

УДК 342.7

DOI <https://doi.org/10.24144/2788-6018.2022.05.85>

FREEDOM OF EXPRESSION IN THE CONTEXT OF REGULATORY PROVISIONS AND CASE LAW USED BY THE EUROPEAN COURT OF HUMAN RIGHTS

*Shcherbyna V.,**Student of the Faculty of International Law
Yaroslav Mudryi National Law University*

Shcherbyna V. Freedom of expression in the context of regulatory provisions and case law used by the European Court of Human Rights.

The article examines the features ensuring the right to freedom of expression and opinion under national law. The importance of these freedoms is emphasized in view of their enshrinement in international regulatory documents. It was mentioned that the importance of the right to freedom of expression is also emphasized by the fact that these rights are enshrined in legal documents of international level. The author gave attention to such international documents as the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Universal Declaration of Human Rights. The author made a detailed analysis of the Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It was noted that Article 10 of the Convention can be structured into two parts. The author stated that the first part is the right to freedom and expression of views, the second is a comprehensive list of legal limitations of the investigated law. The concept of right to freedom to follow ones views, to receive information and to impart information were defined in details. Attention was paid to how the right to freedom of expression is enshrined in the national legislation of Ukraine, especially in the Constitution of Ukraine, the Law of Ukraine "On Information" and the Law of Ukraine "On Printed Mass Media (Press) in Ukraine". Several landmark decisions of the European Court of Human Rights were given, for instance, Nagla versus Latvia and Sunday Times versus United Kingdom (no. 1). Eventually, the author concluded that it is important to establish certain guarantees of the right to freedom of opinion and expression that is, the consolidation of certain conditions and means, which ensure the existence of freedom of speech and information in a democratic society.

Key words: freedom of speech, freedom of expression, freedom of opinion, European Convention for the Protection of Human Rights and Fundamental Freedoms, European Court of Human Rights.

Щербина В. Свобода вираження у контексті нормативного забезпечення та прецедентної практики Європейського суду з прав людини.

У статті досліджуються особливості забезпечення права на свободу вираження і думки за національним правом. Підкреслюється важливість цих свобод з огляду на їх закріплення в міжнародних документах. Було зазначено, що важливість права на свободу вираження також підкреслюється тим, що ці права закріплені в міжнародно-правових документах. Автор приділив увагу таким міжнародним документам, як Міжнародний пакт про громадянські і політичні права, Європейська конвенція про захист прав людини і основоположних свобод (ЄКПЛ) і Загальна декларація прав людини. Автором було проведено детальний аналіз статті 10 Європейської конвенції про захист прав людини і основоположних свобод. Зазначалося, що стаття 10 Конвенції може бути структурована на дві частини. Автор виділив те, що перша частина — це право на свободу і вираження поглядів, друга — комплексний перелік правових обмежень досліджуваних норм права. Детально були розглянуті поняття права свободи слідувати своїм поглядам, отримувати інформацію та передавати інформацію. Увагу було приділено тому, як закріплене в національному законодавстві України право на свободу слова, а саме в Конституції України, Законі України «Про інформацію» та Законі України «Про друковані засоби масової інформації (преса) в Україні». Також автор відмітив, що людина за своєю природою є соціальною істотою, вона має потребу у спілкуванні з іншими людьми, а налагоджена і вільна комунікація сприяє не тільки кращому розумінню один одного, але і допомагає у побудові вільного демократичного суспільства, де кожен може вільно висловлюватися та, що найголовніше, бути почутим. Було зазначено кілька знакових рішень Європейського суду з прав людини, наприклад, Нагла проти Латвії та «Санді Таймс» проти Сполученого Королівства (№ 1). У кінці автор дійшов висновку, що важливо встановити певні гарантії права на свободу думки і висловлювання, тобто закріплення певних умов і засобів, що забезпечують існування свободи слова та інформації в демократичному суспільстві.

Ключові слова: свобода слова, свобода вираження, свобода думки, Європейська конвенція про захист прав людини і основоположних свобод, Європейський суд з прав людини.

Problem setting. The violation of human rights becomes a norm for the modern legal genesis of Ukraine, the negative consequences of this trend are increasingly affecting the life of every person, that, in turn, has a destructive effect on relations between private and legal entities and the authorities [1, p. 143]. In recent years freedom of speech, opinion and expression has become a subject of increasing attention of the European Court and other institutions that protect human rights. Policy of multiculturalism, globalization processes and intensive migration flows challenge the modern world in the sphere of ensuring the right to freedom of expression, opinion and, accordingly, before anyone who feels the need for such protection.

Analysis of recent researches and publications. Among the scientists whose works are devoted in one or another aspect of the issue of legal regulation and exercise of the freedom of expression, it is necessary to identify D. Bychawska-Siniarska [2], K. Barnych [3], M. Macovei [4], H. Runcheva Tasev, M. Aleksov [5], P. Van Dijk and G. Van Hoof, Kluwer [6] and others. At the same time, it should be noted that despite significant contribution of leading scientists to the development of scientific opinion in the mentioned sphere, the problem of ensuring freedom of opinion does not lose its relevance.

The purpose of the article is to find out the normative basis for ensuring the right to freedom of expression in the norms of international legal acts, national legislation and also ECHR case law.

Presenting main material. Democracy without freedom of speech, opinion and expression cannot exist, because they are the most effective means by which citizens can exercise control over the activity of the state. The right to express its opinion is a cornerstone of democracy. Freedom of speech and freedom of mass media are important conditions for the development of democracy and respect for the rule of law. The importance of the right to freedom of expression is also emphasized by the fact that these rights are enshrined in legal documents of international level. For example, in accordance with Article 19, par. 1 of the International Covenant on Civil and Political Rights, everyone shall have the right to hold opinions without interference. Article 19, par. 2 of the above-mentioned document states that everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice [7].

However, States may restrict the right to freedom of expression under very limited circumstances. According to Article 19, par. 3 of the ICCPR, any restriction must be: provided by law; undertaken to respect the right or reputations of others; protect national security or public order, or protect public health or morals; necessary and proportionate to achieve a legitimate objective. National security and counter-terrorism measures must comply with conditions contained in Article 19, par. 3 of the ICCPR. Criminal defamation and blasphemy laws are unlawful restrictions to freedom of expression and States should repeal such laws [7].

What is more, pursuant to Article 9, par. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. In accordance with Article 9, par. 2 of the Convention, freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. Under article 10, par. 1 of the Convention, everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. Article 10, par. 2 of the Convention states that the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary [8].

Article 10 of the Convention can be structured into two parts. The first part is the right to freedom and expression of views, the second is a comprehensive list of legal limitations of the investigated law. Freedom to follow their views includes the right of the person to have his own position on a particular issue, guarantees protection of a person from assigning a certain position on the basis of her previous statements and negative consequences that may arise from this, it also

prohibits the person to disclose his position to others. Freedom to receive information provides an opportunity for the mass media to receive it by any unprohibited means and the right of the public to receive socially necessary information. Freedom to impart information is not only written words or oral statements, but also images, photographs and even cultural heritage intended to express an idea or submitting information [9, p. 281].

Freedom to hold opinions is a prior condition to the other freedoms guaranteed by Article 10 of the Convention, and it almost enjoys an absolute protection in the sense that the possible restrictions set forth in paragraph 2 are inapplicable. As stated by the Committee of Ministers, "any restrictions to this right will be inconsistent with the nature of a democratic society" [2, p. 13].

Moreover, according to Article 19 of the Universal Declaration of Human Rights Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers [10].

In the context of an effective democracy and respect for human rights mentioned in the Preamble to The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), freedom of expression is not only important in its own right, but it also plays a central part in the protection of other rights under the Convention. Without a broad guarantee of the right to freedom of expression protected by independent and impartial courts, there is no free country, there is no democracy. This general proposition is undeniable [2, p. 11].

In accordance with Article 34 of the Constitution of Ukraine, everyone is guaranteed the right to freedom of thought and speech, and to the free expression of his or her views and beliefs. Everyone has the right to freely collect, store, use and disseminate information by oral, written or other means of his or her choice. The exercise of these rights may be restricted by law in the interests of national security, territorial indivisibility or public order, with the purpose of preventing disturbances or crimes, protecting the health of the population, the reputation or rights of other persons, preventing the disclosure of information received confidentially, or supporting the authority and impartiality of justice [11].

According to Art. 9 of the Law of Ukraine «On Information», all citizens, legal entities, and state bodies of Ukraine shall have the right to information, envisaging the possibility of free receipt, use, distribution, and storage of any data as may be required for the implementation of their rights, freedoms, and lawful interests, as well as for carrying out their tasks and their functions.

The implementation of the right to information by citizens, legal entities, and the state shall not infringe the civil, political, economic, social, cultural, ecological, and other rights, freedoms, and lawful interests of other citizens, as well as the rights and interests of legal entities. Every citizen shall be ensured free access to information relating to that citizen, except in cases envisaged by the laws of Ukraine [12].

Furthermore, freedom of speech and expression of views and convictions in printed form is proclaimed in the Art. 2 of the Law of Ukraine "On Printed Mass Media (Press) in Ukraine" [13].

States have an obligation to respect, protect and promote the rights to freedom of opinion and expression. Freedom of opinion and expression are essential for the fulfilment and enjoyment of a wide range of other human rights, including freedom of association and assembly, freedom of thought, religion or belief, the right to education, the right to take part in cultural life, the right to vote and all other political rights related to participation in public affairs. Democracy cannot exist without them [14, p. 3].

A free and uncensored press is essential to ensure freedom of opinion and expression. States should never penalize media outlets, publishers or journalists for reporting or disseminating critical views and dissenting opinions. States should also put in place laws that protect the diversity and plurality of the media, such as laws that prevent undue dominance by privately controlled media groups.

It is appropriate to give an example of such landmark judgement as Nagla versus Latvia (16 July 2013). The case concerned the search by the police of a well-known broadcast journalist's home, and their seizure of data storage devices. Her home was searched following a broadcast she had aired in February 2010 informing the public of an information leak from the State Revenue Service database. The European Court of Human Rights found a violation of Article 10 (Freedom of expression) emphasizing that the right of journalists not to disclose their sources could not be considered a privilege, dependent on the lawfulness or unlawfulness of their sources, but rather as an intrinsic part of the right to information [15].

Another landmark judgment that deserves attention is Sunday Times versus United Kingdom (no. 1) (26 April 1979). The case concerned the injunction served on the Sunday Times restraining publication of news about the pending civil proceedings brought by parents of children born with severe deformities through the taking of thalidomide by women during pregnancy. The European Court of Human Rights found a violation of Article 10 (freedom of expression); this is the first judgment concerning freedom of expression

and information via the press [16]. In the particular circumstances of the case, the Court observed that the “thalidomide disaster” was a matter of undisputed public concern. In addition, the families involved in the tragedy as well as the public at large had the right to be informed on all the facts of this matter. The Court concluded that the injunction ordered against the newspaper “did not correspond to a social need sufficiently pressing to outweigh the public interest in freedom of expression within the meaning of the Convention [4, p. 58].

According to K. Barnych, human by nature is a social being and needs to communicate with other people, well-established and free communication gives not only better understanding of each other, but it also helps to build a free democratic society, where everyone can freely express themselves and, most importantly, to be heard. The state should guarantee the right to freedom of expression in practice [3, p. 23].

Conclusions. The issue of realization and ensuring freedom of expression is extremely important today. Freedom of expression and opinion are legally enshrined and they are guaranteed both by domestic legislation and international law norms. It is important to establish certain guarantees of the right to freedom of opinion and expression that is, the consolidation of certain conditions and means, which ensure the existence of freedom of speech and information in a democratic society.

REFERENCES:

1. Кучинська О.П., Іванов М.С. Загальнотеоретичне та праксеологічне розуміння прав людини. Вісник кримінального судочинства. 2017. №1. С. 142–148.
2. D. Bychawska-Siniarska Protecting the right to freedom of expression under the European Convention on Human Rights: a handbook for legal practitioners. 2017. URL: <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>.
3. Барнич К.І. Реалізація права на свободу вираження: досвід окремих європейських країн. Наукові праці Національного університету «Одеська юридична академія». 2019. Т. 25. С. 19–25.
4. M. Macovei Freedom of expression. A guide to the implementation of Article 10 of the European Convention of Human Rights. Human Rights handbooks. № 2. P. 64.
5. H. Runcheva Tasev, M. Aleksov Article 10 ECHR: freedom of expression in the context of trademarks. Iustinianus Primus Law Review. 2021. URL: <http://hdl.handle.net/20.500.12188/14217/>
6. P. Van Dijk and G. Van Hoof, Kluwer. Report of the Committee of Ministers, in “Theory and Practice of the European Convention on Human Rights”. 1990. p. 413.
7. International Covenant on Civil and Political Rights. URL: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.
8. Конвенція про захист прав людини і основоположних свобод 1950 р. URL: https://zakon.rada.gov.ua/laws/show/995_004.
9. Білоусов Є., Кахнова М. Застосування статті 10 Конвенції про захист прав людини і основоположних свобод у практиці Європейського суду з прав людини. 2021. Вип.4. С. 276–282.
10. Universal Declaration of Human Rights. URL: <https://www.un.org/en/about-us/universal-declaration-of-human-rights>.
11. Конституція України 1996. № 30. ст. 141. URL: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.
12. Закон України «Про інформацію». (Відомості Верховної Ради України (ВВР), 1992, № 48, ст. 650). URL: <https://zakon.rada.gov.ua/laws/show/2657-12#Text>.
13. Закон України «Про друковані засоби масової інформації (пресу) в Україні». (Відомості Верховної Ради України (ВВР), 1993, № 1, ст. 1). URL: <https://zakon.rada.gov.ua/laws/show/2782-12#Text>.
14. Council of the EU. EU Human Rights Guidelines on Freedom of Expression Online and Offline. 2014. URL: https://www.eeas.europa.eu/sites/default/files/eu_human_rights_guidelines_on_freedom_of_expression_online_and_offline_en.pdf.
15. Nagla v. Latvia. URL: [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22002-7640%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-7640%22]}).
16. The Sunday Times v. The United Kingdom. URL: <https://www.ucpi.org.uk/wp-content/uploads/2018/03/The-Sunday-Times-v-The-United-Kingdom-A30-1979-80-2-E.H.R.R.-245.pdf>.