the most important of them. However, all of them are intentional crimes, so the perpetrator has to be aware of all of the elements of those offences, including the element constituting the bases of differentiation. If the perpetrator is not aware of those differential elements, he or she will be charged with basic crime[2].

3.2.2. Art. 135 § 2. – Insult of the President of the Republic of Poland[3]

The Article 135 § 2 of the Criminal Code regulates the offence of an insult of the President of Poland. In this case, in addition to the protection of the legal good in the form of human honour, there is protection of the functioning of public offices. What is more, this legal good was the ratio to increase penalties for committing a prohibited act (the statutory threat for committing this act is imprisonment up to 3 years). It is significant that the defamation does not have to be done in accordance to public office[4].

In 2018, there was only 1 perpetrator convicted of the insult of the President of Poland (penalty imposed: a limitation of liberty)[5].

[1] Informator statystyczny wymiaru sprawiedliwości, Skazania prawomocne z oskarżenia publicznego – dorośli – wg rodzajów przestępstw i wymiaru kary w l.2008–2018, <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/>

[2] Art. 28 § 2: The perpetrator who commits an act in an excusable erroneous belief as to the existence of a mitigating circumstance constituting an element of a prohibited act, is subject to liability according to a provision prescribing such mitigated liability. Tłumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

[3] Art. 135 § 2: Whoever publicly insults the President of the Republic of Poland, is subject to the penalty of deprivation of liberty for up to 3 years. Tłumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

[4] Budyn-Kulik Magdalena, Kodeks Karny, Komentarz aktualizowany, <https://sip.lex.pl/#/commentary/587736970/623970/budyn-kulik-magdalena-i-in-kodeks-karny-komentarz-aktualizowany?cm=URELATIONS>

[5] Informator statystyczny wymiaru sprawiedliwości, Skazania prawomocne z oskarżenia publicznego – dorośli – wg rodzajów przestępstw i wymiaru kary w l.2008–2018, <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/>

3.2.3. Art. 136 – Insult of the Head of foreign state[1]

Article 136 § 3 of the Criminal Code establishes the offence of insulting in the territory of the Republic of Poland the head of a foreign state, an accredited head of a diplomatic mission or another person benefiting from protection under statutes, international agreements or universally recognized international customs.

In paragraph 4 of this Article is established a similar crime, which is defamation of a person belonging to the diplomatic staff of a representation of a foreign country or a consular officer of foreign country in accordance with the performance of the function.

Both regulations are protecting reliability of The Republic of Poland[2] (besides the honour of individual people) and require reciprocity of protection (art. 138).

In 2018, nobody was convicted of this crime[3].

3.2.4. Art. 226 – Insult of public official or constitutional organ[4]

Article 226 of the Penal Code provides for two types of the offence of defamation.

[1] Art. 136 § 3: Whoever, in the territory of the Republic of Poland, publicly insults the person referred to in § 1, is subject to the penalty provided for in § 2. §4 Whoever, in the territory of the Republic of Poland, publicly insults the person referred to in § 2, is subject to a fine, the penalty of limitation of liberty or the penalty of deprivation of liberty for up to one year. Tłumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

[2] Budyn-Kulik Magdalena, Kodeks Karny, Komentarz aktualizowany <https://sip.lex.pl/#/commentary/587736971/623971/budyn-kulik-magdalena-i-in-kodeks-karny-komentarz-aktualizowany?cm=URELATIONS>

[3] Informator statystyczny wymiaru sprawiedliwości, Skazania prawomocne z oskarżenia publicznego – dorośli – wg rodzajów przestępstw i wymiaru kary w l.2008–2018, <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/>

[4] Art. 226 § 1: Whoever insults a public officer or a person assisting the public officer, during the performance of official duties or in relation to performing official duties, is subject to a fine, the penalty of limitation of liberty or the penalty of deprivation of liberty for up to one year. § 2. The provision of art. 222 § 2 applies accordingly. § 3. Whoever publicly insults or degrades a constitutional authority of the Republic of Poland, is subject to a fine, the penalty of limitation of liberty or the penalty of deprivation of liberty for up to 2 years. Tłumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

The first paragraph of this Article establishes the offence of insulting a public official or a person adopted to help such an officer during the performance of official duties. As in the case of insulting the president, the subject of protection is, apart from honour, ensuring the efficient functioning of state offices. However, this regulation is significantly limited by the second paragraph of this regulation, which establishes the reference to art. 222 § 2 of the Criminal Code. Therefore, if the insult is caused by improper conduct of an officer or a person assisting the public officer, the court may apply extraordinary mitigation of the penalty or even waive its imposition[1]. Improper behaviour of a public officer or a person assisting the public officer can have any possible form, such as abuse of rights, arrogant conduct or degradation. Moreover, it seems that a perpetrator does not have to be a recipient of this improper conduct, especially that the norm is not obliging a court to moderate a penalty[2].

In 2018 there were 3031 people convicted of the insult of public officials and court-imposed penalties of 1506 fines, 1056 limitations of liberty and 463 deprivations of liberty. What is interesting the provision of art 226 § 2 was used only in one case[3].

The second crime regulated in Art. 226 of the Penal Code is a crime of public insult or degrade of the constitutional organ of the Republic of Poland. The constitutional organs of the Republic of Poland within the meaning of this provision are: the Sejm, the Senate, the President of the Republic of Poland, the Council of Ministers, the Prime Minister, the vice-president of the Council of Ministers, ministers, the Supreme Court, the Supreme Administrative Court and the Constitutional Tribunal. Of course, this regulation

[1] Art. 222 § 2: If the act referred to in § 1 has been induced by improper conduct of a public officer or a person assisting the public officer, the court may apply extraordinary mitigation of the penalty or even waive its imposition. Tłumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

[2] Budyn-Kulik Magdalena, Kodeks Karny, Komentarz aktualizowany, <https://sip.lex.pl/#/commentary/587737079/624081/budyn-kulik-magdalena-i-in-kodeks-karny-komentarz-aktualizowany?cm=URELATIONS>

[3] Informator statystyczny wymiaru sprawiedliwości, Skazania prawomocne z oskarżenia publicznego – dorośli – wg rodzajów przestępstw i wymiaru kary w l.2008–2018, <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/>

will not be applied in the case of an insult of the President of the Republic of Poland, since in this situation, the above-mentioned provision of 136 § 2 of the Criminal Code shall be applied.

It is also worth noting that in the case of this offence art. 222 § 2 of the Criminal Code will not be applied, this provision will not be applied also in the case of convergence of crimes from 226 § 1 and 226 § 3 of the Criminal Code[1].

There were only 3 perpetrators convicted of the offence established in 226 § 3 in 2018 (penalties imposed: 2 fines and a limitation of liberty)[2]

3.2.5. Art. 257 – Insult because of discriminating reasons[3]

In art. 257 of the Penal Code provides for the offence of insulting a group of people or a particular person because of their national, ethnic, racial, or religious affiliation or because of their lack of religious affiliation. A conduct of perpetrator has to be caused by one or more of those motives (thus a perpetrator has to want insult someone because of one or more of those reasons), that is why this offence can be committed only with dolus directus[4].

In 2018, there were 101 people convicted of the crime provided by art. 257 (penalties imposed: 44 fines, 35 limitations of liberty and 20 deprivations of liberty)[5]

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[1] Barczak-Oplustil Agnieszka, Iwański Mikołaj; red. Wróbel Włodzimierz , Zoll Andrzej; Kodeks Karny. Część Szczególna. Tom II. Część II. Komentarz do art. 212-277d <https://sip.lex.pl/#/commentary/587746494/543934/wrobel-wlodzimierz-red-zoll-andrzej-red-kodeks-karny-czesc-szczegolna-tom-ii-czesc-ii-komentarz…?cm=URELATIONS>

[2] Informator statystyczny wymiaru sprawiedliwości, Skazania prawomocne z oskarżenia publicznego – dorośli – wg rodzajów przestępstw i wymiaru kary w l.2008–2018, <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/>

[3] Art. 257: Whoever publicly insults a group of people or an individual person because of their national, ethnic, racial, political or religious affiliation or lack of religious affiliation, or violates the personal inviolability of another person due to such reasons, is subject to the penalty of deprivation of liberty for up to 3 years. Tłumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

[4] Kalitowski M., Filar M. (red.) Kodeks Karny. Komentarz, Wyd V, <https://sip.lex.pl/#/commentary/587611252/503512/filar-marian-red-kodeks-karny-komentarz-wyd-v?cm=URELATIONS>

[5] Informator statystyczny wymiaru sprawiedliwości, Skazania prawomocne z oskarżenia

3.2.6. Art. 347 – Insult of a military superior[1]

Offences established in articles 347 and 350 of the Penal Code are military crimes.

Article 347 of the Penal Code provides for the prohibited act of insulting a superior. The offence can be committed only by a soldier, thus it belongs to the category of individual offences (it requires special characteristic of a perpetrator to commit it). The subject of protection of this provision, besides honour, is discipline in the army. Prosecution of this offence is commenced on the request of harmed party or a commander of the unit[2]

3.2.7. Art. 350 – Insult or degrade of a military subordinate[3]

Article 350 of the Penal Code regulates the offence of insulting or degrading a subordinate and similarly to the provision of art. 347 can be committed only by a soldier. There is a dispute in legal theory about the scope of the term "degradation", however it seems that any degrading conduct will be insulting at the same time. That is why the use of term "degrade" next to term "insult" ought to be considered as a mistake of the legislator[4]. The prosecution of this offence also takes place on the request of a harmed person or a commander of the unit.

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publicznego – dorośli – wg rodzajów przestępstw i wymiaru kary w l.2008–2018, <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/>

[1] Art. 347 § 1: A soldier who insults a superior, is subject to the penalty of limitation of liberty, the penalty of military detention or the penalty of deprivation of liberty for up to 2 years. § 2. The crime is prosecuted upon the motion of the harmed party or the commander of the unit. Tłumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

[2] Ziółkowska A., Konarska – Wrzosek V (red.), Kodeks Karny. Komentarz, Wyd. II, <https://sip.lex.pl/#/commentary/587716035/571303/konarska-wrzosek-violetta-red-kodeks-karny-komentarz-wyd-ii?cm=URELATIONS>

[3] Art. 350 § 1: A soldier who degrades or insults a subordinate, is subject to the penalty of limitation of liberty, the penalty of military detention or the penalty of deprivation of liberty for up to 2 years. § 2. The crime is prosecuted upon the motion of the harmed party or the commander of the unit. Tłumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

[4] Malewski J., Zoll A. (red.), Kodeks Karny. Część szczególna. Tom III. Komentarz do art. 278–363 k.k., Wyd. IV, <https://sip.lex.pl/#/commentary/587225614/495408/zoll-andrzej-red-kodeks-karny-czesc-szczegolna-tom-iii-komentarz-do-art-278–363-k-k-wyd-iv?cm=URELATIONS>

3.3. Offences different to defamation which infringes individual rights

3.3.1. Art. 119 – Discrimination[1]

The Article 119 of the Criminal Code establishes an offence of discrimination. Of course, the discrimination is not an obvious example of the breach of freedom of expression, but differences in treatment of individual citizens may be considered a manifestation of views. It is worth highlighting that there is a similarity of this regulation to the regulation of Art. 257 of the Penal Code, which provides for an offence in the form of insulting such a person or group of people, however the disposition of art. 119 is wider because it also includes political affiliation. This crime can be committed only with dolus directus, because (similarly to the offence established in art. 257), person's characteristic has to be a motive of perpetrator's conduct[2].

In 2018, there were 128 perpetrators convicted of this crime and courts imposed 16 penalties of a fine, 26 limitations of liberty and 82 penalties of derivation of liberty[3]

3.3.2. Art. 195 – Malicious interference in the freedom of religion[4]

Offences established in art. 195 and 196 of the Criminal Code protect the good in the form of freedom of religion and belief. The Article 195

[1] Art. 119 § 1. Whoever uses force or an unlawful threat towards a group of people or an individual person because of their national, ethnic, racial, political or religious affiliation or lack of religious affiliation, is subject to the penalty of deprivation of liberty for between 3 months and 5 years. Tłumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

[2] Budyn-Kulik Magdalena, Kodeks Karny, Komentarz aktualizowany <https://sip.lex.pl/#/commentary/587736950/623950/budyn-kulik-magdalena-i-in-kodeks-karny-komentarz-aktualizowany?cm=URELATIONS>

[3] Informator statystyczny wymiaru sprawiedliwości, Skazania prawomocne z oskarżenia publicznego – dorośli – wg rodzajów przestępstw i wymiaru kary w l.2008–2018, <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/>

[4] Art. 195 § 1. Whoever maliciously interferes with a public performance of a religious act of a church or another religious association having a regulated legal status, is subject to a fine, the penalty of limitation of liberty or the penalty of deprivation of liberty for up to 2 years. § 2. Whoever maliciously interferes with a funeral, mourning ceremonies or rites, is subject to the same penalty. Tłumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

prohibits malicious interference with a public performance of a religious altar of a church or other religious association with a regulated legal status (paragraph 1) and malicious interference with a funeral, mourning ceremony or rituals (paragraph 2). Since this interference has to be malicious, this crime can be committed only with *dolus directus*.

There were 10 judgements, that convicted perpetrators of a crime established in 195 § 1 (penalties imposed: 2 fines, 7 limitations of liberty and only one deprivation of liberty) and 3 judgements that convicted perpetrators of a crime established in 195 § 2 (penalties imposed: 2 fines and a deprivation of liberty[1].

3.3.3. Art. 196 – Offend of religious feelings[2]

The art. 196 of the Criminal Code establishes the offence of the offend of religious feelings. The most difficult aspect of this crime is finding the difference between allowed criticism and the offend of feelings. In order to classify perpetrator's behaviour as offending, it has to include statements or acts which can be considered degrading or abusive, from both perspectives: objective (the average person would consider this conduct as an offend) and subjective (the harmed person considers this conduct as an offend)[3]. There is a dispute in the study of law if this crime can be committed only with dolus directus, or also with dolus eventualis, however the Supreme Court of Poland ruled in the favour of the second interpretation[4].

[1] Informator statystyczny wymiaru sprawiedliwości, Skazania prawomocne z oskarżenia publicznego – dorośli – wg rodzajów przestępstw i wymiaru kary w l.2008–2018, <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/>

[2] Art. 196. Whoever offends religious feelings of other persons by profaning in public an object of religious worship or a place dedicated to the public celebration of religious rites, is subject to a fine, the penalty of limitation of liberty or the penalty of deprivation of liberty for up to 2 years. Tłumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

[3] Budyn-Kulik Magdalena, Kodeks Karny, Komentarz aktualizowany, <https://sip.lex.pl/#/commentary/587737045/624046/budyn-kulik-magdalena-i-in-kodeks-karny-komentarz-aktualizowany?cm=URELATIONS>

[4] Uchwała Sądu Najwyższego z dnia 29 października 2012 r. o sygnaturze I KZP 12/12, <https://sip.lex.pl/#/jurisprudence/521321688?cm=DOCUMENT>

In 2018, there were 7 people convicted of the offence of religious feelings. Courts imposed in this cases 1 penalty of a fine, 4 penalties of a limitation of liberty and 3 penalties of a deprivation of liberty[1].

3.3.4. Art. 260 – Obstruction of a lawful meeting[2]

In the art. 260 is regulated by the offence of obstructing a legally held meeting, assembly or march. The conduct of the perpetrator can have two forms, he or she can either frustrate or disperse a meeting. Moreover, the meeting or other event will be considered as frustrated, even if it was finished, but not as planned. This offence can be committed only with dolus directus, since it requires classified forms of perpetrator's conduct, which are force or unlawful threat[3].

There was only one conviction for this crime in 2018, the court sentenced the perpetrator for a fine[4].

3.4. Limitations of freedom of expression because of public safety

3.4.1. Art. 117 – Exhortation to war of aggression[5]

The third paragraph of art. 117 establishes the offence of publicly exhorting to initiate a war or publicly extolling the initiation or conduct

[1] Informator statystyczny wymiaru sprawiedliwości, Skazania prawomocne z oskarżenia publicznego – dorośli – wg rodzajów przestępstw i wymiaru kary w l.2008–2018, <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/>

[2] Art. 260. Whoever by force or unlawful threat frustrates conducting a legally held meeting, an assembly or a march, or disperses such meeting, assembly or march, is subject to a fine, the penalty of limitation of liberty or the penalty of deprivation of liberty for up to 2 years. Tłumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

[3] Ćwiąkalski Z. ; Włodzimierz W. (red.) , Zoll A (red.); Kodeks Karny. Część Szczególna. Tom II..Część II. Komentarz do art. 217-277d., <https://sip.lex.pl/#/commentary/587746540/543980/wrobel-wlodzimierz-red-zoll-andrzej-red-kodeks-karny-czesc-szczegolna-tom-ii-czesc-ii-komentarz…?cm=URELATIONS>

[4] Informator statystyczny wymiaru sprawiedliwości, Skazania prawomocne z oskarżenia publicznego – dorośli – wg rodzajów przestępstw i wymiaru kary w l.2008–2018, <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/>

[5] Art. 117 § 3. Whoever publicly exhorts to initiate a war of aggression or publicly extols the initiation or waging of such war, is subject to the penalty of deprivation of liberty for between 3 months and 5 years. Tłumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

of a war of aggression. This offence can be committed only with dolus directus, since those conducts require a perpetrator will, and belongs to the category of formal crimes, thus commission is not linked to the occurrence of any result.
There were no convictions for this crime in 2018[1].

3.4.2. Art. 126a – Exhortation to commit a crime[2]

This regulation establishes a misdemeanour in the form of public exhorting to commit crimes regulated in art. 118, 118a, 119 § 1, 120–125 of the Penal Code or extols those crimes. The crime of inciting to commit these acts may be committed only with a direct intention, while the subject of dispute in the study of law is whether the crime of extolling can also commit with a dolus eventualis. It is a formal crime, which can be committed by any possible form of behaviour such as screaming, sending messages or even putting a poster up[3]. In 2018, there were 3 people convicted of this crime (penalties imposed: 1 fine and 2 deprivations of liberty)[4].

3.4.3. Art. 133 – Insult of the Republic of Poland[5]

This provision establishes the offence of publicly insulting the Nation or the Republic of Poland. The interpretation of the term "Nation" shall be inferred from the Constitution of the Republic of Poland, which is linking the meaning of this term to citizenship. Thus, the Nation is a "historically

[1] Informator statystyczny wymiaru sprawiedliwości, Skazania prawomocne z oskarżenia publicznego – dorośli – wg rodzajów przestępstw i wymiaru kary w l.2008–2018, <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/>

[2] Art. 126a. Whoever publicly exhorts to commit the act provided for in arts. 118, 118a, 119 § 1, arts. 120–125 or publicly extols the commission of the act provided for in those provisions, is subject to the penalty of deprivation of liberty for between 3 months and 5 years. Tłumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

[3] Rams M., Szewczyk M. ; red. Wróbel W. (red.) , Zoll A (red.); Kodeks Karny. Część Szczególna. Tom II. Część I. Komentarz do art. 117–211a, <https://sip.lex.pl/#/commentary/587374794/543371/wrobel-wlodzimierz-red-zoll-andrzej-red-kodeks-karny-czesc-szczegolna-tom-ii-czesc-i-komentarz-do…?cm=URELATIONS>

[4] Informator statystyczny wymiaru sprawiedliwości, Skazania prawomocne z oskarżenia publicznego – dorośli – wg rodzajów przestępstw i wymiaru kary w l.2008–2018, <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/>

[5] Art. 133. Whoever publicly insults the Polish Nation or the Republic of Poland, is subject to the penalty of deprivation of liberty for up to 3 years. Tłumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

shaped, community created on the basis of common historical fates, common economy, common political institutions, characterized by the existence of a sense of state as the basic component of group consciousness, which is manifested by the fact that a given person has citizenship of the Republic of Poland"[1]. Of course, the Nation includes not only citizens living on the territory of Poland, but also those who live in the foreign states. This prohibited act is a formal offence that can also be committed with a dolus eventualis[2].

There were no convictions of the insult of the Republic of Poland in 2018[3].

3.4.4. Art. 255 – Exhortation to commit a crime[4]

This provision regulates the offence of public exhorting to commit other crime. This crime has been divided into 2 offences, depending on the type of crime that the perpetrator incite for. The first paragraph establishes the offence of public exhorting to commit a misdemeanour or a fiscal offence while paragraph 2 establishes the offence of public exhortatio to commit a felony. In order to properly understand the difference between those offences, I will present below the difference between felony and misdemeanour.

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[1] Kardas P.; Wróbel W (red.), Zoll A. (red.); Kodeks Karny. Część Szczególna. Tom II. Część I. Komentarz do art. 117-211a; <https://sip.lex.pl/#/commentary/587286872/543382/wrobel-wlodzimierz-red-zoll-andrzej-red-kodeks-karny-czesc-szczegolna-tom-ii-czesc-i-komentarz-do…?cm=URELATIONS>

[2] Wyrok Sądu Apelacyjnego w Lublinie z dnia 6 czerwca 2011 r. o sygnaturze II AKa 91/11 <https://sip.lex.pl/#/jurisprudence/520989632?cm=DOCUMENT>, jest to jednak przedmiotem sporu w doktrynie, (patrz: Kardas Piotr; red. Wróbel Wlodzimierz , Zoll Andrzej; Kodeks Karny. Część Szczególna. Tom II. Część I. Komentarz do art. 117–211a <https://sip.lex.pl/#/commentary/587286872/543382/wrobel-wlodzimierz-red-zoll-andrzej-red-kodeks-karny-czesc-szczegolna-tom-ii-czesc-i-komentarz-do…?cm=URELATIONS>)

[3] Informator statystyczny wymiaru sprawiedliwości, Skazania prawomocne z oskarżenia publicznego – dorośli – wg rodzajów przestępstw i wymiaru kary w l.2008–2018, <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/>

[4] Art. 255. § 1. Whoever publicly exhorts others to commit a misdemeanour or a fiscal crime, is subject to a fine, the penalty of limitation of liberty or the penalty of deprivation of liberty for up to 2 years. § 2. Whoever publicly exhorts others to commit a felony, is subject to the penalty of deprivation of liberty for up to 3 years. § 3. Whoever publicly extols the commission of a crime, is subject to a fine in the amount of up to 180 daily rates, the penalty of limitation of liberty or the penalty of deprivation of liberty for up to one year. Tłumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

According to art. 7 of the Criminal Code, the offences are divided into two categories: felonies and misdemeanours[1]. Offences which are penalised with the penalty of deprivation of liberty for no less than 3 years, deprivation of liberty for 25 years and deprivation of liberty for life belongs to the category of felonies. All the rest of offences established in the Criminal Code belong to the category of misdemeanours. Fiscal offences are crimes established in the Fiscal Penal Code.

Paragraph 3 of this provision regulates an act in the form of public praise of committing a crime.

All three crimes are formal offences that can only be committed with dolus directus[2]. Of course, the application of these provisions will be sometimes excluded by lex specialis (eg. Art. 117 § 2, 125).

In 2018 there were 5 people convicted of the crime established in art. 255 § 1 (courts imposed fines in each case), 3 people convicted of the crime established in art. 255 § 2 (penalties imposed: 2 fines and 1 limitation of liberty), and only 1 person convicted of the crime established in art. 255 § 3[3].

3.4.5. Art. 256 – Propaganda of fascism[4]

This regulation establishes the crime of propagating of fascism or other totalitarian systems. According to Supreme Court totalitarian system is charac-

[1] Art. 7. § 1. A crime is a felony or a misdemeanour. § 2. A felony is a prohibited act penalised with the penalty of deprivation of liberty for a period of no less than 3 years or with a more severe penalty. § 3. A misdemeanour is a prohibited act penalised with a fine exceeding 30 daily rates or exceeding PLN 5,000, the penalty of limitation of liberty exceeding one month or the penalty of deprivation of liberty exceeding one month. Tłumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

[2] Wyrok Sądu Najwyższego z dnia 17 marca 1999 r. o sygnaturze IV KKN 464/98, <https://sip.lex.pl/#/jurisprudence/521493855?cm=DOCUMENT>

[3] Informator statystyczny wymiaru sprawiedliwości, Skazania prawomocne z oskarżenia publicznego – dorośli – wg rodzajów przestępstw i wymiaru kary w l.2008–2018, <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/>

[4] Art. 256. § 1.Whoever publicly propagates a fascist or other totalitarian political system or exhorts to hatred based on national, ethnic, racial, political or religious affiliation or lack of religious affiliation, is subject to a fine, the penalty of limitation of liberty or the penalty of deprivation of liberty for up to 2 years. § 2. Whoever, with the purpose of dissemination, produces, records or imports, acquires, stores, possesses, displays, transports or transfers a printing, a recording or any other item that contains the contents referred to in § 1 or that is a carrier of fascist, communist or other totalitarian symbolism, is subject to the same penalty. § 3. The perpetrator of the prohibited act referred to in § 2 does not commit the crime if he has committed this act as part of his artistic, educational, collector's or scientific activities. § 4. While sentencing for the crime provided for in § 2, the court imposes the forfeiture of the items referred to in § 2, even if they are not the property of the perpetrator. Tłumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

terised with the use of terror against political opponents, existence of a party with a commanding nature, restrictions in human rights[1].

Moreover, paragraph 2 of this Article establishes the crime of processing or possessing the carrier of totalitarian content in the purpose of dissemination. Previously, this penalty was also imposed on a person who performed these activities with a carrier of fascist, communist or other totalitarian symbolism, but in 2011 this regulation was derogated by the Constitutional Tribunal as inconsistent with the Constitution of Poland[2].

However, the crime will not be committed by a person who performs these activities as part of artistic, educational, collector or scientific activities, thus the legislator in this regulation is also creating some provisions for freedom of expression for artists.

This misdemeanour, in all its forms, is a formal crime and may be committed only with dolus directus, since it requires the conduct of a perpetrator in a purpose of dissemination (also in § 1, since the legislator decided to use terms "propagate" and "exhort"[3])

There were 40 convictions of the offence regulated in art. 256 § 1 (penalties imposed: 20 fines, 17 limitations of liberty and 3 deprivations of liberty) and 4 convictions of the offence regulated in art. 256 § 2 (penalties imposed: 3 fines and 1 deprivation of liberty)[4].

3.5. Regulations protecting public decency

3.5.1. Art. 202 – Displaying pornographic content in public[5]

This regulation establishes the offence of displaying pornographic content in public in such a way that it may impose its reception on a person who

[1] Postanowienie Sądu Najwyższego z dnia 1 września 2011 r. o sygnaturze V KK 98/11, <https://sip.lex.pl/#/jurisprudence/521044140?cm=DOCUMENT>

[2] Wyrok Trybunału Konstytucyjnego z dnia 19 lipca 2011 r. o sygnaturze K 11/10, <https://sip.lex.pl/#/jurisprudence/521057449/1/k-11–10-wyrok-trybunalu-konstytucyjnego?keyword=K%2011~2F10&cm=SREST>

[3] Rams M., Szewczyk M. ; red. Wróbel W. (red.) , Zoll A (red.); Kodeks Karny. Część Szczególna. Tom II. Część II. Komentarz do art. 212-277d, <https://sip.lex.pl/#/commentary/587746536/543976/wrobel-wlodzimierz-red-zoll-andrzej-red-kodeks-karny-czesc-szczegolna-tom-ii-czesc-ii-komentarz…?cm=URELATIONS>

[4] Informator statystyczny wymiaru sprawiedliwości, Skazania prawomocne z oskarżenia publicznego – dorośli – wg rodzajów przestępstw i wymiaru kary w l.2008–2018, <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/>

[5] Art. 202. § 1. Whoever publicly displays pornographic contents in a manner that may impose such contents on another person against this person's will, is subject to a fine, the penalty of limitation of liberty or the penalty of deprivation of liberty for up to 2 years. Tłumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

does not wish to see it. The most important element of this crime is imposing this content on another person against its will, thus if a perpetrator displays pornographic content in public place, but in the time when nobody is there, he or she will not be committing this offence[1].

In 2018, there were 5 people convicted of this crime and courts imposed a fine, a limitation of liberty and 3 deprivations of liberty[2].

In the case of presenting pornographic content with the participation of a minor, it is not required to fulfil the criteria of public presentation in such a way that it may impose the reception of another person (this offence is 4b of this article), while the penalty for such crime is the same. A minor is a person who is less than 18 years old (in previous text of this regulation, a minor was considered to be a person who was less than 15 years old)[3].

In 2018, there were 2 convictions of the crime established in paragraph 2 and courts imposed fines in both cases[4].

Both misdemeanours are formal crimes and can be committed with dolus directus or dolus eventualis[5].

3.6. Regulations dealing with elections

3.6.1. Art. 248 – Interference in voting[6]

This regulation establishes a list of prohibited activities in relation to the organization of elections to the Sejm, Senate, election of the President, elec-

[1] Filar M. (red.), Berent M., Kodeks Karny. Komentarz, Wyd V, <https://sip.lex.pl/#/commentary/587611189/503439/filar-marian-red-kodeks-karny-komentarz-wyd-v?cm=URELATIONS>

[2] Informator statystyczny wymiaru sprawiedliwości, Skazania prawomocne z oskarżenia publicznego – dorośli – wg rodzajów przestępstw i wymiaru kary w l.2008–2018, <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/>

[3] Filar M. (red.), Berent M., Kodeks Karny. Komentarz, Wyd V, <https://sip.lex.pl/#/commentary/587611189/503439/filar-marian-red-kodeks-karny-komentarz-wyd-v?cm=URELATIONS>

[4] Informator statystyczny wymiaru sprawiedliwości, Skazania prawomocne z oskarżenia publicznego – dorośli – wg rodzajów przestępstw i wymiaru kary w l.2008–2018, <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/>

[5] Bielski Marek; red. Wróbel Włodzimierz , Zoll Andrzej; Kodeks Karny. Część Szczególna. Tom II. Część I. Komentarz do art. 117-211a; <https://sip.lex.pl/#/commentary/587286941/543469/wrobel-wlodzimierz-red-zoll-andrzej-red-kodeks-karny-czesc-szczegolna-tom-ii-czesc-i-komentarz-do…?cm=URELATIONS>

[6] Art. 248. Whoever in relation to elections to the Sejm, the Senate, election of the President of the Republic of Poland, elections to the European Parliament, elections of local government authorities or referenda: 1) draws up a list of candidates or voters that does not include eligible persons or that includes ineligible persons, 2) uses deceit with the purpose of

tions to the European Parliament, local government authorities or referenda. Most acts can be done with both dolus directus and eventualis, except using deception to improperly draw up a list of candidates or voters and obtain an unused ballot paper, which can be committed only with direct intent. Even though the crime itself does not belong to the category of individual offences, some acts can be conducted only by a person with special characteristic (e.g. only a person authorised to create a list of candidates can use deceit to draw it up improperly)[1].

In 2018, there were 13 convictions of this crime and courts imposed 10 fines, 1 limitation of liberty and 2 deprivations of liberty[2].

3.6.2. Art. 249 – Interference in voting[3]

Norm of art. 249 establishes other crimes of interference in elections. This misdemeanour belongs to the category of formal offences that can be committed only with dolus directus, since it requires qualified conduct of a perpetrator (the use of force, unlawful threat or deceit).

There were no convictions of this offence in 2018[4].

improper drawing up of a list of candidates or voters, election reports or other electoral or referendum documents, 3) destroys, damages, conceals, alters or forges election reports or other electoral or referendum documents, 4) commits a malfeasance or allows the commission of a malfeasance with regard to collecting or counting of votes, 5) gives away an unused voting card to another person before the lapse of the voting period, or obtains an unused voting card from another person with the purpose of using it during the voting, 6) commits a malfeasance with regard to drawing up the lists with the signatures of citizens nominating candidates for elections or citizens initiating a referendum, is subject to the penalty of deprivation of liberty for up to 3 years. Tlumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

[1] Pilch A., Szewczyk M. ; red. Wróbel W. (red.) , Zoll A (red.); Kodeks Karny. Część Szczególna. Tom II. Część II. Komentarz do art. 212–277, <https://sip.lex.pl/#/commentary/587746524/543964/wrobel-wlodzimierz-red-zoll-andrzej-red-kodeks-karny-czesc-szczegolna-tom-ii-czesc-ii-komentarz…?cm=URELATIONS>

[2] Informator statystyczny wymiaru sprawiedliwości, Skazania prawomocne z oskarżenia publicznego – dorośli – wg rodzajów przestępstw i wymiaru kary w l.2008–2018, <https://isws.ms.gov.pl/pl/pl/baza-statystyczna/opracowania-wieloletnie/ >

[3] Art. 249. Whoever by force, unlawful threat or deceit interferes with: 1) an assembly preceding voting, 2) the free exercise of the right to stand for an election or to vote in an election, 3) the voting or counting of votes, 4) drawing up election reports or other electoral or referendum documents, is subject to the penalty of deprivation of liberty for between 3 months and 5 years. Tlumaczenie: Wróbel W. (red.), Wojtaszczyk A., Zontek W., <https://sip.lex.pl/#/act-translation/1459619682>

[4] Informator statystyczny wymiaru sprawiedliwości, Skazania prawomocne z oskarżenia publicznego – dorośli – wg rodzajów przestępstw i wymiaru kary w l.2008–2018, <https://isws.ms.gov.pl/pl/pl/baza-statystyczna/opracowania-wieloletnie/>

3.7. Petty offences code

3.7.1. Art. 138 of petty offences code – Higher fee for the service

Moreover, the breach of freedom of expression can lead to legal consequences provided in the Petty Offences Code. The most interesting example is art. 138 of this code, which is penalising charging a higher fee for the service. The regulation states that the perpetrator who is professionally involved in the provision of services and charges a higher fee for this service, is punishable by a fine. What is more, previously this regulation was also punishing a person who was refusing to perform a task without a good cause, however this norm was considered by Constitutional Tribunal to be inconsistent with the Constitution[1]. This ruling is an outcome of the case of a person who refused to perform a service because of his beliefs.

4. What criminal liability measures are provided in national legislation for the breach of the limitations on the freedom of expression?

Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man[2]. However, Article 10 of European Convention on Human Rights indicates that exercise of these freedoms […] may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society[3]. In the Polish legal system the Criminal Code is the elementary source of law regarding rules on criminal liability for breach of the limitations on the freedom of expression. Aforementioned Code provides different types of penalties

[1] Wyrok Trybunału Konstytucyjnego z dnia 26 czerwca 2019 r. o sygnaturze K 16/17; <https://sip.lex.pl/#/jurisprudence/522778410/1?directHit=true&directHitQuery=K%2016~2F17>

[2] Handyside v. The United Kingdom, 5493/72, Council of Europe: European Court of Human Rights, 4 November 1976

[3] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950

or penal measures. The following will be discussed below: the penalty of deprivation of liberty, the penalty of restriction of liberty, fine and adjudgment of compensatory payment. Limitations on the freedom of expression located in the Criminal Code are not collected in one chapter, but they are presented in several various chapters.

In the Polish criminal law the penalty of deprivation of liberty is the primary means of responding to manifestations of serious crime[1]. Polish Penal Enforcement Code in Article 67 states, that execution of this penalty is aimed at inducing the convicted person's willingness to cooperate in shaping his or her socially desirable attitudes, in particular the sense of responsibility and the need to respect the legal order and thus to refrain from returning to crime. Furthermore, it lasts for the shortest time one month, 15 years at the most. Due to the weight of this penalty it is seldom intended for breach of the limitations on the freedom of expression. Nevertheless, the Polish Criminal Code provides the possibility of adjudicating this penalty, inter alia, for the crimes of:

– insulting the nation or the Republic of Poland, insulting the President and public insulting (due to national, ethnic, racial, religious or religious affiliation or because of lack of religious beliefs), for up to 3 years,

– offence of religious feelings, promoting Fascism and Totalitarianism, for up to 2 years;

– libeling and insulting by means of mass communication (qualified types of libel and insult), insulting symbol of the State, for up for 1 year.

With reference to the crime of insulting the nation, the reason for such a relatively high threat of punishment may hide behind the very premise of criminalisation, which is the necessity to protect the dignity of both the Polish nation and the Polish state[2] In case of insulting the President or public official, the statement of the Constitutional Tribunal (Poland) should be regarded as correct: "the law should counteract the spread in the language of public communication of offensive [..] phrases that violate human dignity, replace authentic public debate with ad personam arguments, the language

[1] Wróbel Włodzimierz (red.), Zoll Andrzej (red.), Kodeks karny. Część ogólna. Tom I. Cześć I. Komentarz do art. 1–52, wyd. V

[2] M. Królikowski, R. Zawłocki, Kodeks karny. Część szczególna. Komentarz do artykułów 117–221. Tom I. Wyd. 4, Warszawa 2017

of the social margin, lowering the authority of state institutions and people in public office."[1]

The penalty of restriction of liberty in Polish legislation, in terms of severity, [..] is an indirect penalty between a fine and imprisonment. According to the legislator, it is to be a punishment imposed in response to minor and medium crime[2]. It shall be for not less than one month and not more than 2 years and it is imposed in terms of months and years. Moreover, the Criminal Code provides two variations of the penalty of restriction of liberty, they may be pronounced individually or jointly. They consist of: 1) the obligation to perform unpaid, controlled work for social purposes, 2) withholding from 10% to 25% of the remuneration for work on a monthly basis on the social objective indicated by the court. Additionally, while serving a sentence, the convicted person may not change his or her place of residence without the court's consent and is obliged to provide explanations concerning the course of serving the sentence. This type of punishment may be imposed primarily for the crimes of: insulting, libeling, insulting the monument, offence of religious feelings, insulting symbol of the State. With regard to the crime of insulting, it might be added that the good protected by law under Article 216 of the (Polish) Criminal Code is human dignity, understood primarily as an internal aspect of the worship of the person[3]. This may be related to the fact that this crime is prosecuted by private accusation, just as in the case of the crime of libel.

The fine is the most lenient penalty among the code penalties imposed for a crime. The essence of the fine is an economic nuisance, which consists in interfering with the perpetrator's property. This annoyance is implemented by the obligation to pay the State Treasury a sum of money specified by the court in the conviction[4]. The fine is measured in daily rates by determining the number of rates and the amount of one rate, the lowest number of rates is 10 and the highest is 540. When determining the daily rate, the court takes into account the perpetrator's income, personal and family conditions,

[1] Wyrok Trybunału Konstytucyjnego z dnia 21 września 2015 r. K 28/13

[2] Stefański Ryszard (red.), Kodeks karny. Komentarz wyd. 25

[3] B. Kunicka-Michalska, Przestępstwa przeciwko czci, s. 308

[4] A. Grześkowiak, w: Grześkowiak, Wiak, Kodeks karny, 2015, s. 276

property relationships and earning possibilities. The daily rate cannot be lower than 10 PLN or exceed 2000 PLN[1]. A fine is also provided for offences that have already been mentioned when describing the penalty of restriction of freedom. The important thing is that the fine is the most common penalty for a crime of insulting[2]. This is understandable because the Court, when choosing the penalty, is guided not only by the circumstances of the case (social harmfulness of the insult, repentance of the perpetrator, regret), but also by the personal conditions of the offender (e.g. previous criminal record, assets of the convicted).

Compensatory payment to the benefit of the injured person, the Polish Red Cross or towards another social cause indicated by the injured person, is considered as a compensatory measure. The essence of the reference is to pay a certain amount of money to a specific entity[3]. The court may decide to impose a compensatory payment in case of conviction for any type of libel offence crime or crime of insulting. The amount of this compensatory measure cannot exceed 100 000 PLN. Giving (the injured party) the opportunity to indicate the social purpose for which the court may rule on the relationship, reflects one of the fundamental principles of the current criminal law order, expressed in taking into account, as far as possible, the position and legally protected interests of the injured party[4]

The growing number of convictions for the crime of libel (one of the most common limitation on the freedom of expression) in Poland in recent years[5] indicates the need to look into the validity of criminalisation of this crime as well as other limitations on the freedom of expression provided in Polish legislation.

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[1] Criminal Code 1997 , Article 33

[2] <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie>; Roczniki Statystyczne RP za lata 2011–2016; Informator Stastyczny Wymiaru Sprawiedliwości

[3] M. Królikowski, R. Zawłocki, Kodeks karny. Część szczególna. Komentarz do artykułów 117–221. Tom I. Wyd. 4, Warszawa 2017

[4] Ibidem.

[5] Stanowisko HFPC, Watchdog Polska i Towarzystwa Dziennikarskiego, <https://www.hfhr.pl/dekryminalizacja-znieslawienia-droga-do-wykonania-wyroku-etpc-stanowisko-trzech-organizacji/>

5. Is the freedom of expression protected by the criminal law?

Freedom of expression in Poland is being guaranteed and therefore protected by the Constitution of the Republic of Poland. However, the polish penal code also refers to this basic freedom in democratic countries.

Polish penal law mostly addresses the issues of exceeding limits of the freedom of expression such as defamation or insults. Those examples are included in articles 135 (addressing public insulting of president of the Republic of Poland), 137 (public insulting of national flag, emblem, banner or any other national symbol) or 226 (insulting public servant or constitutional authorities).

But are there no references towards protection of freedom of expression in polish penal law? Actually, there are – for example Article 213 clause 1 and 2 which protect true accusations made in private as well as public propagation of true accusations towards public servants' actions and those serving the purpose of defending public interests.

And this Article should be the main focus in the discussion about freedom of speech inside polish penal code. And that's because this particular Article introduces an interesting mechanism of switching the burden of proof towards the defendant and forcing him to prove innocent rather than having to prove them guilty. So this regulation is an embodiment of the right to criticize but on the other hand it contains strict regulations on how this right should be exercised. According to the Supreme Court of Poland right to criticism mainly allows people to express their opinion and judgement without checking them for compliance with actual truth and only after considering it under the premises of Article 212 par 1 if given plea was to be found untrue should we consider it on the surface of the non-statutory right to criticism.

Considering all things given polish penal law focuses rather on punishing violation of the borders of freedom of speech rather than protecting the actual right leaving the protection to the said freedom to the Constitution, however as pointed out there are some circumstances under which the penal law can exclude criminal responsibility.

6. Has your country reached the adequate balance in establishing criminal responsibility for the breach of the limitations to the freedom of expression? If not, what needs to be changed?

It seems that the balance in legal norms defined by the Polish Penal Code between criminal responsibility for breach of the limits of freedom of expression and lack of it, although not perfect, it is sufficient to implement the assumptions of constitutionally protected values, is not wrong. Naturally, it would be naive to say that the construction of these norms is in any way perfect and should not be subject to change. Such changes are absolutely necessary and I will write about their reasons later in this report.

Nevertheless, an appropriate balance in the matter at hand is maintained, first of all, not only through the appropriate formulation of legal norms in a synthetic form, but also through the use of, for example, the institution of a justification. This is a typical circumstance that always excludes the criminal record and sometimes the unlawfulness of the act[1]. One of them is the justification based on permitted criticism. The legislator correctly assumed that in order to protect the constitutional freedom of speech, it is important not only to protect the subject whose goods have been infringed (aggrieved), but also those who potentially infringe these goods – their freedom of expression. This balance is visible in the case of the offense of defamation (included in Art. 212 of the Penal Code) and the corresponding justification (included right next to it, in Art. 213 of the Penal Code). It is forbidden in Polish law to publicly defame a person and expose them to ridicule, under penalty of a criminal sanctions. But the legislator, decided to protect the constitutional right to freedom of expression, and stated that if the allegation was true and committed in private, the unlawfulness of the act is excluded by law. A similar solution is visible in Art. 196 Penal Code – crime of offending religious feelings. Any behaviour that would publicly offend the object of religious worship or a place where religious ceremonies would take place is prohibited.

[1] J. Warylewski, Prawo Karne część ogólna, wydanie 7, Warszawa 2017, s.311

In this case, although the legislator did not foresee the existence of a typical situation in which unlawfulness or punishability could be excluded, the case law comes to the rescue. An example is the case of Adam Darski (described in more detail in section titled „How freedom of express is regulated in Your country"), in which the Supreme Court stated in its resolution that a crime under Art. 196 of the Penal Code, should act with a direct or possible intention, i.e. deliberately[1]. In the cited case, the singer's views were widely known and largely shared by the concert participants. Therefore, it becomes impossible to commit this crime unintentionally and you cannot offend the religious feelings of a person who did not participate at the time of committing the act and would find out about it post factum. In a similar way, the Polish legal system tries to balance the sphere of freedom and criminal responsibility by setting limits in the conduct of every human being. Thus, for each constitutionally described freedom, the Polish Penal Code provides for criminal liability for their violation.

However, this system is not permanent and must undergo adjustments along with technological progress and cultural and social changes. The three most important issues currently faced by the Polish legal system in order to continue to ensure an appropriate balance in determining the boundaries between freedom of expression and criminal reaction for crossing them are the issues of the limits of artistic freedom (where art ends and prohibited content begins), hate speech (especially related to freedom of expression on the Internet) and responsibility for spreading false information. The lack of appropriate legal provisions regulating these issues is becoming more and more apparent with time. Therefore, it is postulated, inter alia, establishment of recognition of the so-called a justification of artistic performance that would provide legal protection to people presenting controversial content within the created work. Currently, artistic freedom has a statutory rank, but it is not specified what, according to the Constitution, art itself or artistic creation itself is. This freedom is protected by a quasi-justification called non-statutory justification. Undoubtedly, an important issue is to raise this justification to the statutory rank and not to leave it in the present state, so only at the level of the doctrine opinion. Currently, a certain paradox arises,

[1] Supreme Court resolution, 29 October 2012, signature I KZP 12/12

which consists in the fact that the freedom of art protected by the constitution is protected by criminal law – by means of a non-statutory justification – formally almost to the same extent as custom (e.g. April Fool's Day) or sports risk. Formalizing it would ensure greater stability of the law and jurisprudence as well as increase the awareness of citizens in this area, for whom it would be easier to get acquainted with this subject, without the need to delve into doctrinal considerations. However, it is difficult because one should first find out how to define the concept of art. If it was considered an imitation of beauty, aestheticism, it could be narrowed down too much and its meaning could be distorted, bearing in mind that for example in modern times, artistic creativity also includes the so-called non-representational art. On the other hand, expanding it would make some behaviours that are objectively socially harmful would be protected too much.

The issue of responsibility for disseminating false information is a bit more complicated because one thing is deliberately keeping people who believe in the so-called hypothesis of flat earth, e.g. for commercial purposes, other thing is to mislead the public during the election period in order to influence the results of individual candidates, and another thing is to provide false information in the field of natural sciences, e.g. medicine, in order to gain financial benefits and which would result in death of a believer in the erroneous information provided. Considering this issue, without a doubt, on the basis of the degree of social harmfulness of the act, one can find qualified types of a potential crime of public disinformation. The concept of social harmfulness itself, although it does not have a strict definition in Polish criminal law, can be described as the attitude of society towards the committed act. It is also subject to gradation and can be negligible or e.g. significant and become the so-called a qualified type, characterized by a particularly negative evaluation of the society in relation to the manner of committing the crime, its consequences or the attacked legal good.

However, first of all, it can be seen from the examples I have given the elements of the potential crime itself. It is important to recognize them and keep in mind the constitutionally protected freedom of speech and information, and not to penalize rumours or provide false information resulting from ignorance of their irregularities to the person providing them. In the Polish legal system, there is practically no law that would directly protect access to

reliable information and criminalize behaviour that misleads the public opinion. Therefore, it becomes more and more vital to implement the regulations that characterize activities aimed at such disinformation. Criminalization of such behaviour should be based on specific characteristics such as:

1. Deliberate action and awareness of incorrect information provided,
2. Objectively, high social harmfulness,
3. An act directed at the public or a social group.

Moreover, disinformation itself as an object of an executive action should not be conditional on the achieve of the intended purpose.

Summing up, the legal and criminal system of protection of freedom of expression in Poland, although not perfect, is at the appropriate level to effectively implement the assumptions of constitutional freedoms and it can certainly be said that there is an appropriate balance between the protection of these freedoms and the criminalization of behaviours that violate them. With the aforementioned technological progress and the changing cultural and moral conditions, new challenges for criminal law arose. The false information I have mentioned, hate speech or better protection of artistic creativity are the most important challenges faced by the Polish justice system in this area, and appropriate changes should be made as soon as possible.

7. What circumstances should be taken into account in criminalization of the freedom of expression?

Freedom of speech and expression is one of the cornerstones of a democratic state under the rule of law, as well as a modern democratic system in a general sense. Therefore, each time, the issue of the limitation of these rights requires the fulfilment of strict conditions, which will always leave a wide scope for public discussion. Most often, the premises allowing for the criminalisation of expression in the case of Polish judicial practice concern images of religious feelings, or the promotion and promotion of totalitarian regimes, however, in my opinion, there is a need for a broader, theoretical-legal approach to the problem of categorising the premises for restricting freedom of expression.

Freedom of speech and expression, due to its fundamental importance in the rule of law, is of course guaranteed by the national, international or EU legislation. The most important legal acts that guarantee freedom of expression are:

– Constitution of the Republic of Poland,
– Universal Declaration of Human Rights,
– Charter of Fundamental Rights of the European Union.

Of course, the Constitution of the Republic of Poland itself, which is the most important legal act in the whole system of Polish law, will be the most important from the perspective of practical application in Poland.

From the perspective of the above analysis, the most important will be articles of the constitution such as:

– Article 14: The Republic of Poland shall ensure freedom of the press and other social media.

– Art. 31 §3: Restrictions on the exercise of constitutional freedoms and rights may be imposed only by law and only if they are necessary in a democratic state for its security or public order, or for the protection of the environment, public health and morals, or the freedoms and rights of others. These restrictions shall not violate the essence of freedoms and rights.

– Art. 53 §5: Freedom to manifest one's religion may be restricted only by law and only if it is necessary to protect national security, public order, health, morals or the freedom and rights of others.

– Art. 54 §1: Everyone is guaranteed the freedom to express his or her views and to obtain and disseminate information.

As you can see, freedom of speech and expression is one of the fundamental features of the Polish legal system and is also guaranteed in a wide range of categories. An interesting element is also the specification of certain specific issues concerning the protection of freedom of expression in these issues. Apart from the freedom of expression and thought, these concerns, in particular, the issues related to the religious freedom of all religious associations and churches operating and registered in the territory of the Polish Republic. Also, due to historical reasons, the authors of the Polish Basic Law, in Article 14, guarantee the freedom of the press and journalistic work, while at the same time prohibiting all forms of both censorship and preventive censorship.

It is understandable that when freedom, which is so important from a systemic perspective, is restricted, very often the question of whether a given premise should already form the basis for the restriction of freedom of expression is unclear and questionable even among state institutions. An excellent example of this is the case being examined by the Constitutional Court, at the request of the Ombudsman, Mark K 28/13[1]. In this case, the RPO asked for an examination of the compatibility of Article 49 §1 of the 1971 Code of Offences with the constitution guaranteeing freedom of expression and expression. The content of this Article is as follows:

Art. 49. § 1. Anyone who, in a public place, demonstrably shows disrespect for the Polish Nation, the Republic of Poland or its constitutional bodies, shall be subject to the penalty of arrest or fine.

This article, which still comes from the legislation of the People's Republic of Poland, clearly shows the potential problem of marking the limits of expression and speech. On the one hand, there is the individual's right to freedom of expression, guaranteed both by the 31st Article of the Constitution and by the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms. On the other hand, however, it serves to protect the value of the Polish state itself, the entire Polish nation or constitutional bodies, which, because of their great importance in the state, must also be protected by them and their authority.

Therefore, in considering the limitation of freedom of expression, the ruling of the Constitutional Court, in this case, may be very valuable to us. The TK ruled that Article 49 does not violate constitutional freedoms and is fully applicable, with sufficiently precise formulations as pointed out by the Ombudsman in his conclusion. However, looking at the communication of the Constitutional Court itself, in this case, the principle of proportionality is very much stressed[2]:

[1] Case K 28/13 Initiator: Ombudsman. RPO applied for the examination of the compliance of art. 49 § 1 of the Act of 20 May 1971 – Code of Offences with art. 54 § 1 in connection with art. 31 § 3 of the Constitution of the Republic of Poland and with art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

[2] <https://trybunal.gov.pl/postepowanie-i-orzeczenia/komunikaty-prasowe/komunikaty-po/art/8558-wolnosc-slowa-ograniczenia-wolnosci-slowa>

The Constitutional Court found that Article 49 § 1 of the Code of Civil Procedure slightly restricts freedom of speech, eliminating only the manifestations of its abuse in public places, and only in relation to the most important entities from the constitutional point of view. It does not, however, restrict this freedom in such a way as to make it impossible to make judgments, give opinions, or even criticism of these subjects, and thus does not suppress the public debate that can and should take place in a way that is free from the demonstrable disrespect shown in public places. In the opinion of the Constitutional Tribunal, the essence of freedom of speech has not been violated, and the restriction introduced, justified by a public policy premise, does not violate the principle of proportionality.

The very principle of proportionality will be a fundamental premise behind any consideration of limiting freedom of expression. From the CT's message, it also follows that the value of the restriction of freedom of expression or expression is stressed, as can be seen in such statements as "slightly limits the freedom of speech" or "does not, however, hinder that freedom in a way that makes it impossible to make judgments". Thus, it can be assumed, on the basis of the assessment of this highest judicial authority in Poland, that both freedom and its restriction in the case of speech and expression are gradual values, possible to limit to some extent, but still guaranteed. As a result, the most important prerequisite for the decision to restrict freedom of expression will be its proportionality. Each time there will be a need to "weigh" pure freedom on the one hand and another good or value that should be protected on the other. This approach is, of course, quite subjective, from the perspective of both the legislator and later the judge, which guarantees judicial freedom and the possibility to approach each case individually in this regard.

Therefore, there is a limited catalogue of reasons to limit freedom of expression in Polish legislation. In the case of Poland, the restriction of freedom of expression and expression is mainly based on articles of the penal code such as:

Art. 196. CC Whoever insults the religious feelings of others by publicly insulting an object of religious worship or a place intended for the public performance of religious rites is subject to a fine, the penalty of restriction of liberty or imprisonment for up to 2 years.

Art. 256. KK Propagating Fascism or another totalitarian system:

§ 1 Anyone who publicly promotes a fascist or other totalitarian state system or incites hatred based on national, ethnic, racial, religious or religious differences, is subject to a fine, restriction of liberty or imprisonment for up to 2 years.

Art. 135. Active assault or insult of the President of Poland:

§ 2 Who publicly insults the President of the Republic of Poland, is punishable by imprisonment of up to 3 years.

In addition to the above, there are, of course, other regulations applicable in proceedings restricting freedom of expression, for example, in the noisy case of the Łódź printer[1] who, at the time of refusing to print promotional materials for the Equality March, was charged under Article 138 of the Code of Offences.

Every time the freedom of expression is restricted in the Polish legal system, there is a different good or value behind it. This may, for example, be a premise for a healthy free-market economy, not excluding any group of people unjustifiably from the market and from the possibility of entering into legal relations, as in the case of the printing house's case, which is the furthest away from the issue. However, the most common cases of this type in Poland are still those of insulting religious feelings. This is a very delicate subject, especially recently. On the one hand, the feelings of people who may feel offended remain there, as well as some traditional values that have a significant impact on the state in historical terms, but on the other hand, an increasingly modern and more secularized society appreciates the opportunity to make vital comments on religious issues. A great example of what grounds should be taken into account, in this case, is the court ruling that the vocalist, Adam Darski, has torn the Bible on stage. The court ruled that people going to the black metal band's concert were previously aware of the artists' creative style, so their feelings could not be unexpectedly offended by this gesture, while another issue is the issue of Internet transmission, where a random viewer may come across such

[1] <https://www.rp.pl/Prawo-karne/190629570-Trybunal-ws-drukarz-vs-LGBT-niemozna-nikogo-zmuszac-do-swiadczenia-uslug.html>

a recording by chance and feel offended. As you can see, however, even in this matter, the courts are still looking for the greatest possible scope for defending the freedom of expression, as well as the proportionality of possible limitations. In this case, proportionally, only the actual offence of someone's feelings can lead to punishment for the artist's performance, and I personally agree with this approach.

An insult to government officials, such as the president, is also a basis for restricting freedom of speech and expression, as well as one clear example of protecting values if they are opposed to freedom. The state itself, as well as its officials, require, regardless of the times and people in office, the respect that this state legislation protects. This is not a matter of censorship of criticism, however, but of maintaining a certain level of discussion, even critical.

8. How can you evaluate public opinion about freedom of expression in your country in general?

Currently, freedom of expression in Poland is guaranteed by the constitution. That is why it is the fundamental right of every citizen. Theoretically, there is media pluralism in Poland which is provided by the constitution and other provisions in polish legislation. For example, if you want to create your own TV channel, you should be granted by a concession given by the National Radio and Television Council. There are many TV channels, newspapers or unlimited internet access. In the media space, it is possible to share opinion, debate and express views with all due respect to what other people think.

But is freedom of expression really respected in Poland?

In 2015 Poland was ranked 18th place by the Reporters Without Borders Report (2020 World Press Freedom Index). In 2020 Poland is in 62nd place. What are the reasons for this situation? First of all, the government begins to have an effect on the freedom of expression of independent media outlets. As an example, we can use the Gazeta Wyborcza case which continues to be

the leading target of government lawsuits. Second, state-owned media are not objective and, what is more, the content is considered as propaganda.

Another example which I want to mention is the democracy ranking published by British "The Economist" where Poland was in 57th place. This means that Poland is considered a "flawed democracy". One of the reasons is the campaign against private TVN[1].

To illustrate how state-owned TVP is I will demonstrate an example from local and regional elections. There are three main TV stations in Poland: TVP (public TV), TVN and Polsat. Each of them has its own news program. Journalist Society compared them in their report campaign in the recent local and regional elections (21 October/4 November 2018). What were the results? In public TV 73% of the politicians' statements aired were PiS politicians talk, including the PiS candidates. What is more – in this huge overwhelming propaganda everything was linked to the campaign and supporting government candidates[2].

The propaganda is not only shown in the political campaign. TVP often attacks TVN calling them for example "Fake news factory" or accusing station creators and journalists of relations with the services of the People's Republic of Poland. On April 2020 TVP made a special series of programs which were composed of different charges against TVN such as promoting abortion or creating the rebellion[3].

After this attack, The US ambassador to Warsaw, Georgette Mosbacher, intervened. TVN is a private broadcaster owned by Discovery and, as Mosbacher published on her Twitter, "publicly traded US company listed on the NY Stock Exchange, committed to transparency, freedom of speech, and independent, responsible journalism. To suggest otherwise is simply false". Also, it was not the first time the ambassador had intervened with regard to polish media. In 2018 she wrote to Prime Minister Mateusz Morawiecki

[1] Daniel Tilles, „Poland falls to lowest ever position in World Press Freedom Index", Notes from Poland, 2020

[2] Piotr Maciej Kaczynski, „Poland's public TV is a propaganda tube, confirmed", political-europe.com, January 14, 2019

[3] Magdalena Chrzczonowicz, „Rebelia, ubecja, aborcja! Taki był tydzień z nagonką pracowników TVP na dziennikarzy TVN", OKO.press, 23 kwietnia 2020

"expressing deep concern over recent allegations made by members of the Polish government against…TVN"[1].

Unfortunately, despite the fact that Poland is a democratic country and has constitutionally guaranteed freedom of expression, it is in great danger. The threat that basic rights to express opinion, feelings and thoughts is real. To emphasize how huge this threat is I want to present one more example which is connected with LGBT+ community.

According to the annual "Rainbow Map" produced by ILGA-Europe, a Brussels-based NGO that advocates for the rights of LGBT people, Poland is the worst country in the European Union for LGBT People. They are attacked by politicians, church and state-owned or conservative media. President Andrzej Duda has dismissed LGBT as foreign ideology undermining Poland traditions. Archbishop of Kraków, Marek Jędraszewski said that the LGBT community is similar to communism and Nazism and must be resisted. Also, he described them as "rainbow plague". What is more Gazeta Polska, the conservative polish newspaper was distributing tickets allowing people to mark somewhere as an 'LGBT-free zone'[2].

In March 2017 The District Court for Łódź Widzew found guilty of a misdemeanour of an employee of a private printing house who refused to print the posters of the LGBT foundation because of his convictions. However, he refrained from imposing penalties on him. The court, justifying the judgment, that there was no justification, the misdemeanour has occurred but as it comes to fine – the reason is the family situation. The Constitutional Tribunal on June 26 this year ruled that the provision providing for penalties for willful refusal to provide services without just cause is unconstitutional. Penalizing a refusal to provide services, intent without a just cause constitutes an interference with the freedom of the service provider, in particular the right to decide on the conclusion of a contract, the right to express one's own opinion or to act in accordance with one's conscience. Freedoms limited by the challenged provision are no less important than protection against

[1] Daniel Tilles," American ambassador defends US-owned station attacked as "fake news factory" by Polish state TV", Notes from Poland, 2020

[2] Daniel Tilles, „LGBT ideology" is like Nazism or Bolshevism and must be resisted, says Polish archbishop", Notes form Poland 2020

discrimination The legislator may use milder but more effective means of protection against discrimination. This shows that we are dealing with an ideological war in every part of our life[1].

To sum up, when there is no other option to get the basic rights, the activist must fight in the tragic ideological war. Fight the power, the church, the other people. When the three activists hung rainbow flags on monuments in Warsaw, they were arrested because it is a threat to Roman Catholic values and the nation's identity. The crime carries a possible sentence of two years in prison. But what should they do when they are compared with the Nazi plague? The flag is an only weapon of choice[2].

Why in the 21st century we have to fight for our rights? The above examples show that democracy, equality and freedom of expression are in great danger because of discrimination and propaganda.

Conclusion

Summarizing all of the reports which are presented above, it is really difficult to appropriate the balance between the freedom of expression and the lack thereof. The reports indicate the Polish legislation on freedom of expression which has to protect this fundamental human right. Unfortunately, there is a disturbing tendency to it being limited.

[1] Krzysztof Sobczak, „Sprawa drukarza odmawiającego usługi fundacji LGBT wróci do sądu", prawo.pl, 2019

[2] Anatol Magdziarz „In Poland, the Rainbow Flag Is Wrapped Up in a Broader Culture War", New York Times, 2020

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– Wyrok Trybunału Konstytucyjnego z dnia 26 czerwca 2019 r. o sygnaturze K 16/17;
– Wyrok Trybunału Konstytucyjnego z dnia 21 września 2015 r. K 28/13;
– Case K 28/13 Initiator: Ombudsman.

General conclusions

(Based on Polish and Ukrainian research)

Compering the research, it should be noted that the freedom of expression is regulated and protected in national legislation both in Ukraine and in Poland (Constitutions, National Laws, Conventions, Declarations, etc.).

Besides the Constitution, there are many legal acts and documents regarding and or protecting the freedom of expression in some way.

For Instance, due to the Polish legislation, Freedom of speech is certainly closely tied to – or at least should be tied to – free media. And regarding that issue, the Act of January 26 1984 on Press Law constitutes that, on the basis of The Constitution, the press in Poland uses freedom of expression and practices citizens' rights to reliable and fair informing, transparency of public life and the control and criticism of the public. Furthermore, this act grants every citizen the right to inform the press about anything, according to personal freedoms, freedom of speech and the right to criticism. The right to report to the press is also a key component of maintaining transparency and the safety of the public, as well as exercising personal rights and freedoms.

Accordingly, Ukrainian legal protection of freedom of expression is based on the following: the Laws of Ukraine 'On Information', 'On Printed Mass Media (Press) in Ukraine' and 'On Access to Public Information', together with the Constitution of Ukraine and the Civil Code, which are the leading legislative instruments governing the right to freedom of expression and freedom of speech as its component.

Discussing the question of the limitation of freedom of expression. The researchers specified the question of freedom of expression and its limitations under the European Convention on Human Rights as well as compared the Limitations accordingly to National Legislations in Poland and in Ukraine.

As for limitation conditions, art. 31 paragraph 3 of Polish Constitution states that "any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights." The most important consequence of the provi-

sion mentioned above is providing Polish legal system with the principle of proportionality.

Accordingly, the Constitution of Ukraine, art 34, §2, it's indicated that the execution of the right to freedom of expression may be restricted by law in the interests of national security, territorial integrity or public order in order to prevent riots or crimes, protect public health or reputation, prevent the disclosure of confidential information or maintain authority and impartiality of justice.

In Polish Criminal Code, as well as in Ukrainian Criminal Code, there are restrictions of the freedom of expression which are permissible in order to protect other essential values: protection of the personal freedom, protection of the sexual liberty and decency, protection of the freedom of conscience and religion, protection of human dignity and honor, protection of democratic public order. But all the restriction of the freedom of expression in these countries met the requirement of the European Convention on Human Rights and Polish Constitution.

In both legislative systems the breach of the limitations to the freedom of expression constitute the body of crime, the comparative research provides a deep analyze of such crimes accordingly to Ukrainian and Polish Laws.

In Polish legal system the Criminal Code is the elementary source of law regarding rules on criminal liability for breach of the limitations on the freedom of expression. However, there are some peculiarities. Firstly, it is protected implicitly. Secondly, it is protected through prohibiting of act that may obstruct freedom of expression. Codes provide different types of penalties or penal measures. The following will be discussed below: the penalty of deprivation of liberty, the penalty of restriction of liberty, fine and adjudgment of compensatory payment. Limitations on the freedom of expression located in the Criminal Code are not collected in one chapter, but they are presented in several various chapters.

Discussing the question if the countries reached the adequate balance in establishing criminal responsibility for the breach of the limitations to the freedom of expression, the following is concluded in research:

In Poland, the balance in legal norms defined by the Polish Penal Code between criminal responsibility for breach of the limits of freedom of expression and lack of it, although not perfect, it is sufficient to implement the assumptions of constitutionally protected values, is not wrong. In Ukraine, it can be concluded that the adequate balance in establishing criminal responsibility for the breach of the restrictions on freedom of expression has not been reached in Ukraine. Despite some changes for the better achieved with the adoption of the new Criminal Code in 2001, the protection of the right to freedom of expression needs more modern and effective regulation. As it stated in the research, first, it is necessary to bring Ukrainian legislation in line with the practice of the ECtHR, including in matters relating to the criminalization of the propaganda of communism and Nazism. It is also of a high importance to ensure that criminal sanctions for an act (for example, genocide) and public calls to it meet the proportionality criterion.

Answering the question of what circumstances should be taken into account in criminalization of the freedom of expression, the researchers provided the following statements:

Freedom of speech and expression, due to its fundamental importance in the rule of law, is of course guaranteed by national, international or EU legislation. The most important legal acts that guarantee freedom of expression are Constitutions of Ukraine and the Republic of Poland, Universal Declaration of Human Rights, Charter of Fundamental Rights of the European Union.

Criminalization is the legal recognition of certain acts as crimes and the establishment of criminal liability for their commission. It can be carried out not only by including new rules in the Special Part of the Criminal Code, but also by expanding the boundaries of at least one of the elements of existing corpus delicti.

The public danger of certain acts is the decisive factor for the legislator to classify them as criminal. Public danger is inherent in a crime, which consists in the fact that it (the crime) causes serious damage to the existing law and order in society or puts the law and order at risk of causing such harm. In fact, public danger does not depend on the position of the legislator. This is

an objective characteristic inherent in the corresponding behaviour, aimed at the relevant social relations. Public danger is not a static characteristic. Depending on the stage of development of society, it may increase or, conversely, decrease and even disappear altogether. With regard to the standards of the European Convention of Human Rights in resolving issues of crime and punishment, it should be noted that certain provisions of the criminal law and/or the practice of its application violate the guarantees provided by the Convention.

Popular non-fiction edition

Freedom of expression under the criminal law of Ukraine and Poland

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Публікацію присвячено кримінально-правовій охороні свободи висловлювань як однієї з фундаментальних свобод, які визнані демократичними суспільствами. У ній послідовно розкрито питання правового регулювання свободи висловлювань, меж її здійснення, зокрема тих, що визначені кримінальним правом України та Польщі. Особливу увагу приділено пошуку адекватного балансу між кримінальною відповідальністю за зловживання свободою висловлювань і кримінально-правовими положеннями, що регламентують відповідальність за посягання на свободу висловлювань у цих державах. Наприкінці наведено корисні міркування щодо публічної оцінки стану реалізації свободи висловлювань в Україні та Польщі, а також зроблено висновки про основні розбіжні та спільні риси правового регулювання.

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