

## HUMAN RIGHT TO FREEDOM OF ASSOCIATION: CONFLICT OF INTERNATIONAL LEGAL AND NATIONAL REGULATION



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**Abstract.** The article deals with the analysis and comparison of norms of international law and practice of its application, legislation of Ukraine, scientific researches of the status of informal public organizations. It has been found that according to European Union law sources the practice of the European Court of Human Rights for the establishment of an association of persons requires only two criteria, namely: freedom of association and the legitimate purpose of association. The inclusion in Ukrainian legislation of conditions for the mandatory formalization of voluntary associations creates a potential threat to the realization of the human right to freedom of association. The Law of Ukraine "On Public Associations" should enshrine the right of persons to establish informal associations that do not require State registration in order to achieve common legitimate goals; provide for a procedure for notifying State authorities, local government on the establishment of a public association. The envisaged administrative responsibility for leading and participating in unregistered associations of citizens (Article 186-5 of Code of Administrative Offences of Ukraine) is contrary to the norms of international law and should be deleted therefore.

**Keywords:** *freedom of association, public association, informal association, state registration, administrative and legal responsibility.*

## Introduction

Freedom of association is one of the fundamental human rights, namely the possibility of joint realization of common cultural, economic, social and other interests of subjects of law. Along with personal interest this right is essential for the functioning of democracy and is a prerequisite for the realization and protection of other human rights. Ukrainian legislation provides for obtaining legal permission from the State to establish a public association and for further State control and legal responsibility for participation in informal public associations. Fundamentally this is at variance with the international legal approach, the case law of the European Court of Human Rights on the implementation of the human right of association with others and legitimately requires the adaptation of the existing international legal standards by existing legislation in this field.

The research objectives are: 1) an analysis of international law, the practice of the European Court of Human Rights regarding the regulation of the right of association of persons, including the informal (illegalized) position of the association or persons; 2) its comparison with the current legislation of Ukraine on public associations, scientific assessments; 3) formulation of reasoned proposals to the legislator.

**Literature review.** In our research we used the acts of international law, the case law of the European Court of Human Rights, the legislation of Ukraine in terms of regulation of the right to freedom of association, liability for violation of its implementation as well as the scientific works of M. Buromenskyi, O. Drozdov and O. Drozdova, O. Zhukovska, Ye. Zakharov, J. McBride, Yu. Ryabchun.

**Research results.** The freedom of association was first proclaimed in the Convention of the International Labour Organization "On freedom of association and protection of the right to organize", 1948 in connection with the protection of employment rights of employees. This right was soon enshrined at the global level in the Universal Declaration of Human Rights of 10 December 1948 as a political right in Article 20.

The first step taken by humanity required the implementation of international legal instruments and national legislation establishing State obligations to civil society. On the European continent the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (hereinafter the ECHR) was concluded to give effect to the rule of law and respect for human rights, Article 11 enshrines freedom of assembly and association. The content and potential of the right to freedom of association is developed and protected through the jurisprudence of the European Court of Human Rights which will be summarized below in the context of the purpose of the research.

At the national level the right to freedom of association is enshrined at the basic level in the Article 36 of the Constitution according to which "citizens of Ukraine have the right to

freedom of association in political parties and public organizations in order to exercise and protect their rights and freedoms and to satisfy political, economic, social, cultural and other interests, except for restrictions established by law in the interests of national security and public order, public health or the protection of the rights and freedoms of others" (Section 1). Sections 2 and 3 of this rule set out a general approach to the right to membership in political parties and trade unions. Section 4 enshrines the right to freely choose to join any association of citizens and prohibits discrimination on the basis of membership or non-membership of a particular public organization. The equality of all associations of citizens before the law was proclaimed (Article 36, Section 5 of the Constitution of Ukraine, 1996).

In accordance with the above provisions the 4572-VI Law of Ukraine "On Public Associations" of 22.03.2012 was adopted (hereinafter referred to as the Law) defining the legal and organizational framework for the exercise of the right to freedom of association. Consider the individual provisions of current legislation that are of direct relevance to the subject of the research. In particular it is determined that "a public association is a voluntary association of individuals and/or legal entities of private law for the exercise and protection of rights and freedoms and the satisfaction of public in particular economic, social, cultural, environmental and other interests". A public association may carry out activities with or without the status of a legal entity (Article 1, Sections 1, 5). One of the principles of formation and activity of public associations is self-government, providing for the right of members (participants) of the

public association to independently manage the activity of the public association in accordance with its purposes (objectives) to determine the directions of activity as well as non-interference of state authorities, other state bodies, local self-government bodies in the activity of a public association, except in cases defined by the law» (Article 3, Section 3).

Formation and activity of public associations whose purpose (objectives) or actions are aimed at eliminating the independence of Ukraine, changing the constitutional order by force, violating the sovereignty and territorial integrity of the State, undermining its security, unlawful seizure of State power, propaganda for war, violence, incitement of inter-ethnic, racial, religious hatred, infringement of human rights and freedoms, public health, propaganda of communist and/or National Socialist (Nazi) totalitarian regimes and their symbols are prohibited. Other restrictions on the right to freedom of association including the right to form and operate public associations may be established solely by law in the interests of national security and public order, public health or the protection of the rights and freedoms of others (Article 4, Sections 1, 3 of the Law).

If a requirement is not connected with the exercise of the person's rights as a person entitled to represent a public association or a member (participant) of a public association such requirement to indicate information about the membership (participation) of a person in a public association is not available except as specified by the Section 3 of Article 5 of the Law. On the basis of these general norms we believe that Ukrainian legislation on public associations could be considered democratic and pro-European in nature. After all according to the opinion of M. Buromenskyi, O. Zhukovska in accordance with the ECHR and the practice of the European Court of Human Rights in "the establishment of an association requires only two criteria: freedom of association and the purpose of association. The European Court of Human Rights also stresses the importance of these criteria. The inclusion of other additional criteria in national legislation may potentially threaten the realization of the right to freedom of association" (Buromenskyi, 2004, p. 622).

However, other provisions of the Law provide grounds for a critical assessment of

the legal regulation of the right to freedom of association. They have introduced compulsory State registration and subsequent strict State control over the establishment and activities of voluntary associations which cannot be considered democratic. In particular in Sections 8-9 of the Article 9 of the Law stipulates the requirement to pass the «State registration in the order determined by the Law of Ukraine "On the State Registration of Legal Entities, Natural Persons, Entrepreneurs and Public Formations" within 60 days from the date of holding the constituent assembly. In the event of failure to submit (non-delivery) documents for the registration of a public association within 60 days from the date of its establishment such public association shall not be deemed to have been formed. Actions on behalf of an unregistered public association shall be prohibited except for actions connected with the registration of such an association". It should be mentioned that in the draft of the Law "About the Youth" of 05.09.2019 it was proposed to provide for the creation of informal youth associations which are unregistered groups of young people united by common interests and to give them the right to participate in the bodies of self-organization of young people as observers without the right to take decisions (Section 7 of Article 1, Section 3 of Article 7). However, this bill was withdrawn by its authors. As can be seen, the Ukrainian State provides for the mandatory formalization of citizens' associations as a condition for authorizing their activities. After registration the State seeks total control over the activities of public associations. Systematically implementing the idea of control of civil society the legislature introduced administrative responsibility for the management of the association of citizens which was not legalized in the manner prescribed by law as well as participation in the activities of such an association which is the basis for imposing a fine of 25 to 130 tax-exempt minimum incomes of citizens (Article 186-5 of the Code of Administrative Offences of Ukraine).

This legislative approach is inconsistent with the rule of law and the essence of the right to freedom of association. According to article 11 of the ECHR and the case law of the European Court of Human Rights freedom of association not only guarantees the right to form and register associations but also

includes those rights and freedoms, freedom of association implies a degree of autonomy from the State. It fully protects formal and informal associations.

The European Court of Human Rights in the case of "Chill v. the United Kingdom" indicated that according to Article 11 of the ECHR the aim of the freedom of organization is a protection of the private sector from State interference. Associations have the right to create their own rules and manage their own affairs. In the case of "Sigurdur A. Sigurjonsson v. Iceland" the European Court of Human Rights focused on the private nature of the public association which is its most important characteristic (The decision of the European Court of Human Rights in the case of "Sigurdur A . Sigurjonsson v. Iceland», 1993). The organizational autonomy of associations is an important aspect of freedom of association which is protected by Article 11 of the ECHR (The decision of the European Court of Human Rights in the case «Lovric v Croatia», 2017).

Moreover, no restrictions may be imposed on the exercise of the rights of associations for the protection of their rights except in the case of "which are provided by law and necessary in a democratic society in the interest of state security, protection of health or morality of the population or protection of rights and freedoms of others" (Article 11 of the ECHR). Restrictions on the freedom of association must be interpreted clearly and only valid and reasoned evidence can justify restrictions on the right to freedom of association. The essence of freedom of association is that an individual or a group of persons may freely establish associations, determine their organizational structure and legal objectives, implement them in practice, implementing measures that play an important role in their activity. Restrictions on such activities must be established by law and pursue a legitimate aim. National legislation may provide for any procedure for registration of associations as well as for refusal of registration may have consequences for legal status and legal capacity. However, such legislative requirements may not be mandatory for any association of people. In the case "Gorzelik and others v. Poland", the European Court of Human Rights stated: "The main aspect of freedom of association is the possibility for citizens to establish associations in accordance with the law for joint action in

the area of common interests. Without this possibility the right of association will have no practical significance» (The decision of the European Court of Human Rights in the case "Gorzelik and others v. Poland", 2017). This makes it impossible for unregistered associations to operate and therefore limits the very essence of freedom of association.

Based on the unprecedented law of the European Commission and the European Court of Human Rights and the recommendations of the Council of Europe the "Guidelines on Freedom of Association" adopted by the Venice Commission at the 101st plenary session (Venice, 13-14 December, 2014) were developed. The Act states that "in view of the importance of associations it is essential that their role and activities as well as the right to freedom of association have to be effectively supported and protected by the norms enshrined in the laws and other legal acts of States". ... "National legislation should not prohibit or unreasonably impose restrictions on the formation of an informal association since the establishment of an association with legal personality may require compliance with certain formal requirements" (Guidelines on Freedom of Association, adopted by Venice Commission at its 101st Plenary Session, 2014, ch. 149). Thanks to modern technologies an increasing number of associations are established on the Internet. Despite the fact that it may seem that such associations challenge the established ideas about the procedure of formation of associations and membership in them, their main difference from "ordinary" associations, in fact there is only a lack of possibility of their members physical presence at the meetings. However, they have common objectives and there are legal instruments regulating the activities of such associations. In this regard legislation should support this form of association formation and the possibility of its further operation. Access to the Internet must also be ensured (The decision of the European Court of Human Rights in the case "Cheall v.the United Kingdom", 1985). It is reasonable to request registration or submission of a communication to those associations that wish to acquire legal personality, provided that the process involves sufficiently substantiated claims, is not too burdensome and does not undermine the exercise of the right to freedom of association" (Guidelines on Freedom of

Association, adopted by Venice Commission at its 101st Plenary Session, 2014, ch. 151-152). We see inconsistency of norms of the Ukrainian legislation on public associations which provides only the procedure of their state registration again.

Our monitoring of the case law of the European Court of Human Rights also gives rise to a proposal to amend Article 185-6 of the Code of Administrative Offences of Ukraine. As it is true that informal associations of citizens do not have a "rigid" membership, the structure raises the question of whether all such entities are protected by the action of Article 11 of the ECHR. According to J. McBride has taken a very broad approach to the ECHR case law in determining which constituencies are afforded protection under the freedom of association rules. But for these guarantees to apply it is necessary to prove that the group concerned is more than just a society with common goals because Article 11 of the ECHR is not intended to protect the ordinary assembly of people who just enjoy spending time with each other. In particular, in the case of "McFeely v. the United Kingdom" the European Commission described the freedom of association as «relating to the right to form or join a group or organization with specific objectives" (The decision of European Court of Human Rights in the case of «McFeeley v. United Kingdom», 1980). Thus, the position of the European Commission clearly shows the weight to be given to the element of "institutionalization" of a public association on the criterion of achievement of a certain goal (MakBraid, 2004, p. 569). The European Court of Human Rights has repeatedly pointed out that an association of citizens should not be forced to take a legal form that it does not attempt to obtain as this would reduce the freedom of association of its founders and members making it either non-existent or devoid of practical value (Decision of the European Court of Human Rights on «Republican Party of Russia against Russia» dated April 12, 2011; Decision on "Zhehev vs Bulgaria" dated June 21, 2007; Decision on «National Turkish Union Kungyun vs Bulgaria» dated June 08, 2017) (Guide to Article 11 of the Convention «Freedom of Assembly and Association», 2019, p. 24). However, the approach of the

European Commission and the European Court of Human Rights requires not only that a group of persons be formed to achieve a certain goal, but also that its existence will be characterized by a certain degree of permanence, that is, the presence of some organizational (not necessarily formalized) the structure of which persons together constitute this group could be objectively defined (McBraid, 2004, p. 571).

The State may establish liability for specific acts constituting a threat to interests as defined by Article 2, Article 11 of the ECHR. However, it is the association, participation in it is unlikely to harm these interests. Therefore, legal liability for the activities of illegal public associations is contrary to the international obligations of Ukraine, in particular the Article 11 of the ECHR and the International Covenant on Civil and Political Rights. This allows for the arbitrary prosecution of any more or less stable, even informal, associations of people. The abolition of responsibility for the activities of illegal public associations will constitute compliance by Ukraine with its international obligations in the field of human rights, in particular freedom of association. "The administrative penalty in force is contrary to the principles of the Council of Europe on non-governmental organizations and the practice of the European Court of Human Rights. It should be deleted", says the head of the Ukrainian Helsinki Union E. Zakharov (Riabchun, 2020). In the context of our support the exclusion of administrative liability for participation in informal public associations should be mentioned the practice of the European Court of Human Rights to prohibit sanctions for membership in an association. In particular, the Court has repeatedly stated that one of the positive duties incumbent upon States in protecting the right to freedom of association should be borne in mind according to which the state shall not apply inappropriate sanctions to a person only for his membership in the association (McBraid, 2004, p. 572). Obviously, the current edition is in Article 185-6 of the Code of Administrative Offences of Ukraine does not correspond to such an equitable approach of the European Court of Human Rights, so it must be brought into line with the corrected position.



## Conclusions

In accordance with international law and the practice of the European Court of Human Rights only two criteria are required for an association of persons, namely: freedom of association and the legitimate purpose of association. The scope of international guarantees is not limited to organizations with formal status and covers groups of an informal nature, provided that their existence is not (or is not intended to be) short-lived. According to the approach of the European Commission and the European Court of Human Rights the association of citizens should not be forced to take a legal form which it is not trying to obtain as this would reduce the freedom of association of its founders and members. The European Court of Human Rights has repeatedly pointed out that the State should not impose inappropriate sanctions on a person solely for membership in an association. The State may establish liability for specific wrongful acts that threaten the public interest.

According to the "Guidelines on Freedom of Association" of 2014, the national legislation of the member States of the Council of Europe should take into account that the acquisition of legal personality status should generally be interpreted as a right and not a duty or obligation. States may require associations wishing to receive various forms of State support or to be granted a special status. In order to obtain the status of a legal person it must be sufficient to notify the public authorities of the establishment of the association.

However, Ukrainian legislation provides for the mandatory formalization of public associations as a condition for allowing lawful action. After registration, the State seeks total control over the activities of public associations. The envisaged responsibility for the leadership and participation in the activities of the association of citizens which is not legalized in the manner established by law (Code of Administrative Offences, Article 186-5) is contrary to Article 11 of the ECHR.

On the basis of the foregoing we consider it necessary to provide in the Law of Ukraine "On Public Associations" for the right of persons to establish informal associations that do not require State registration in order to achieve common legitimate goals. It seems also advisable to provide in the said Law of Ukraine a procedure for notifying state and local self-government bodies about the establishment of a public association which completes the process of legalization. In our opinion, separate State registration of an association of citizens should be envisaged only when its activities require the acquisition of legal personality. It is necessary to exclude from the provisions of Article 186-5 of the Code of Administrative Offences the responsibility for leadership or participation in unregistered associations of citizens.

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