

LIBERDADE DE EXPRESSÃO EM ASSUNTOS PÚBLICOS FRONTEIRAS DA CRÍTICA POLÍTICA NA JURISPRUDÊNCIA DO TRIBUNAL EUROPEU DOS DIREITOS HUMANOS

FREEDOM OF EXPRESSION IN PUBLIC MATTERS BORDERS OF POLITICAL CRITIQUE IN JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

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SUMÁRIO: Introduction; 1. Lingens versus Austria; 2. Oberschlick versus Austria; 3. Castells versus Spain; 4. Incal versus Turkey; 5. Oberschlick versus Austria (no. 2); 6. Krasulya versus Russia; 7. Kita versus Poland; Conclusions.

RESUMO: O objetivo deste artigo será fronteiras da liberdade de expressão na jurisprudência do Tribunal Europeu dos Direitos do Homem, em Estrasburgo a respeito da art. 10º da Convenção Europeia dos Direitos do Homem.

ABSTRACT: The subject of the chapter will be borders of the freedom of expression in jurisprudence of the European Court of Human Rights in Strasbourg concerning the art. 10 of the European Convention of Human Rights.

PALAVRAS CHAVE: liberdade de expressão; assuntos públicos; Tribunal Europeu dos Direitos Humanos.

KEYWORDS: freedom of expression; public matters; European Court Of Human Rights

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INTRODUCTION

Freedom of expression is treated as one of the essential foundations of democratic society, one of the basic conditions for its progress and for the development of every man.¹ It is guaranteed by the art. 19 of the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948², the art. 19 of the International Covenant on Civil and Political Rights adopted in 1966³, the art. IV of the American Declaration of the Rights and Duties of Man adopted by the Ninth International Conference of American State in 1948⁴, the art. 13 of the American Convention on Human Rights adopted by the nations of the Americas in 1969⁵, the art. 9 of the African Charter on Human and Peoples' Rights adopted in 1981, the art. 10 of European Convention on Human Rights signed in 1950.

The subject of the chapter will be borders of the freedom of expression in jurisprudence of the European Court of Human Rights in Strasbourg (hereinafter "Tribunal") concerning the art. 10 of the European Convention of Human Rights (hereinafter "European Convention" or "Convention"). The Tribunal is entitled to examine application against European states – members of the European Convention on Human Rights. This Convention has the most important influence on standards of human rights protection in European countries, because of the right of the Court to control if provisions of the European Convention was not infringed by states.

According to the 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.

In jurisprudence of the Tribunal freedom of expression is treated very widely. It is not only freedom of oral or written statements but also freedom to communicate with others in other ways, for example by some gesture, painting.

To recognize real extend of the freedom we should remember about the limits of the freedom. According to the art. 10 paragraph 2 of the Convention the

¹ Judgment Handyside versus the United Kingdom, application number 5493/72. Judgments of the Tribunal can be found in Hudoc. It is the Tribunal's database, accessible by internet: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>

² According to the art. 19 of the Universal Declaration „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 and regardless of frontiers.”

³ Adopted by the United Nations General Assembly on 16th December 1966, and in force from 23th March 1976.

⁴ According to the art. IV of the American Declaration „Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever”. According to the art. 13 of the American Convention „Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice”. According to the art. 9 of the African Charter ⁵, 1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law.”

limits should be: prescribed by law, necessary in a democratic society and in the interests of goods stipulated in this article. They are:

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

The freedom of expression in public matters may be in conflict with all of these goods. Especially the reputation of others very often constitutes a border of political critique. It is very difficult to find a solution of the kind of conflict and to decide which good, the freedom of expression or the reputation of others, is more important in the concrete situation. Therefore the analysis of the issue in the jurisprudence of the Tribunal needs to present circumstances of the cases.

1. LINGENS VERSUS AUSTRIA

One of the most famous jurisdiction of the Tribunal regarding the issue was judgment delivered on 8th July 1986 in the case *Lingens versus Austria* (application no. 9815/82). On October 1975 in the course of a television interview, Mr. Wiesenthal, who was President of the Jewish Documentation Centre, accused Mr. Peter, the President of the Austrian Liberal Party that he had served in the first SS infantry brigade during the Second World War. This unit had on several occasions massacred civilians. Mr. Peter stated that he was a member of the unit, but he was never involved in the atrocities. Mr. Wiesenthal then said that he had not alleged anything of the sort. Being questioned on television about these accusations against Mr Peter, Mr. Kreisky, the Chancellor and President of the Austrian Socialist Party supported him and referred to Mr. Wiesenthal’s organization and activities as a “*political mafia*” and “*mafia methods*”. As reaction to this event Mr Lingens published two articles.

The first one related in particular the activities of the first SS infantry brigade. It also concentrated on Mr. Peter’s role in criminal proceedings against persons who had fought in that SS brigade. The author concluded that although Mr. Peter was admittedly entitled to the benefit of the presumption of innocence, his past nevertheless rendered him “*unacceptable as a politician*” in Austria. Mr Lingens also criticized Mr. Kreisky who protected, in his opinion, Mr. Peter and other former members of the SS for political reasons.

In the second article Mr Lingens again criticized Mr Kreisky for supporting Mr. Peter and his attitude towards former Nazis. He also claimed Austria for ignoring her history and not coming in terms with its past. In his opinion this policy risked delivering the country into the hands of a future fascist movement. He added that: “*In truth Mr. Kreisky’s behavior cannot be criticized on rational grounds but only on irrational grounds: it is immoral, undignified*”. The author stated that Austrians could reconcile themselves with the past without seeking the

favors of the former Nazis.

The Chancellor brought two private prosecutions against Mr. Lingens. He considered that certain passages in the articles summarized above were defamatory and relied on the art. 111 of the Austrian Criminal Code. The Vienna Regional Court found Mr. Lingens guilty of defamation for having used the expressions “*the basest opportunism*”, “*immoral*” and “*undignified*”. However, it held that certain other expressions were not defamatory in their context (“*minimum requirement of political ethics*”, “*monstrosity*”). It fined him 20,000 Schillings. The court considered as mitigating circumstances the fact that the accused intended to voice political criticism of politicians on political questions and that the latter were expected to show greater tolerance of defamation than other individuals. In view of the defendant’s good faith it awarded Mr. Kreisky no damages but, on his application, ordered the confiscation of the articles complained of and the publication of the judgment.

Both sides appealed against the judgment. The Court of Appeal set the judgment aside without examining the merits, on the ground that the Regional Court had failed to go sufficiently into the question whether the then Chancellor was entitled to bring a private prosecution. The Vienna Regional Court came to the conclusion that he had been criticized not in his official capacity but as a head of a party and as a private individual who felt himself under an obligation to protect a third person. It followed therefore that he was entitled to bring a private prosecution. The Regional Court passed the same sentence as in the original judgment.

Both sides again appealed to the Vienna Court of Appeal, which confirmed the Regional Court’s judgment and reduced the fine imposed on the applicant. However, the Court of Appeal pointed out that the art. 111 of the Criminal Code applied solely to the esteem enjoyed by a person in his social setting. In the case of politicians, this was public opinion. Frequent use of insults in political discussion had given the impression that statements in this field could not be judged by the same criteria as those relating to private life. Politicians should therefore show greater tolerance. As a general rule, political critique did not affect a person’s reputation unless they touched on his private life. That did not apply in the instant case to the expressions “*minimum requirement of political ethics*” and “*monstrosity*”. Mr. Kreisky’s appeal was therefore dismissed.

Mr. Lingens lodged an application against the judgment before the European Court of Human Rights. In his opinion the decision infringed his freedom of expression to a degree incompatible with the fundamental principles of a democratic society. The Tribunal stated that it was not disputed that there was “*interference by public authority*” with the exercise of the applicant’s freedom of expression. The question was if the interference contravenes the Convention. The Tribunal had to determine whether the interference was “*prescribed by law*”, had an aim that is legitimate under the art. 10 paragraph 2 and whether the interference was “*necessary in a democratic society*” for the aim.

The Tribunal declared that the conviction, based on the art. 111 of the Austrian Criminal Code, was accordingly “*prescribed by law*” and had a legitimate aim under the art. 10 paragraph 2 of the Convention. Therefore the Tribunal concentrated on the question whether the interference was “*necessary in a democratic society*” for achieving the aim. The adjective “*necessary*” implies the existence of a “*pressing social need*”. The Tribunal underline that Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it.

In this case the Tribunal decided that the interference with Mr. Lingens’ exercise of the freedom of expression was not necessary in a democratic society for the protection of the reputation of others. It was also disproportionate to the legitimate aim pursued. There was accordingly a breach of the art. 10 of the Convention. In justification of the judgment the Tribunal recalled that:

freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfillment. Subject to paragraph 2, it is applicable not only to “information” or “ideas” that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”.

The Tribunal also underlined that these principles are of particular importance as far as the press is concerned. It is incumbent on the press to impart information and ideas on political issues just as on those in other areas of public interest, but the press must not overstep the bounds set for the “protection of the reputation of others”.

Freedom of the press furthermore affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention.

With regard to acceptable critique of politician the Tribunal stated that it is wider than critique of private individual. A politician “inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.” The art. 10 of the Convention protects reputation of all individuals but the requirements of such protection have to be weighed in relation to the interests of open discussion of political issues.

According to the Tribunal the expressions (“*basest opportunism*”, “*immoral*” and “*undignified*”), used by Mr. Lingens apropos of Mr. Kreisky, dealt

with political issues of public interest in Austria. It had given rise to many heated discussions concerning the attitude of Austrians to National Socialism and to the participation of former Nazis in the governance of the country. The Tribunal agreed that the use of the aforementioned expressions in particular appeared likely to harm Mr. Kreisky's reputation, but content and tone of the articles were fairly balanced. It is also important to see the background against which these articles were written. It was shortly after the general election that causes always political controversy. As the Vienna Regional Court noted in its judgment in this struggle each used the weapons at his disposal and these were in no way unusual.

The Tribunal underline that at issue was not Mr. Lingens's right to disseminate information but his freedom of opinion and his right to impart ideas. The relevant Austrian courts sought to determine whether the defendant had established the truth of his statements. This was in pursuance of the art. 111 of the Austrian Criminal Code. With regard to this the Tribunal made distinction between facts and value-judgments. The truth of value-judgments is not susceptible of proof. The facts on which Mr. Lingens founded his value-judgment were undisputed. Under Austrian law journalists cannot escape conviction unless they can prove the truth of their statements. As regards value-judgments this requirement is impossible of fulfillment and it infringes freedom of opinion, which is secured by the art. 10 of the Convention.

2. OBERSCHLICK VERSUS AUSTRIA

The next very important judgment of the Tribunal which concerned the issue was delivered on 23th May 1991 in the case of Oberschlick versus Austria (application no. 11662/85). Mr. Oberschlick and other persons laid a criminal information against Mr. Grabher-Meyer. He was a Secretary General of one of the political parties which participated in the governing coalition in Austria. During the parliamentary election campaign Mr. Walter Grabher-Meyer had suggested that the family allowances for Austrian women should be increased by 50% in order to obviate their seeking abortions for financial reasons, whilst those paid to immigrant mothers should be reduced to 50% of their current levels. He had justified his proposals by saying that immigrant families were placed in a discriminatory position in other European countries as well.

The full text of the information was published by Mr. Oberschlick in a review Forum. The cover page of the review's issue contained a summary of its contents, including the title : "*Criminal information against the Liberal Party Secretary General*". This information contained suspicion of commitment of: the misdemeanour of incitement to hatred, the misdemeanour of incitement to commit criminal offences and expressing approval of criminal offences, the offence of activities within the meaning of provisions on the prohibition of the National Socialist Party (NSDAP). The information contained also justification of the suspicion.

Mr. Grabher-Meyer brought a private prosecution for defamation against

the applicant and the other authors of the criminal information. The Vienna Regional Criminal Court decided to order the discontinuance of the proceedings, because the publication did not constitute the criminal offence defined in the art. 111 of the Criminal Code. The case concerned value-judgments on behavior which had been correctly described. The Vienna Court of Appeal quashed the above decision. It held that for the average reader the publication must have created the impression that a contemptible attitude was ascribed to Mr Grabher-Meyer. The court underlined that authors insinuated motives which Mr. Grabher-Meyer had not himself expressed, in particular by alleging that he had been guided by National Socialist attitudes.

In the next proceeding before the Regional Court the applicant was convicted of defamation again. The Court of Appeal did not depart from this decision. Mr Oberschlick lodged the application against the judgment before the European Court of Human Rights.

Mr Oberschlick alleged that his conviction for defamation and the other related court judgments had breached his right to freedom of expression. It was “*interference*” with his right to freedom of expression, which was “*prescribed by law*” and was aimed at protecting the “*reputation or rights of others*” within the meaning of the art. 10 paragraph 2 of the Convention. In the applicant’s opinion the interference was not “*necessary in a democratic society*” to achieve that aim.

In a democratic society the role of periodicals is to comment on politicians’ social or legal policy proposals. The Austrian courts had denied him the right of giving his opinion as to whether the proposal constituted a revival of National Socialism. According to the Austrian Government, Mr. Oberschlick had overstepped the limits of justifiable and reasonable criticism. He had not been able to prove his accusation. The Government also added that the European Court should respect the margin of appreciation to be left to the national authorities which are better placed than the international judge to determine what matters should be regarded as defamatory. It depends on national conceptions and legal culture.

Examining violation of the art. 10 of the Convention, Tribunal recalls the meaning of freedom of expression. “*It is applicable not only to “information” or “ideas” that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.*” Underlining the role of the free press the Tribunal added that it affords the public one of the best means of discovering and forming an opinion of the ideas.

In the Tribunal’s opinion the criminal information published in the Forum contributed to a public debate on a political question of general importance. The issue of different treatment of nationals and foreigners in the social field had given rise to discussion not only in Austria but also in other member States of the Council of Europe. The proposals of Mr. Grabher-Meyer were likely to shock many people. That is why Mr. Oberschlick criticism was published in a provocative manner.

It should be recalled that the reason of conviction of Mr. Oberschlick was

that he had failed to prove his allegations. In this context the Tribunal held that the criminal information published in the Forum contained the facts and the analysis of the Mr. Grabher-Meyer's statements. The part reporting politician's statements was factually correct. The letter part of the information was regarded by the Tribunal as a value-judgment. It expressed the opinion of the author about the proposal made by Mr. Grabher-Meyer. Consequently the Tribunal stated that as regards value-judgments requirement of proving its truth it is impossible to fulfill. Therefore it constitutes an infringement of freedom of opinion.

The form of the publication was very important too. The Tribunal marked that Austrian courts did not establish that the form of a criminal information was misleading in the sense that a significant number of the readers were led to believe that a public prosecution had been instituted against Mr. Grabher-Meyer or even that he had already been convicted. That is why Mr. Oberschlick cannot be said to have exceeded the limits of freedom of expression by choosing this particular form. In conclusion the Tribunal declared that the interference with Mr. Oberschlick's exercise of his freedom of expression was not "*necessary in a democratic society ... for the protection of the reputation ... of others*".

3. CASTELLS VERSUS SPAIN

As a decision of the Tribunal having meaning for the issue of political critique it have to be mentioned the judgment delivered on 23 th April 1992 in the case Castells versus Spain (application no.11798/85). Mr. Castells was a senator supporting independence for the Basque Country. He published in some weekly magazine an article concerning murders on political grounds which were not investigated in a correct way. He accused the government of this situation, especially the right-wing parties who were in power.

He accused that perpetrators of these crimes continue to work and remain in posts of responsibility. No warrant has been issued for their arrest. Any other endeavor had been taken to reveal the truth about the murders. He also presented situation of persons who were ETA members. Thousands of persons, suspected of being members of ETA, have been detained in police stations. Mr. Castells stated that in the Basque Country nothing has changed has far as impunity and questions of liability are concerned. In his opinion fascist associations engaged in the attacks against Basques had not any independent existence, outside the State apparatus.

In 1979 the prosecuting authorities instituted criminal proceedings against Mr Castells for insulting the Government. The Supreme Court, requested the Senate to withdraw the applicant's parliamentary immunity. In 1981 the Supreme Court charged Mr. Castells with having proffered serious insults against the Government and civil servants. During the proceeding the Supreme Court refused to admit the majority of the evidence put forward by the defence. They were intended to show the truth of the information disseminated by Mr. Castells. He lodged an appeal. The Supreme Court confirmed its decision and it stated that the accuracy of the information was not decisive for a charge of insulting the Government. In 1983

the Supreme Court gave the judgment. It sentenced Mr. Castells to imprisonment. He was also disqualified for one year from holding any public office and exercising a profession. Mr Castells lodged an appeal. He complained that he had not been able to have the Supreme Court's judgment examined by a higher court and of the length of the proceedings. He again offered to prove the truth of his statements. In 1985 the Constitutional Court dismissed the appeal.

Mr. Castells lodged the application against the judgment before the European Court of Human Rights. According to his submission the criminal proceedings brought against him, and his subsequent conviction for insulting the Government, interfered with his freedom of expression.

The Tribunal recalled that freedom of expression, enshrined in paragraph 1 of the art. 10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress. The freedom is especially important for an elected representative of the people. His task is to draw attention to their preoccupations and defends their interests. It is important especially for an opposition member of parliament, like Mr. Castells. Although he did not express his opinion from the senate floor, he might have done without fear of sanctions, but chose to do so in a periodical. He did not loose his right to criticize the Government.

The Tribunal also underlined the role of the press.

Although it must not overstep various bounds set, inter alia, for the prevention of disorder and the protection of the reputation of others, it is nevertheless incumbent on it to impart information and ideas on political questions and on other matters of public interest.

The pursue of Mr. Castells' article was to denounce the Tribunal impunity enjoyed perpetrators of numerous attacks in the Basque Country since 1977. He thereby recounted facts of great interest to the public opinion of this region. In his view the Government was responsible for the situation. Assessing his accusation the Tribunal pointed that

limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion. Furthermore, the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media. Nevertheless it remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith.

The Tribunal emphasized that Mr. Castells offered to prove the truth of his statements, but the Supreme Court declared such evidence inadmissible, because the defence of the truth could not be pleaded in respect of insults directed at the institutions of the nation. According to the Tribunal many of applicant's assertions were susceptible to establish their truth, but the Supreme Court prevented him from demonstrating his good faith. Therefore the Tribunal considered such an interference in the exercise of Mr. Castells' freedom of expression as unnecessary in a democratic society.

4. INCAL VERSUS TURKEY

The limits of political critique was the subject of the judgment of the Tribunal delivered on 9th June 1998 in the case *Incal versus Turkey* (application no. 22678/93). Mr. Incal was a Turkish national, a member of the executive committee of the İzmir section of the People's Labour Party ("the HEP").

In 1992 the executive committee decided to distribute in the İzmir a leaflet. It contained critique of the measures taken by the local authorities against small-scale illegal trading and the sprawl of squatters' camps around the city. In the text the authors stated that it was a part of a campaign against the Kurdish population. The first stage was the operation [against] street traders, stallkeepers and mussel sellers. The aim of this operation was to impose an 'economic blockade' mainly on Kurdish, fellow citizens who make their living through these activities, condemning them to destitution and starvation. This caused to racist and anti-Kurdish attitudes. In this way the masses were to be frightened, oppressed and compelled to return to their province of origin. According to the leaflet the second prong of the campaign was 'Operation shantytown'. The same combination of prefecture, security police and town hall launched the demolition of the squatters' camps. The authors claimed that the demolitions, which began in Yamanlar will soon spread to İzmir's other shantytowns. It was a part of the special war against the Kurdish people. The leaflet was ended by the appeal: "We call on all Kurdish and Turkish democratic patriots to assume their responsibilities and oppose this special war being waged against the proletarian people." The public prosecutor instituted criminal proceedings in the National Security Court against the authors of the leaflet. In 1993 the Court found Mr. Incal guilty of the offences charged. The applicant and the other convicted persons appealed to the Court of Cassation. The Court decided that it was not necessary to hold a hearing.

Mr. Incal lodged an application against the judgment before the European Court of Human Right. He submitted that his conviction had infringed his freedom of expression. Assessing the case the Tribunal underlined the meaning of freedom of expression in democracy. This freedom is particularly important for political parties and their active members, because they represent their electorate. They role is to defend their interests. The closest scrutiny is needed for the interferences with the freedom of expression of a member of an opposition party, like Mr. Incal.

The Tribunal underlined that "*its task is not to take the place of the*

competent domestic courts but rather to review under the art. 10 the decisions they delivered pursuant to their power of appreciation.” On the other site the Tribunal noted that the relevant passages in the leaflet criticized certain measures taken by the authorities. The appeal aimed to the population of Kurdish origin, urging them to band together to raise certain political demands. “Although the reference to “*neighbourhood committees*” appears unclear, those appeals cannot, however, if read in the context, be taken as incitement to the use of violence, hostility or hatred between citizens.”

Assessing if the interference was necessary in a democratic society, the Tribunal underlined that the freedom of political debate is not absolute. A Contracting State may make it subject to certain “*restrictions*” or “*penalties*”, but the limits of permissible criticism are wider with regard to the government than in relation to a private citizen, or even a politician.

Furthermore, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless it remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks.

The Tribunal stated that the interference of authorities was very radical. The executive committee of the HEP submitted a copy of the leaflet to the Ýzmir prefecture with an application for permission to distribute it. The authorities could require changes to the text. However the leaflets were seized and there was brought prosecutions against its authors.

During proceeding before the Tribunal the representatives of Turkish Government asserted that “*it was apparent from the wording of the leaflets ... that they were intended to foment an insurrection by one ethnic group against the State authorities*”. It had therefore been the State’s “*duty to forestall any attempt to promote terrorist activities by means of incitement to hatred*”, given that “*the interest in combating and crushing terrorism takes precedence in a democratic society*”. Taking those arguments into consideration the Tribunal stated that it does not discern anything which would warrant the conclusion that Mr Incal was in any way responsible for the problems of terrorism in Ýzmir. It pointed out that the Prevention of Terrorism Act was not applied in the case by the National Security Court. Therefore the Tribunal assessed that Mr. Incal’s conviction was disproportionate to the aim pursued, and it was unnecessary in a democratic society.

5. OBERSCHLICK VERSUS AUSTRIA (NO. 2)

Judgment delivered on 1 th July 1997 in the case Oberschlick versus Austria (no. 2) (application no. 20834/92) is also very important for the subject of limits political critique. In 1990 on the occasion of a “*peace celebration*”, leader

of the Austrian Freedom Party and Governor of the Land of Carinthia, Mr. Haider gave a speech glorifying soldiers who had taken part in the Second World War. In his opinion people should not differentiate between good and bad soldiers. All of them, even German soldiers, had fought for peace and freedom. He also said that *“freedom of expression reaches its limits where people lay claim to that spiritual freedom they would never have got if others had not risked their lives for them so that they may now live in democracy and freedom.”*

Mr. Oberschlick, an Austrian writer published in Forum Haider’s speech and commented: “Idiot instead of `Nazi”. He also noted that being called a Nazi is an advantage to Jörg Haider. He explained his opinion adding that Mr. Haider is an idiot because he excluded the vast majority of Austrians from any exercise of freedom as they did not have the legitimising good fortune to have risked their lives *“in the uniform of honour of the Third Reich for the Hitlerian freedom to wage wars of conquest and impose the final solution”*.

In 1991 Mr. Haider brought an action for defamation and insult against Mr. Oberschlick. The court found the applicant guilty of having insulted Mr. Haider. In the court’s view, the word “Trottel” (English – “Idiot”) was an insult and it could never be used for any objective criticism.

Mr. Oberschlick lodged an appeal against that judgment, but the Vienna Court of Appeal upheld the Regional Courts judgment. It noted that only those who had read Mr Haider’s speech and the comments accompanying would understand why Mr. Oberschlick used the word “idiot”. Mr. Oberschlick lodged an application against the judgment before the European Court of Human Rights.

The Tribunal recalled fragments of its prior judgments concerning the issue of wider range of freedom of expression in political matters and critique of politicians. The conviction of Mr. Oberschlick interfered his freedom and this interference was prescribed by law. Its purpose – protection the reputation of others - was one of the purposes stipulated in the art. 10 paragraph 2 of the Convention. The problem that needed to be resolved was if the interference was *“necessary in a democratic society”*.

In Mr. Oberschlick’s opinion the word “Idiot” was used to draw public attention to how outrageous, illogical and dangerous the arguments in Mr Haider’s speech were. The word “Idiot” was against what Mr. Haider had said not against him. On the other hand, in the government’s opinion the word used by Mr. Oberschlick was nothing but an insult that broke basic rules in public life.

Probing the case the Tribunal pointed that the judicial decisions taken by Austrian courts should be considered in the light of the whole article of Mr. Oberschlick and the circumstances in which it was written. Mr. Haider’s speech was provocative and it was intended to arouse strong reactions. The article published in Forum contained the speech of Mr. Haider, the critique of Mr. Oberschlick and the explanation of word used against Mr. Haider. The reason of the critique was exclusion people who was not soldiers from enjoying any freedom of opinion.

According to the Tribunal the word “Idiot” was polemical but it did not

constitute a personal attack. It was a part of political discussion provoked by Mr. Haider' speech. The truth of the word is not susceptible to proof. Although the word "Idiot" may offend but it was not disproportionate to the indignation aroused by Mr. Haider. The article 10 of the Convention protects not only the ideas and information, but also the form in which they were conveyed. The Tribunal declared that the interference in the freedom of expression was not necessary in a democratic society.

6. KRASULYA VERSUS RUSSIA

The problem of the margin of appreciation in the cases of limits of freedom of political critique was brought in the judgment of the Tribunal delivered on 22th February 2007 in the case of Krasulya versus Russia (application no. 12365/03). Mr. Krasulya was the editor-in-chief of a regional newspaper "Noviy Grazhdanskiy Mir". In 2001 there was published an article about a decision of the town legislature connected with the procedure of appointment of the town's mayor. The author of the article was Mr. Krasulya, who was also competitor of Mr. Chernogorov in former the election. The critique of the decision was connected with the fact that the procedure of appointment was no longer made by towns residents but by town's legislature. According to the author of the article the decision was taken under pressure of Mr. Chernogorov.

In 2002 the prosecutor's office of the Stavropol Region initiated criminal proceedings against the applicant. The court found the applicant guilty of defamation. Mr. Krasuly appealed against the conviction, but the court upheld the judgment.

According to the Tribunal it is important to determine if the interference with the applicant's right was necessary in a democratic society.

The test of necessity in a democratic society requires the Court to determine whether the "interference" complained of corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it were relevant and sufficient. In assessing whether such a "need" exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not however unlimited, but goes hand in hand with a European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10. The Court's task in exercising its supervisory function is not to take the place of the national authorities, but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their margin of appreciation.

Considering this problem many circumstances have to be taken into account many elements, for example the position of the applicant, the position of

the person against whom his criticism was directed, the subject matter of the publication, characterization of the contested statement by the domestic courts, the wording used by the applicant, and the penalty imposed on him.

The author was a journalist and therefore it have to be underlined the role of the press in ensuring the proper functioning of political democracy. He criticized a politician in respect of whom the limits of acceptable criticism are wider than in the case of a private individual. The subject matter of the article was the decision of the town legislature to abolish mayoral elections in the regional capital. The author also disqualified the governor's managerial abilities. It was a very important problem for regional community and the article was a part of an on-going political debate.

In the Tribunal's view, the applicant's statement about Mr. Chernogorov's influence on the legislators' decision was too imprecise to constitute an accusation of bribery. The author stated that Mr. Chernogorov took a part in the legislative session. The governor and his advisors lobbied the legislators for the decision. According to the Tribunal it is undisputed that the governor attended the session and endeavored to persuade the lawmakers to vote for a law abolishing mayoral elections in the town. Therefore, the Court considered that Mr. Krasulya published a fair comment on an important matter of public interest.

Additionally some of the author's statements was not about facts but it constituted his opinion. Therefore the requirement to prove their truth was impossible to fulfill and infringed Mr Krasulya's freedom of opinion.

The Tribunal declared that the article did not exceed the acceptable limits of criticism. The domestic courts overstepped the narrow margin of appreciation afforded to them for restrictions on debates of public interest. The article was strongly worded, but it did not resort to offensive form. It did not go beyond the acceptable degree of exaggeration or provocation. The interference with Mr. Krasulya freedom was disproportionate to the aim pursued and not "necessary in a democratic society". Additionally the Tribunal considered that the penalty was disproportionately severe. It had a chilling effect on the applicant by restricting his journalistic freedom and reducing his ability to impart information and ideas on matters of public interest.

7. KITA VERSUS POLAND

The limits of political critique regarding representatives of local authorities was a subject of the judgment delivered on 8th of July 2008 in the case Kita versus Poland (application no. 57659/00). The applicant wrote an article concerning alleged financial irregularities in the municipality and distributed it in the form of leaflets. His article was entitled: "Information Bulletin: What the president of the City Council and the City Council Board have to hide". He stated that they don't have time to administer the municipal educational funds properly, because they had been so busy interfering with the employment policies of the local schools. Therefore teachers and employers of the municipal educational institutions had

not received money for protective clothing which under relevant legal provisions they should have received. Some allowance was not paid to the physical education teachers too. When Mr. Kita informed about the problem the mayors and the president of the City Council Board, he had been dismissed from his post. In his opinion the teachers did not claim this allowance because they had been afraid to lose their jobs. Furthermore although the municipality had received subsidies from the State to provide transport for children to schools, the schools had been required to pay an additional contribution to the municipality. Mr Kita added that he was not surprised that one of the people, mentioned in his article, had not replied to an inquiry from the Supreme Control Chamber as the municipal budget surplus had probably been used to pay bonuses and per diem allowances for the council members. He encouraged the readers of the leaflet to reconsider if these people can be offered yet another term of office in the next elections.

On October 1998 the Kielce Regional Court ordered the applicant to publish in the local newspaper an apology and a statement that he had included untrue information in his leaflet. It further ordered the applicant to pay a fine of 1,000 Polish zlotys (PLN) for the benefit of the Childrens Hospital in Kielce. Mr Kita lodged an appeal. The Cracow Court of Appeal quashed the first-instance decision because the applicant had not been able to defend himself in person and accordingly the proceedings had been invalid. On November 1998 the Kielce Regional Court gave again a decision. The court ordered the same and only the fine was reduced. According to the Court the article contained statements which lacked any factual basis. In addition, it could have caused the fact that politicians mentioned in the article had received fewer votes, because the applicant had deliberately distributed the leaflet during the election campaign. Mr Kita lodged an appeal again. The Court of Appeal found that the decision of the Regional Court was correct. The Court explained that the applicants untrue statements could not be considered as part of “acceptable criticism” within the meaning of Article 10 of the Convention. Proceedings provided for under section 72 of the Local Elections Act were aimed at ensuring the proper conduct of the electoral campaign by preventing infringements of the personal rights of those standing for election.

During the proceeding before the Tribunal the Government claimed that the applicant had failed to prove the correctness and accuracy of his statements. He had also overstepped the limits of political, because he had defamed several local politicians during a very sensitive period just before the elections. In the government’s opinion the courts had not exceeded the margin of appreciation available to them in assessing the need for such interference. According to the applicant he had been deprived of his right to freedom of expression. The courts had not examined the evidence submitted by him. Moreover his statements had been made in the public interest and during a political debate.

According to the Tribunal the interference was prescribed by law, pursued the legitimate aim of protection of the reputation or rights of others and the problem which needed an examination was if the interference was necessary in a democratic

society. The Tribunal recalled his judgments that declare that freedom of expression constitutes one of the essential foundations of a democratic society. This freedom is subject to exceptions, but they must be interpreted strictly. The Tribunal underlined that he must look at the impugned interference in the light of the case as a whole. It is important to take into an account the content of the statements concerned, the context in which they were made and also the particular circumstances of those involved.

Mr Kita distributed the leaflet in the course of an ongoing election campaign. He aimed to criticize the president and named members of the City Council Board. The Tribunal underlined that public authorities and their representatives are exposed to the permanent scrutiny of citizens.

According to the Tribunal “the Polish courts unreservedly qualified all of them as statements which lacked any factual basis without examining the question whether they could be considered to be value judgments”. In his opinion some of the statements of the applicant could be considered as statements which lacked a sufficient factual basis, but some of them could reasonably be considered value judgments. The applicant’s article was formed as a part of a debate on matters of public interest. He acted in good faith.

In any event, the Court (the Tribunal – added by the author) would observe that the distinction between statements of fact and value judgments is of less significance in a case such as the present, where the impugned statements were made in the course of a lively political debate at local level, and where the members of the community should enjoy a wide freedom to criticize the actions of a local authority, even where the statements made may lack a clear basis in fact.⁶

The courts had failed to recognize that the case involved a conflict between the right to freedom of expression and the protection of the reputation of others. They did not give into an account that the limits of acceptable criticism of the members of the City Council Board were wider. The Tribunal emphasized that there were not any passages of the applicant’s in the courts’ decisions. They had only considered the general meaning of his article.

The decisions of the Kielce Regional Court and the Krakow Court of Appeal were given some time after the local elections, so they could have discontinued the proceedings, especially as the parties had at their disposal the possibility of issuing ordinary civil proceedings against the applicant.

Finally the Tribunal concluded that Mr Kita did not exceed the acceptable limits of criticism. The small fine that applicant was ordered to pay did not detract from the fact that the standards applied by the courts were not compatible with the principles embodied in Article 10 of the Convention. There were not “*relevant and sufficient*” reasons justifying the interference at issue.

⁶ The Tribunal recalled also the judgment delivered on 24th April 2007 in the case *Lombardo and Others versus Malta*, application no. 7333/06).

CONCLUSIONS

All of the presented judgments show that according to the Tribunal the solution of the conflict of the freedom of expression and the reputation of others depends on many circumstances of the cases. Therefore it is impossible to point at the limits of political critique in an abstractive way. The extend of the freedom depends on the author of the expression (word, gesture etc.), the addressee, the matter it concerns, the object of critique – its position, its behavior (provocative or not), other circumstances which may arise in concrete cases. The Tribunal considered also if the reaction (penalty imposed on an application) was proportional. Too severe reaction could be treated as infringement of the art. 10 of the Convention. It is also important to remember about the margin of appreciation afforded to domestic courts. This power is not unlimited and the task of the Tribunal is to assess if a restriction is reconcilable with freedom of expression.

