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VIII YEREVAN INTERNATIONAL CONFERENCE

BASIC CRITERIA OF LIMITATION OF HUMAN RIGHTS IN THE PRACTICE OF CONSTITUTIONAL JUSTICE

Yerevan, 3-4 October 2003

REPORT ON

«Article 10 of the European Convention on Human Rights and Limitations of Freedom of Expression»

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I. Article 10 of the European Convention on Human Rights provides:

> *1. 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 (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*
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> *2. 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.*

II. Within last thirty plus years, the Court has developed a rich case law concerning freedom of expression and its limitations. The general principles of this case law were, in particular, formulated in two cases coming from the U. K.: the Handyside Case (December 7, 1976 - restriction of dissemination of an allegedly obscene textbook for children) and in the Sunday Times v. the U. K. (April 26, 1979 - restriction of publications on thalidomide-deformed children), and later elaborated in numerous other judgements of the Court.

Generally speaking, the freedom of expression (together with similar freedoms guaranteed in Articles 8, 9 and 11 of the Convention) enjoys a central part in the system of protection of human rights. As the Court observed in the Handyside judgement (§ 49), and repeated in many subsequent judgements:

> "... 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 without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued."

In the Janowski v. Poland judgement (January 21, 1999; § 30), the Court repeated three fundamental principles which:

> "... emerge from its judgments relating to Article 10:
> (i) 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-fulfilment. Subject to paragraph 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. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see

the following judgments: Handyside v. the United Kingdom, 7 December 1976, Series A no. 24, p. 23, § 49; Lingens v. Austria, 8 July 1986, Series A no. 103, p. 26, § 41; and Jersild v. Denmark, 23 September 1994, Series A no. 298, p. 23, § 31).

(ii) The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The 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, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see the above-mentioned Lingens judgment, p. 25, § 39).

(iii) In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see the above-mentioned Lingens judgment, pp. 25-26, § 40, and the Barfod v. Denmark judgment of 22 February 1989, Series A no. 149, p. 12, § 28). In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts (see the above-mentioned Jersild judgment, p. 24, § 31).

Therefore, limitations of the freedom of expression, while allowed by Article 10 para. 2, must be subjected to a narrow interpretation and the State's margin of appreciation remains more limited than in respect to certain other rights and freedoms guaranteed under the Convention.

III. In deciding the freedom of expression cases, the Court adopted a "five stages approach" (see, in particular: Harris-O'Boyle-Warbrick: Law of the European Convention on Human Rights, p. 301), always analyzing successively:

1) whether there is a right protected under Article 10;
2) whether there has been an interference with such right;
3) whether such interference has been "prescribed by law";
4) whether the interference has served one of the "legitimate aims";
5) whether the interference has been "necessary in a democratic society" (i. e. whether the respondent State invokes, and gives evidence for, relevant and sufficient reasons for the interference and those reasons are proportionate to the limitation of the applicant's enjoyment of his right, in which connection the margin of appreciation is most important).

Ad. 1 - the identification of the "right": unlike the U. S. Supreme Court, the ECHR does not adopt "the categorization approach", i.e. it does not begin its analyze with distinguishing of different categories of speech (expression) and different levels of their protection. The ECHR rather prefers to distinguish different categories of expression within the last stage of its analyze, i. e. when assessing the proportionality of interference. Nevertheless, in exceptional situations, applicant's complaints based on Article 10 may be rejected if his/her exercise of the freedom of expression represented abuse of this right (Article 17 of the Convention).

In the recent decision Garaudy v. France (65831/01; June 24, 2003) the Court applied this approach to the so-called "Holocaust denial speech":

> "1... i. En ce qui concerne tout d'abord les condamnations du requérant pour contestation de crimes contre l'humanité, la Cour se réfère en effet à l'article 17 de la Convention, lequel « pour autant qu'il vise (...) des individus, a pour but de les mettre dans l'impossibilité de tirer de la Convention un droit qui leur permette de se livrer à une activité ou d'accomplir un acte visant à la destruction des droits et libertés reconnus dans la Convention ; (...) ainsi personne ne doit pouvoir se prévaloir des dispositions de la Convention pour se livrer à des actes visant à la destruction des droits et libertés ci-dessus visés ; (...) » (*Lawless c. Irlande*, arrêt du 1er juillet 1961, série A no 3, § 7, p. 45).
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> L'ouvrage qui est à l'origine des condamnations du requérant analyse de façon détaillée plusieurs événements historiques relatifs à la deuxième guerre mondiale, tels que les persécutions des Juifs par le régime nazi, l'Holocauste, le procès de Nuremberg. S'appuyant sur de nombreuses citations et références, le requérant remet en cause la réalité, l'ampleur, et la gravité de ces faits historiques qui ne font pourtant pas l'objet de débats entre historiens mais sont au contraire clairement établis. Il apparaît, comme l'ont montré les juridictions nationales à l'issue d'une étude méthodique et de constats approfondis, que loin de se limiter à une critique politique ou idéologique du sionisme et des agissements de l'Etat d'Israël, ou même de procéder à un exposé objectif des thèses négationnistes et de réclamer seulement, comme il le prétend, « un débat public et scientifique » sur l'événement historique des chambres à gaz, le requérant a fait siennes ces thèses et procède en fait à une remise en cause systématique des crimes contre l'humanité commis par les nazis envers la communauté juive.
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> Or, il ne fait aucun doute que contester la réalité de faits historiques clairement établis, tels que l'Holocauste, comme le fait le requérant dans son ouvrage, ne relève en aucune manière d'un travail de recherche historique s'apparentant à une quête de la vérité. L'objectif et l'aboutissement d'une telle démarche sont totalement différents, car il s'agit en fait de réhabiliter le régime national-socialiste, et, par voie de conséquence, d'accuser de falsification de l'histoire les victimes elles-mêmes. Ainsi, la contestation de crimes contre l'humanité apparaît comme l'une des formes les plus aiguës de diffamation raciale envers les Juifs et d'incitation à la haine à leur égard. La négation ou la révision de faits historiques de ce type remettent en cause les valeurs qui fondent la lutte contre le racisme et l'antisémitisme et sont de nature à troubler gravement l'ordre public. Portant atteinte aux droits d'autrui, de tels actes sont incompatibles avec la démocratie et les droits de l'homme et leurs auteurs visent incontestablement des objectifs du type de ceux prohibés par l'article 17 de la Convention.
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> La Cour considère que la plus grande partie du contenu et la tonalité générale de l'ouvrage du requérant, et donc son but, ont un caractère négationniste marqué et vont donc à l'encontre des valeurs fondamentales de la Convention, telle que les exprime son Préambule, à savoir la justice et la paix. Elle considère que le requérant tente de détourner l'article 10 de la Convention de sa vocation en utilisant son droit à la liberté d'expression à des fins contraires à la lettre et à l'esprit de la Convention. De telles fins, si elles étaient admises, contribueraient à la destruction des droits et libertés garantis par la Convention.

> En conséquence, la Cour estime qu'en vertu des dispositions de l'article 17 de la Convention, le requérant ne peut pas se prévaloir des dispositions de l'article 10 de la Convention en ce qui concerne les éléments relevant de la contestation de crimes contre l'humanité.
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> Partant, cette partie du grief est incompatible *ratione materiae* avec les dispositions de la Convention au sens de l'article 35 § 3 et doit être rejetée en application de l'article 35 § 4".

Ad 2) - the identification of the interference. It depends on the entirety of the facts of the case and must be considered upon the individual characteristic of the applicant.

While in the stages 1) and 2) it lies, principally, with the applicant to demonstrate that the State has interfered with one of his/her rights protected under Article 10, the burden of proof shifts for the three subsequent stages. Thus, it is for the respondent government to show that the interference was "prescribed by law", served one of the "legitimate aims" and was "necessary in a democratic society".

Ad 3) - "prescribed by law". This requirement breaks into three separate components: a) there must be a specific legal rule providing for limitation of freedom of expression and, therefore, justifying the State's interference with this freedom in the applicant's case; b) the legal rule must be "accessible", i. e. ": the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case." (Sunday Times v. the U. K., 1979, § 49); c) the legal rule must be "precise", i . e. "a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice." (Sunday Times v. the U. K., 1979, § 49).

Ad 4) - "legitimate aim". The interference must be justified as serving to protect one of the aims enumerated in Article 10 para. 2. Since the Convention uses rather general language in defining public interest capable to justify limitations of the freedom of expression, it is usually possible for the respondent government to demonstrate that three was a link between interference and one of the "legitimate aims". Thus, it is quite rarely that the Court finds a violation on this stage of its analyze.

Ad 5) - "necessary in a democratic society". This is, probably, most important criterion in the Strasbourg case law and it is this stage of analyze, where most of the violations have been found. The Court has, in several judgements, emphasized that freedom of expression remains closely linked to the very nature of "a democratic society". Thus, particular importance (and particular protection) of certain categories of expression, first of all, of the political speech. At the same time, since democratic society is built upon peace and tolerance, the State may enjoy more freedom of action to limit expression which promotes values which are incompatible with the very system of rights and freedoms protected under the Convention, in particular the expression which can be reasonably regarded as advocating or inciting the use of violence.

The necessity of interference must be measured upon the "pressing social need" criterion. As the Court observed in the Janowski v. Poland judgement:

> "... The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The 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, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see the above-mentioned Lingens judgment, p. 25, § 39).

The evaluation of the "pressing social need" requires balancing of the importance of the expression interest and the importance of the public interest involved. Thus, the Court applies proportionality approach, distinguishing among different types of expression (political expression, artistic expression, commercial expression), different manners of communication (press, electronic media) and, on the other side, different types of the public interest involved. Two examples from the recent case law may be given here.

In the Skalka v. Poland (May 27, 2003) judgement, the applicant, who had been serving a prison sentence, was refused preliminary release. To express his dissatisfaction, he wrote a letter to the President of the Regional Court, in which he described the penitentiary judges as "irresponsible clowns", "outstanding cretins" etc. In consequence, he was convicted of insulting a State authority and sentenced to eight months' imprisonment. The Court found that while the protection of the authority of the system of justice justified the conviction as such, nevertheless:

> "... the severity of the punishment applied in this case exceeded the seriousness of the offence. It was not an open and overall attack on the authority of the judiciary, but an internal exchange of letters of which nobody of the public took notice. Furthermore, the gravity of the offence was not such as to justify the punishment inflicted on the applicant. Moreover, it was for the first time that the applicant overstepped the bounds of the permissible criticism. Therefore, while a lesser punishment could well have been justified, the courts went beyond what constituted a "necessary" exception to the freedom of expression." (§ 42).

In the Alinak v. Turkey decision (September 2, 2003), the Court found inadmissible the application of a member of parliament who was prevented from finishing a speech before the Assembly by the violent reaction of another Member. While the Court reaffirmed that, in principle, Article 10 applies to MPs speaking from the floor of parliament (and noticed that Mr. Alinak's speech was related to highly sensitive and politically important matters), it also observed that the applicant has himself contributed to the disruption of the meeting by having exceeded his speaking time and failing to follow eight request by the speaker to bring his speech to a close.