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Restriction of the right to information in the interests of national security: The problem of justification

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Abstract. The relevance of this study is conditioned upon the lack of a single theoretical justification for limiting the right to information, even though Ukrainian legislation allows such limitations in the Constitution. The purpose of this study was to analyse certain cases of restrictions on the right to information in the interests of national security and determine ways to justify such restrictions. The methodological framework of this study included the analysis of law enforcement practices concerning the restriction of the right to information. The study established that, despite a considerable theoretical basis in protection of human and civil rights and freedoms, the modern practice of administrative courts is based only on providing a legal assessment of the actions of the Security Service of Ukraine regarding the recognition of information and other activities of the subject of information relations as illegal in the light of the powers and advantages granted to the Service pursuant to Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The absence of a single mechanism for restricting the right to information in the interests of national security was proved. The paper substantiated that the courts and state bodies of Ukraine, which are responsible for regulating information activities, have not yet developed their own ways and mechanisms for restricting the right to information, which would factor in their practice of providing a legal assessment of each of these cases. It was noted that the basic means of justifying the restriction of the right to information in the interests of national security, as well as any restriction of the right to information, is the use of a "three-part test". The outlined grounds for localizing the right to information will be useful for scientists, law enforcement officers, and information security specialists for their legitimate application

Keywords: rights and freedoms of a person and a citizen; lawful restriction of the rights and freedoms of a person and a citizen; security; information security; information rights of a person; three-part test

Introduction

Even though Ukrainian legislation allows for certain restrictions on the right to information to ensure public order, territorial integrity, or national security in general; prevent crimes or riots; provide a system of measures aimed at preserving and developing physiological and psychological functions of optimal working capacity and social activity of a person with the maximum biologically possible individual life expectancy; protect the rights and freedoms of other people or their reputation; prevent disclosure of information obtained confidentially, or to observe the impartiality of justice and maintain its authority – the doctrinal provisions of legal science do not contain justifications for the implementation of such restrictions.

The practice of administrative courts since 2019 covers the consideration of cases concerning the national defence and security of Ukraine, public security and order, namely: suppression and prevention of illegal activities of organizations, societies, and other institutions that encroach on the freedoms and rights of citizens and/or the constitutional system; refugees. A separate area of development of justifications for restricting the right to information is cases concerning appeals against inaction or actions, acts of the President of Ukraine, the Verkhovna Rada of Ukraine, the High Council of Justice, the High Qualification Commission of Judges of Ukraine and bodies that evaluate, dismiss, elect (appoint) members of the High Council of Justice.

With the adoption and entry into force of the Law of Ukraine "On Sanctions" (2014), as well as some decisions regarding the use of special economic and other localization measures (sanctions) to subjects of information activity and other citizens who are guaranteed the right to information, namely with reference of such subjects to the category of persons controlled by non-resident foreign physical or legal entities, stateless persons, foreigners, as well as persons who commit terrorist crimes, as well as to the application itself, the question of their validity arose. Since the right to information of some subjects determines the emergence of legal obligations for officials of subjects of power (Dovzhuk, 2020).

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Scientific literature of a methodological and theoretical nature devoted to the protection of human freedoms and rights contains some well-founded theses and ideas related to the issues under study. The theoretical aspects of the essence of restrictions on human and civil rights are covered by the studies of legal scholars O. Andriievska (2018) on the constitutional and legal mechanism for restricting human and civil rights and freedoms in Ukraine, I. Dakhova (2018) on constitutional regulation and practice of the European Court of Human Rights, O. Osynska (2010) on theoretical and applied aspects of restricting human rights and freedoms, Yu. Razmietaieva (2018) on the doctrine and practice of human rights protection, M. Savchyn (2018) on constitutional criteria for restricting human rights and fundamental freedoms, V. Sorokun (2010) on the international legal protection of the right to freedom of conscience and religion, T. Slinko (2018) on the legal grounds for restricting the exercise of human and civil rights and freedoms, S. Shevchuk (2007) on the practice of the European Court of Human Rights in the context of Western legal tradition, etc.

The opinions of representatives of Ukrainian science agree that the restriction of fundamental human rights (incl. the right to information) is directly related to the difference between absolute and relative rights (Koruts *et al.*, 2021; Politanskyi, 2016), is a necessary component of the legal system, introduced with a particular purpose (one of which is the protection of national security), specified in the law, form an exhaustive list (Bilousov, 2015) and should not distort the essence of rights and freedoms (Plakhotniuk *et al.*, 2021). If the target can be protected in another way, avoiding restricting the right to information, preference should be given to the latter. A balance must be maintained between the information rights of a person, which cannot be unlimited, and the introduction of real responsibility of officials of subjects of power for numerous non-committal replies, as managers of public information (Guyvan, 2019). A practical position is to consolidate the possibility of restricting the rights and freedoms of a person in the text of the Constitution by state authorities under conditions of martial law in the interests of national security (Bukhanevych *et al.*, 2021), such as, for instance, the Asian model of ensuring information security (Shemchiuk, 2020). This proposal requires a separate theoretical legal investigation.

Notably, despite the exceptional importance and relevance of the issue of certain restrictions on the right to information in the interests of national security, foreign and Ukrainian science did not pay the necessary attention to the development of the rationale, which indicates the existing and potential significant gaps in the legislation, while the judicial practice during 2019-2022 indicates efforts to develop such solutions.

The absence of a single theoretical justification of individual localization measures regarding the right to information, considering the interests of national security, was noted. Despite a significant theoretical basis in the field of protection of human rights and freedoms, the modern practice of administrative courts is based on providing a legal assessment of the actions of the Security Service of Ukraine to recognize information and other activities of the subject of information relations as illegal in the light of the powers granted to it and the principles prescribed in Article 10 of the European Convention on Human Rights (1950).

Separately, the problem of substantiating the limitation of the right to information, considering the interests of national security, concerns the absence of requirements in the Convention that prevent states from requiring licensing (revocation of the licence) of the activities of cinematographic, radio broadcasting, or television enterprises, which necessitates the continuation of scientific research.

Considering the significance and relevance of the highlighted problem, the purpose of this study was to analyse the law enforcement practice regarding certain limits of the right to information, factoring in the interests of national security and the genesis of definitions regarding the ways to justify the corresponding restriction as one of the areas of further academic and applied research.

To fulfil the specified purpose, the relevant legislative framework was analysed, namely: provisions of the Constitution of Ukraine (1996), Laws of Ukraine "On Access to Public Information" (2011), "On Amendments to the Law of Ukraine "On Information" (2011), "On Sanctions" (2014), "On the Condemnation of the Communist and National Socialist (Nazi)" totalitarian regimes in Ukraine and the Prohibition of Propaganda of Their Symbols" (2015). Certain decisions of local courts, the Supreme Court of Ukraine, and the European Court of Human Rights were also considered.

Law enforcement practice on localization of the right to information

Let us consider some of the most revealing cases concerning the restriction of the right to information.

Thus, in case No. 9901/22/21, the plaintiff substantiates his claims by the fact that the controversial Decree of the President of Ukraine No. 43/2021 of 02.02.2021, which caused the suspension of broadcasting of such television channels as "112", "NewsOne" and "Zik", violates his rights as a buyer of audio-visual information, and also indicates that by its consequences in the form of the termination of broadcasting of the specified three television channels, the disputed Decree mediates interference with his rights, specifically constitutional ones (Decision of the Supreme Court…, 2021). In addition, the plaintiff, referring to Article 7 of the Law of Ukraine "On Information" (Law of Ukraine No. 2938-VI…, 2011) and Article 10 of the European Convention on Human Rights (1950), insists that receiving audio-visual information through a public telecommunications network constitutes the content of his right to receive information, and this right guarantees him the freedom to choose the forms and sources of receiving information. The defendant (representative of the President of Ukraine), in his response to the statement of claim, insists that "the current legislation clearly establishes that state authorities, only if there are sufficient grounds, submit proposals for the application of sanctions to the NSDC for consideration" (Decision of the Supreme Court…, 2021), which indicates the application of the "presumption of legality" in relation to corresponding actions or decisions. In the appellate instance, the Grand Chamber of the Supreme Court determined that "the disputed decree is an act of individual action and its issuance does not affect the particular rights of the plaintiff" and "restricting the viewer's access to certain TV channels or TV programs does not mean a violation of the right to information" (Resolution of the Supreme Court…, 2021).

In case No. 520/118/20 (Decision of the Kharkiv District Administrative Court…, 2020), the Kharkiv District

Administrative Court considered the position of the Main Territorial Department of Justice in the Kharkiv Region regarding the fact that with the entry into force of the Law of Ukraine "On the Condemnation of the Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and the Prohibition of Propaganda of Their Symbols" (2015) the founders of print media that used any well-known or historically recognized symbols of known totalitarian regimes of the 20th century (communist, national-socialist, Nazi), as well as posted appeals or elements of propaganda of these regimes, were obliged to re-register the print media. At the same time, the Court refused the plaintiff to satisfy the claim, and in the appellate (Decision of the Second Appeal Administrative Court…, 2020) and cassation (Resolution of the Supreme Court in a panel…, 2021) instances, it left this decision unchanged, referring to the procedure established by the current rules and procedures for determining non-compliance (Procedure) of any economic or other activity of any legal entity (both resident and non-resident), political party, non-state, public movement, as well as other association of citizens (their structural formation of oblast, regional, city, village, settlement level, territorial community level), their names or symbols, as well as the statutory purposes of the requirements of the above-mentioned law (Law of Ukraine No. 317-VIII…, 2015). According to the plaintiff, the limitation of his right to information was not justified and was directly manifested in the failure of the Ministry of Justice to comply with the procedure defined by law for establishing the non-compliance of print media activities with the requirements of the law. In addition, the plaintiff drew the court's attention to the application of an appeal to the court with a lawsuit to stop the activity of the specified object without applying the preliminary establishment of non-compliance of its activity by the method of conducting a legal examination (Decision of the Kharkiv District Administrative Court…, 2020).

The court of first instance issued a ruling considering the current legislation, which stipulates a procedure that should precede the appeal of the Ministry of Justice to the court with a claim for termination of the activity of a particular object. Separately, at the beginning of the procedure, the Ministry of Justice must take several measures: firstly, to ensure the conduct of a legal examination, as well as the commission assessment of the relevant content with the drafting of the corresponding decision by the Commission. It should also be borne in mind that at this stage the deadlines for filing a lawsuit in court regarding the termination of the object's activity are determined, which amount to ten days and the countdown begins from the time the Commission drafts a decision on non-compliance with the requirements of the Law. Therefore, the court of first instance noted that the program goals of Slovo Pravdy newspaper, regarding which this decision was made, do not contain manifestations of propaganda of well-known totalitarian regimes of the 20th century (communist, national socialist, Nazi). The court also stated that the specified name does not contain any symbolism of the known totalitarian regimes of the 20th century (communist, national socialist, Nazi). Furthermore, the plaintiff did not submit any evidence to the case materials confirming the factual use of the symbols of the well-known totalitarian regimes of the 20th century (communist, national socialist, Nazi) by the newspaper in its title, its implementation of any manifestations of promotion of the well-known totalitarian regimes of the 20th century (communist, national socialist, Nazi).

In Part 2 of Article 6 of the Law of Ukraine "On Access to Public Information" (2011), the possibility of applying such mechanisms in the general practice of localization of the right to information to ensure national security, namely special economic and other localization measures regarding subjects of information activity, requires a profound analysis and the formation of a justified position both in the field of law enforcement by courts, and the study of these mechanisms by scientific and educational circles, etc.

Social engineering approach to strengthening information security

Thus, the Law of Ukraine "On Access to Public Information" (2011) acts as a guarantor of ensuring the access of Ukrainian citizens to public information. Therefore, the primary basis for the protection of state sovereignty in the information sphere is the observance of information freedom, as the fundamental principle of protection of information sovereignty (Solodka, 2020). Therewith, the criterion of mandatory provision of appropriate access is the public interest in such information.

In its decision dated 06.05.2020 in the case regarding the confirmation of the illegality of inaction, the requirement to perform actions (case No. 380/2525/20) referring to the military unit 3002 of the National Guard of Ukraine, the Lviv District Administrative Court outlines the circle of individuals affected by the "public interest" and states that an exhaustive list of subjects in the field of access to public information has been determined pursuant to Article 12 of the Law of Ukraine No. 29-39-VI (Decision of the Lviv District Administrative Court…, 2020).

As noted by the Human Rights Commissioner of the Verkhovna Rada of Ukraine, during the ten months of 2020, she personally received over 3,200 complaints regarding non-compliance with the right to access to socially important and public information. This represents more than 11% of the total number of complaints received by the Commissioner's Secretariat (Oleksiiuk *et al.*, 2020). Therewith, the authors of the Recommendations of the Commissioner of the Verkhovna Rada of Ukraine regarding the guarantee of the constitutional rights of a person and a citizen on the possibility of obtaining the necessary information, prepared as a result of the consideration of these complaints, emphasize that the substantial interest of society in certain information, a general public dispute regarding the object of information is an important reason to incline the manager of information before its provision (Oleksiiuk *et al.*, 2020).

Information that proves a threat to the territorial integrity of Ukraine, state sovereignty is recognized as a subject of public interest in the specified relations; supports the implementation of constitutional freedoms, duties, and rights; attests to the possibility of non-compliance with human rights, intentional false information, threatening economic and some other negative results of activity and/or inaction of legal entities (Oleksiiuk *et al.*, 2020).

At the same time, to reduce the risk of abuse regarding the localization of the right to information by the state, a narrow interpretation of this norm should be used, and the application of national security interests should be avoided as a prerequisite for limiting the right to information (Tsviki, 2017).

Procedural issues of applying restrictions on the right to information

In the specified Decision of the Lviv District Administrative Court in the case No. 380/2525/20 (2020), it is recorded that the existence of reasons for restricting access, which comprise the content of the "three-part test" is mandatory for the manager of information.

According to the position of the Court, reasoned refusal of access to public information must contain the following justifications: 1) to which type of interests from those listed in Item 1, Part 2, Article 6 of the Law of Ukraine "On Access to Public Information" (2011) the localization belongs and why access restriction concerns particular information; 2) what real damage is caused to the legitimate interest(s); what is the correlation between the possible occurrence of damage and the provision of access; why the occurrence of this harm is important; any possibility of harm as a result of obtaining access to information must be considered; 3) why the public interest may be exceeded by the damage resulting from obtaining information (Law of Ukraine No. 2939-VI…, 2011).

Lack of information in the judge's conclusion regarding at least one of the above-mentioned reasons of the so-called the three-part test is a signal that restricting access to information is illegal and a negative decision on its provision is groundless (Decision of the Lviv District Administrative Court…, 2020).

During consideration of court case No. 9901/22/21, the Supreme Court of Ukraine, formed by the panel of judges of the Cassation Administrative Court, analysed whether the blocking of an information resource has a negative effect on the corresponding user, i.e., whether he can receive similar information from other sources; whether the information to which access is restricted has a special nature for the user; whether the blocking of the resource led to the deprivation of the user of the main source of communication or the distribution of his information (Decision of the Supreme Court in a panel…, 2021).

When determining whether there is a public interest in receiving information, by Resolution of the Plenum of the Supreme Administrative Court of Ukraine (2016), managers are suggested to consider certain factors: firstly, the category of the person requesting information, indicating the possibility of making the request independently; secondly, the circle of persons (individuals or legal entities) for whom information is requested; thirdly, the presence of public interest (discussions, public discussion, petitions, etc.) in such information, which is discussed, e.g., in the media, the Verkhovna Rada, or a local representative body at the time of forming (receiving information by the manager) a request; fourthly, the length of time from creating a document (documenting information) to submitting a request; fifthly, assessment of the probability of causing harm as a result of non-disclosure of information; sixthly, additional arguments in favour of disclosure of information, such as the connection of the request with a public person or a candidate for this public position; seventhly, assessment of the arguments for the possibility of harming the rights to protect personal data, refusal to interfere with personal life, especially when it comes to ideological, religious, political beliefs, ethnic or racial origin, membership in political parties or unions, having a criminal record, as well as other personal information covering genetic, biometric, health status, sexual life, etc. in comparison with the usefulness of the public interest in disclosure of information.

Conceptual significance of the "three-part test" for justifying the restriction of the right to information

Both the judicial practice and the doctrinal provisions of the information law consider both the restriction of access to public information and the ban on its distribution permissible, but on the condition that the judicial authorities (law enforcement authorities) use the means of the "three-part test", while avoiding the application of "three-part test" regarding the localization of access to information, according to the position of both national and European courts – entails the illegality of such a restriction (Decision of the Lviv District Administrative Court…, 2020).

Thus, on the one hand, the position of the court, and, on the other hand, the absence of any other justification for restricting the right to information outside the relationship of access to public information, allows considering the use of the "three-part test" as the main concept of justification. It is also necessary to consider the position of the European Court of Human Rights, according to which rights should be considered in a broad sense, and limitations or exceptions should be as specific as possible (Decision of the European Court of Human Rights…, 2009), adapt to the solution of urgent public problems and be symmetrical to the legitimate ultimate goal (Bohdan, 2019).

According to the procedure recommended by the resolution of the Plenum of the Supreme Administrative Court of Ukraine (2016), first of all, it is advisable to discuss the "legality of interests", for the protection of which the corresponding right to information is applied. Thus, according to Clause 6.3 of the Procedure, "interests" are specified in Item 1, Part 2, Article 6 of the Law of Ukraine No. 2939-VI "On Access to Public Information" (2011) and correspond to Article 34 of the Constitution of Ukraine (1996).

The procedure also orients the law enforcement officer to ensure that his or her actions correspond to a single purpose – to protect the relevant interest. In turn, the courts are advised to pay attention to proportionality (non-proportionality) in relation to the legitimate interest that is protected, establishing a balance between the interest that is protected and which may be harmed by information activities (the exercise of the right to information), and the right of society to know the requested information. When justifying the legitimacy of restrictions due to the legitimacy of interests, the courts must consider the presence of public interest in certain information (information activity), which cannot be considered "lost", and the corresponding list of types of information activity – exhaustive. Consequently, the application of the criteria defined by the procedure for the existence of public interest in particular information can also be carried out in relation to the right to information, specifically in the following aspects:

- dissemination in society or a certain part of it of discussion on topical issues, explanation of this important information to update the public discussion;
- clarification and interpretation of the content of prerequisites for making certain decisions by authorities, officials of local self-government bodies or state bodies;
- strengthening the accountability and control of the authorities to society, ensuring the openness of making relevant decisions and the process of preparing them;
- efficiency of audit of receipt and provision of public funds, management of municipal and state property, variance of municipal benefits;

◂ research of threats to public order and security, health of citizens, preventive measures for the occurrence and counteraction to serious consequences;

◂ identifying facts of misleading the public;

◂ other cases prescribed by law.

In addition, such justifications should be attributed to restrictions on the right to information by assigning the content of such information to the category "restricted access information". Thus, pursuant to the recommendations of the procedure for applying the "three-part test" in any case, localization of the right to information is mandatory.

The fact that the information has previously been lawfully classified as "information with restricted access" or the time for checking whether there are grounds for restriction has already expired cannot be considered an obstacle to non-application of the restriction. Other examples of the conceptuality of the application of the "three-part test" are quite frequent cases when the harm to the legitimate interest exceeds the public interest, respectively, of a separate piece of information or document, and therefore, the restriction is imposed only on that part of the information that passed the "three-part test". It is necessary to factor in the fact that such a complex legal institution as the right to information is heterogeneous in terms of the legal force of freedom and rights, which differ in possibilities and extremities of their limitation (Lukianova & Slyvka, 2021).

As indicated in the above-mentioned Court decision in case No. 380/2525/20, the list should be the cornerstone of the information to which access can be localized. This rule is applied in case there are grounds for restriction in each particular case, identified using the "three-part test" and should be applied by requesters and managers of such information (Decision of the Lviv District Administrative Court…, 2020). Thus, to evaluate the same list, which is nothing more than an abstract category of information, there is no need to use a "three-part test". At the same time, for any information that is marked "for official use", the use of the "three-part test" is mandatory.

Conclusions

As a result of the analysis of the law enforcement practices, it was established that both Ukrainian judicial practice and the judicial practice of the European Court of Human Rights are united in the legal position that no official is empowered to take actions aimed at sanctioning the right to socially useful information, without giving reasons for such a restriction according to the construction: "the restriction will not cause more harm than good".

The analysis of law enforcement practice in general proved the presence of several issues: firstly, the absence of a single mechanism for applying restrictions; secondly, the efforts of the courts of Ukraine and state bodies, whose competence includes the regulation of information activities, to develop their own paths and mechanisms of applying restrictions on the right to information, considering their practice of providing a legal assessment to each of these cases.

One of the ways to solve the specified issues in the practical plane is the application of the "three-part test" as a tool for justifying the implementation of any restriction of the right to information.

Further research into the issue of the justification of certain localization of the right to information in the interests of ensuring national security should be directed towards evaluation of the means of the "three-part test", specifically in the aspect of choosing a means that will ensure minimal restriction of the right to information. Another area of research should be consideration of the justification for the cancellation (liquidation) of the right to information as an extreme form of localization of the right to information in the interests of national security, using the "three-part test".

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Conflict of interest

None.

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Обмеження права на інформацію в інтересах національної безпеки: проблема обґрунтування

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Анотація. Актуальність статті зумовлено відсутністю єдиного теоретичного обґрунтування обмеження права на інформацію, незважаючи на те що українське законодавство такі обмеження допускає у Конституції. Мета роботи – проаналізувати певні випадки обмеження права на інформацію в інтересах національної безпеки й визначити способи обґрунтування таких обмежень. Методологічна основа дослідження – аналіз правозастосовної практики щодо обмеження права на інформацію. У статті встановлено, що, незважаючи на значну теоретичну базу у сфері захисту прав і свобод людини та громадянина, сучасна практика адміністративних судів ґрунтується лише на наданні правової оцінки діям Служби безпеки України щодо визнання інформаційної та іншої діяльності суб'єкта інформаційних відносин протиправною у світлі наданих Службі повноважень та переваг відповідно до ст. 10 Конвенції про захист прав людини і основоположних свобод. Доведено відсутність єдиного механізму обмеження права на інформацію в інтересах національної безпеки. Обґрунтовано, що суди та державні органи України, до компетенції яких віднесено регулювання інформаційної діяльності, досі не напрацювали власних шляхів і механізмів обмеження права на інформацію, які б враховували їхню власну практику надання правової оцінки кожному з таких випадків. Наголошено, що базовим засобом обґрунтування обмеження права на інформацію в інтересах національної безпеки, як і будь-якого обмеження права на інформацію, є застосування «трискладового тесту». Окреслені підстави локалізації права на інформацію стануть в пригоді науковцям, правоохоронцям, фахівцям з інформаційної безпеки для правомірного їх застосування

Ключові слова: права і свободи людини та громадянина; правомірне обмеження прав і свобод людини та громадянина; захищеність; інформаційна безпека; інформаційні права людини; трискладовий тест