EHRC EUROPEAN HUMAN RIGHTS CASES UPDATES

ANNOTATIE

OOO Informatsionnoye Agentstvo Tambov-Inform v. Russia (ECtHR, 43351/12) - Online media and elections: firm ground for the European Court

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Annotatie bij Europees Hof voor de Rechten van de Mens, 18-05-2021, ECLI:CE:ECHR:2021:0518JUD004335112 (EHRC-2021-0142)

Overview

1. In the case of *OOO Informatsionnoye Agentstvo Tambov-Inform v. Russia* [1] the European Court of Human Rights found itself on the familiar terrain of freedom of expression and media freedom in the context of elections. The Third Section of the Court held unanimously that the applicant company's right to freedom of expression, as guaranteed by Article 10 of the European Convention on Human Rights, had been violated.

2. The applicant company was a limited liability company, with radio and television broadcasting as its main activities. It set up a mass media outlet in the form of an information agency, which operated online. It was prosecuted and convicted for having engaged in "pre-election campaigning" and for having published certain articles and the results of an opinion poll on its website during an election period, without providing certain information that was required by law. The Russian authorities considered an article criticizing an electoral candidate to constitute "pre-election campaigning". Erroneously so, according to the European Court of Human Rights, which concluded that this qualification and the prosecution of the applicant company pursuant to those regulations amounted to an unjustified interference by a public authority with the applicant company's freedom of expression.

3. The Court's ruling was neither surprising nor controversial. The Court had found violations of the right to freedom of expression in earlier cases against Russia on similar issues, e.g. in *Orlovskaya Iskra*. The national regulations on "pre-election campaigning" that formed the backdrop to the earlier cases were largely unchanged in the present case. The Court made ample references to *Orlovskaya Iskra*, reaffirming its reasoning and findings.

4. The Court took issue with the quality of law of the relevant provisions of domestic law, and more specifically, the foreseeability of their effects. The regulatory provisions concerning campaigning and pre-election campaigning did not specifically mention internet-based media outlets. The absence of specific mentions was problematic in light of the applicant company's conviction for failing to specify certain information, namely the number of copies of the distributed material, the date of its publication, details on the persons who had "produced" the campaigning material, and whether it had been paid for from the electoral fund of a candidate or a party. The applicant company argued that it could not have foreseen that these requirements also applied to mass media outlets on the internet. The Court also found that the requirement to provide certain information about the number of copies would only make sense in the case of a print publication. These considerations led the Court to have doubts about the lawfulness of the applicant company's conviction pursuant to relevant legislative provisions.

5. Nevertheless, the Court ultimately paid more attention to the legitimate aims and necessity of the interference than to whether it was prescribed by law. In this regard, it recalled some of the key findings in its *Orlovskaya Iskra* judgment, including:

the difficulty or impossibility of distinguishing – based on vague provisions in relevant domestic law – between negative comments and campaigning goals, thus restricting the activity of the print media;
the pertinence of the public watchdog role of the press at election time, not only by disseminating political advertising, but by freely discussing candidates and programmes, thus informing the public and helping them to make informed voting choices;
the relevant regulatory framework excessively and without compelling justification reduced the scope for press expression by restricting the range of participants and perspectives during the election period.

6. In the present case, it was not suggested, nor was there any evidence, that the applicant company or the information agency it had set up was affiliated to any political party, electoral group or candidate. The domestic courts did not assess whether there was proof of the campaigning aim of material, despite being required to do under national law. Nor did the

domestic courts consider whether the content of the articles had led to any harm. The European Court of Human Rights accordingly concluded that the conviction of the applicant was not necessary in a democratic society.

7. The Court gave similar scrutiny to the conviction of the applicant company for failing to meet the statutory requirement to provide certain information in relation to the publication of another article and an online poll. The vagueness of the constituent elements of the offence (e.g., publication, results, opinion poll) and the lack of clarity about the relevance of some required information to the online poll were problematic. The Court found that the main question of the poll, its methodology and other required information were self-evident from the presentation of the poll on the website and that the requirement to specify the region in which the poll took place was not relevant for an online poll. It was thus not substantiated that the prosecution of the applicant company for breach of these requirements was necessary in a democratic society.

Sure-footed on firm ground

8. These issues were firm, well-trodden ground for the Court. The right to freedom of expression and the right to free elections, protected by Article 3 of Protocol No. 1 to the Convention, are inextricably linked. As the Court emphasized in its *Bowman v. the United Kingdom* judgment: "Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system".[2] This famous "bedrock" quote itself became the bedrock of the Court's case-law on freedom of expression and elections. Surprisingly, it was not referenced in the present judgment.

9. Media freedom is often described as a corollary of freedom of expression; the media are instrumental in ensuring that the public is informed about matters of interest to society, including and in particular, political affairs and elections. The public not only has the right to be informed about matters of public interest; the media have the task of imparting such information and ideas.[3]

The power of the media

10. The central rationale for *granting* media freedom and for *limiting* media freedom is power. Roger Silverstone really nailed this point when he observed: "It's all about power, of course. In the end. The power the media have to set an agenda. The power they have to destroy one. The power they have to influence and change the political process. The power to enable, to inform. The power to deceive. The power to shift the balance of power [...]".[4] In democratic societies, the media often reach the pinnacle of their power in the run-in to elections. During electoral periods, the media can influence not only public debate, but also the outcome of the electoral

process. The case of *OOO Informatsionnoye Agentstvo Tambov-Inform* brought the power of the (online) media in election times into sharp relief.

11. The Court underscored that the internet's important role in enhancing the public's access to news and information is even more pronounced in relation to election periods, which are driven by public debate. It similarly pointed to the "increasingly pertinent" public watchdog role of the media at election time and to how the internet enhances the availability, diversity and reach of traditional media through their online outlets. It elaborated that the need for political expression in the press to involve a range of participants and perspectives applies "even more forcefully in the context of online publications, which nowadays tend to be accessible by a greater number of people and viewed as a major source of information and ideas".[5]

12. Together, these observations about online media show a shift in the Court's thinking; a shift away from its earlier reluctance to appreciate the growing impact of the internet and social media.

Still searching for firm footholds in less familiar ground

13. Over the years, the Court has made various pronouncements about the reach and impact of different media, repeatedly emphasizing, in particular, that "the audiovisual media have often a much more immediate and powerful effect than the print media".[6] The advent of the internet disrupted the old media order, leaving the Court to re-consider its roughshod distinction between audiovisual and print media in a transformed communications environment. The obvious question was now: how do the reach and impact of the internet and social media measure against those of audiovisual and print media?

14. The Court has consistently recognised "the immediate and powerful effect of the broadcast media, an impact reinforced by the continuing function of radio and television as familiar sources of entertainment in the intimacy of the home".[7] However, it has been reluctant to accept that (at least in 2013) there had been "a sufficiently serious shift in the respective influences of the new and of the broadcast media in [the United Kingdom] to undermine the need for special measures for the latter".[8] The Court found – without providing any supporting evidence – that information circulating via internet and social media "does not have the same synchronicity or impact as broadcasted information".[9] This finding was already problematic in 2013 and it is even more problematic today. In a multi-media world, the same content is often disseminated through different media, and we use different media in ways that are alternately interchangeable and complementary. It is always difficult to assess the effects of specific media or media content, but in an increasingly multi-media

environment, it is very important to take cross-media dynamics into account. Media and their effects should be considered, not in isolation, but more broadly in relation to other media.

15. The Court also stated *obiter dictum* in *OOO Informatsionnoye Agentstvo Tambov-Inform* that it did not "rule out that certain online operators – such as major platforms with national or international reach and/or hosting a large volume of third-party content – may present specific challenges for the integrity of electoral processes", even if such an issue did not arise in the present case.[10] This remark could yield interesting exploration in future case-law. In light of the "digital dominance"[11] of a small coterie of major online platforms and the immense communicative power that they wield, including the ability to influence or even disrupt electoral processes, this is a very pertinent remark. It should also be considered in relation to the EU's forthcoming Digital Services Act (DSA), which envisages, *inter alia*, a set of specific obligations for so-called very large online platforms (VLOPs), which have a reach of 45 million or more monthly active users in the EU. The DSA aims to enhance the protection of consumers and their fundamental rights online; establish a framework of transparency and accountability for online platforms; and foster innovation, growth and competitiveness within the EU's internal market.

16. In *Animal Defenders International*, the Court did not give any criteria or indications that would help to ascertain when online media may achieve greater impact than broadcast media. Some remarks in *OOO Informatsionnoye Agentstvo Tambov-Inform* suggest the Court's thinking on the power and influence of online media may be slowly shifting, but the elephant is still in the (court) room.

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[1] *OOO Informatsionnoye Agentstvo Tambov-Inform v. Russia*, ECtHR 18 May 2021, no. 43351/12, ECLI:CE:ECHR:2021:0518JUD004335112.

[2] *Bowman v. the United Kingdom*, ECtHR 19 February 1998 [GC], no. 24839/94, ECLI:CE:ECHR:1998:0219JUD002483994, par. 42, *Reports of Judgments and Decisions* 1998-I.

[3] See, for example, Observer *and Guardian v. the United Kingdom*, ECtHR 26 November 1991, no. 13585/88, ECLI:CE:ECHR:1991:1126JUD001358588, par. 59, Series A no. 216.

[4] Roger Silverstone, *Why Study the Media?* (London/Thousand Oaks, CA/New Delhi, SAGE Publications, 1999), p. 143.

[5] *OOO Informatsionnoye Agentstvo Tambov-Inform v. Russia*, par. 88.

[6] *Jersild v. Denmark*, ECtHR 23 September 1994, no. 15890/89, ECLI:CE:ECHR:1994:0923JUD001589089, par. 31, Series A no. 298.

[7] *Animal Defenders International v. the United Kingdom* ECtHR 22 April 2013 [GC], no. 48876/08,

ECLI:CE:ECHR:2013:0422JUD004887608, par. 119.

[8] *Ibid*.

[9] *Ibid*.

[10] *OOO Informatsionnoye Agentstvo Tambov-Inform v. Russia*, par. 89.

[11] Martin Moore and Damian Tambini (Eds.), *Digital Dominance: The Power of Google, Amazon, Facebook, and Apple* (Oxford, Oxford University Press, 2018).