



CHALLENGES IN INVESTIGATION AND COURT HEARING OF CRIMINAL CASES RELATING TO VIOLATION OF JOURNALISTS' PROFESSIONAL RIGHTS IN UKRAINE

ANALYTICAL REPORT



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1. Key facts about the number of crimes committed against journalists, the state of their investigation and the outcomes of relevant trials

A large number of reports have been published lately in the media about certain violations of the rights of journalists and media outlets. One can often read a story depicting some media workers found their cars set on fire or with a grenade in, some were physically assaulted while performing their professional duties or were obstructed when filming, which made it impossible for them to record a story, and many more cases.

Such disturbing reports are increasingly raising the question of creating a safe environment for the journalist activity.

The magnitude of this problem can be realized by referring to statistic data.

According to the information published in the Uniform Report on Criminal Offenses (Form No. 1), approved by the order of the Prosecutor General's Office of Ukraine in agreement with the State Statistics Committee of Ukraine on October 23, 2012, the following number of criminal offenses committed against journalists were recorded for 2013-2018¹:

	2013	2014	2015	2016	2017	2018
Impeding lawful professional activity of a journalist, Article 171	52	80	72	102	129	106
Threat or violence against a journalist, Article 345-1	0	0	9	35	35	63
Intentional destruction or damage to property of a journalist, Article 347-1	0	0	4	4	9	6
Infringement on the life of a journalist, Article 348-1	0	0	0	0	1	2
Taking journalist hostage, Article 349-1	0	0	0	0	0	0

The aforementioned data clearly illustrate the dynamics of growth in the number of offences committed against journalists in connection with their professional activity. Specifically, from 2013 to 2017, the number of officially registered criminal proceedings on Impeding lawful professional activity of a journalist has steadily increased. And only in 2018 their slight decline was recorded. Albeit, since 2015, when the Criminal Code of Ukraine was supplemented with the Articles 345-1, 347-1, 348-1, 349-1, more violent crimes against journalists have been registered. Comparing to 2015, when 9 criminal charges were recorded on threats or violence against a journalist, in 2018, already 63 such incidents were listed in the Unified Register of Pre-trial Investigations. The increase in the number of Infringement on the life of journalists is also worrying.

¹ See Uniform Report on Criminal Offenses (Form # 1), approved by the order of the Prosecutor General's Office of Ukraine in agreement with the State Statistics Committee of Ukraine 23.10.2012, for 2013-2018 URL <https://www.gp.gov.ua/ua/statinfo.html> (consulted on: 17.12.2018).

Numerous violations of journalists' professional rights are also reported by media organizations. In particular, according to the National Union of Journalists of Ukraine, it recorded 86 cases of physical assaults against media workers in 2018, and 89 more incidents in 2017. Most of those violations occurred in May (13 cases), 12 cases - in March, 9 cases - in February and the same number in September 2018².

The NGO "Institute of Mass Media" (IMI) provides the following statistics. In 2017, on the non-occupied territory of Ukraine it recorded 281 cases of violations of the freedom of speech, which is slightly higher than in 2016 (in 2016 - 264 cases, in 2015 - 310 cases, in 2014 - 995 cases). Top-three categories of offenses, considering the quantitative indicators, included: impeding lawful professional activity of a journalist, restriction of access to public information, as well as threats and intimidation of journalists. According to IMI, there were 92 cases of "impeding lawful professional activity of journalists", 38 cases of threats to journalists, and 30 cases of attacks and beating of journalists listed in 2017³.

For the year of 2018, the Institute of Mass Media quotes the following data: the total number of violations of the freedom of speech in Ukraine reached 235. "The leader in the number of violations in 2018 appeared the category of "impeding lawful professional activity of journalists" with 96 episodes (this number is higher than in 2017 with 92 cases)," the annual report "The Freedom of Speech Barometer" highlights⁴.

Describing violations of the journalists' professional rights in 2019, the following facts should be noted. Within five months of 2019, criminal investigation departments of the National Police of Ukraine opened pre-trial investigations in 77 proceedings for crimes against professional activity of journalists. Specifically, 58 of those were opened under Article 171 of the Criminal Code of Ukraine ("Impeding lawful professional activity of a journalist"), 14 proceedings - under Article 345-1 ("Threat or violence against a journalist"), 4 - under Article 347-1 ("Intentional destruction or damage to property of a journalist"), and 1 proceeding - under Article 348-1 ("Infringement on the life of a journalist").

During the same period, indictments in six criminal proceedings for eight criminal offenses of the specified category were submitted to the court, namely under the Article 171 - four, Article 345-1 - two, Article 347-1 - two. Those statistic data were quoted by Mr Artem Shevchenko, the Communication Department Director of the Ministry of Internal Affairs of Ukraine at the conference titled "Freedom of Speech in Ukraine: Challenges and Possible Solutions" on June 6, 2019.

As the Interior Ministry spokesperson also mentioned, investigators approved with the prosecutor their closing of 63 criminal proceedings on "journalistic" articles, of which 56 proceedings were under Article 171, six - under Article 345-1, and one proceeding - under Article 347-1 of the Criminal Code of Ukraine.

² "The National Union of Journalists of Ukraine: 175 Physical Attacks on Journalists Recorded in Two Years" / Radio Svoboda. – Can be accessed at: <https://www.radiosvoboda.org/a/news-atomy-na-zhurnalistyv/29726883.html>

³ «281 Freedom of Speech Violations Reported in 2017 in Ukraine – IMI»/ Institute of Mass Media, Freedom of Speech Barometer. - Available at: <https://imi.org.ua/monitorings/u-2017-rotsi-v-ukrajini-zafiksovano-276-porushennya-svobody-slova-imi/>

⁴ «235 Freedom of Speech Violations Reported in Ukraine in 2018 - IMI Research"/ Institute of Mass Media, Freedom of Speech Barometer. - Available at: <https://imi.org.ua/monitorings/235-porushen-svobody-slova-zafiksovano-v-ukraini-u-2018-rotsi-doslidzhennia-imi/>

He also stated that investigators of subordinate units were conducting pre-trial investigations in 315 crimes of the specified category, of which under the Article 171 of the Criminal Code - 198 proceedings, Article 345-1 - 76, Article 347-1 - 14, Article 348-1 – three proceedings. In this regard, for the alleged commission of four crimes from that list some persons were given a notice of suspicion, in particular under Article 171 – three persons, under Article 345-1 – one person.⁵

The above data, regrettably, do not imply an improvement in the situation.

At the same time, it appeared difficult for us to find – in the Unified State Register of Judgments – at least a hundred of criminal proceedings concerning crimes committed against journalists in connection with their professional activities, for the period of 2006 to the end of 2018. In our view, this indicates that the vast majority of such cases were simply not brought before the court. This is indirectly confirmed by the fact that, out of 103 criminal proceedings we detected and analyzed, 23 concerned the complaints of inaction by investigators and prosecutors about their failure to report crimes to the State Register (i.e. every fifth case). Yet, on the other hand, we cannot exclude the possibility that not every single court decision was filed corded in this register.

The court decisions detected and analyzed for the purpose of preparing this analytical report can be summarized as follows: the total number of court proceedings in criminal cases relating to violations of journalist professional rights in 2006-2018 amounts to 103 cases. Among them:

- 49 proceedings ended with the passing of sentences;
- 8 – with rendering a decree on release from criminal liability;
- 23 - with rendering a decree in cases of appealing the inaction of an investigator or prosecutor for the failure to enter information about a crime to the State Register;
- 20 - a decree in appellate cases concerning the decisions to close criminal proceedings; and
- 3 proceedings concerned other procedural issues.

Out of the 49 court decisions on the merits of the charges: 41 were rendered in criminal proceedings under Article 171 of the Criminal Code of Ukraine (impeding the lawful professional activity of journalists), 4 - in cases under Article 345-1 of the Criminal Code of Ukraine (threat or violence against a journalist), and 1 - under Article 347-1 of the Criminal Code of Ukraine (intentional destruction or damage to journalist's property). Any sentences under the Articles 348-1 (infringement on the life of a journalist), 349-1 (taking journalist hostage) were not found in the Unified State Register of Judgments.

Among the aforementioned 49 court decisions on the merits, 39 proceedings ended with the decision on the conviction of the defendant, in 7 cases - the defendant(s) got acquitted, 3 sentences - were both justified and indictable (justified in the part of presented conviction).

In 6 cases out of 43 - where the defendant was found guilty in whole or in part – the conciliation agreements were concluded with the victim. One such agreement was terminated by the court of appeal.

⁵ «Crimes against journalists: police quoted this year's statistics, and human rights activists claim they were wrong”/ Human Rights Information Centre. - Available at: https://humanrights.org.ua/material/zlochiny_proti_zhurnalistiv_policiija_navela_cogorichnu_statistiku_pravozahisniki_rozkazali_shho_z_neju_ne_tak

When taking a decision to convict a defendant of a crime against a journalist, the courts tend to apply **the non-custodial sentences**. Most of trials resulted in the **imposition of fines** of 30 to 100 non-taxable minimum incomes. The most common was a fine of 50 non-taxable minimum incomes. In only two cases did the fine exceed the amounts indicated and amounted to 200 and 400 non-taxable minimum incomes.

Nine cases resulted in the adoption of sentences of **imprisonment** (three of them under Article 345-1 of the Criminal Code). Albeit, herein the defendants were also released from serving a sentence of probation. In six cases, individuals were released from serving a sentence due to the amnesty, and in one case the motivation lied in the expiration of the criminal statute of limitations.

The imprisonment has been applied in only a few trials. The peculiarity of those cases demonstrates that in addition to the crimes against journalists, the accused committed other crimes or failed to serve a sentence previously prescribed by the court.

Only in one case the court issued a three-month **arrest**. Such a decision was made by the Factory District Court in Zaporizhzhya on November 7, 2018 in case No. 332/890/18, finding the defendant guilty of committing a criminal offense under part 1 of Article 171 of the Criminal Code of Ukraine.⁶ In imposing such a punishment, the court took into consideration, *inter alia*, **the observed negative practice in the country regarding violations of journalist rights and the systemic impunity for that**.

In the light of above, one may conclude that there is no practice in Ukraine of imposing significant punishments for crimes against journalists that could change the situation described above and mitigate the atmosphere of impunity. Since, for committing those offenses, the defendants usually get a small fine or probation.

Moreover, the reason for the described problem lies not only in the shortcomings of investigating this category of cases and their judicial review. This phenomenon stems mainly from the limitations of the Ukrainian legislation, which imposes small penalties for committing those offenses. This entails another problem – the short time period given for the criminal prosecution for crimes committed against journalists.

With a view to remedying this situation and overcoming or decreasing the impunity level, a comprehensive approach to the described problem may be applied as the only possible solution. On the one hand, the sanction for criminal offenses aimed at violating the professional rights of journalists should be increased. On the other hand, the practice of pre-trial investigation and trial of crimes against journalists should be improved.

⁶ Consult the judgment of the Factory district court in Zaporizhzhya of 07.11.2018 in case No 332/890/18: <http://www.reyestr.court.gov.ua/Review/77666438#>

2. Problems arising during the pre-trial investigation of crimes committed against journalists

The Criminal Procedure Code (CPC) of Ukraine states, among other basic principles, the rule of law, publicity, reasonableness of time-limits, other. **The rule of law principle** implies that a person, his rights and freedoms are recognized as the highest values and determine the content and direction of the state action. In line with **the principle of publicity**, the prosecutor is obliged, within the limits of his competence, to initiate a pre-trial investigation in each case of the direct detection of signs of a criminal offense (except where criminal proceedings can be initiated only on the basis of the victim's statement) or on the basis of a filed complaint, as well as to take all the measures prescribed by law to establish the fact of the criminal offense and the person who committed it. Also, the CPC of Ukraine requires that in the course of criminal proceedings, each procedural action or procedural decision is executed or taken **within a reasonable time**.⁷

Nevertheless, these principles are not always implemented in practice, which negatively affects the state of pre-trial investigation, which is rendered inefficient.

The analysis of criminal proceedings conducted within this research proves that during their investigation the following procedural irregularities, slowing down the course of criminal proceedings, appeared quite frequent:

- 1) failure to enter or violation of the time-limits for filing a crime report in the Unified Register of Pre-Trial Investigations;
- 2) consideration of allegations of crimes under “journalistic articles” under the Law of Ukraine “On Citizens` Appeals”, instead of the CPC-prescribed procedure;
- 3) inaction of the investigator and/or prosecutor during the pre-trial investigation;
- 4) improper legal qualification of offenses committed against a journalist;
- 5) refusal to recognize the journalist as a victim;
- 6) groundless closure of criminal proceedings;
- 7) failure to notify the victim about the closure of criminal proceedings;
- 8) excessive length of pre-trial investigation, etc.

Each of these violations, individually or combined with others, often leads to the outcome that persons who have attacked or otherwise intimidated a journalist go unpunished. The pre-trial investigation in such cases, considered mostly not complicated, can take many years. As a result, we are witnessing frequent cases when offenders are released from liability due to the expiration of the limitation period for the criminal charges.

All this cannot but cause concerns. With regard to the numerous violations of journalists' rights, being recorded by the relevant civil society organisations or creative associations, only a few cases are brought to court. This situation negatively affects the journalistic activity and the freedom of expression in general. It is therefore necessary to analyze the problems identified in more detail, in order to understand better how they should be addressed.

⁷ Articles 7, 8, 25, 28 of the Criminal Procedure Code of Ukraine

3. Conclusions and Recommendations

Following the conducted analytical research, the next conclusions can be drawn:

1. The practice of investigating crimes against journalists and judicial proceeding thereof has just started to emerge.
2. An analysis of criminal proceedings made within this research has revealed a number of shortcomings of the current legislation of Ukraine and practices of its implementation, which impede an efficient counteracting the violations of journalists' professional rights.
3. Procedural violations by investigators and prosecutors negatively affect the effectiveness of pre-trial investigations into crimes committed against media professionals. The most widespread are the next ones:
 - failure to enter or violation of the time-limits for filing a crime report in the Unified Register of Pre-trial Investigations;
 - consideration of allegations of crimes under “journalistic articles” under the provisions of the Law of Ukraine “On Citizens` Appeals”, instead of the CPC of Ukraine;
 - inaction of the investigator and/or prosecutor during the pre-trial investigation;
 - undue legal qualification of offenses committed against a journalist;
 - refusal to recognize the journalist as a victim;
 - unreasonable closure of criminal proceedings;
 - failure to notify the victim about the closure of criminal proceedings;
 - excessive length of pre-trial investigation, etc.
4. Our review of the materials in a number of criminal cases concerning the unjustified closing of criminal proceedings concerning violation of the rights of journalists indicates that their investigators were inactive in the beginning and did not enter information about the crime allegation in the State Register. And when the court obliged them to do so – they reluctantly conducted a pre-trial investigation and, at the end of the day, closed the criminal proceedings. Some decisions to close a proceeding were often made by investigators, but then were overturned by the prosecutor or the court several times. Particularly ineffective appeared the cases where violations of journalists' rights were committed by influential persons (high-ranking officials or their families, special services workers, heads of local self-government bodies, etc.).
5. A lack of knowledge among investigators, prosecutors and judges regarding the legal foundations of the exercise of the right to freedom of expression and the journalistic activity also remain the challenges for Ukraine. The judicial practice of dealing with crimes against journalists demonstrates that the courts do not take into account the public interest in the information being collected when establishing the lawfulness of the media workers` actions.
6. Practical difficulties appear in determining the correct legal qualification of offenses committed against a journalist; the collection and evaluation of evidence to support the status of a journalist

and the "legitimacy" (lawfulness) of his activity, as the establishment of an intent to impede the journalist activity.

7. Investigators, prosecutors, and judges often fail to duly evaluate the role of the editorial instruction (mission) in the work of media professionals. Case law has shown that editorial instructions are placed above the provisions of legal acts, thereby limiting the rights of journalists without any legitimate reasons.

The requirement to work only within the editorial instructions interferes with the creative search of the journalist himself, narrows the scope of the journalist's rights as to the place and means of collecting information, and thereby restricts his right to independently collect and report the publicly important information. This clearly does not comply with the Articles 34 of Ukraine's Constitution and 10 European Convention guaranteeing the right of free speech to everyone. The editorial instruction is aimed at resolving organizational issues within the journalistic team and, therefore, cannot serve as an instrument for restricting the rights of journalists prescribed by law. In this respect, the availability or absence of editorial instructions cannot be regarded as a factor affecting the legitimacy assessment of the journalists' actions when performing their professional duties.

8. Another challenge for investigating and prosecuting crimes against journalists is doing so within a reasonable time. Cases of this category usually belong to simple cases, but their proceedings last for many years and often exceed the statute of limitations for criminal prosecution. This allows offenders to avoid any punishment for their wrongdoing. At present, there is a tendency to increase the length of the criminal proceedings.

9. Groundless releases from the criminal responsibility of persons who have committed a crime against a journalist, motivated by the changed circumstances, also take place.

10. It is equally worth noting a specific form of closing the criminal proceedings concerning crimes committed against journalists – the adoption of a verdict with the conciliation agreement. Yet, it should be taken into account that attacks and other acts of aggression against journalists who, in the performance of their professional duties, collect, process, disseminate publicly important information, are not only the attacks on their personal rights and interests. They can be regarded as the attack on the freedom of expression in general. Since these actions are aimed at preventing the free dissemination of information, they are sometimes called censorship through the use of force. They also entail the so-called "chilling effect", which results in self-censorship, which is also dangerous. The society may not learn some publicly important information. In this regard, given the public danger of those crimes, such categories of cases should not end in conciliation agreements.

11. Article 171 of the Criminal Code of Ukraine provides for a light punishment for committing unlawful acts, which do not have a significant influence on the behaviour of offenders and do not promote the decrease in impunity. At the same time, a low degree of punishment affects the length of the criminal statute of limitations, which are also quite short. In practice, this often leads to the release of defendants from criminal liability.

With a view to resolve these problematic issues and shortcomings, **it is recommended:**

1. To take into account the conclusions drawn in this report on the legal qualification of offenses committed against journalists; the collection and evaluation of evidence to support the status of a journalist, the "legitimacy/lawfulness" of his activity, as the intent to impede the activity of a journalist.

2. To reconsider the practice of determining the legitimacy of the journalist actions, depending on the availability and content of his/her editorial instructions, bringing it in line with the requirements of Articles 10 of the European Convention, Article 34 of the Constitution of Ukraine and the legislation of Ukraine.
3. To carry out the pre-trial investigation and the trial of crimes against journalists within a reasonable time, which should not exceed the statute of limitations for bringing the offender to justice.
4. To reconsider the practice of releasing the offenders of crimes against journalists for the reasons of changed circumstances. To avoid applying the above ground for exemption from the criminal liability until the number of crimes committed against media professionals is decreased substantially.
5. To consider the possibility of increasing responsibility for committing crimes under the Article 171 of the Criminal Code of Ukraine.
6. To reinforce the prosecutorial control over the observance of pre-trial investigations within the specified category of cases and the lawfulness of investigator's decisions with the aim of timely elimination of violations of the rights of journalists as victims in criminal proceedings.
7. To develop and introduce into the training programs – aimed at raising qualification of judges, prosecutors and investigators – a special course of lectures and practical assignments on the freedom of speech and legal principles of the journalist and mass media activity in Ukraine.
8. Take into account other conclusions and recommendations set out in this report.