Court Practices in Cases Involving Dissemination of Information on the Internet

The trends and challenges in enforcement practices

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INTRODUCTION

This analysis report was prepared by the NGO *Human Rights Platform* experts Oleksandr Burmahin and Liudmyla Opryshko based on the findings from digital rights monitoring in Ukraine that took place in May-September 2019 and April-July 2020 under the *Monitoring Digital Rights Violations* and *Strengthening Digital Rights in Ukraine* projects funded by *Counterpart International.*

During the monitoring process, the experts selected and analyzed court judgments concerning dissemination of information on the Internet that were published in the National Register of Court Judgments during the same period. The study used the digital rights monitoring methodology[1].

Monthly findings of the monitoring are presented in the reports for May-September 2019 and April-July 2020[2], and published on the NGO *Human Rights Platform* website at https://www.ppl.org.ua.

[1] The digital rights monitoring methodology is available at the following link: https://www.ppl.org.ua/wp-content/uploads/2019/06/%D0%9C%D0%B5%D1%82%D0%BE%D0%B4%D0%BE%D0%BB%D0%BE%D0%B3%D1%96%D1%8F-.pdf

[2] See the *'Download Report'* tab at the following link: https://www.ppl.org.ua/monitoring/monitoring-cifrovix-prav

I. COURT PRACTICES IN CASES INVOLVING FALSE RUMOR MONGERING

By Liudmyla Opryshko

Foreword

In March 2020, a quarantine was imposed in Ukraine due to the coronavirus disease (Covid-19) pandemic. This hot topic generated a great multitude of news stories, including fake news stories, spreading on social media, especially on Facebook. To counter fake news, the law enforcement agencies started filing multiple reports of administrative offenses punishable under Article 173-1 of the Code of Ukraine on Administrative Offenses (false rumor mongering) and bringing the cases to court. Consequently, a new, somewhat controversial practice emerged to prosecute individuals for rumor mongering on the Internet.

In April-July 2020, the NGO *Human Rights Platform* experts monitoring digital rights violations **analyzed 145 court rulings** in cases under Article 173-1 of the Code on Administrative Offenses. In April, there were 32 such rulings published in the National Register of Court Judgments; in May, the number increased 1.5-fold to 48 rulings; in June and July, the number dropped to 38 rulings in June and 27 in July. Practically all of them involved Covid-19.

What does this article imply? Article 173-1 of the Code on Administrative Offenses imposes administrative liability for false rumor mongering that may cause panic among the public or disrupt public order and is punishable by a fine of 10 to 15 tax-exempt minimum wages, i.e. UAH 170 to 255, or up to one month of correctional labor withholding 20 percent of the wages.

What is interesting is that in the thirty years since Article 173-1 was introduced into the Code, it was nearly *'dead,'* applied only occasionally in select cases. The situation changed recently following the outbreak of the coronavirus disease and the quarantine measures being imposed. In early June 2020, the Security Service of Ukraine reported that during the time the quarantine measures were in effect, Ukraine's Security Service cyber specialists exposed 393 individuals who were spreading fake news stories about Covid-19, 367 of whom were reported to the National Police. Also according to the Security Service, in April-May 2020, 160 individuals were charged with administrative offenses under Article 173-1 of the Code on Administrative Offenses, however, we found only 80 such cases were registered with the National Register of Court Judgments at that time and, as was pointed out above, a total of only 145 judgments under the Article in April-July 2020.

The outcomes of court trials in such cases were as follows.

Proof of the administrative offense was established in **54** cases. In 33 of those, the courts imposed a **fine** of UAH 170 (in one case, UAH 255[3]) and charged a court fee of UAH 420.40 payable to the State. In twenty of those cases, the defendants pleaded guilty; in another six, they pleaded not guilty; in one of the cases, the defendant pleaded partially guilty; in the other seven cases, it was unclear from the rulings whether the defendants pleaded guilty. In the remaining 21 cases, the courts did establish proof of administrative offenses but **dropped the charges against the defendants** due to the **minor nature** of the offenses, merely issuing a verbal warning, and closed the cases. In the majority of cases of this kind, the defendants

[3] See the ruling at the following link: http://reyestr.court.gov.ua/Review/89027625

pleaded guilty (there were 15 such cases). Only in one case, the defendant pleaded partially guilty. In addition, there were four rulings registered with the National Register of Court Judgments in which the offenses were held to be minor but it is unclear from the rulings whether the defendants pleaded guilty.

Notably, courts quite often **remand the cases** to the National Police for **revision,** sometimes even more than once[4]. Mainly, the reason for this is that the administrative offense reports needed to be brought into compliance with the requirements of the National Register of Court Judgments. There were twenty such court rulings registered with the National Register of Court Judgments in April-July 2020.

In addition, another type of cases emerged in July 2020. These include cases in which courts ruled to close administrative cases due to **expiration of the statute of limitations**. A total of nine such rulings were registered with the National Register of Court Judgments. Of these, in seven instances, the courts closed the cases without establishing the defendant's guilt of an administrative offense, and in the other two cases, the defendants were found guilty of offenses punishable under Article 173-1 of the Code on Administrative Offenses.

On the other hand, in most administrative cases, **the courts failed to establish the facts and/or elements of a criminal offense and closed the cases**. So far, there are **61** such cases. In addition, one case was closed due to the death of the defendant.

The analysis of court judgments suggests that problems arise on two levels: both during collection of evidence by law-enforcement agencies and during court trials.

Problems arising during collection of evidence.

Not infrequently, courts remand administrative offense reports to law-enforcement agencies because the reports do not reflect the essence of the offenses, specifically what constituted an offense. For example, cases have been remanded because the reports provided no information about the place and time of the administrative offense and/or the subject matter of the rumors, nor information about why the rumors were false, exactly what consequences they had or could have and what those consequences were[5]. The analysis of court practices showed that inadequate preparation of administrative cases by law-enforcement agencies was one of the main reasons why the cases were closed.

In such instances, judges normally stress that incomplete reporting of the factual circumstances of the events and lack of clear and specific charges violate the right of defendants to defense and prevent courts from conducting full and comprehensive trials in administrative cases and completing them within a reasonable time frame[6].

Thus, the findings of the monitoring suggest the need to improve the level of awareness of police officers involved in preparation of administrative cases.

Problems arising during court trials

Court practices in cases of false rumor mongering are quite controversial. The analysis of court judgments made over the course of the monitoring process highlighted the following

[4] See the ruling at the following link: http://reyestr.court.gov.ua/Review/89050098

[5] http://reyestr.court.gov.ua/Review/88889191, http://reyestr.court.gov.ua/Review/88974317, http://reyestr.court.gov.ua/Review/89399681, http://reyestr.court.gov.ua/Review/88640301

[6] http://reyestr.court.gov.ua/Review/88872339

problems in the application of Article 173-1 of the Code on Administrative Offenses in court trials:

- Failure by courts to establish all circumstances of a case;
- Lack of verification or improper legal evaluation of news stories;
- Lack or insufficiency of evidence that a news story can cause panic among the public or disrupt public order;
- Finding the defendant guilty of an offense based on inadequate or insufficient evidence;
- Failure to comply with the standards of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

CONCLUSIONS AND RECOMMENDATIONS

Conclusions:

- Improperly prepared reports of administrative offenses punishable under Article 173-1 of the Code on Administrative Offenses are often the cause for remanding administrative cases for revision.
- The prevailing violations in preparation of administrative cases for court trial include the following: failure to identify and quote the full text of the news story in the report; lack of information about what part of the news story is untrue; lack of evidence that the news story is untrue as well as lack of evidence of intent to cause panic and/or disrupt public order or of probability of such consequences following the publication of the news story.
- Court practices in cases of false rumor mongering are quite controversial. More often than not, different courts interpret similar circumstances differently and make dramatically disparate decisions with regard to establishing the elements of an administrative offense. Reports from the Security Service of Ukraine filed in administrative cases are often accepted by courts as valid and admissible evidence of guilt of disseminators while other courts refuse to admit is as valid evidence.
- When trying cases under Article 173-1 of the Code on Administrative Offenses, courts do not always examine the full text of the news story reported as an administrative offense, do not always properly verify the news stories, and their judgments do not provide valid and sufficient evidence of intent to mislead, cause panic, or disrupt public order or of probability of such consequences following the publication of the news story inform.
- When trying cases under Article 173-1 of the Code on Administrative Offenses, courts hardly ever apply the standards of freedom of expression laid down by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the case law of the European Court of Human Rights on Article 10 of the ECHR.

Recommendations:

- Improve the skills of police officers preparing administrative cases under Article 173-1 of the Code on Administrative Offenses.
- Address violations that warranted remand of administrative offense reports for revision.

- Promote consistency in court practices when trying this type of cases. Similar circumstances of a case may not be interpreted in a way that leads to inconsistent and essentially contradictory court judgments. Evaluation of reports from the Security Service of Ukraine also must be consistent in all cases under Article 173-1 of Code on Administrative Offenses.
- Point out to judges that this type of cases requires examining the full text of the contested news story and taking into account the context in which it was published, as well as giving a balanced assessment of the evidence that the information reported as an administrative offense is untrue, that the offense was intentional, and that there was probability of consequences such as panic or disruption of public order, and providing valid and sufficient grounds for the judgment.
- Recommend that when trying cases under Article 173-1 of the Code on Administrative Offenses, courts should apply the standards of freedom of expression as laid down by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the case law of the European Court of Human Rights on Article 10 of the ECHR.

II. LEGAL REMEDIES FOR VIOLATIONS OF NON-PROPRIETARY RIGHTS OF CLAIMANTS IN CASES INVOLVING PERSONAL AND BUSINESS DEFAMATION.

By Liudmyla Opryshko

The findings of the digital rights monitoring (hereinafter – *Monitoring*), conducted by NGO *Human Rights Platform* in May-September 2019 and April-July 2020, revealed a number of problems related to the free flow of information on the Internet. Particularly, these involve court practices in applying legal remedies for violations of the rights of claimants in cases involving personal and business defamation.

CONCLUSIONS AND RECOMMENDATIONS.

Conclusions:

- Simultaneous application of legal remedies such as refutation and removal of contested information is becoming more common in personal and business defamation cases. Notably, courts hardly ever provide rationale for removal of contested information, let alone simultaneous removal and refutation.
- Courts provide different grounds for applying such legal remedy as removal of contested information from a website.
- Removal of contested information is an extremely serious infringement of the right to freedom of expression comparable to censorship.
- Not infrequently, court orders to remove contested information from an article or refute contested information on the Internet infringe non-proprietary copyrights.
- Ordering the defendant to publish the text of the court judgment is not always consistent with the principle of proportionality and may lead to violations of other laws and the rights of the litigants.
- Refutation statements prescribed by court judgments are not always consistent with the purpose of this legal remedy.

Recommendations:

- When ordering to publish a refutation statement or remove contested information from a website, assess the public need and proportionality of each legal remedy, and provide valid and sufficient rationale for their application (especially when applied simultaneously).
- Develop uniform approaches to addressing application of a legal remedy such as removal of contested information.
- Apply a legal remedy of removal of contested information only under exceptional circumstances and provide valid and sufficient rationale for the decision, consistent with the case law of the European Court of Human Rights on Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.
- When applying any legal remedy, make sure that no copyrights or any other rights of the litigants are infringed.
- When choosing a legal remedy, respect the principle of proportionality.
- Comply with the requirements of the legislation of Ukraine regarding refutation statements.

III. COURT PRACTICES IN CASES ON FREEDOM OF EXPRESSION AND PRESUMPTION OF INNOCENCE, AND CLEARANCE TO USE THE NAME OF A PERSON

By Oleksandr Burmahin

Lately, courts have been more commonly applying the special provision of Article 296.4 of the Civil Code of Ukraine in civil cases. The provision governs the use of the name of a person suspected of or charged with a crime or a person guilty of an administrative offense.

CONCLUSIONS:

1. A comparison between the findings of domestic courts in the abovementioned cases and the ECtHR standards suggests that, as far as the rights to use a name are concerned, domestic courts tend to dismiss the criteria used by the ECtHR to balance conflicting rights as inapplicable in Ukraine.
2. The national legislation leaves room for balancing restrictions on the use of the name of an individual and dissemination of information of public interest but this approach was used only once by a first instance court in the case of *M. v National Anticorruption Bureau of Ukraine.*
3. Domestic courts do not always apply the case-law of the ECtHR correctly. Particularly, in their rationale of the presumption of innocence, court judgments not infrequently refer to the ECtHR judgments in cases such as *Khuzhin and others v Russia*[7] (as in the case against the National Anticorruption Bureau of Ukraine), *Shagin v Ukraine,*[8] and *Hrabchuk v Ukraine*[9] (as in the case against the Anticorruption Action Center). In all of these cases, the ECtHR found that the presumption of innocence was violated by **government agencies or public officers.** However, the Anticorruption Action Center is a nongovernmental organization with strong media presence, therefore, consistent with the ECtHR case-law, the standards applicable to mass media and journalist should apply in its case[10].
4. Applying a legal remedy such as removal of an entire news story mentioning the name of the claimant (e.g. the case against the National Anticorruption Bureau), without providing any additional proof of its necessity, suggests disproportionate infringement of freedom of expression. As courts point out in their judgments, it is not about restrictions on coverage of criminal investigations but improper use of the

[7] https://cedem.org.ua/library/sprava-huzhyn-ta-inshi-proty-rosiyi/ In this case, the contested statements were made on TV by a public prosecutor: *"As you can tell, the Khuzhin brothers are violent, bold, and greedy, seeing how they wanted to exploit another person's physical labor for cheap, in fact, for free…"* / *"A flagrant crime. If anyone is aware of other such cases, please report them to the police, and the criminals will be prosecuted…"*

[8] https://zakon.rada.gov.ua/laws/show/974_612#Text In this case, the statements regarding a criminal case made in mass media by top-level officials (public prosecutors) were found to be inconsistent with the principle of the presumption of innocence.

[9] https://zakon.rada.gov.ua/laws/show/974_118#Text This case did not at all concern the presumption of innocence in the context of dissemination of any information on the Internet or in media. It examined the decision to close the criminal case against the claimant that was worded in a way that left no doubt as to the opinion that the claimant was guilty of the crime.

[10] The ECtHR judgment in the case of TÁRSASÁG A SZABADSÁGJOGOKÉRT V. HUNGARY https://cedem.org.ua/library/sprava-ugorske-obyednannya-gromadskyh-svobod-proty-ugorshhyny/

names. If a news story is removed, all information is lost to the public, including the names and facts of a criminal case.

5. Courts evaluate evidence of adverse consequences of disclosure of information in such cases differently. Whereas, in the case against the National Anticorruption Bureau, the appellate court referred to the lack of any evidence of damage to business reputation, the courts trying the case against the Anticorruption Action Center, without reference to any evidence, established a number of facts such as, *"the public opinion of the claimant's business and professional competencies as a duty holder was adversely affected,"* and, *"which affected the public opinion and suggested to the public that the claimant was guilty of the crimes."* Similarly, in the case against the Anticorruption Action Center, the courts, without reference to any evidence of cause and effect, established the relationship between the following legal facts: 1) violation of the right to use the name had led to 2) violation of the presumption of innocence which had led to 3) violation of the right to business reputation. In our opinion, each of those rights warrant protection in their own right which, accordingly, requires valid reasoning and reference to evidence, including cause and effect relationship.

6. Courts do not quote nor examine statements that, according to them, violate the presumption of innocence. In the case of Mr. M. against the National Anticorruption Bureau, the first instance court pointed out that the publication did not imply that the claimant had committed a crime. Nevertheless, not one judgment in that case quoted a single abstract from the contested news story. In the case of Mr. M. against the Anticorruption Action Center, the courts limited themselves to comments that the information was about *"the claimant being suspected of committing the crimes."* In our opinion, in the context of how important it is to properly balance conflicting rights, evaluating the contested information is key. The ECtHR places special emphasis on such evaluation in its judgments concerning restrictions on the freedom of expression and information.

7. The legal reasoning of domestic courts for overlooking the public interest in the information and the public status of the individual when making judgments on the merits of a case, and the prohibition to use the name of an individual even despite his/her consent to coverage of the criminal proceedings he/she is involved in, can have a significant *'chilling effect.'* Journalists and other disseminators would be wary of mentioning names of officials, politicians, and other public figures in their publications, and may even altogether avoid topics involving criminal investigations.

IV. COURT PRACTICES IN CASES INVOLVING WEBSITE BLOCKING AS PART OF PREVENTIVE MEASURES IN CRIMINAL PROCEEDINGS

By Oleksandr Burmahin

In 2019, the *Human Rights Platform* lawyers were contacted by the owner of the *Enigma* website[11] seeking legal assistance. Visitors to his blog were reporting that they were unable to enter and browse his website. In turn, the Internet service providers informed him that they had received a court order to block access to nineteen websites, many of which were news websites, including *Enigma*[12]. As it turned out, a court order has been issued to seize assets as a preventive measure in criminal proceedings.

The court order listed nineteen webpages, allegedly containing information that, according to the prosecution, showed ***"signs of extortion from victims, dissemination of adverse material, and other forms of slander."*** Even assuming that such preventive measures are in fact applicable in criminal proceedings, slander was decriminalized yet back in 2001, and defamation is not considered the type of content that, according to international standards, should be blocked. Notwithstanding the above, the court order restricted access not only to webpages containing potentially damaging material but to entire websites.

While working on this case, we discovered that the court order was far from being the first in the string of similar orders. If you go to the official website of the National Commission for state regulation of communications and IT[13] (ISP regulator) and type *'seizure'* in the search field, you will get the following results:

- 2018: three court orders.
- 2019: seven court orders.
- 2020: four court orders.

These court orders essentially follow the same template and their operative provisions read as follows:

Seize **intellectual property rights of Internet users arising** from the use of websites (listed) by ordering ISPs (listed) and **other ISPs** operating in Ukraine and officially registered pursuant to Article 42.2 of the Law of Ukraine *On Telecommunications* **to block access to the websites listed above**.

The analysis of such court orders and appeals against them also suggests that despite the same circumstances, appeals against seizure court orders to block websites can have different outcomes. In some cases, appellate courts rule to overturn seizure, while in other similar cases, they reject the appeals.

Given that the legislation of Ukraine, including the Criminal Procedure Code of Ukraine, does not provide for website blocking (i.e. does not specify valid grounds and procedures), the above practice of applying preventive measures in criminal proceedings may be viewed as such that is not *'prescribed by law'* within the meaning of Article 10 of the European Convention for

[11] https://enigma.ua/
[12] Case no. 757/38387/19-к.
[13] https://nkrzi.gov.ua/index.php?r=site/index&pg=1&language=uk

the Protection of Human Rights and Fundamental Freedoms and the case-law of the European Court of Human Rights in its application[14].

In our opinion, there is also every indication that such restrictions imposed on online news websites are disproportionate as blocking access to an entire site is an extraordinary measure that, in theory, may be applied only in the case of multiple violations of the law by each of the news websites listed in the court order.

[14] CASE OF AHMET YILDIRIM v. TURKEY https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-115705%22]}