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## Freedom of Expression under Martial Law

Anna S. Slavko <sup>a</sup>, Vladyslava M. Zavhorodnia <sup>a</sup>, Sergey I. Degtyarev <sup>a, b, \*</sup>

<sup>a</sup> Sumy State University, Ukraine

<sup>b</sup> Cherkas Global University, Washington, DC, USA

### Abstract

The article examines realizing the right to freedom of expression under martial law conditions. The authors analyze the concept, content, and guarantee of the right to freedom of expression within national and international legal orders. In particular, the guarantees right to freedom of expression are considered. The study explicitly focuses on how the constitutions of various countries determine the conditions for restricting freedom of expression. Most national constitutions consider the right to freedom of expression as a relative right that may be subject to interference to protect national security, the privacy of individuals, the authority of justice, the protection of commercial property, etc. In the European Court of Human Rights (ECtHR) case law, at least such elements of freedom of expression are highlighted: freedom to adhere to views; freedom to disseminate information and ideas; freedom to receive information and ideas; freedom of the press; freedom of radio and television broadcasting.

The ECtHR's approaches to derogation are studied. The ECtHR's jurisprudence contains several cases related to limiting freedom of expression during the derogation. The authors argue that despite security threats, the ECtHR believes that without dialogue within society, a democratic process is impossible. Therefore, imposing disproportionate restrictions on freedom of expression violates Art. 10 of the Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR or Convention). Criteria for determining the proportionality (a necessity in a democratic society) of interference with freedom of expression under martial law can be: the sphere of social relations to which the information belongs; the primary source of information; credibility of information; consequences of dissemination of information; the subject of information dissemination; method of dissemination of information.

**Keywords:** freedom of expression, derogation, martial law regime, armed conflict, legal remedies, freedom of information, European Court of Human Rights. derogation.

### 1. Introduction

Freedom of expression (or freedom of speech; also, in this research - freedom of the press and freedom of media) is a fundamental human right closely related to one's identity and worldview. The idea of freedom of expression arose in ancient times and accompanied scientific and social progress. In particular, in analyzing the development of this freedom, the Norwegian researcher Gunnar Skirbekk cites three famous people who suffered for their statements: Socrates, Jesus of Nazareth, and Galileo Galilei (Skirbekk, 2019).

Freedom of expression is crucial for the functioning of the entire society, maintaining public dialogue and democracy. As the High Representative of the EU emphasizes, "... by facilitating the free flow of information and ideas on matters of general interest, and by ensuring transparency and

\* Corresponding author

E-mail addresses: [starsergo2014@gmail.com](mailto:starsergo2014@gmail.com) (S.I. Degtyarev)

accountability, independent media constitute one of the cornerstones of a democratic society” (Borrell, 2022). Therefore, without establishing adequate guarantees of freedom of speech, the functioning of most of the tools of democracy - free elections, referenda, etc. - is impossible. One of the essential indicators of democracy in a particular state is the index of freedom of speech, which is monitored by Reporters without Borders. During this monitoring, the economic, sociocultural, and political contexts, legal framework, and safety are considered (World Press, 2022).

Freedom of expression is not absolute, and often there is a need to balance it with other rights (e.g., the freedom of conscience, the right to privacy, etc.). Media freedom may be subject to proportionate restrictions in the conditions of "war or other emergency threatening the nation's life". The role of media in the conditions of martial law is difficult to overestimate. They are essential for operationally informing the population about the challenges and threats that arise from hostilities and for propaganda and counter-propaganda, the relevance of which increases in war conditions.

According to the position of the Council of Europe, “free, independent and impartial media is one of the basic foundations of a democratic society and can contribute to the protection of civilians and the prevention of conflicts, as well as draw the attention of the international community to the horrors and realities of conflict” (Principles, 2022). Proof of the close connection between freedom of speech and the situation of the armed conflict that continues in Ukraine is, among other things, the fact that in 2022 Ukraine lost nine positions in the World Press Freedom Index. According to the report, “... the war started by Russia on February 24, 2022, endangers the survival of Ukrainian mass media. In this “information war” Ukraine is at the forefront of the expansion of the Kremlin's propaganda system” (World Press, 2022). The decrease in the ranking position (from 97th to 106th place) is connected, among other things, with the restrictions imposed on press freedom under the martial law regime.

The ongoing war in Ukraine significantly differs from other major conflicts of recent decades. On the one hand, these differences are determined by the scale of the armed conflict and its localization. This armed conflict is taking place in a European country with a large territory, a population of 40 million, and a considerable number of objects, the impact of which, by military means, can cause critical artificial disasters (nuclear and hydroelectric power plants, chemical plants, metallurgical plants, etc.). With international humanitarian law's general prohibition of damage to civilian infrastructure objects, such disasters are almost inevitable. A feature of this armed conflict is the vast number of forced migrants, which is measured in millions and may increase in the future. Even the conflict of the 1990s in the former Yugoslavia was not so dangerous for European security.

Information is critical in such an armed conflict. The level of access to objective information about the circumstances and processes within the armed conflict can become a factor in the survival of hundreds of thousands of people. Based on factual data and assessment of the situation and threats, these people can make appropriate decisions for themselves and their families. These decisions are critically important - to stay or not in a certain territory, to invest in one's businesses, or to cease them, etc.

Therefore, restricting access to information under martial law can become a factor of critical influence on individuals, decisive for preserving life and health. We must consider that the State's priorities under martial law are focused, first of all, on the general interest of surviving the community and preserving the nation as such, and can sacrifice the fate of a specific person.

On the other hand, the war in Ukraine is the first war of such a scale that takes place in “live broadcasts” or is positioned through the distribution of recorded events (hitting missiles at particular objects, the results of the action of anti-aircraft defenses, etc.), public speeches of the hostilities participants, bloggers who call themselves “war correspondents” and even “owners” of private military companies. The unimpeded exercise of freedom of speech and freedom of expression can be used to gain a military advantage for one or the other side of the conflict, cause a real threat of destruction of civilian objects (intentionally or because the adversary, using available information sources, considered them appropriate for attack and proportionate following the norms of international humanitarian law).

The legal remedies of the martial law regime in Ukraine impose rather severe restrictions on exercising freedom of speech and media freedom. In particular, quite reasonable and adequate administrative and criminal liability measures are envisaged, for example, for distributing photo and video materials about circumstances related to military actions, military logistics, etc. But, even during the war, citizens are entitled to know what their government is doing if it does not

threaten national security or the performance of specific military tasks. Therefore, measures aimed, for example, at the creation and state financing of a non-alternative news television channel, “Yedyni novyny” (United News), are questionable and require a balanced legal assessment. All these questions need an answer based on the criteria of deviations/restrictions from guaranteeing the right to freedom of expression and the formation of well-founded criteria for derogation, which are the objectives of this study.

Freedom of expression is also a necessary element of post-conflict settlement. Without reflection on the causes and consequences of the conflict, punishment of the guilty, and a comprehensive investigation of the circumstances of the conflict, the proper development of society seems impossible (Zavhorodnia et al., 2022). Fulfilling the above tasks is only possible with the active functioning of the media and ensuring freedom of expression. Accordingly, a critically important task for lawyers, researchers, and practitioners is to find the optimal model of media regulation (both traditional and modern) “in a war or state of emergency.”

## 2. Materials and methods

As noted above, free media is the ground for the functioning of any democratic society. Therefore, guarantees of the media's work, their rights, and responsibilities have received adequate regulation in national legislation, international law, and researchers' papers. Accordingly, the theoretical basis for this study was the works devoted to the content and methods of realizing freedom of media and freedom of expression (Bonotti, Seglow, 2022; Bresner, 2015; Bychawska-Siniarska, 2017; Macovei, 2004; Skirbekk, 2019). Also, to achieve the goals of this article, the results of research in related areas were used, in particular, devoted to the study of the impact of the ECtHR practice on the regulation of information relations in the Council of Europe member states (Plotnikova et al. 2021), the formation of lawful behavior patterns due to the level of critical assessment of information (Lebid et al., 2020; Zavhorodnia et al., 2019) and legal remedies under martial law (Panasiuk et al., 2022). National constitutions and international treaties have become an essential resource for research. Their analysis made it possible to assess the establishment of the freedom of expression, its guarantees, and possible derogations.

The progress made in the mentioned field by many international bodies and organizations, for example, the UN Human Rights Committee, the ECtHR, the Committee of Ministers of the Council of Europe, etc., is quite significant. Their reports, recommendations, and decisions were analyzed to achieve the goals of this study.

Nevertheless, it is worth emphasizing the comparatively insignificant development of international justice bodies (for example, the ECtHR) in the state's derogation in the conditions of “war or another situation that threatens the nation's life.” This situation is due to the infrequent occurrence of grounds for derogation in Europe. Nevertheless, several states have faced the need to invoke Art. 15 of the ECHR in the last several years due to pandemics and full-scale war. Accordingly, the need to develop this topic has increased.

## 3. Discussion

First, the right to freedom of expression (freedom of speech) is enshrined in national and international law. From a philosophical point of view, freedom of expression can be interpreted as a unique liberty – distinct from other liberties and/or more robust than liberty in general – on different grounds. It is said to be vital to protect the diversity and pluralism liberal societies value; an adjunct of liberal tolerance and means of promoting tolerant attitudes; a safety valve that enables public grievances to be raised peacefully, or a route to civic order and stability more generally; and a bulwark against the slippery slope of governments tendency to arrogate ever greater legal and policy powers to themselves (Bonotti, Seglow, 2022).

The definition of “freedom of expression” in international law has evolved over time. The United Nations General Assembly in January 1946 passed a resolution that defined freedom of information as a fundamental human right and “the touchstone of all the freedoms to which the United Nations is consecrated” (Bresner, 2015). Later, this right was expressed in the ICCPR, regional acts on human rights, and national legislation.

The Constitution of Ukraine envisages for everyone “the right to freedom of thought and speech, to the free expression of one's views and beliefs” (Art. 34) (Ukraine, 1996). The substance of this freedom encompasses the ability to share information and compile it in a manner that does not conflict with the law and does not infringe on the rights and freedoms of other people.

Part 3 of Art. 24 of the Constitution sets that the enjoyment of the right to freedom of expression may be lawfully restrained for:

- “1) protecting the interests of national security, territorial integrity or public order;
- 2) preventing riots or crimes;
- 3) protecting public health;
- 4) protecting the reputation or rights of individuals;
- 5) precluding the disclosure of data received in confidence;
- 6) upholding the credibility and independence of the judiciary” (Ukraine, 1996).

Interpreting these provisions, the Constitutional Court of Ukraine declared that “the Constitution of Ukraine defines an exhaustive list of grounds, in the presence of which the laws of Ukraine may provide for the restrictions of a person's rights to free collection, storage, use, and dissemination of information” (Constitutional Court, 2012).

Similar rules we can find in the constitutional law of other states. Thus, Art. 22 of the Constitution of Albania states that “freedom of expression is guaranteed” (Albania, 2016) while not establishing any formal restrictions on this right. Hothewer part 3 of Art. 40 of the Constitution of Angola declares that “freedom of expression and information shall be restricted by rights enjoyed by all to their good name, honor, reputation, and likeness, the privacy of personal and family life, the protection afforded to children and young people, state secrecy, legal secrecy, professional secrecy and any other guarantees of these rights, under the terms regulated by law” (Angola, 2010).

The Constitution of Armenia, in part 3 of Art. 42, pre: “... only by law to protect state security, public order, health and morals, honor and reputation of other persons, other fundamental rights and freedoms” (Armenia, 2015).

Freedom of expression and its limitations are spelled out in Art. 12 of the Constitution of Botswana in a rather specific way. On the one hand, it requires the validity of restrictions due to the need to ensure the public interests (national security, public safety, public order, public health, etc.). The need to protect public morality, rights, freedoms, and legitimate interests of individuals may also serve as a criterion for the admissibility of restrictions. Just like the Ukrainian legislation, the Constitution of Botswana assumes that limitations can be introduced to maintain the judiciary's authority and independence. On the other hand, the limitations of this right look quite specific in the context of “interests in the regulation of educational institutions, technical management or the technical operation of telephony, telegraph, post, wireless communication, radio broadcasting or television.” Moreover, such prescriptions can be established for public servants (servants of state and local self-government bodies) and teachers. (Botswana, 2016).

Art. 54 of Cuba's Constitution stipulates that “deliberate restrictions on the right [to freedom of expression] cannot be used with the intention of evading compliance with the law or preventing another person from exercising his rights” (Cuba, 2019).

After all, Art. 5 of the German Constitution states that freedom of expression is limited by “the provisions of general laws, provisions for the protection of youth and the right to personal honor” (Germany, 1949).

At the universal level, freedom of expression is enshrined primarily in the UDHR (Art. 19) and the ICCPR (Art. 19). The latter also provides conditions for interference with the right to freedom of expression:

- “1) prescribed by law;
- 2) respecting other person's rights and reputation or protecting the population's state security, public order, health or morals” (Covenant, 1966).

The ECHR plays the leading role in protecting rights and freedoms in the European region and guarantees freedom of expression in Art. 10. Since freedom of media is one of the basic foundations of a democratic society, the ECtHR always pays special attention to the guarantee of respect for freedom of expression in cases under Art. 10 (the case of *Big Brother Watch and Others v. the United Kingdom*, § 442) (Big Brother Watch, 2021). The ECHR again underlined the value of freedom of speech. It emphasized that it is the fundamental basis of democracy, an essential condition for every person's social development and self-realization. Moreover, the protection should extend to “shocking” ideas and information that may cause concern to the state, society, or its strata. Pluralism and tolerance necessarily require ensuring such freedom. Otherwise, the existence of a democratic society is impossible (§ 49) (Handyside, 1976).

Summarizing the positions of several researchers, it seems feasible to define the scope of the right to freedom of expression and to identify its essential elements. This right includes:

- 1) “freedom to adhere to views;
- 2) freedom to obtain information and ideas; and
- 3) freedom to transmit information and ideas” (Bychawska-Siniarska, 2017).

According to another position, the right to freedom of expression includes at least the following: “freedoms to adhere to views; to disseminate information and ideas; to receive data and ideas; freedom of the press; freedom of radio and television broadcasting” (Macovei, 2004).

As an essential point of freedom of expression, the freedom to hold opinions cannot be restricted due to its nature. Then in other cases, government interference in exercising the corresponding right is possible.

Art. 10 of the ECHR restricts the right to freedom of expression, provided they meet the three-part test. Therefore, the limitations should “be prescribed by law; have a legitimate purpose; be necessary in a democratic society” (Convention, 1950).

However, under extraordinary circumstances, the conditions for interference with the right to freedom of expression may change. Thus, Art. 15 of the Convention provides that “in time of war or other public emergency threatening the life of the nation, any State may take measures derogating from its obligations under this Convention”. Part 2 of the same Article spells that “the right to media freedom may be subject to additional restrictions under such extraordinary circumstances” (Convention, 1950).

The United Nations Human Rights Committee applies the same rules to protect the right to freedom of expression. General Comment No. 34 on Art. 19: Freedoms of opinion and expression provides that “specific conditions for restriction are: the restrictions must be ‘provided by law’; they may only be imposed for one of the grounds set out in ICCPR; and they must conform to the strict tests of necessity and proportionality”. (General Comment, 2011).

#### 4. Results

Given the above, there is no doubt about the conclusion that freedom of expression is one of the fundamental rights at the foundation of a free democratic society. Interference with this right must be carried out following the requirements of the three-part test. However, this approach can be adjusted given the role played by mass media in conflict situations. So, according to Resolution 2217 (2018), legal challenges related to hybrid war and human rights obligations, “... although Art. 15 of the ECHR allows States Parties to derogate from certain obligations “in time of war or other emergency threatening the life of the nation, any derogation from the rights enshrined therein must be per specific substantive and procedural requirements. When countering hybrid warfare threats, States parties to the ECHR may also invoke national security as a legitimate purpose for restricting the following rights: ... freedom of expression (Art. 10). Any restriction of the above rights must be compatible with a three-part test. (Resolution, 2018).

According to the same logic, the Guidelines of the Committee of Ministers of the Council of Europe on protecting freedom of expression and information in times of crisis state that crises such as wars and terrorist attacks, which certainly pose severe threats to society, human rights, and freedoms, are still quite common. At the same time, the Committee of Ministers expresses deep concern over the fact that governments, focusing on the priority of society's survival, may be tempted to introduce unreasonable restrictions. As a result, freedom of expression can be threatened, and its limitations implemented without proper justification. The document assumes that the concept of “crisis” includes wars, terrorist attacks, environmental disasters, and artificial catastrophes. The list of extraordinary events is not exhaustive and may include situations in which freedom of speech and information is threatened (for example, due to security restrictions) (Guidelines, 2007).

Structurally, the document includes several sections, including those related to the personal safety of journalists, protection of their sources, guarantees against abuse of defamation laws, and manipulation of public opinion. Worthy of attention is also the Recommendation of the Committee of Ministers R (96) 4 on the protection of journalists in situations of conflict or tension. This Recommendation specifies the right of journalists to free exercise of rights and freedoms provided for in the ECHR and under other international obligations of the participating states. Journalists' rights include, in particular, the right to seek, distribute and receive information and ideas regardless of borders; the right to freedom of movement and choice of residence, subject to legal stay on the state's territory; the right to leave any country freely; the right to the confidentiality of correspondence, in whatever form it is carried out (Recommendation, 1996).

However, the mentioned documents refer mainly to the physical protection of journalists, and there are no criteria for assessing the proportionality of restrictions on freedom of expression under conditions of war or other emergency situations threatening the nation's life.

The ECtHR's practice in applying derogation is scarce and heterogeneous. As the researchers emphasize, the derogation has a dual purpose – to protect fundamental human rights and, simultaneously, the nation's life. But in many states, this state has been a form of legalization of systematic violations of human rights for decades (Borysov, 2019). In Europe, it is vital to comply not only with the formal requirements for derogation (notification of the General Secretary of the Council of Europe) but also with material requirements (the presence of circumstances that threaten the life of the nation) (Melnychenko, 2022).

In the case of *Sahin Alpay v. Turkey*, the applicant worked for a newspaper that was considered oppositional to the current government and repeatedly criticized the current state policy in his publications. In July 2016, an attempted military coup took place in Turkey, which was suppressed almost immediately. The authorities connected it with the followers of Fethullah Gülen, an opposition politician living outside Turkey for a long time. Therefore, the Turkish government submitted a declaration of derogation and carried out several arrests of persons who were probably accomplices of the rebels. The applicant and his colleagues were detained and placed in custody as one whose activities were directed against the state.

At the detention hearing, the applicant stated that he supported democracy and had never supported sedition or other attacks on democracy. However, after analyzing the applicant's articles, the national court concluded that they promoted terrorist activities. At the time of consideration of the case by the ECtHR, the applicant was in prison (Şahin Alpay, 2018).

During the hearing, the Turkish government based its objections on failing to exhaust all domestic remedies (criminal proceedings were still ongoing) and the compliance of the alleged interference with freedom of expression with the three-part test. The government also spoke about the vagueness of the wording because, in its opinion, the fact that the applicant was detained and placed in custody does not automatically violate the right to freedom of expression (Şahin Alpay, 2018).

Assessing the circumstances of the case, the Court recalls the so-called “chilling effect” that the detention or persecution of journalists has on the atmosphere of freedom of speech in the state. As the Court emphasized, it “... is ready to take into account the circumstances of the case, particularly the difficulties faced by Turkey after the attempted military coup. The coup attempt and other acts of terrorism seriously threaten democracy in Turkey. ... However, the Court considers that one of the main characteristics of democracy is the possibility of solving problems through public debate. It repeatedly emphasized that democracy thrives thanks to freedom of expression”. In this context, the existence of an “emergency situation that threatens the life of the nation” should not serve as a reason to limit the freedom of political debate, which is the basis of the concept of a democratic society. According to the Court, “... even in a state of emergency – which, as the Constitutional Court noted, is a legal regime whose purpose is to restore a normal regime by guaranteeing fundamental rights – the Member states of the Convention must proceed from the fact that any measures taken must be aimed at protecting against threats to the democratic order, protecting values, in particular, pluralism, tolerance, diversity of views (§ 180). Therefore, the ECtHR found a violation of the right to freedom of expression (Şahin Alpay, 2018).

A similar situation occurred in the case of *Ahmet Hüsrev Altan v. Turkey*, where the applicant – a well-known writer and publicist – was detained for his articles critical of the authorities in the period following the July 2016 military coup attempt. Admitting that Turkey needed to take extraordinary measures to overcome the rebellion, the Court underlined that the applicant's detention itself was unjustified “from the point of view of Art. 5 of the Convention. Therefore, interfering with his freedom of expression was not permitted under the law” (Ahmet Altan, 2021). In the case of *Vedat Sorli v. Turkey*, the applicant was detained because he had published caricatures depicting the president of the state on his social network page. In its objections, the Turkish government referred, in particular, to the derogation made in 2016. In this case, the ECtHR refused to consider the application for derogation because the government did not demonstrate how it affected the applicant's situation (Vedat Sorli, 2021).

In the case *Dareskizb LTD v. Armenia*, the applicant organization was the publisher of the opposition newspaper. In February 2008, elections were held in Armenia. Immediately after announcing the preliminary election results, the opposition candidate called on his supporters to gather in the square in the state capital. The protests, which involved at least several tens of

thousands of people, lasted ten days and led to clashes with the police. On March 1, 2008, the president of Armenia issued a decree introducing the state of emergency. The rules of the decree referred to the instruction to mass media “.. to submit information on matters of state and internal affairs exclusively within the limits of official information provided by state bodies” Armenia submitted a request for derogation ([Dareskizb LTD, 2021](#)).

On March 3 and 4, 2008, the applicant organization prepared the newspaper's layout and handed it over to the printing house. However, representatives of law enforcement agencies, without explaining the reasons, forbade the newspaper's publication. Attempts to appeal the ban to the national administrative court did not lead to a result - the court did not recognize its jurisdiction in the case.

This case is generally interesting because the ECtHR analyses the derogation application. The Court recognized that the notification of Armenia of its withdrawal complied with the formal requirements of Art. 15 of the Convention, namely to notify the Secretary General of the Council of Europe fully of the measures taken to withdraw from the Convention and the reasons for taking them. (§ 55) ([Dareskizb LTD, 2021](#)). Nevertheless, the Court recalls that each Party of the Convention “responsible for the ‘life of [its] nation’ determines whether that life is threatened by an ‘emergency’ and, if so, how far it must go to overcome the emergency. Because of their direct and constant contact with the urgent needs of the moment, national authorities are, in principle, better placed than an international judge to decide on the existence of such an emergency and on the nature and extent of concessions necessary to prevent it”. Accordingly, the national authorities should have broad discretion in this matter.

However, the Parties of the Convention do not have unlimited discretion. The ECtHR must decide whether, in particular, states have gone beyond the “extent strictly necessary by the urgency” of the crisis. Thus, domestic discretion combines with the supervision of ECtHR. In exercising this oversight, the Court must give due weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances giving rise to the emergency and its duration” (§ 57) ([Dareskizb LTD, 2021](#)). According to the ECtHR position, a derogation could only be justified by an actual or imminent emergency. The emergency situation should affect the whole nation. It should endanger the organized and orderly life of society. Thus, we are talking about exceptional crises and dangers with which it is impossible to cope with the usual measures and restrictions the Convention allows ([Dareskizb LTD, 2021](#)). Analyzing the circumstances in Armenia, the ECtHR found no factors indicating the need to deviate from the obligations.

In light of this conclusion, accordingly, the applicant organization conducted an analysis of the need to ban newspaper printing. The Court underlined, “... nothing suggests that the material of the applicant company intended to print contained any hate speech or incitement to violence or unrest” ([Dareskizb LTD, 2021](#)). The Government did not argue this either. As followed from the totality of the evidence, the only reason for the prohibition was that the applicant company was an opposition newspaper and published critical materials about the Government.

The Court held that such restrictions, designed to stifle political debate and silence dissent, violated the law. They went against the goals of Art. 10 and “were not necessary in a democratic society” (§78), thus constituting a violation of the right to freedom of expression ([Dareskizb LTD, 2021](#)).

It is worth paying attention to the situation in Ukraine. Under paragraph 3 of the Decree of the President of Ukraine, “On the martial law in Ukraine,” due to the martial law in Ukraine, “the constitutional rights and freedoms of a person and a citizen provided for in Art.s 30-34, 38, 39, 41-44, 53 of the Constitution of Ukraine, can be restricted” ([Decree, 2022](#)). Clause 11 of Part 1 of Art. 8 of the Law of Ukraine “On the Legal Regime of Martial Law” authorizes the military command and military administrations independently or with the involvement of executive authorities, the Council of Ministers of the Autonomous Republic of Crimea, local self-government bodies ... to regulate ... the work of providers of electronic communication networks and/ or services, printing enterprises, publishing houses, television and radio organizations, television and radio centers and other enterprises, institutions, organizations, and institutions of culture and mass media ([Law, 2015](#)). The above restrictions are also mentioned in the Note verbale N<sup>o</sup> 31011/32-017-3, dated February 28, 2022, of the Permanent Representative of Ukraine to the Council of Europe. The Note refers to the martial law in Ukraine and the possible withdrawal of Ukraine from its obligations, including under Art. 10 of the ECHR ([Note verbale, 2022](#)). The same legal limitations of freedom of expression are common in most countries during martial law ([Slavko, 2016](#)).

## 5. Conclusion

Freedom of expression as a fundamental human right ensures the functioning of democracy. Therefore, its guarantees are contained in national (mainly constitutional) and international law. At the same time, freedom of expression is not an absolute right and may be subject to restrictions imposed as part of the three-part test requirement. The limitations must be stipulated by law, fulfill a legitimate purpose, and be proportional. Identifying the proportionality of the interference with freedom of expression is complicated by the so-called “emergency regimes,” which allow derogation from certain international obligations of states.

Both material and procedural requirements must be met to implement a valid derogation. The first is “a war or other situation threatening the nation's life.” States traditionally use derogation to suppress mass riots and coup attempts and enforce quarantine restrictions during a pandemic. In this context, a full-scale military invasion is an adequate basis for derogation. Procedural requirements include submitting a request for derogation to an authorized person. The analysis of the ECtHR jurisprudence proves that even the grounds for derogation and its formal announcement do not lead to automatic approval of cases of interference with freedom of expression. On the other hand, the Court believes that acute social events (for example, riots, rebellions, attempted military coups) require a conscientious national dialogue, which is impossible without the activity of mass media and freedom of the press.

In the conditions of war or other crises, the state is entrusted, among other things, with the duty to protect journalists from threats to their lives and health and provide them with opportunities to inform the population about the situation that has developed promptly. According to the ECtHR and other judicial institutions, a declaration of derogation does not relieve the state of its obligations to ensure informational pluralism and to carry out only necessary and proportionate interventions in the activities of the media.

In the ECtHR jurisprudence, it has been impossible to single out the criteria for determining the proportionality of the interference with freedom of expression. However, we assume such criteria can be:

A) The sphere of social relations to which the information belongs. In particular, information about threats to human life and health, expected shelling, air danger, species, or air pollution should be distributed without restrictions, but the source of such information should be authorized persons. In contrast, information related to defense capabilities cannot be disseminated in real-time.

B) Primary source of information. The criteria suggest there should be no restrictions on distributing messages from the authorized person (the press secretary or the head of the state body; the data was obtained at the official request of a journalist, etc.).

C) Credibility of information. The distribution of reliable news and messages (if the rules established by criterion A are followed) should not be restricted. Instead, the spread of rumors, unreliable information, and disinformation not only does not help to increase the defense capability but also must entail responsibility.

D) Consequences of dissemination of information. Suppose adverse effects have occurred due to careless or deliberate dissemination of information (damage to property, life, or the health of people, etc.). In that case, there are grounds to bring the journalist/media to justice. Nevertheless, a direct cause-and-effect relationship between the dissemination of information and negative consequences must be proven. The “negative consequences” concept cannot be interpreted broadly and should include only direct and actual harm.

E) Subject of information dissemination. The influence of information spread by official media is more significant than the same information distributed by private individuals. The large audience of the media and public trust entails conducting a more thorough data verification and ensuring its balanced presentation. A separate aspect worth paying attention to is the functioning of anonymous channels/blogs. Anonymity in such a case can protect against abuse by the authorities and spread harmful rumors and panic.

F) Method of dissemination of information. Social networks and Internet technologies contribute to the rapid dissemination of information. Therefore, the responsibility for spreading news through the network should carry a stricter burden than producing leaflets, inscriptions on the walls, pasting announcements, etc.

The above criteria can be used cumulatively to assess the proportionality and find the balance of protection and interference with freedom of expression during war or another public emergency threatening the nation's life.



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