



SERIES:  
Freedom  
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**FREEDOM  
OF EXPRESSION.  
INTERNATIONAL STANDARDS,  
PRACTICE OF THE EUROPEAN  
COURT OF HUMAN RIGHTS,  
AND NATIONAL LEGISLATION  
OF UKRAINE UNDER MARTIAL LAW**

Kyiv, October 2022





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# Freedom of Expression. International Standards, Practice of the European Court of Human Rights, and National Legislation of Ukraine under Martial Law

Kyiv, October 2022

## **Freedom of expression. International Standards, Practice of the European Court of Human Rights, and National Legislation of Ukraine under Martial Law.** Overview of Legal Approaches. Series: Freedom of Speech and National Security. – Kyiv, UCIPR, 2022. – 25 p.

This analytical overview contains conclusions about Ukraine's performance of its commitments to guarantee the right to freedom of expression under the legal regime of martial law. The overview, based on the judgements and approaches of the European Court of Human Rights, estimates a degree of conformity in legislative regulation of state actions in the area of guarantees for freedom of speech and expression with the Constitution of Ukraine and approaches prescribed by international legal documents. The overview is part of efforts made by non-governmental experts in Ukraine to develop policy aimed at establishing democratic values within the context of armed aggression against the country. The conclusions of the overview may be used to monitor changes and amendments to legislation as well as the standards and development of court practice.

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## INTRODUCTION

## Introduction

On 24 February 2022, the Russian Federation launched its large-scale military invasion of Ukraine and, for more than six months, has been taking aggressive military actions against Ukraine aiming to annihilate the Ukrainian people and invade Ukrainian territory.

Therefore, Ukraine has introduced the legal regime of martial law, which restricts human rights and freedoms, including the right to freedom of speech, and has made a range of changes and amendments to its legislation that directly impact freedom of expression.

In view of these facts, there is a need to analyse the above-mentioned legislative changes and amendments, as well as administrative and court practice on conformity of these changes and amendments with international standards on freedom of expression during armed conflicts.

### **In the text, the following abbreviations are used:**

**ECHR** or **Convention** – the European Convention on Human Rights

**ECtHR** – the European Court of Human Rights

**AFU** – the Armed Forces of Ukraine

**CCU** – the Criminal Code of Ukraine

**CUAO** – the Code of Ukraine on Administrative Offences

**ICCPR** – the International Covenant on Civil and Political Rights

**PKK** – the Kurdistan Workers' Party

## 1. THE RIGHT TO FREEDOM OF EXPRESSION AS A FUNDAMENTAL HUMAN RIGHT

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# 1. The right to freedom of expression as a fundamental human right

The right to freedom of expression is one of the fundamental human rights without which a democratic state cannot function. It is guaranteed by [Article 19](#) of the International Covenant on Civil and Political Rights, [Article 10](#) of the European Convention on Human Rights and other international documents.

The right to freedom of expression includes:

- a) freedom to hold opinions;
- b) freedom to seek, receive and impart information and ideas of all kinds without interference by public authority and regardless of frontiers (freedom of information);
- c) freedom to individually choose the form of expression and opinion (oral, writing, the form of art, sign language, etc.).

The right to freedom to hold opinions is not subject to any conditions and restrictions. No person may be forced to change their opinion or position<sup>1</sup>. Meanwhile, two other freedoms – freedom to seek, receive and impart information and ideas and freedom to choose the form of expression – may be restricted in the conditions described below.

**Everyone** is guaranteed to have the above-mentioned rights. Thus, they apply to natural persons and legal entities including mass media, journalists, politicians, businesspeople, civil activists and ordinary citizens.

The right to freedom of expression is not absolute and may be restricted according to [Article 10.2](#) of the Convention when three conditions exist:

- a) the restriction must be prescribed by a **law** that satisfies accessibility and quality requirements<sup>2</sup>;
- b) the restriction is introduced to gain a **legitimate aim** defined by Article 10 of the Convention;
- c) the restriction must be **necessary in a democratic society**, namely:
  - 1. an **urgent public need** must exist in order to introduce the restriction (context, public interest, a person's status and influence, etc. are assessed);
  - 2. the restriction must be **proportionate to its legitimate aim** (it is necessary to find the respective balance between the right which the restriction is designed to protect and the right to freedom of expression);
  - 3. grounds for the restrictions must be appropriate and sufficient (reasonable justification of decisions made).

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1 See, among others, Case of Shvydka v. Ukraine, Judgement, Strasbourg, 30 October 2014, § 41. Website of the Verkhovna Rada of Ukraine [https://zakon.rada.gov.ua/laws/show/974\\_a40#Text](https://zakon.rada.gov.ua/laws/show/974_a40#Text)

2 See, among others, Case of Editorial Board of Pravoye Delo and Shtekel v. Ukraine, Judgement, Strasbourg, 5 May 2011. Website of the Verkhovna Rada of Ukraine [https://zakon.rada.gov.ua/laws/show/974\\_807#Text](https://zakon.rada.gov.ua/laws/show/974_807#Text)

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## 1. THE RIGHT TO FREEDOM OF EXPRESSION AS A FUNDAMENTAL HUMAN RIGHT

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Article 10.2 of the Convention (as well as Article 34 of the Constitution of Ukraine) classifies, *inter alia*, the following interests as legitimate aims of restriction on freedom of expression:

- **national security,**
- **territorial integrity,**
- **public safety.**

Protection of these interests takes on particular significance during armed conflicts.

[Article 2](#) of the Constitution of Ukraine prescribes that the sovereignty of Ukraine shall **extend throughout its entire territory**. Ukraine is a unitary state. **The territory of Ukraine within its present borders is indivisible and inviolable.**

[Article 1](#) of the Law of Ukraine “On National Security of Ukraine” defines the terms “public safety and order”, “national security of Ukraine” and “national interests of Ukraine”<sup>3</sup>.

It is unquestionable that there is legitimate interest for restricting freedom of expression in Ukraine after 24 February 2022.

Meanwhile, the issues of adherence to the principle of legality (taking into account its interpretation by the European Court of Human Rights) when freedom of expression is restricted under martial law, and of “necessity in a democratic society”, require special attention.

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<sup>3</sup> The national security of Ukraine means protecting state sovereignty, territorial integrity, democratic constitutional order and other national interests of Ukraine against real and potential threats.



## 2. CRITERIA FOR BALANCING THE RIGHT TO FREEDOM OF SPEECH AND THE INTERESTS OF NATIONAL SECURITY, TERRITORIAL INTEGRITY AND PUBLIC SAFETY

# 2. Criteria for balancing the right to freedom of speech and the interests of national security, territorial integrity and public safety

Analysis of the case law of the European Court of Human Rights makes it possible to distinguish the following key criteria which are used to establish a balance between the right to freedom of speech and the interests of national security, territorial integrity and public safety:

1. **nature of the expression.** In particular, whether incitements to violence are spread, hate speech is used, ideas of terrorism are supported, and violence, torture, capital punishment etc. are justified<sup>4</sup>;
2. **context in which the expression has been made** (the general publication rather than part of the context<sup>5</sup> should be analysed);
3. **context where the expression has taken place** (existing public tension, unrest, armed conflict, etc<sup>6</sup>);
4. **real or potential harm caused by the expression**<sup>7</sup>;
5. **degree of influence of the author of the expression**<sup>8</sup>;
6. **medium of information dissemination and impact on the audience**<sup>9</sup>;
7. **nature and severity of the punishment**<sup>10</sup>.

In addition, in its judgements, the ECtHR points out that the concepts of “national security” and “public order” must be construed strictly to be used **as grounds for restricting** freedom of expression.

Considering the meaning of the concept of “prevention of disorder”, the European Court of Human Rights noted, *inter alia*, that since the words used in the English text appear to be only capable of a narrower meaning, the expressions “the prevention of disorder” and “*la défense de l'ordre*” in the English and

4 See Case of Perinçek v. Switzerland (Application no. 27510/08), Judgement, Strasbourg, 15 October 2015, <https://hudoc.echr.coe.int/eng?i=001-15823>; Case Zana v. Turkey (Application no. 69/1996/688/880), Judgement, 25.11.1997, <https://hudoc.echr.coe.int/eng?i=001-58115> <https://hudoc.echr.coe.int/eng?i=001-58115>; Case of Sürek v. Turkey (no. 1) (Application no. 26682/95), Judgement, Strasbourg, 8 July 1999, <https://hudoc.echr.coe.int/eng?i=001-58279>

5 See, among others, Case of Savva Terentyev v. Russia (Application no. 10692/09), Judgement, Strasbourg, 28 August 2018, § 8 70–72, <https://hudoc.echr.coe.int/eng?i=001-185307>

6 See, among others, Case of Zana v. Turkey (Application no. 69/1996/688/880), Judgement cited above.

7 See, among others, Case of Sürek v. Turkey (no. 1) (Application no. 26682/95), Judgement, Strasbourg, 8 July 1999, <https://hudoc.echr.coe.int/eng?i=001-58279>

8 See, among others, Case Zana v. Turkey (Application no. 69/1996/688/880), Judgement, 25.11.1997, <https://hudoc.echr.coe.int/eng?i=001-58115>

9 See, among others, Case of Stomakhin v. Russia (Application no. 52273/07), Judgement, Strasbourg, 9 May 2018, <https://hudoc.echr.coe.int/eng?i=001-182731>

10 See Case of Dmitrijevskiy v. Russia (Application no. 42168/06), Judgement, Strasbourg, <https://hudoc.echr.coe.int/eng?i=001-177214>

### 3. ABUSE OF THE RIGHT TO FREEDOM OF SPEECH

French texts of Article 10 § 2 can best be reconciled by being read as having **the narrower meaning**<sup>11</sup>.

>> **The concepts of “national security” and “public order” must be construed strictly to be used as grounds for restricting freedom of expression.**

It should be remembered that limits for acceptable criticism of government are considered among the widest limits, as government is dominant in society.

## 3. Abuse of the right to freedom of speech

It is worth noting that [Article 20](#) of the ICCPR prohibits any propaganda of war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. [Article 17](#) of the Convention prohibits the destruction of rights guaranteed thereby, especially the right to freedom of expression<sup>12</sup>.

In its judgement in the Case of [Roj TV A/S v. Denmark](#), the European Court of Human Rights described the principles of applying Article 17 of the Convention in cases related to freedom of expression, namely<sup>13</sup>:

- *...freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”. As enshrined in Article 10, freedom of expression is subject to exceptions which must, however, be construed strictly, and the need for any restrictions must be established convincingly...;*
- *Although the press must not overstep certain bounds, regarding in particular protection of the reputation and rights of others, its task is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. The task of imparting information necessarily includes, however, “duties and responsibilities”, as well as limits which the press must impose on itself spontaneously...;*
- *Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role as “public watchdog”...;*

<sup>11</sup> See Case of [Perinçek v. Switzerland](#) (Application no. 27510/08), Judgement, Strasbourg, 15 October 2015, <https://hudoc.echr.coe.int/eng?i=001-158235>

<sup>12</sup> See, among others, Freedom of Speech under Martial Law. Overview of Practice of the European Court of Human Rights. Burmahin O.O., Opryshko L.V., Opryshko D.I. Kyiv, Human Rights Platform NGO, 2019, p. 112. [https://www.ppl.org.ua/wp-content/uploads/2019/11/Draft\\_Chapter\\_on\\_ECHR\\_preview.pdf](https://www.ppl.org.ua/wp-content/uploads/2019/11/Draft_Chapter_on_ECHR_preview.pdf)

<sup>13</sup> See Case of [ROJ TV A/S v. Denmark](#) (Application no. 24683/14) at <https://hudoc.echr.coe.int/eng?i=001-183289>

- *The purpose of Article 17 [of the Convention], in so far as it refers to groups or to individuals, is to make it impossible for them to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention; “... therefore, no person may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms ...”;*
- *Speech that is incompatible with the values proclaimed and guaranteed by the Convention is not protected by Article 10 by virtue of Article 17 of the Convention... The decisive point when assessing whether statements, verbal or non-verbal, are removed from the protection of Article 10 by Article 17, is whether the statements are directed against the Convention’s underlying values, for example by stirring up hatred or violence, and whether by making the statement, the author attempted to rely on the Convention to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it...;*
- *The Court has applied Article 17, inter alia, in Garaudy v. France... and found the applicant’s Article 10 complaint incompatible ratione materiae with the provisions of the Convention. The applicant was the author of a book that systematically denied crimes perpetrated by the Nazis against the Jewish community. The Court based its conclusion on the observation that the main content and general tenor of the applicant’s book, and thus its aim, were markedly revisionist and therefore ran counter to the fundamental values of the Convention and of democracy, namely justice and peace, and inferred from that observation that he had attempted to deflect Article 10 from its real purpose by using his right to freedom of expression to ends which were contrary to the text and spirit of the Convention...;*
- *The Court reached the same conclusion in, for example, Norwood v. the United Kingdom and Pavel Ivanov v. Russia [20 February 2007], which concerned the use of freedom of expression for Islamophobic and anti-Semitic purposes respectively.*
- *In Orban and Others v. France [15 January 2005] the Court noted that statements pursuing the unequivocal aim of justifying war crimes such as torture or summary executions likewise amounted to deflecting Article 10 from its real purpose.*
- *In Hizb ut-Tahrir and Others v. Germany [12 June 2012], ... the Court observed that the Federal Administrative Court, having carefully analysed a substantial number of written statements published in magazine articles, flyers and transcripts of public statements concluded that the first applicant, the association Hizb ut-Tahrir, did not only deny the State of Israel’s right to exist, but called for the violent destruction of this State and for the banishment and killing of its inhabitants, and that the propagation of these aims was one of the association’s main concerns. The Court observes that this assessment was based on a number of articles indisputably published by the first applicant and on two public statements made by the second applicant, who acted as the first applicant’s representative in the proceedings. The Court noted, in particular, that the second applicant, in the above-mentioned statements, repeatedly justified suicide attacks in which civilians were killed in Israel and that neither the first nor the second applicant distanced themselves from this stance during the proceedings before the Court. Having regard to the above, the Court considered that the first applicant attempted to deflect Article 11 of the Convention from its real purpose by employing this right for ends which are clearly contrary to the values of the Convention, notably the commitment to the peaceful settlement of international conflicts and to the sanctity of human life. Consequently, the Court found that by reason of Article 17 of the Convention, the first applicant could not benefit from the protection afforded by Article 11 of the Convention (or Article 10);*
- *...in Kasymakhunov and Saybatalov v Russia [14 March 2013] the Court found that the dissemination of the political ideas of Hizb ut-Tahrir by the applicants clearly constituted an activity falling within the scope of Article 17 of the Convention.*

### 3. ABUSE OF THE RIGHT TO FREEDOM OF SPEECH

- ...decision, *Belkacem v. Belgium* ((dec.), [20 July 2017], concerns the conviction of the applicant, the leader and spokesperson of the organisation “Sharia4Belgium”, which was dissolved in 2012, for incitement to discrimination, hatred and violence on account of remarks he made in YouTube videos concerning non-Muslim groups and Sharia. The Court noted that in his remarks the applicant had called on viewers to overpower non-Muslims, teach them a lesson and fight them. The Court was in no doubt as to the markedly hateful nature of the applicant’s views, and agreed with the domestic courts’ finding that the applicant, through his recordings, had sought to stir up hatred, discrimination and violence towards all non-Muslims. In the Court’s view, such a general and vehement attack was incompatible with the values of tolerance, social peace and non-discrimination underlying the Convention. With reference to the remarks concerning Sharia, the Court observed that it had previously ruled that defending Sharia while calling for violence to establish it could be regarded as “hate speech” [...] and that each Contracting State<sup>14</sup> was entitled to oppose political movements based on religious fundamentalism.

In the Case of [Roj TV A/S v. Denmark](#), recognising that the application was incompatible *ratione materiae* with the provisions of the Convention, the ECtHR recalled that Article 17 of the Convention was only applicable on an exceptional basis and in extreme cases. The ECtHR upheld the conclusion of the City Court that had found that one-sided coverage with repetitive incitement to participate in fights and actions, incitement to join the organisation/the guerrillas, and the portrayal of deceased guerrilla members as heroes, had amounted to propaganda for the PKK, a terrorist organisation, and that it could have not been considered only a declaration of sympathy. The ECtHR also took into account the fact that the applicant TV company had been financed to a significant extent by the PKK in the years 2006 to 2010, and the programmes’ content, presentation and connection had concerned promotion of the PKK’s terror operation.

Consequently, the ECtHR firstly took into account the nature of the impugned programmes, which included incitement to violence and support for terrorist activity; secondly, the fact of their wide dissemination (the views expressed therein were disseminated to a wide audience through television broadcasting), and thirdly, the direct relation of the programmes to an issue that is paramount in modern European society – the prevention of terrorism and terrorist-related expressions advocating the use of violence.

In view of this, the ECtHR decided that the applicant company’s complaint did not, by virtue of Article 17 of the Convention, attract the protection afforded by Article 10.

In the context of counteraction of the dissemination of hate speech, it is also important to mention [ECRI General Policy Recommendation N°15 on Combating Hate Speech](#) adopted on 8 December 2015 and, *inter alia*, its paragraph 10 which recommends that the governments of Member States:

*“take appropriate and effective action against the use, in a public context, of hate speech which is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it through the use of the criminal law provided that no other, less restrictive, measure would be effective and the right to freedom of expression and opinion is respected, and accordingly:*

*a. ensure that the offences are clearly defined and take due account of the need for a criminal sanction to be applied;*

- b. ensure that the scope of these offences is defined in a manner that permits their application to keep pace with technological developments;*
- c. ensure that prosecutions for these offences are brought on a non-discriminatory basis and are not used in order to suppress criticism of official policies, political opposition or religious beliefs;*
- d. ensure the effective participation of those targeted by hate speech in the relevant proceedings;*
- e. provide penalties for these offences that take account both of the serious consequences of hate speech and the need for a proportionate response...”*

Summarising the above, it is important to stress that the right to freedom of expression is a basic right for the existence and development of a democratic society. That is why it provides for the possibility of disseminating not only information or ideas that are favourably received or regarded as a matter of indifference, but also those that offend, shock or disturb.

However, criticism and offence should be clearly differentiated. The causing of offence may fall outside the protection of freedom of expression if it amounts to wanton denigration, for example where the sole intent of the offensive statement is to insult a person. However, the use of vulgar phrases in itself is not decisive in the assessment of an offensive expression, as it may well merely serve stylistic purposes. In this case, such statements are the form of expression and, though they can be considered insulting they, together with the content, are protected by the right to freedom of speech<sup>15</sup>.

It is also worth stressing that the right to freedom of expression must not be used to harm human rights and freedoms, among others, to propagate war, stir up hatred and violence, disseminate ideas of terrorism and justify terrorist activities, war crimes, etc.

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**The right to freedom of expression must not be used to harm human rights and freedoms, among others, to propagate war, stir up hatred and violence, disseminate ideas of terrorism and justify terrorist activities, war crimes, etc.**

<<

Any abuse of this right is a basis for applying enforcement actions by the state, including criminal liability, to offenders. Meanwhile, enforcement actions must be clear and specific, be construed strictly, be necessary in a democratic society and must not lead to excessive restriction of public debates on any issues of public interest.

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**15** See, among others, Case of Editorial Board of Grivna Newspaper v. Ukraine. (Application no. 41214/08), Judgement, Strasbourg, 16 April 2019, § 94. Website of the Verkhovna Rada of Ukraine [https://zakon.rada.gov.ua/laws/show/974\\_d97#n147](https://zakon.rada.gov.ua/laws/show/974_d97#n147)

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#### 4. GENERAL OVERVIEW OF UKRAINIAN LEGISLATION ON FREEDOM OF EXPRESSION PRIOR TO RUSSIA'S LARGE-SCALE INVASION OF UKRAINE ON 24 FEBRUARY 2022

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## 4. General overview of Ukrainian legislation on freedom of expression prior to Russia's large-scale invasion of Ukraine on 24 February 2022

[Article 34](#) of the Constitution of Ukraine guarantees that everyone has the right to freedom of thought and speech, and to free expression of views and beliefs. It provides that everyone has the right to freely collect, store, use, and disseminate information by oral, written, or other means at his/her discretion. Meanwhile, Article 34 regulates conditions for restricting the right to freedom of expression. Among other things, it prescribes that the exercise of such rights may be restricted by law in the interests of national security, territorial integrity, or public order, for the purposes of preventing disturbances or crimes, protecting the health of the population, protecting the reputation or rights of other persons, preventing the publication of information received confidentially, or supporting the authority and impartiality of justice.

[Article 15](#) of the Constitution prohibits censorship, and [Article 50](#) of the Constitution guarantees that everyone has the right of free access to information about the environmental situation, the quality of foodstuffs and consumer goods, as well as the right to disseminate such information. No one may make such information secret.

A range of other articles of the Constitution set rules that create grounds for restricting freedom of expression. [Article 17](#) states that protecting the sovereignty and territorial integrity of Ukraine, ensuring its economic and information security are the most important functions of the State and a matter of concern for all the Ukrainian people; [Article 37](#) prohibits the foundation and activity of political parties and public associations if their programme goals or actions are aimed at the liquidation of the independence of Ukraine, changing the constitutional order by force, violation of the sovereignty and territorial integrity of the State, undermining national security, unlawful seizure of state power, the propaganda of war or violence, incitement of interethnic, racial, or religious hatred, or infringement of human rights and freedoms or the health of the population.

The Law of Ukraine "[On Information](#)" regulates issues related to the formation, collection, receipt, storage, use, dissemination, protection and security of information. [Section III](#) of the law is dedicated to the activities of journalists, mass media and their employees. [Article 24](#) of the law prohibits censorship and interference with the professional activities of journalists and mass media.

[Article 29](#) of the Law of Ukraine "On Information" guarantees the right to disseminate publicly necessary information, and [Article 30](#) sets the basis for absolving from responsibility for expressing value judgements. A value judgement, the law states, is not subject to contradiction and proof of its truthfulness.

In Ukraine, a range of laws regulates the activities of particular types of mass media. These are, among others, the Laws of Ukraine "[On Television and Radio Broadcasting](#)", "[On Printed Mass Media \(Press\) in Ukraine](#)" and "[On Information Agencies](#)". Each of them, among other things, prohibits the use of mass media:

- to incite seizure of power, or change of the constitutional order or territorial integrity of Ukraine by force;
- to propagate war, violence and brutality;
- to stir up racial, national, religious hatred;
- to disseminate pornography, including for the purposes of acts of terrorism and other illegal actions;



- to propagate communist and/or national socialist (Nazi) totalitarian regimes and their symbols;
- to popularise or propagate the aggressor state and its authorities, representatives of the authorities of the aggressor state and their actions that form a positive image of the aggressor state, justify the occupation of Ukrainian territories and recognise it as legitimate;
- to interfere in personal and family life unless prescribed by legislation;
- to cause harm to an individual's honour and dignity;
- to disclose any information that can cause the identity of a juvenile offender to be revealed without his/her consent and his/her legal representative's consent.

The laws mentioned above contain a range of other restrictions that, among others, take into account the characteristics of each type of mass media.

[Article 15](#) of the Law of Ukraine “[On State Support of Mass Media and Social Protection of Journalists](#)” places a range of obligations on journalists and other participants of a creative team who work in locations of armed conflict, locations of acts of terrorism and at scenes of the liquidation of dangerous criminal gangs. They are obliged to adhere to requirements on non-disclosure of the plans of special units, and of information that constitutes a secret of pre-trial investigation; to prevent the real propaganda of actions, acts and statements of terrorists and other criminal gangs, specially intended for mass media; not to appear as an arbiter; not to interfere in an incident, and not to create artificial psychological tension in society.

In addition, paragraphs 8, 9, 11 and 12 of Article 8 of the Law of Ukraine “[On the Legal Regime of Martial Law](#)” allow military command, along with military administrations (if established), independently or with the involvement of executive authorities, the Council of Ministers of the Autonomous Republic of Crimea, and local self-governing authorities, within temporary restrictions on constitutional human rights and freedoms, citizens' rights, and rights and legal interests of legal entities provided for by Decree of the President of Ukraine “On the Imposition of Martial Law”, to introduce and take, *inter alia*, the following measures of the legal regime of martial law:

- 8) *to prohibit holding peaceful assemblies, rallies, marches and demonstrations, other mass events;*
- 9) *to raise, in the manner prescribed by the Constitution and laws of Ukraine, the issue of prohibiting the activities of political parties and public associations if they are aimed at eliminating Ukraine's independence; changing the constitutional order by force; violating the sovereignty and territorial integrity of the state; undermining its security; seizing power in an illegal way; propagating war, violence, incitement of interethnic, racial, religious hatred; attacking sustainability of critical infrastructure, human rights and freedoms, public health;*
- 11) **to regulate in the manner prescribed by the Cabinet of Ministers of Ukraine the work of suppliers of electronic communication networks and/or services, printing companies, publishers, television and radio organisations, television and radio centres, and other enterprises, institutions, cultural organisations and institutions, mass media, and to use local radio stations, television centres and printing houses for military needs and for conducting awareness-raising activities among the troops and the population; to prohibit the operation of two-way radios for personal and collective use and the transmission of information via computer networks;**
- 12) *in case of violation of the requirements or non-compliance with the measures of martial law, to confiscate electronic communication equipment, television, video and audio equipment, computers and, if necessary, other technical means of communication from enterprises, institutions and organisations of all forms of ownership and from individual citizens.*

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## 5. DEROGATION FROM OBLIGATIONS ON FREEDOM OF SPEECH

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The existing legal and regulatory framework of Ukraine predominantly complies with key international standards on freedom of expression and guarantees free expression of opinions and beliefs, and public discussions on all issues of high public interest.

# 5. Derogation from obligations on freedom of speech

The Decree of the President of Ukraine [No. 64/2022](#) “On Imposition of Martial Law in Ukraine” dated 24 February 2022, approved by the Law of Ukraine [No. 2102-IX](#) dated 24 February 2022, imposed martial law in Ukraine, which has been extended multiple times. Martial law was still effective when this report<sup>16</sup> was being prepared. The above-mentioned document **allows restriction of a range of constitutional citizens’ and human rights and freedoms**, including the right to freedom of expression, temporarily, for the period of the legal regime of martial law.

In imposing martial law, the State of Ukraine partially derogated from its international obligations on ensuring human rights on the basis of [Article 15](#) of the Convention. The derogation by the State from its international legal obligations concerns, in particular, Articles 9, 10 and 11 of the European Convention on Human Rights<sup>17</sup>.

In view of this, it is important to analyse whether the derogation from the obligations has resulted in taking “measures... **to the extent strictly required by the exigencies of the situation...**” or whether the State has crossed the line.

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**Has the partial derogation from the obligations resulted in measures taken by the State to the extent strictly required by the exigencies of the situation, or has the State crossed the line?**

**The respective assessment should take into account the nature of the rights harmed, circumstances causing the derogation from the obligations, and their duration.**

The respective assessment should take account of the nature of rights harmed, circumstances causing the derogation from the obligations, and their duration. Specifically, the following factors are taken into account:

- Would ordinary legislation be adequate to cope with a threat caused by social danger?
- Do the measures really address the emergency?
- Have the measures been applied, justifying the purposes of their imposition?

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**16** 20 November 2022.

**17** See, among others, Note verbale dated 02.03.2022 <https://rm.coe.int/0900001680a5b0b0> and Note verbale dated 07.06.2022. <https://rm.coe.int/0900001680a6ccc2>



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- Is the derogation from the obligations limited in scope and are reasons specified in its rationale?
  - Is the need for the derogation from the obligations constantly reviewed?
  - Have the measures taken been mitigated?
  - Have any guarantees against abuse been provided?
  - How important is the threatened right and the wider purpose of judicial control over interference in the right?
  - Is judicial control over the measures practicable?
  - Are the measures proportionate, have they caused any unjustified discrimination?
  - Is court interpretation that contradicts effective legislative provisions in breach of legal certainty?
  - Opinions of any national judges who have considered the issue: if the highest domestic court in a Contracting State has reached the conclusion that the measures were not strictly required, the ECtHR will be justified in reaching a contrary conclusion only if satisfied that the national court had misinterpreted or misapplied Article 15 or the Court's jurisprudence under that article, or reached a conclusion which was manifestly unreasonable<sup>18</sup>.

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**18** Guide on Article 15 of the European Convention on Human Rights. Derogation in time of emergency. Council of Europe/European Court of Human Rights. Updated on 31 August 2022, § 24. [https://www.echr.coe.int/documents/Guide\\_Art\\_15\\_ENG.pdf](https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf)

## 6. CHANGES TO UKRAINIAN LEGISLATION MADE UNDER THE LEGAL REGIME OF MARTIAL LAW THAT IMPACT FREEDOM OF EXPRESSION. ANALYSIS OF RESPECTIVE COURT PRACTICE

## 6. Changes to Ukrainian legislation made under the legal regime of martial law that impact freedom of expression. Analysis of respective court practice

### Imposition of martial law and introduction of a unified information policy

Within the legal regime of martial law, a range of changes impacting freedom of speech has been made to Ukrainian legislation.

a. In particular, the Decree of the President of Ukraine [No. 152/2022 dated 19 March 2022](#) brought into effect the decision of the National Security and Defence Council dated 18 March 2022 “[On Implementation of a Unified Information Policy under Martial Law](#)” launching a unified information policy in Ukraine by uniting all nationwide TV channels that predominantly broadcast information and/or analytical programmes into a single information platform of strategic communication: the 24-hour information marathon “United News #UAtogether”.

The above-mentioned decision does not define what such unification calls for, and does not determine sanctions for failure to implement the decision.

The National Council on Television and Radio Broadcasting is recommended to take measures aimed at implementing the above-mentioned decree.

b. In addition, a special regime of operation of Zeonbud Limited Liability Company, which is subordinate to Broadcasting, Radiocommunications & Television Concern (BRT Concern) was imposed for the period of martial law<sup>19</sup>.

Based on mass media information, on 04 April 2022, Broadcasting, Radiocommunications & Television Concern discontinued digital broadcasting of the TV channels “Espresso”, “Priamyi” and “5 Kanal”, despite them having effective licences for digital broadcasting. As of September 2022, digital broadcasting of these TV channels had not been renewed. The actions of BRT Concern subordinated to the State Service of Special Communications and Information Protection of Ukraine (SSSCIP) **are of an arbitrary nature**, in view of the fact that no decision on discontinuing digital broadcasting of the channels has been published regardless of high public resonance (and these are grounds to doubt that such a written document exists). Thus, the reasons for such measures taken by the authority are unknown.

<sup>19</sup> See the decision of the National Security and Defence Council dated 18 March 2022 “On Neutralisation of Threats to the Information Security of the State” brought into effect by the Decree of the President of Ukraine No. 151/2022 dated 19 March 2022 .

The State Service of Special Communications and Information Protection of Ukraine<sup>20</sup> explained that digital broadcasting of “Espresso”, “Priamyyi” and “5 Kanal” was discontinued in compliance with the Decree of the President of Ukraine on broadcasting the unified marathon and on the grounds of the legal regime of martial law, noting that it was governed by laws and regulations, organisational and administrative documents with limited access.

Analysed information from open sources suggests that digital broadcasting of the above-mentioned channels has been discontinued illegally.

BRT Concern has no powers to control the information content of TV channels that broadcast information and/or analytical programmes. The SSSCIP also has no such powers. Thus, these institutions have no competence to cancel digital broadcasting of any channel. Even if BRT Concern and the SSSCIP were governed by laws and regulations with limited access, decisions adopted in such a way do not comply with the principle “set by law” as neither the respective law/regulation nor the decision restricting the right to freedom of speech has been published, i.e. it is not available to the public. For these purposes, such actions of the authority cannot be deemed foreseeable.

Meanwhile, the National Council on Television and Radio Broadcasting, which has the right to control the content of programmes, stated that it had not adopted any decision on discontinuing digital broadcasting of “Espresso”, “Priamyyi” and “5 Kanal”, and that it had no such powers<sup>21</sup>.

In view of the above, there are grounds to deem that cancelling digital broadcasting of the said channels is not underpinned by law. The public has not received any information that would demonstrate that such actions of the authority are necessary in a democratic society, as the reasons for discontinuing digital broadcasting of these TV channels are unknown.

The derogation by Ukraine from its obligations under the Convention does not change the conclusions made, as there are no facts which would demonstrate that the exigencies of the situation required the authority to take those actions in relation to the said TV channels.

### **Prohibition of justification of armed aggression and glorification of its participants**

After martial law was imposed, the Laws of Ukraine “On Printed Mass Media (Press) in Ukraine”, “On Television and Radio Broadcasting”, and “On Protection of Public Morals” implemented a provision prohibiting justifying Russia’s armed aggression against Ukraine, recognising the aggression as legitimate or denying the aggression, and glorifying participants of the aggression. In addition, grounds for prohibiting the activities of political parties and civil associations were clarified by making changes to the

20 The reply of the State Service of Special Communications and Information Protection of Ukraine to the request from Detector Media Civil Organisation. 09.05.2022 <https://detector.media/infospace/article/199070/2022-05-09-derzhspetsvvyazku-tsyfrovyi-efir-espresso-pryamogo-ta-5-kanalu-vidklyuchyly-na-vykonannya-rishennya-rnbo/>

21 Communication of the press service of the National Council on Television and Radio Broadcasting, Ukrinform, 21.10.2022. [https://www.ukrinform.ua/rubric-society/3449500-nacrada-kaze-so-ne-uhvaluvala-risenna-pro-vimknenna-5-kanalu-pramogo-ta-espresso.html?fbclid=IwAR2lamD2g5-IGLgDFt\\_Wpw9sKnHE2VCmFvZiDbwstojCKI7SN9lXpb9Yihs](https://www.ukrinform.ua/rubric-society/3449500-nacrada-kaze-so-ne-uhvaluvala-risenna-pro-vimknenna-5-kanalu-pramogo-ta-espresso.html?fbclid=IwAR2lamD2g5-IGLgDFt_Wpw9sKnHE2VCmFvZiDbwstojCKI7SN9lXpb9Yihs)

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Laws of Ukraine “On political Parties” and “On Civil Associations” respectively<sup>22</sup>. The Criminal Code of Ukraine was supplemented with Articles [111–1](#) and [436–2](#) that provide for criminal liability for justifying Russia’s armed aggression against Ukraine and glorifying its participants.

The explanatory note to the draft law offering to supplement the Criminal Code of Ukraine with Article 436–2 states that such a step is necessary to counteract the adverse information influence of the Russian Federation, and that the said changes and amendments are aimed at “strengthening criminal liability for the production and dissemination of banned information products, predominantly those of a **propaganda** nature”<sup>23</sup>.

Supplementing the Criminal Code of Ukraine with Article 111–1, as specified in the said explanatory note to the draft law, aims to “fix a fair punishment for persons who collaborate with the aggressor state, and limit access for such persons to positions related to functions of the state or local self-governments”<sup>24</sup>.

However, a war on dissent, namely against the victims of Russian hostile propaganda who have expressed their beliefs publicly for any reason, can be a side effect of realising the said legal provisions<sup>25</sup>. Applying criminal punishment to such persons can hardly be justified by the purposes for which the said legislative changes and amendments are made.

In addition, the Law of Ukraine “[On prohibition of propaganda of the Russian Nazi totalitarian regime, the armed aggression of the Russian Federation as an aggressor state against Ukraine, symbols of the military invasion of Ukraine by the Russian Nazi totalitarian regime](#)”<sup>26</sup> prohibiting the use of the symbols of the military invasion of Ukraine by the Russian Federation, was adopted in May 2022. The law classifies propaganda of the Russian Nazi totalitarian regime and armed aggression by the Russian Federation against Ukraine as terrorist activities.

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- 22 Law of Ukraine No. 2109-IX “On making changes and amendments to certain laws of Ukraine prohibiting the production and dissemination of information products aimed at propagating actions of the aggressor state” dated 03.03.2022. Website of the Verkhovna Rada of Ukraine <https://zakon.rada.gov.ua/laws/show/2109-20#Text>
- 23 See the explanatory note to the draft Law of Ukraine “On making changes and amendments to certain laws of Ukraine (on strengthening criminal liability for the production and dissemination of banned information products)” dated 18.02.2021. Website of the Verkhovna Rada of Ukraine [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_2?pf3516=5102&skl=10](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=5102&skl=10)
- 24 See the explanatory note to the draft Law of Ukraine “On making changes and amendments to certain legislative acts (on introducing criminal liability for collaboration)”. Website of the Verkhovna Rada of Ukraine [http://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_2?pf3516=5144&skl=10](http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=5144&skl=10)
- 25 See, for example, the judgement of the Novohrad-Volynskyi City District Court in Zhytomyr Oblast dated 19.08.2022 in case No. 285/3974/22, the Unified State Register of Court Decisions, <https://reyestr.court.gov.ua/Review/105837705>, and the judgement of the Shyshatsk District Court in Poltava Oblast dated 15.09.2022 in case No. 88/556/22, the Unified State Register of Court Decisions, <https://reyestr.court.gov.ua/Review/106249152>
- 26 The Law of Ukraine No.2265-IX “On prohibition of the propaganda of the Russian Nazi totalitarian regime, the armed aggression of the Russian Federation as an aggressor state against Ukraine, symbols of the military invasion of Ukraine by the Russian Nazi totalitarian regime” dated 22.05.2022. Website of the Verkhovna Rada of Ukraine, <https://zakon.rada.gov.ua/laws/show/2265-20#Text>

## Brief overview of court practice

Court practice in holding criminally liable for the public denial of Russia's armed aggression against Ukraine and the use of symbols of the Russian invasion is ambiguous.

In some cases, such actions are qualified under Article 111–1.1 of the Criminal Code, and in some cases, under Article 436–2 of the Criminal Code, even though each may be a case of dissemination of information that is similar in content. This happens because the above-mentioned norms partially duplicate the bodies of criminal offences, allowing a choice of grounds for criminal liability.

In addition, the practice of holding offenders liable **for the use of symbols of the Russian invasion** differs.

In some cases, a person was held administratively liable under Article 173 of the Code of Ukraine on Administrative Offences (misdemeanour) for defacing a monument with the letter Z<sup>27</sup>. In other cases, offenders who had used the symbols Z and/or Z, V in their posts in social media were held criminally liable under Article 436–2.2 of the Criminal Code of Ukraine. The actions of such persons were qualified as justification of Russia's armed aggression against Ukraine or as recognition of the aggression as legitimate<sup>28</sup>. The use of the above-mentioned symbols in public has also resulted in a conviction under Article 111–1.1 of the Criminal Code – for public support of decisions and actions of the aggressor state, armed groups, and occupation administrations of the aggressor state<sup>29</sup>.

Thus, courts consider that the use of symbols of the Russian invasion is an administrative offence that infringes public order and public safety, or a criminal offence against the foundations of the national security of Ukraine, or a criminal offence against peace, human security and international law and order. With the adoption of Law of Ukraine No. 2265-IX dated 22.05.2022, the use of the said symbols can be considered a criminal offence against public safety since, as mentioned above, such actions are classified as terrorist activities.

This diversity of state reactions to one offence, namely the use of the invasion symbols in public, demonstrates that the principle of legal certainty is not adhered to. We believe that the said norms of the law cannot duly meet the goals for which they have been introduced. The competition between Articles 111–1 and 436–2 of the Criminal Code of Ukraine gives rise to significant difficulties in case law and facilitates corruption, as investigators and prosecutors may target a punitive measure that is preferred by the offender and is conditional on the applied article of the Criminal Code of Ukraine, and may, at their discretion, choose grounds for holding an offender criminally liable.

It is worth noting that Articles 111–1 and 436–2 will be effective not only during the period of martial law but in peace time, although the social danger from actions defined thereby will be different during and after the armed aggression. The legal norms do not take into account the status of a person who disseminates banned information, although social danger from dissemination of the said infor-

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27 See the resolution in case No. 688/1368/22 dated 16.06.2022. The Unified Register of Court Decisions. <https://reyestr.court.gov.ua/Review/104924118>

28 See the judgements in case No. 953/3282/22, <https://reyestr.court.gov.ua/Review/104738073>, and case No. 953/3501/22 <https://reyestr.court.gov.ua/Review/104801168>. The Unified Register of Court Decisions.

29 See, among others, the judgement in case No. 217/93/22. The Unified Register of Court Decisions. <https://reyestr.court.gov.ua/Review/105956982>

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mation by influential public persons is significantly higher than from its dissemination by ordinary citizens. Whether the armed aggression is justified publicly also has no legal meaning for establishing the body of the criminal offence specified by Article 436–2 of the Criminal Code of Ukraine. In practice, this can mean that persons are punished for their opinions and beliefs, which is ultimately unreasonable.

All these facts demonstrate that the application of the said legal norms can result in breached standards on freedom of expression during armed conflicts, and in recognising that standards introduced by the state are not required by the exigencies of the situation.

Therefore, the said norms of the Criminal Code of Ukraine and other laws must be brought into line with the above-mentioned standards on freedom of expression.

### **Liability for insult to the military**

In March 2022, the Criminal Code of Ukraine was supplemented with the new [Article 435–1](#) “Attack on the honour and dignity of the military, threat to the military”. The explanatory note to the respective draft law does not specify the need to introduce such a legal norm.

However, the said provision can significantly affect freedom of expression. Key reasons for this conclusion are as follows:

- Article 435–1 applies not only to the period of martial law but to peace time. In the post-war period, it will be impossible to justify these amendments with “the exigencies of the situation” as the basis for the derogation by Ukraine from its obligations under the Convention;
- criminal punishment for expressing value judgements, even unreasonable ones (insults), is unjustified and, as a rule, has a significant cooling effect on freedom of speech. In view of this, Ukraine decriminalised insults in 2001. The renewal of criminal liability for the said actions, though to a limited extent, is an essential step backwards and a derogation from democratic principles governing freedom of expression;
- the said legal norm can potentially be used to restrict or suppress criticism, in particular, of military leaders even if respective sound reasons exist, and is not compatible with democratic governance<sup>30</sup>;
- according to the effective version of the article, criminal liability applies not only to the fact of a public insult to the military, but to cases when derogatory words are addressed not in public but in private. Court practice already demonstrates this with real cases<sup>31</sup>. However, it is doubtful that an insult to the military made not in public but in private causes social danger;
- the effective version of the said article imposes criminal liability for an insult to a military member who takes measures to ensure national security and defence, and repel and deter the armed aggression of the Russian Federation, even if the expressed phrase is not related to

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**30** The ECtHR notes that insulting language can exceed the limits of the protection of freedom of expression if it equals unreasonable disparagement; however, the use of vulgar language is not crucial for the assessment of an insulting expression as it can be used for stylistic purposes only. The ECtHR considers that style constitutes part of the communication as the form of expression and is as such protected together with the content of the expressed ideas and information (see, among others, Case of Grebneva and Alisimchik v. Russia (Application no. 8918/05), Judgement, 22.11.2016, § 52; Case of Savva Terentyev v. Russia (Application no. 10692/09), Judgement, 28.08.2018, § 68).

**31** See the judgement of the Sosnivskyi District Court in Cherkasy City dated 14.07.2022 in case No. 712/4108/22, the Unified Register of Court Decisions, <https://reyestr.court.gov.ua/Review/105237696>, and the resolution of this court dated 23.05.2022. <https://reyestr.court.gov.ua/Review/104409632>

military service. In order to hold a person liable, it is sufficient that the insulted person has military status. Thus, the article applies to cases of personal inimical relations if the military is one of the parties. There are attempts to use this legal norm for this purpose<sup>32</sup>. However, criminal liability for an insult resulting from personal inimical relations is, evidently, an excessive measure;

- An insult to the military and the production of materials containing the insult imply imprisonment or restraint for three to five years. Such a punishment is very severe and will have a limiting effect on freedom of speech.

The above-mentioned, in our opinion, demonstrates that the said legal norm creates a threat of excessive restriction on freedom of expression within the legal regime of martial law as well as in peace time.

### **Restriction on information dissemination under martial law**

The order of the Commander-in-Chief of the Armed Forces of Ukraine “On organisation of the counteraction among the Armed Forces of Ukraine, other components of defence forces and mass media representatives for the period of the legal regime of martial law” defining the list of data whose disclosure and dissemination would be prohibited was one of the first legal acts that restricted the possibility of disseminating information during the period of martial law in Ukraine<sup>33</sup>.

Later, the Criminal Code of Ukraine was supplemented with [Article 114–2](#) which introduced criminal liability for unauthorised dissemination, during the periods of martial law and a state of emergency, of information on channelling and displacement of weapons, armaments and ammunition in Ukraine, and on movement, displacement and deployment of the Armed Forces of Ukraine or other military units formed under the laws of Ukraine.

Introducing restrictions on the collection and dissemination of this information during the acute phase of an armed conflict is an absolutely justified measure. It was in reaction to a range of particular cases, including the destruction of Retroville Shopping and Entertainment Centre in Kyiv by a hostile rocket attack resulting from dissemination in social media by a citizen of Kyiv of a video showing AFU military equipment<sup>34</sup>, a rocket attack on a military hospital near Mykolaiv after a TV story about the hospital<sup>35</sup>, etc.

It is also appropriate to note that it is possible to be held criminally liable for the said offence only if a special legal regime, martial law or state of emergency, is introduced. In peace time, when no state of emergency is introduced, it is not prohibited to disseminate the information specified in the article.

<sup>32</sup> See, for example, the resolution of the Kovpakivskiy District Court in Sumy City dated 22.08.2022 in case No. 592/5410/22. The Unified Register of Court Decisions. <https://reyestr.court.gov.ua/Review/105863917>

<sup>33</sup> Order of the Commander-in-Chief of the Armed Forces of Ukraine No. 73 “On organisation of the counteraction among the Armed Forces of Ukraine, other components of defence forces and mass media representatives for the period of the legal regime of martial law” dated 03.03.2022. LigaZakon, <https://ips.ligazakon.net/document/MUS36785?an=97>

<sup>34</sup> Communication of the Committee on Digital Transformation, 22.03.2022. Website of the Verkhovna Rada of Ukraine <https://www.rada.gov.ua/news/razom/220741.html>

<sup>35</sup> Communication of Hanna Maliar, the Deputy Minister of Defence of Ukraine, in Facebook, 18.06.2022, <https://www.facebook.com/ganna.maliar/posts/pfbid03mt8ex8Ht6c1nctTLzwvBLFrtLicpbPYxyP7TqignKwCCSfxCBQ4DxbcMfbaFopbl>

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>> **A range of restrictions on the collection and dissemination of information is introduced exclusively for the period of a legal regime – martial law and a state of emergency. In peace time, when no state of emergency is introduced, it is not prohibited to disseminate such information.**

In such circumstances, we consider that the introduction of restrictions on information dissemination specified in the article is proportionate to existing threats.

Currently, an analysis of judgements adopted in criminal proceedings under Article 114–2 of the Criminal Code of Ukraine<sup>36</sup> and published in the Unified Register of Court Decisions does not give any grounds to consider that they threaten freedom of expression in Ukraine. Defendants in these criminal proceedings are suspected of transferring information on locations of the military units of the AFU to agents related to the Russian Federation, which constitutes a real social danger under martial law. At present, certain judgements prove this conclusion<sup>37</sup>. But court practice in this category of cases is still minimal.

Meanwhile, it should be mentioned that Article 114–2 of the Criminal Code of Ukraine contains provisions that can have an unexpected effect when applied. In particular, the term “official sources of partner states” in which one may publish information without being held criminally liable can be interpreted in different ways. The lack of clear understanding in this issue somewhat hinders freedom of speech, as journalists can refrain from publishing information in foreign mass media for fear of incurring criminal liability.

36 See the Unified Register of Court Decisions, particularly, resolutions in cases: No. 490/1496/22, <https://reyestr.court.gov.ua/Review/105835376>; No. 201/4845/22 <https://reyestr.court.gov.ua/Review/105453033>; No. 202/2399/22 <https://reyestr.court.gov.ua/Review/104799253>; No. 712/3941/22 <https://reyestr.court.gov.ua/Review/104771961>; No. 712/2939/22 <https://reyestr.court.gov.ua/Review/104120969>

37 See, among others, the judgements in cases No. 761/13295/22 dated 26.08.2022, <https://reyestr.court.gov.ua/Review/105914431>, and No. 225/1400/22 dated 07.09.2022, <https://reyestr.court.gov.ua/Review/106097808>. The Unified Register of Court Decisions.



## Conclusions

1. The right to freedom of expression is one of the fundamental human rights which ensures the existence and development of a democratic society. It includes the right to disseminate not only information or ideas that are favourably received or regarded as a matter of indifference, but also those that offend, shock or disturb. Insulting expressions constitute part of style and are protected as such together with the content of the expression, unless they aim to humiliate a person.
2. The right to have one's own opinions and beliefs as a component of the right to freedom of expression is not subject to restriction, whereas the right to collect and disseminate information and ideas and the right to select a form of expression may be restricted if these restrictions are necessary in a democratic society and serve the interests of national security, public safety and territorial integrity of the state.
3. The large-scale invasion of Ukraine by the armed forces of the Russian Federation and further introduction of the legal regime of martial law in Ukraine raised a reasonable need to temporarily restrict the right to freedom of expression in the interests of national security, territorial integrity and public order of Ukraine.
4. The changes and amendments made to the legislation of Ukraine under the legal regime of martial law in order to restrict freedom of expression do not fully comply with law quality requirements.
5. The bodies of criminal offences defined by Articles 111–1 and 436–2 of the Criminal Code of Ukraine are partially duplicated, which is in breach of the principle of legal certainty. In addition, the wording of these legal norms and of Article 435–1 of the Criminal Code of Ukraine is highly general and can, in practice, result in persons being punished for their opinions and beliefs. The wording of Article 114–2 of the Criminal Code of Ukraine is partially in breach of the principle of legal certainty. In view of this, the said legal norms must be improved.
6. Some changes and amendments made to the legislation of Ukraine under the legal regime of martial law are not necessary in a democratic society. We consider that criminal liability for an insult to the military, implying imprisonment or restriction, is a particularly excessive means of influence which will have a cooling effect on freedom of expression.

# Freedom of Expression. International Standards, Practice of the European Court of Human Rights, and National Legislation in Ukraine under Martial Law

## **Overview of legal approaches**

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# About the Ukrainian Center for Independent Political Research

The Ukrainian Center for Independent Political Research is a non-governmental organisation that has been working since 1991 to strengthen democracy and civil society in Ukraine.

“Civil Liberties and National Security: A Balance for Protection with UCIPR” project, which is being implemented in 2022 with the support of the United States Agency for International Development (USAID), is aimed to assess the changes in the exercise of the right to access information and freedom of expression in Ukraine due to the introduction of the legal regime of martial law, and to develop a technique for identifying discourse that poses threats to human rights and national security.

This publication is a contribution of the Ukrainian Center for Independent Political Research team to overcoming the challenges of wartime and is part of UCIPR’s ongoing efforts to build a sustainable open society in which human rights and civil liberties are realised.

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