

RESTRICTION OF FREEDOM OF EXPRESSION OF POLITICAL VIEWS IN MARTIAL LAW

UDC 340.12:342.727–048.23 (477) (043.5)
DOI <https://doi.org/10.32782/ehrlrichsjournal-2023-7.01>

ZORYANA BAITALYUK

Assistant of the Department of Theory of Law and Human Rights
Yuriy Fedkovych Chernivtsi National University, Ukraine
z.baitiliuk@chnu.edu.ua
ORCID 0009-0002-7055-3367

Abstract. The article examines the issue of restrictions on freedom of expression under martial law. Freedom of political expression is defined as the right of every person to freely express his or her political views and assess historical events of a political nature and current political processes and phenomena in a manner prescribed by law. Support for freedom of expression is characterized as one of the important guarantees for the development and protection of democracy. Thanks to the right to freedom of political expression, modern democratic states find the most optimal solutions to the socio-political and legal challenges that arise in the course of their functioning.

It is noted that due to the ability to freely express oneself, criticize the authorities, hold certain political views and freely promote them, everyone has the opportunity to influence the democratic institutions of their state and be an active participant in political processes in it. The author emphasizes that freedom of expression should be classified as the so-called “immutable core of human rights” along with the right to life, prohibition of torture and inhuman or degrading treatment, the right to a fair trial, and the right not to be subjected to enforced disappearance.

It is noted that restrictions on freedom of expression are the basis for the existence of democratic institutions and the rule of law, civil society and the realization of most human rights. At the same time, such restrictions should be imposed as an exception and solely for the purpose of protecting the rights of an individual. The purpose of such restrictions should be proportionate to the means of achieving it. It is emphasized that the criteria for limiting the right to freedom of expression should be established exclusively in law. In turn, the law should be accessible, specific and sufficiently clear.

Key words: human rights, freedom of expression of political views, martial law, restriction of freedom, grounds for restriction of freedom of expression of political views.

ОБМЕЖЕННЯ СВОБОДИ ВИРАЖЕННЯ ПОЛІТИЧНИХ ПОГЛЯДІВ В УМОВАХ ВОЄННОГО СТАНУ

УДК 340.12:342.727–048.23 (477) (043.5)
DOI <https://doi.org/10.32782/ehrlrichsjournal-2023-7.01>

ЗОРЯНА БАЙТАЛЮК

асистент кафедри теорії права та прав людини
Чернівецького національного університету імені Юрія Федьковича, Україна
z.baitiliuk@chnu.edu.ua
ORCID 0009-0002-7055-3367

Анотація. У статті досліджено проблему обмеження свободи вираження політичних поглядів в умовах воєнного стану. Свободу вираження політичних поглядів визначено як право кожної людини вільно у визначений законом спосіб виражати свої політичні погляди, оцінювати історичні події політичного характеру та сучасні політичні процеси і явища. Підтримку свободи вираження політичних поглядів охарактеризовано як одну із важливих гарантій для розвитку та захисту демократії. Завдяки праву на свободу вираження політичних поглядів сучасні демократичні держави знаходять найбільш оптимальні рішення для розв'язання суспільно-політичних та правових викликів, які виникають у процесі їх функціонування.

Зауважено, що завдяки можливості вільно висловлюватися, критикувати владу, дотримуватися тих чи інших політичних поглядів і вільно їх пропагувати кожен має можливість впливати на демократичні інституції своєї держави і бути активним учасником політичних процесів у ній.

Акцентовано увагу, що свободу вираження політичних поглядів слід відносити до категорії так званого «незмінного ядра прав людини» поряд із правом на життя, заборонаю катувань та нелюдського чи принижуючого гідність людини поводження, правом на справедливий судовий розгляд та правом не піддаватися насильницькому зникненню.

Зазначено, що обмеження свободи вираження політичних поглядів є основою для існування демократичних інститутів та правової держави, громадянського суспільства та реалізації більшості прав людини. При цьому такі обмеження необхідно встановлювати як виняток і виключно з метою захисту прав індивіда. Мета таких обмежень має бути пропорційна засобам її досягнення. Наголошено, що критерії обмеження права на свободу вираження політичних поглядів необхідно встановлювати виключно в законі. Своєю чергою закон має бути доступним, конкретним і досить чітким.

Ключові слова: права людини, свобода вираження політичних поглядів, воєнний стан, обмеження свободи, підстави обмеження свободи вираження політичних поглядів.

A democratic state, for its part, guarantees a person the right to freedom of expression. Freedom of political expression is the right of every person to freely express his or her political views in the manner prescribed by law, to assess historical events of a political nature and current political processes and phenomena.

In the context of human rights, freedom of political expression is important not only in itself, but as a factor that plays a crucial role in protecting other rights guaranteed by the state. Without broad guarantees of the right to freedom of expression, there can be no free country and no democracy. However, this thesis should be used with one condition – if a person does not abuse this freedom by violating the rights of others. The right of one person ends where it begins to violate the right of another. Expressing or defending one’s own political views should be done within the framework established by law. Freedom of expression may not conflict with other human rights, such as the right to a fair trial, the right to respect for private life, and the right to freedom of conscience and religion.

Freedom of expression as a fundamental human right is reflected in the main international human rights documents of global and regional importance. Certain aspects related to the content of freedom of expression, international legal regulation of its restriction and protection at the international universal and regional levels have been the subject of research in the works of the following Ukrainian researchers: M. Baimuratov, M. Buromenskyi, A. Voitsikhovskiy, M. Hnatovskiy, T. Korotkiy, V. Lysyk, A. Melnyk, L. Yarmol, and others.

The purpose of the article is to study the problem of restrictions on freedom of expression under martial law.

Presenting main material. As is well known, one of the important guarantees for maintaining, developing and, accordingly, protecting democracy is the support and protection of the right to freedom of expression. This freedom, which is enshrined in Article 19 of the Universal Declaration of Human Rights of 1948 [4], Article 10 of the European Convention of 1950 [5], Article 19 of the International Covenant on Civil and Political Rights of 1966 [8], is a prerequisite for the exercise and normal realization of many other fundamental rights and freedoms. Accordingly, the process of reproducing the right to freedom of expression in the tests of the constitutions of all democratic states is natural.

As rightly noted in the literature, “representative democracy as we know it today is largely the result of free expression” [10, p. 25]. In general, the importance and significance of the existence of this freedom in a modern state governed by the rule of law and civil society is emphasized by almost all researchers of this issue. At the same time, in most literary sources, special emphasis has recently been placed on the freedom of expression of political views, because it is precisely through the ability to freely express oneself, criticize the authorities, hold certain political views and freely promote them that each of us has the opportunity to influence the democratic institutions of our state in a positive sense of the word and to be an active participant in political processes. Therefore, we support the position of those scholars who argue that freedom of political expression should also be included in the category of the so-called “unchanging core of human rights” along with the right to life, the prohibition of torture and inhuman or degrading treatment, the right to a fair trial, and the right not to be subjected to enforced disappearance.

Freedom of expression as a subjective legal right is the ability of a person, enshrined in legal norms and ensured by the state, to freely express views, collect, search, receive, record, store, disseminate, transmit and use information and ideas orally, in writing or in any other form and in any manner, except in cases determined by law. Freedom of expression as a subjective legal right enshrined in domestic and international law includes the following elements (possibilities) of this subjective right: to adhere to one’s views; to express views freely

(this right includes the following freedoms: to collect, search, receive, record, store, disseminate, transmit, use information and ideas – except in cases determined by law).

An important place in the structure of human consciousness is occupied by such an essential component as opinions, which form the basis of the fundamental human right of freedom of expression. A person's views and other components of his or her consciousness – thoughts, beliefs, ideas, faith, etc. – interact with each other. Freedom of expression can be classified into the following types: 1) depending on the forms of consciousness – freedom of expression of religious, legal, political and other views; 2) depending on the content of views – freedom of expression of assumptions and freedom of expression of opinions; 3) depending on the forms of external expression – freedom of expression in various forms: verbal (oral, written, printed), non-verbal and combined (combination of verbal and non-verbal); 4) depending on how correctly a person's views reflect objective reality – freedom of expression of true views and freedom of expression of false views.

The right to freedom of expression clearly belongs to the category of natural human rights, which are inalienable and inalienable, and therefore cannot be deprived of it in a democratic state. Freedom of expression as a natural human right is the ability of a person to express internally and externally in any form an attitude of a probabilistic nature to any present, past, future phenomena, processes, events, facts of reality or to give an assessment of them.

The exercise of this right through the pluralism of opinions and views allows us to find the best solution to the most complex socio-political and legal problems that arise in the process of building democratic institutions in modern states. Freedom of expression is one of the fundamental provisions of a democratic society and one of the main conditions for its development and self-realization of each individual. Freedom of expression, according to the constitutions of many countries of the world, is recognized as one of the most valuable rights, according to which everyone can freely speak, write, read, and be responsible only for the abuse of this freedom [3, p. 253].

Investigating the concept of freedom of expression of political views in the interaction of socio-political and administrative-legal dimensions, according to M. Blikhar, such interaction allows bringing society as an association of people closer to the State as an organization of political power of society, thereby contributing to the consolidation of a positive image of the State in the legal consciousness of the vast majority of citizens. According to the scientist, the concept of freedom of expression of political views has a three-part structure: 1) direct exercise by a person of his or her right to freedom of expression of political views; 2) activities of authorized bodies and officials to ensure the exercise of the right to freedom of expression of political views by people; 3) processes of interaction between a person and authorized bodies with the aim of conducting a dialogue to achieve positive changes in certain political processes or phenomena. The first part of this structure involves the activity of the person himself or herself, taking certain actions to solve existing problems (participation in the political life of the state, in elections, rallies). This is, first of all, a human right, not an obligation; no one can force a person to take certain actions to express their political views. The second part of the structure is the professional activity of persons and bodies established to ensure the effective realization of this right. Their professional activities should promote the observance of the human right to express one's political views, monitor violations of this right and facilitate its fastest possible restoration. The third part is a dialog between the individual and the state (through representatives authorized by law). Through the expression of their political views, people show the state their attitude to the political processes taking place, demonstrate their acceptance or rejection. Rule of law democracies listen to people, taking their opinions into account when making certain political decisions. Undemocratic regimes suppress any manifestations of political activity of citizens in order to prevent their influence on political processes [1, p. 226].

Thanks to the right to freedom of political expression, modern democratic states, through pluralism, find the most optimal solutions to the socio-political and legal challenges that arise in the course of their functioning. In other words, freedom of expression is one of the fundamental provisions of a democratic society and one of the main conditions for its development and self-realization of each individual.

At the same time, despite this importance and the role of this freedom for the development of democracy, there are still certain restrictions on its implementation in cases clearly defined by law. In fact, this means that this freedom is not absolute. Such restrictions are enshrined in the European Convention of 1950 [5], and a number of other international legal acts, as well as in the norms of national legislation.

The problem of establishing the limits of freedom of expression is particularly relevant, since such freedom is the basis for the existence of democratic institutions and the rule of law, civil society and the realization of most human rights.

In the legal literature, restriction of human rights and freedoms is generally understood as a regime of temporary or specific individual suspension or narrowing of the scope of rights and freedoms defined and guaranteed by law in the interests of ensuring the rights of others, as well as ensuring national security and defense of the state [11].

Undoubtedly, an absolute prohibition to express oneself is more harmful than the actual expression. Consequently, such restrictions are difficult to justify in various circumstances. Statements can often cause harm to both the individual and society as a whole. And if restrictions on freedom of expression are already established, such restrictions should be imposed as an exception and solely to protect the rights of an individual, which will fall into one of the following categories: slander and libel; incitement to riot; incitement to violence; interference with privacy.

Given the above, it can be concluded that such measures are in some cases compulsory, which, as an exception, are used by the state to protect public order or the rights and freedoms of individuals. The purpose of such restrictions must be proportionate to the means of achieving it. The purpose serves a certain interest defended by a democratic state, namely the protection of national security, territorial integrity, public order, prevention of disorder and crime, protection of reputation or rights of others, protection of health, morals, prevention of disclosure of confidential information and maintaining the authority and impartiality of justice [7, p. 186].

Criteria for limiting the right to freedom of expression should be established exclusively in law. Legality is the adherence to law by state bodies and its citizens, or strict and unswerving adherence to law by state bodies and officials in the process of applying law. The actions and measures of the state are recognized as legitimate if they do not contradict the requirements of accessibility, predictability and are carried out for legitimate purposes. The law must be sufficiently accessible, and a citizen must be able to obtain relevant information about the legal provisions that apply to him or her. In addition, the relevant rule must be clearly formulated so that individuals can harmonize their behavior with it. The phrase “in accordance with the law” not only requires compliance with national law, but also refers to the quality of such law. National law must be specific and define with sufficient clarity the limits and manner of exercise of the relevant right granted to the authorities to provide citizens with the minimum level of protection to which they are entitled under the rule of law in a democratic society. National legislation should be interpreted and applied in accordance with the case law and principles of the ECHR, and when a conflict is found, European law should prevail.

The analysis of international law and national legislation leads to the conclusion that such restrictions apply to six cases: 1) when it comes to protecting the interests of national security, territorial integrity or public safety; 2) when preventing riots or crimes; 3) when it comes to ensuring health or morality; 4) when protecting the reputation or rights of others; 5) when preventing the disclosure of confidential information; 6) when maintaining the authority and impartiality of the court (part 2 of Article 10 of the European Convention, part 3 of Article 34 of the Constitution of Ukraine [6]).

It should be noted that the category “restriction of human rights” is not identical to the category “violation of human rights”. A “restriction regime”, unlike a violation, can be both legal and unlawful, while a “violation regime” is always unlawful and, as a result, entails liability. Considering the social value of human rights and freedoms and their significance in terms of compliance for society, most of them fall under criminal legal protection.

In general, the above cases of restrictions on freedom of expression, which, in our opinion, are quite extensive, do not usually cause sharp criticism either among scholars or ordinary citizens when they occur during martial law (which falls under the first point). It is believed that in times of war, it is not the right time to address certain political issues that could create internal threats to confrontation in society and the state, which would therefore distract from solving more important problems of defense of the state, territorial integrity and independence of the state. After all, internal conflicts within a country always serve to benefit the enemy. Therefore, conscious citizens perceive this normally and adequately, realizing that during a war, the population needs to mobilize and unite to properly repel an external enemy. At the same time, such restrictions can only be imposed if a number of requirements are met, which are quite clearly set out in international legal acts. They

are most fully reflected in the European Convention of 1950, and since Ukraine is a party to it, these provisions are binding on our country. According to part 2 of Article 10 of the Convention, such restrictions must: first, be provided for and clearly defined in the law, which must meet the criteria of clarity, predictability, be made public and, accordingly, available to citizens for review; second, be introduced only for the achievement of a legitimate aim, as defined in part 2 of Article 34 of the Convention (as discussed above), no other purpose is allowed; thirdly, they must be necessary in a democratic society, i.e., there must be, firstly, an urgent social need for their introduction (the context, public interest, status of the person and his/her influence, etc. are assessed); secondly, the restriction must be proportionate to the legitimate aim (it is necessary to find an appropriate balance between the right to protect which the restriction is aimed at and the right to freedom of expression); and thirdly, the reasons for imposing restrictions must be appropriate and sufficient [2, p. 10].

In the legal literature, such criteria for restricting freedom of political opinion are called the “three-step test”. In particular, when determining the legality of restrictions, the ECtHR in its judgments examines their compliance with each criterion, if they do not meet at least one, the restrictions are considered to violate Article 10 of the European Convention of 1950. As the Court has repeatedly noted, referring to Article 10: “This freedom is subject to exceptions, which, although they must be interpreted as restrictions, must be established with a high degree of conviction” [12].

In general, it should also be noted that ensuring a balance between the right to freedom of expression, especially when it comes to martial law, and the protection of national interests, territorial integrity and public security is a rather difficult issue and task even for the most progressive states. On the one hand, the existence of such a factor as military aggression undoubtedly makes it easier to justify the need for such restrictions, but on the other hand, it is still not enough.

Therefore, based on the above, one can conclude that freedom of expression of political views is, firstly, the cornerstone of democracy in the modern world, an indicator of the civilized development of the state and civil society, secondly, it is universally recognized and perceived as a norm of life for modern citizens, thirdly, although it carries an inherent and inalienable character due to its classification as natural rights and freedoms, it does not possess an absolute nature – under certain clearly defined cases outlined in the law, its restriction is possible.

REFERENCES

1. Blihar M.M. Freedom of expression of political views: socio-political and administrative-legal dimensions. *Scientific Bulletin of the Uzhhorod National University*. 2022. Issue 69: *Law series*. P. 224–228.
2. Burmagin O.O., Opryshko L.V., Opryshko D.I. Freedom of speech in conditions of armed conflict. Review of the practice of the European Court of Human Rights. Kyiv: NGO “Human Rights Platform”, 2019.
3. Vorobets H.M. Legitimate restriction of freedom of expression: experience of the European Court of Human Rights. *Law and society*. 2018. No. 3. P. 253.
4. General Declaration of Human Rights of 10.12.1948. Retrieved from: https://zakon.rada.gov.ua/laws/show/995_015
5. Convention on the Protection of Human Rights and Fundamental Freedoms of November 4, 1950 (with protocols). Retrieved from: https://zakon.rada.gov.ua/laws/show/995_004#Text
6. Constitution of Ukraine dated June 28, 1996 with amendments and additions. Retrieved from: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>
7. Lysyk V., Melnyk A. Lawful restriction of freedom of expression: international legal aspect. *Bulletin of Lviv University. Series: International relations*. 2017. Issue 42. P. 180–191.
8. International Covenant on Civil and Political Rights of 1966. Retrieved from: https://zakon.rada.gov.ua/laws/show/995_043#Text/
9. Melnyk R.I., Chubko T.P. Problems of restriction of human rights and freedoms under the conditions of operation of a special legal regime. *Bulletin of the Luhansk State University of Internal Affairs named after E.O. Didorenko*. 2016. No. 1. P. 132.
10. Handbook on freedom of expression. Kyiv: IREX ProMediaUkraine-Inf. press center, 1999.
11. Skrypnyuk O.V. Constitutional and legal regulation of restriction of human and citizen rights and freedoms in Ukraine. *Public law*. 2011. No. 3. P. 5–11.
12. Nilsen and Johnsen v. Norway (App no 23118/93) ECHR 26 November 1999. Retrieved from: https://www.ohchr.org/en/ohchr_homepage?gad_source=1&gclid=Cj0KCQjw8pKxBhD_ARisAPrG45knvGO8g9I8SGCV0Suh-ZVDVupwHmWDRc2OCkvaQ43WpS5jDnRIOswaAp58EALw_wcB

ВИКОРИСТАНІ МАТЕРІАЛИ

1. Бліхар М.М. Свобода вираження політичних поглядів: суспільно-політичний та адміністративно-правовий виміри. *Науковий вісник Ужгородського національного університету*. 2022. Вип. 69: *Серія Право*. С. 224–228.
2. Бурмагін О.О., Опришко Л.В., Опришко Д.І. Свобода слова в умовах збройного конфлікту. *Огляд практики Європейського суду з прав людини*. Київ : ГО «Платформа прав людини», 2019.
3. Воробець Х.М. Правомірне обмеження свободи вираження поглядів: досвід європейського суду з прав людини. *Право і суспільство*. 2018. № 3. С. 253.
4. Загальна декларація прав людини від 10.12.1948 року. URL: https://zakon.rada.gov.ua/laws/show/995_015 (дата звернення: 05.10.2023 р.).
5. Конвенція про захист прав людини і основоположних свобод від 04.11.1950 року (з протоколами). URL: https://zakon.rada.gov.ua/laws/show/995_004#Text (дата звернення: 05.10.2023 р.).
6. Конституція України від 28 червня 1996 року зі змінами та доповненнями. URL: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> (дата звернення: 05.10.2023 р.).
7. Лисик В., Мельник А. Правомірне обмеження свободи вираження поглядів: міжнародно-правовий аспект. *Вісник Львівського університету. Серія: Міжнародні відносини*. 2017. Вип. 42. С. 180–191.
8. Міжнародний пакт про громадянські і політичні права 1966 року. URL: https://zakon.rada.gov.ua/laws/show/995_043#Text/ (дата звернення: 05.10.2023 р.).
9. Мельник Р.І., Чубко Т.П. Проблеми обмеження прав і свобод людини в умовах дії спеціального правового режиму. *Вісник Луганського державного університету внутрішніх справ імені Е.О. Дідоренка*. 2016. № 1. С. 132.
10. Посібник з питань свободи вираження. Київ : IREX ПроМедіаУкраїна-Інф. прес-центр, 1999.
11. Скрипнюк О.В. Конституційно-правове регулювання обмеження прав і свобод людини й громадянина в Україні. *Публічне право*. 2011. № 3. С. 5–11.
12. Nilsen and Johnsen v. Norway (App no 23118/93) ECHR 26 November 1999. URL: https://www.ohchr.org/en/ohchr_homepage?gad_source=1&gclid=Cj0KCQjw8pKxBhD_ARIsAPrG45knvGO8g9I8SGCV0Suh-ZVDVupwHmWDRc2OCkvaQ43WpS5jDnRIOswaAp58EALw_wcB (дата звернення: 05.10.2023 р.).