DOI https://doi.org/10.51647/kelm.2021.5.2.31

REALIZACJA PROPORCJONALNOŚCI W KRYMINALIZACJI MOWY NIENAWIŚCI: PERSPEKTYWY DLA UKRAINY

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Adnotacja. W artykule autor analizuje kwestię ograniczenia wolności słowa w sposób ustanowienia zakazu karnego. Przeanalizowano różnicę w podejściu do określania granic ingerencji w wolność słowa w Europie (podejście merytoryczne) i w USA (podejście neutralne merytoryczne). Stwierdzono, że mowa nienawiści (jako przestępstwo lub wykroczenie karne) jest karnym zakazem prawnym, który jest ustalany na podstawie treści czynu, ten ostatni może być uważany za dyskryminację wolności słowa w znaczeniu w USA. Ustalono, że na Ukrainie wolność słowa podlega znaczącej kryminalizacji w przypadku, gdy jest szkodliwa dla bezpieczeństwa narodowego, integralności terytorialnej, porządku publicznego, zapobiegania wykroczeniom lub przestępstwom, ochrony zdrowia publicznego, reputacji lub praw innych osób. Taka kryminalizacja powinna podlegać ocenie proporcjonalności, w szczególności realizacji kryminalizacji tylko jako ostateczny remedium.

Słowa kluczowe: bilansowanie, prawo, wolność słowa, kryminalizacja merytorycznie neutralna, kryminalizacja oparta na treści.

REALIZATION OF PROPORTIONALITY IN THE CRIMINALIZATION OF HATE SPEECH: UKRAINIAN PERSPECTIVE

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Abstract. In the provisions of the article, the author analyzes challenges of freedom of speech limitation utilizing establishing criminal law prohibition. It is analyzed what are the differences between framing limits of freedom of speech in Europe (content-based approach) and the United States of America (neutral-based approach). It is concluded that hate speech (either crime or criminal offense) is a content-based criminal law prohibition that may be regarded as discriminatory to freedom of speech in the USA. It is stated that in Ukraine freedom of speech is subject to content-based criminalization if it is regarded to be harmful to national security, territorial indivisibility, or public order, to prevent disturbances or crimes, protect the health of the population, reputation, or rights of other persons. Such criminalization must be subject to proportionality and the latter one must be implemented as ultimate remedium.

Key words: balancing, limitation, freedom of speech, neutral-based criminalization, content-based criminalization.

РЕАЛІЗАЦІЯ ПРОПОРЦІЙНОСТІ В КРИМІНАЛІЗАЦІЇ МОВИ ВОРОЖНЕЧІ: ПЕРСПЕКТИВИ ДЛЯ УКРАЇНИ

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Анотація. У статті авторка аналізує питання обмеження свободи слова у спосіб встановлення кримінально-правової заборони. Проаналізовано відмінність у підходах до визначення меж втручання у свободу слова в Європі (змістовний підхід) і у США (нейтрально змістовний підхід). Зроблено висновок, що мова ворожнечі (як злочин або кримінальний проступок) є кримінально-правовою забороною, що встановлюється на основі змісту діяння, останнє може розцінюватися як дискримінація свободи слова за змістом у США. Визначено, що в Україні свобода слова підлягає змістовній криміналізації, якщо вона є шкідливою для національної безпеки, територіальної цілісності, громадського порядку, запобіганню правопорушенням або злочинам, захисту здоров'я населення, репутації чи прав інших осіб. Така криміналізація має підлягати оцінці пропорційності, зокрема реалізації криміналізації лише як ultimate remedium.

Ключові слова: балансування, правообмеження, свобода слова, змістовно нейтральна криміналізація, криміналізація на основі змісту.

Introduction. Hate speech is rather a concept, not a definitive legal term (Ukraine's hate crime…data collection system, 2020: 26), (Bayer, Bard, 2020: 20). In the criminal legislation world widely, there is no unanimous explanation on what the exact content of hate speech is (Ukraine's hate crime…data collection system, 2020: 62; Striking a balance, 1992: 50). As a rule, it is used to describe an intolerance to certain groups in society based on a certain characteristic (race, nationality, ethnic origin, sex, sexual orientation, etc.) which list may be either exhaustive (Italy, Malta, Poland, etc.) or open-ended (Germany, Hungary, etc.) (Bayer, Bard, 2020: 63–64). The ambiguity of understanding the hate speech blurred the measures of what speech may be regarded as a subject of criminalization. In general, different types of behavior may be framed under the hate speech concept: from genocide and its trivialization, denial to defamation of state or its symbols; dissemination of hate material; supporting an extremist group; incitement to hatred; promotion of totalitarian ideology by the display of its symbols, etc. The list of what hate speech entails depends on the state's historical background of propaganda regulation, legislative understanding of limits of freedom of speech, and many other socio-cultural factors. That is why it is hard for a legislator to define the real limits of criminal law intervention into the freedom of thought and speech. However, there are no doubts that criminal sanction is the strongest instrument of the state (Ukraine's hate crime…data collection system, 2020: 62; Wolfman, 1996: 546; Fino, 2020: 32) that needs to be used alongside regulating the issue in civil law (Italy, Germany, Hungary, Poland), media law (Malta, Italy, Germany, Hungary, Poland), as well as press self-regulation via voluntary adopting by them press codes (Hungary, Italy, Poland). Thus, the criminalization of hate speech, defining its scope and its balancing with freedom of speech should be the subject to the assessment of proportionality.

The aim. To provide an analysis of what approaches on limiting the freedom of speech exists and what were their prerequisites; to define what approach was implemented into the Criminal Code of Ukraine (hereinafter – CC Ukraine); to analyze what types of freedom of speech expression, that are rendered as hate speech, is or is not criminalized in CC Ukraine and why; to estimate proportionality of criminalization of hate speech on CC Ukraine example.

Materials and methods. This research is based on the analysis of the case-law of the European Court of Human Rights and Supreme Court of the US, as well as the provisions of the Criminal Code of Ukraine and the Constitution of Ukraine. General and special scientific methods were used, e.g., the deduction for spreading the general conclusions of assessing approach of the hate speech in criminal law; induction for making conclusions about the peculiarities of proportionality implementation in hate speech criminalization in the Criminal code of Ukraine; analysis and synthesis within overviewing of national and foreign legislation and case law.

Results and discussion. At the outset, a concept of hate speech was created in Europe after World War II as a reflection of Nazi regime atrocities (Cohen, 2014: 238; Wolfman, 1996: 549; Fino, 2020: 37; Striking a balance, 1992: 2). At some point, it became obvious that atrocities happened to a major extent because of hate propaganda that was aimed to negatively affect targeted groups of society (Jews, gypsies, etc.). Back then the core question that arose was to what extent freedom of speech was the cause and consequence of committed atrocities. Years later in 2003, the similar question was analyzed by the International Criminal Tribunal for Rwanda within the review of advocating ethnic hatred or inciting violence against the Tutsi population for RTLM radio broadcasts in 1994 (Prosecutor v. Mahimana, Barayagwiza, and Ngeze, 2003) and by International Criminal Tribunal for the former Yugoslavia (e.g., Vojislav Seselj case). After the Nuremberg tribunal, the limitation of a certain type of speech based on its content became a subject for criminalization in law-making (Fino, 2020: 32–33). Criminalizing certain types of speech is called a content-based law that is «*a regulation of speech or expression that is based on the substance of the message being communicated, rather than just the manner or method in which the message being expressed*» (Limitations on Expression, online media). We may define this as a content-based criminalization in which realization of proportionality *«necessarily entails making a value judgment depending on the ideas expressed*» (Striking a balance, 1992: 52). Nowadays this approach is rooted deeply in the European tradition, and it is not regarded as unconstitutional to estimate the content of speech. So, some speech can be forbidden by criminal law due to being regarded as content harmful. Hate propaganda is regarded to be a part of the concept of hate speech in the European Union (Wolfman, 1996: 552). Challenges of limitation of freedom of speech, setbacks of defining hate speech were the subjects of analysis and assessment in many landmark decisions of the European Court of Human Rights, for instance, Handyside v. the United Kingdom (1976), Garaudy v. France (2003), Erbakan v. Turkey (2006), M'Bala v. France (2015), Perinçek v. Switzerland (2015), Williamson v. Germany (2019), Pastörs v. Germany (2019), and many others.

While post-war Europe was challenging limits of freedom of thought and speech as a fundamental human right, a neutrality-based perspective was chosen in the USA. Even after facing World War II atrocities during the Nuremberg Tribunal, US courts were insisting on the First Amendment to the US Constitution to be interpreted as the one which guarantees unlimited freedom of speech – «*Congress shall make no law…abridging the freedom of speech, or of the press*» (Constitution of the United States, 1789) regardless of its content. The only case that stands out from common judicial practice is the debatable case of Chaplinsky v. New Hampshire (1942). The First Amendment is treated as the legal provision that forbids making content-based criminalization and estimate it as content-discriminatory and insists on the need to follow the content-neutral approach (e.g., Brandenburg v. Ohio, 1969; Central Hudson Gas & Electric Corp. v. Public Service Commission, 1980; R.A.V. v. City of St. Paul, 1992; Matal v. Tam, 2017). The result of this for the US legislator is that the state must provide respect and equal protection to any type of speech, including the one that may be assessed as hateful (e.g., flag burning, etc.). As it was mentioned in the case of the United States v. Schwimme: «*Speech that demeans on the basis of race, ethnicity, gender, religion, age,*

disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express «the thought that we hate» (the United States v. Schwimme, 1929).

Upon analysis of the Constitution of Ukraine (hereinafter – Constitution), it may be firmly stated that it envisages the European approach to the limitation of the freedom of speech. Article 34 of the Constitution envisages that everyone is guaranteed the right to the freedom of thought and speech and the free expression of their views and beliefs. It also entails that the exercise of these rights may be subject to restrictions *«by law in the interests of national security, territorial indivisibility, or public order, to prevent disturbances or crimes, protect the health of the population, reputation or rights of other persons*» (Constitution of Ukraine, 1996). Contradictory to the First Amendment on the US Constitution, in Ukraine, the freedom of thought and speech may be limited under the circumstances foreseen by the Constitution.

Criminalization is commonly accepted in legal doctrine as one of the legislative instruments of human rights restriction that must be used by the legislator only as of the ultimate remedium. Since it is linked with the most severe form of human rights restriction – the burden of criminal responsibility and in some cases punishment. If criminalization is used as primum remedium, it must be estimated as unproportioned because of unjust restrictions of human rights and freedoms. We do agree with the statement that proportionality is «*a threshold which cannot be undercut without threatening the very existence of freedom of opinion and expression*» (Striking a balance, 1992: 51). According to the Art. 34 of the Constitution the right to freedom of speech is not absolute. Therefore, criminalization of some forms of freedom of speech expressions cannot be regarded as unconstitutional by default except in cases when criminalization does not meet the requirements of ultimate remedium, thus contradicts the proportionality principle. This is the essence of the realization of proportionality in criminalization. Article 3 of the Constitution provides that «*human rights and freedoms and guarantees thereof shall determine the essence and course of activities of the State. The State shall be responsible to the individual for its activities. Affirming and ensuring human rights and freedoms shall be the main duty of the State*» (Constitution of Ukraine, 1996). The Criminal Code of Ukraine must reflect the values enshrined in the Constitution and must not contradict its core. Taking it into consideration, the Ukrainian legislator is ought to implement a content-based approach to the criminalization of some forms of freedom of speech, namely, hate speech. It means that legislator must balance, on the one hand, the freedom of speech and thought and, on the other, the need to defense by criminal law means the national security, territorial indivisibility, public order, the purpose of preventing disturbances or crimes, protecting the health of the population, reputation, rights of other persons, etc. Thus, in CC of Ukraine, it is reflected the need for the realization of «*the criterion of democratic necessity which, in the interests of respect for human rights, presupposes inter alia proportionality of the to the legitimate objective pursued*» (Striking a balance, 1992: 45).

According to the Constitution freedom of speech may be limited if the legislator has reasonable grounds to do so to protect values proscribed by the Constitution as well as human dignity as one of it. Violation of each of the abovementioned objects using hate speech can lead, as a result, to a violation of dignity. At the same time, it is still arguable whether the legislator has any kind of legal (positive) obligation to criminalize hate speech or not. If we believe so, then the legislator must analyze all forms of hate speech that occur and prioritize which is the most harmful so the means of criminal law would be the ultimate remedium. Also, the legislator needs to consider whether criminalization is "*necessary in … democratic societies to sanction or even prevent all forms of expression which spread, incite, promote, or justify hatred based on intolerance*" (Howard, 2017: 62). So, let us focus on analyzing types of freedom of speech that have already been regarded by the Ukrainian legislator as hate speech. In CC of Ukraine (Criminal code of Ukraine, 2001), the following expressions of freedom of speech are limited:

1. Chapter "Crimes against the national security of Ukraine":

– in p. 2 art. 109 "*Actions aimed at forceful change or overthrow of the constitutional order or take-over of government*" it is prohibited a public incitement to violent change or overthrow of constitutional order of government take-over and materials dissemination with any incitement to commit mentioned above actions.

– in p. 1 art. 110 "*Trespass against territorial integrity and inviolability of Ukraine*" it is forbidden public incitement or distribution of materials with incitement to commit change of territorial boundaries or national borders of Ukraine for violating order which is established by the Constitution of Ukraine.

2. Chapter "Criminal offenses against public safety":

– in p. 1, 2 art. 258-2 "*Public incitement to commit a terrorist act*" it is forbidden public incitement to commit a terrorist act, as well as distribution, manufacture, or possession for distribution of materials with such incitements, as well as the same actions committed with the use of the media.

3. Chapter "Criminal offenses against public order and morality":

– in art. 295 "*Incitement for committing acts that threaten public order*" it is forbidden public incitement for pogroms, arsons, destruction of property, seizure of buildings or structures, forced eviction of citizens threatening public order, as well as distribution, manufacture, or storage to distribute materials of the mentioned above content.

– in art. 299 "*Animal Cruelty*" it is forbidden public incitement for actions that have signs of cruelty to animals, as well as the distribution of materials calling for the commission of the abovementioned acts.

4. Chapter "Criminal offenses against the authority of public authorities, local governments, associations of citizens and criminal offenses against journalists":

– in p. 1, 2 art. 338 "*Outrage against state symbols*" it is forbidden a public outrage against the national flag of Ukraine, the national coat of arms of Ukraine or the national anthem of Ukraine, as well as public outrage against an officially installed or raised flag or coat of arms of a foreign state.

5. Chapter "Criminal offenses against peace, human security and international law":

– in art. 436 "*Propaganda of war*" it is forbidden public calls to aggressive war or armed conflict and made of materials with calls to any of the abovementioned actions for distribution purposes or distribution of such materials.

– in art. 436-1 "*Production, dissemination of communist, Nazi symbols and propaganda of the communist and national socialist (Nazi) totalitarian regimes*" it is forbidden production, distribution, and also public use of the symbols of the communist, national-socialist (Nazi) totalitarian regimes, including in the form of souvenir products, public performance of anthems of the USSR, Ukrainian SSR (Ukrainian SSR), other union and autonomous Soviet republics or their fragments in the whole territory of Ukraine, except for the cases provided for by parts two and three of Article 4 of the Law of Ukraine "On the condemnation of communist and national socialist (Nazi) totalitarian regimes in Ukraine and the prohibition of propaganda its symbols".

– in p. 2 art. 442 "*Genocide*" it is forbidden public incitement to genocide, as well as the production of materials calling for genocide with a view to its distribution or distribution.

The abovementioned prohibitions evidence the usage of the content-based approach to the limitation of freedom of speech in CC of Ukraine. As in CC of Ukraine it is criminalized only those forms of speech and thought expression which are regarded by legislator as harmful to the following objects: national security, public safety, public order, morality, peace, human security, international law. Let us overview briefly some of the abovementioned crimes and try to analyze what motives were hidden behind the criminalization of these acts and their justification.

Within p. 2 art. 109 "*Actions aimed at forceful change or overthrow of the constitutional order or take-over of government*" and p. 1 art. 110 "*Trespass against territorial integrity and inviolability of Ukraine*" of the CC of Ukraine, freedom of speech is restricted and regarded as hateful: firstly, only when it is public that means in private a person can freely share one's opinion; secondly, mentioned in these articles acts are aimed to harm established constitutional order (sovereignty of the state, its structure); thirdly, incitement in part 2 article 109 is criminalized only for violent, not peaceful actions. It may be assumed that if the constitutional order in Ukraine forcefully changed or overthrown, the government to be taken over, or trespass against territorial integrity and inviolability of Ukraine occurred, Ukraine would fail as a democratic state. As a result, it may be questioned as a whole if Ukraine would be able to fulfill its obligations to the citizens, e.g., protection of human rights. It is worth mentioning, that under article 34 of the Constitution of Ukraine, national security, territorial indivisibility, and public order are legitimate grounds for limiting freedom of speech. So, the restriction of freedom of speech by using criminalization of incitement to commit acts foreseen by p. 2 art. 109 and p. 1 art. 110 of the Criminal Code of Ukraine is justified by the legislator because of protecting the abovementioned objects and seems to be proportionate for this reason because of the harmful outcomes of this speech and values that are put at stake.

Public incitement to commit a terrorist act (p. 1, 2 art. 258^2 of CC of Ukraine) is commonly used by terrorist organizations to further support their cause and call for violent action (Rediker E., 2015: 328-331). For this reason, the criminalization of incitement to commit a terrorist act is aimed not only for the protection of public order but also for national security. Both of which are legitimate grounds for limiting freedom of speech under article 34 of CU. Within art. 295 "*Calls for committing acts that threaten public order*" of CC of Ukraine, freedom of speech is restricted and regarded as hateful because it is aimed to violate public safety and public order, as well as create disturbances or crimes among society. The latter prohibition must be the subject of proportionality for not to be regarded as over-criminalization.

Ukrainian legislator put some standards of ethical human behavior towards animals by drawing the line in criminal law for behavior that must be condemned in a civilized society by criminalizing *public incitement* for actions that have signs of *cruelty to animals*, as well as the distribution of materials calling for the commission of the abovementioned acts (art. 299 of CC of Ukraine). Unfortunately, nowadays the animal rights movement in Ukraine is poorly developed (Ukraine fights animal abuse in baby steps, 2021), (Voiceless Animal Cruelty Index, 2021), as well as legislation aimed to regulate ethical treatment towards animals despite recent positive changes, e.g., adopting of Draft Law on Amendments to Certain Legislative Acts of Ukraine (Regarding the Implementation of Provisions of Certain International Agreements and EU Directives in the Field of Fauna and Flora Protection) № 2351 from 30 October of 2019. In our opinion, criminalizing public incitement for actions that have signs of cruelty to animals will positively affect the perception of unethical treatment of animals.

In p. 1,2 art. 338 *"Outrage against state symbols"* of CC of Ukraine, it is forbidden a public outrage against the national flag of Ukraine, the national coat of arms of Ukraine or the national anthem of Ukraine, as well as public outrage against an officially installed or raised flag or coat of arms of a foreign state. Within this article, the national flag or flag of a foreign state is considered as a symbol of national unity which outweighs the freedom of speech because the abovementioned actions may incite anger in citizens or foreigners, preconceptions against some nation, ethnicity, etc. On the contrary to the above-mentioned estimation, in the case Texas v. Johnson, the US Supreme court stated that actions like flag burning constitute are a form of "symbolic speech" protected by the First Amendment, so even though "*the majority noted that freedom of speech protects actions that society may find very offensive, but society's outrage alone is not justification for suppressing free speech*" (Texas v Johnson, 1989). As a consequence, the US Supreme put one of the main widely-used arguments against the criminalization of these acts simply just by asking why it is not criminalized the other actions, for instance, burning and burying a worn-out flag, etc.; what is so special about burning a flag, thus it becomes a reason for criminalization and an exemption from freedom of speech? (Texas v Johnson, 1989). The same questions may be addressed to art. 338 of CC of Ukraine under

which it is protected national or foreign flag only if it meets certain conditions (size, shape, etc. or being officially installed or raised) but not protected without exemptions in all cases. As well as, whether the public outrage against the national flag of Ukraine of the other size, the shape is less offensive to Ukrainian citizens remain unanswered.

Art. 436 *"Propaganda of war"* of CC of Ukraine, forbids public calls to aggressive war or armed conflict and making of materials with calls to any of the above-mentioned actions with aim of its distribution or distribution of such materials. This criminal prohibition entails worldwide consensus that public interest overweight private in case of war propaganda. Art. 436 is created for two purposes: firstly, to provide peaceful cooperation among all members of the international community according to prevailing principles of international law and, secondly, to confirm that war propaganda is not only harmful to a specific person or group of people but a human community in general because it violates the basics of human coexistence.

Nowadays condemnation and refusal to use war for resolving issues in some state's national policy is a core principle in international public policy. Ukraine ratified the relevant international agreements (Measures to be taken against propaganda and the inciters of a new war, 1947) in which it is condemned resourcing to war as the instrument of settling international disputes. That is why the criminalization of mentioned above acts frames the allowed expressions of thought about Ukrainian foreign political policy.

In art. 436[1] of CC of Ukraine, it is forbidden *production, dissemination of communist, Nazi symbols, and propaganda of the communist and national socialist (Nazi) totalitarian regimes* is one of the most ambiguous articles in CC of Ukraine. Law of Ukraine "On the condemnation of communist and national socialist (Nazi) totalitarian regimes in Ukraine and the prohibition of propaganda its symbols" was criticized by the European Commission for democracy through law (Joint interim opinion on the Law of Ukraine on the condemnation of the communist and national socialist (nazi) regimes and prohibition of propaganda of their symbols, 2015). The public interest of the state in criminalization is the protection of international law, non-discrimination on the grounds of national, social, class, ethnic, racial, or other grounds, as well as protection of historical and national memory of events related to the communist and national-socialist (Nazi) totalitarian regimes. Both the European Court of Human Rights and the UN Human Rights Committee refer to the propaganda of totalitarian regimes to political speech as an especially sensitive area within the realm of protection cast by Article 10 ECHR. That is why the restrictions on political speech must be justified, thus taking a strict approach when assessing the necessity of criminal law measures. It should be noted that ECHR mentioned: "*a blanket ban on such symbols may also restrict their use in contexts in which no restriction would be justified*" (Fratanolo v. Hungary, 2011). ECHR in Vajnai Case considered that feelings of the general public – however understandable – cannot be regarded as grounds affirming the existence of a pressing social need. In the Court's view, a legal system "*which applies restrictions on human rights to satisfy the dictates of public feeling – real or imaginary – cannot be regarded as meeting the pressing social needs recognized in a democratic society, since that society must remain reasonable in its judgment. To hold otherwise would mean that freedom of speech and opinion is subjected to the heckler's veto*" (Vajnai v. Hungary, 2014). But on the other hand, a particular historical experience and context have been considered "*a weighty factor in the assessment of the existence of a pressing social need*" for the Court in many cases (Joint interim opinion on the Law of Ukraine on the condemnation of the communist and national socialist (nazi) regimes and prohibition of propaganda of their symbols, 2015: 14).

In p. 2 art. 442 *"Genocide"* of CC of Ukraine, it is forbidden public incitement to genocide, as well as the production of materials calling for genocide with a view to its distribution. The criminalization of incitement to genocide is a sign of prevailing a post-World War II approach to the value-based limitation to human rights restriction in Ukraine. This approach insists on protecting human dignity as a core fundamental value. Genocide remains to be a sensitive topic today in Europe (Pigmon, 2011: 55–68). The memory of World War II atrocities in the form of genocide was a launching point of the creation of a content-based approach in doctrines of constitutional and criminal law. Thus, it is no wonder that incitement to genocide is criminalized.

Conclusion. A content-based approach to freedom of speech limitation is reflected in the Criminal Code of Ukraine, as well as in the Constitution of Ukraine. Despite the freedom of speech is the core of democratic values in Ukraine, it is not an absolute right and may be a subject of a criminal law prohibition. If the legislator defines that some type of speech reaches out the threshold of being harmful and under the condition that it is not effective to limit it by less intrusive means than criminalization (ultimum remedium). In case when speech encroaches on the most important values defined in Constitution, the freedom of speech must be balanced with the need to protect national security, territorial indivisibility, or public order, to prevent disturbances or crimes, protect the health of the population, reputation, or rights of other persons. This means that each criminalization of freedom of speech expression must be carefully analyzed in each case by the legislator on the matter to be an ultimum remedium. So, we may only assume that a lot of work for the Ukrainian legislator, as well as scientists in criminal law doctrine, is ahead to be done to improve current provisions of CC of Ukraine or possibly to create new ones within this topic. To some point, every legislator and the Ukrainian one must be a watchdog of human rights protection.

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