UDC 342.9
DOI https://doi.org/10.32782/ln.2023.21.39

Leheza Yu.O.
Doctor of Law, Professor, Professor Department of Civil, Economic and Environmental Law, Institute of Human and Social Sciences, Dnipro University of Technology
ORCID: 0000-0002-4896-3178
Scopus Author ID: 57215790362

NATIONAL COURT PRACTICE AND ECTHR PRACTICE IN GUARANTEEING THE RIGHT TO PEACEFUL ASSEMBLY FOR LGBT REPRESENTATIVES

Formulation of the problem. The realization of a person's right to peaceful assembly refers to the system of subjective public rights of a person regardless of his gender or sexual identification. For a long time, the issue of gender identification at the level of normative and legal regulation was limited to the range of issues related to the realization of a person's right to health care, to the protection of the right to sexual integrity. And only in recent years, there is a gradual normative reflection of its content not only as a component of the rights of a person, which ensure his physical existence, but also as a component of the rights that determine his social existence. Gender identification is determined at the level of a person's emotional and intuitive sympathy for his or her gender or the absence of a clear definition of such a perception, that is, a feeling of uncertainty (ambivalence). At the same time, despite the established medical practice and medical protocols, which stipulate that gender identification should take place for a person between the ages of two and three, this issue for an individual may not be resolved during his entire life, which requires the state to create administrative support sexual, sexual and gender freedom, which should include the creation of conditions for holding peaceful meetings, demonstrations, marches, which should draw public attention to such a problem, and thus increase the effectiveness of the protection of individual rights.

The state of scientific development of the problem. The issues of holding peaceful meetings were directly considered in the publications of E. A. Kobruseva [1, p. 195-197], O. I. Bezpalova [2], and a number of others, but at the same time, the issue of protecting the rights of LGBT representatives was not considered or separated, despite its importance and relevance.

Taking into account the above, the *purpose* of this article is to characterize the national judicial practice and the practice of the ECtHR in guaranteeing the right to peaceful assembly for LGBT representatives.

Presenting main material. Restrictions on the exercise of the right to assemble peacefully, without weapons, and to hold meetings, rallies, marches and demonstrations, the execution of which is notified in advance to executive authorities or local self-government bodies, may be established by the court in accordance with the law and only in the interests of national security and public order - in order to prevent riots or crimes, to protect public health or protect the rights and freedoms of other people [3]. Article 68 of the Constitution of Ukraine guarantees the inadmissibility of limiting human rights and freedoms in their exercise.

Based on the content of the Convention on the Protection of Human Rights and Fundamental Freedoms of 1950 [4], ratified by the Verkhovna Rada of Ukraine in accordance with the Law of Ukraine of July 17, 1997 No. 475/97-BP «On the Ratification of the Convention on the Protection of Human Rights and Fundamental Freedoms of 1950» [5] it is determined that the exercise of the rights to freedom of assembly and association is

not subject to any restrictions, except for those established by law and necessary in a democratic society in the interests of national or public security, to prevent riots or crimes, to protect health. self or morality or to protect the rights and freedoms of others.

According to the International Covenant on Civil and Political Rights, ratified by the Decree of the Presidium of the Verkhovna Rada of the Ukrainian SSR dated October 19, 1973 No. 2148-VIII [6], the right of a person to peaceful assembly is established (Article 21). Restrictions on the exercise of such a right are inadmissible, except for those imposed in accordance with the law and which are necessary in a democratic society in the interests of state or public security, public order, protection of health and morals of the population or protection of the rights and freedoms of other persons.

According to Article 315 of the Civil Code of Ukraine, the right of natural persons to peaceful assemblies, conferences, meetings, festivals, etc. is provided, which can also be limited only on the basis of the law [7].

Based on the content of the provisions of the Law of Ukraine «On Local Self-Government in Ukraine» dated 05/21/1997 No. 280/97-BP, it is established that the executive committee of the Odesa City Council has the authority to resolve, in accordance with the law, issues regarding the holding of meetings, rallies, demonstrations and demonstrations , spectacular and other mass events; implementation of control over provision during their implementation of public order (Article 38) [8]. A similar approach is supported in a number of scientific publications [9, p. 107-111].

Despite the existence of such a normative provision, the practice of its enforcement is ambiguous, which is confirmed by the relevant judicial practice. As an example, it is necessary to pay research attention to the decision of the Administrative Court of Cassation as part of the Supreme Court dated October 23, 2019 in case No. 815/4612/15 [10].

The subject of the administrative lawsuit in the investigated case was the realization of the individual's right to freedom of peaceful assembly, which was initiated by the decision of the organizing committee of the festival of queer culture «Odesa Pride-2015», as part of which it was planned to hold open discussion platforms, show short films on the issues of SOGI and a peaceful action in the form of the «March of Equality» demonstration. According to the above notification, the beginning of the aforementioned «Equality March», in which representatives of the LGBT community: lesbians, gays, bisexuals and transgenders will take part, should take place at 9:30 a.m. on August 15, 2015 in the central part of Odessa.

The ban on holding this event was connected with the prevention of mass violations of public order, which was determined, in particular, by the holding of 14.08.2015 at 7:30 p.m. in Odesa at the CPKtaV named after T.G. Shevchenko at the stadium of FC Chornomorets during the match between FC Shakhtar (Donetsk) and FC Dnipro (Dnipropetrovsk); and on August 16, 2015 at 7:00 p.m., a football match between FC Chornomorets (Odesa) and FC Zorya (Luhansk) is also planned to be held at the specified location.

Courts of the first and second instance found that the case lacked the appropriate amount of information about the planned events, namely, the form of holding all the planned events, the time and place of their holding, including the route of the planned Equality March, the approximate number participants of the events, no information is given about the authorized persons (organizers) of the relevant events.

The position of the Supreme Court is based on the fact that, according to the current legislation, there is no mechanism for preliminary agreement on the conditions for holding a peaceful assembly, while the current legislation of Ukraine establishes the notified nature of the holding of peaceful assemblies, which does not provide for the receipt of appropriate approvals from the authorities, but obliges the organizers of the event independently provide comprehensive information about the planned event.

In addition, the Supreme Court substantiated the erroneous application by the courts of

the first and second instance of the Decree of the Presidium of the Supreme Council of the USSR dated 07.28.1988 No. 9306-XI «On the procedure for organizing and holding meetings, rallies, street marches and demonstrations in the USSR» [11].

According to the Decision of the Constitutional Court of Ukraine of April 19, 2001 No. 4-рп/2001 (the case regarding advance notification of peaceful assemblies), it was clarified that the provisions of the first part of Article 39 of the Constitution of Ukraine regarding advance notification of executive power bodies or local self-government bodies gatherings, rallies, marches and demonstrations in the aspect of constitutional submission should be understood as the organizers of such peaceful gatherings must notify the specified bodies about the holding of these events in advance, that is, in acceptable terms preceding the date of their holding. These terms should not limit the right of citizens provided for in Article 39 of the Constitution of Ukraine, but should serve as its guarantee and at the same time provide an opportunity for the relevant bodies of executive power or local self-government bodies to take measures for the unhindered holding of meetings, rallies, marches and demonstrations by citizens, ensuring public order, rights and other people's freedoms. Determining the specific terms of advance notification, taking into account the peculiarities of the forms of peaceful assemblies, their mass, place, time, etc., is the subject of legislative regulation [12].

That is why, in order to establish the category of «propriety» of a notice of holding peaceful assemblies, the provisions of Article 39 of the Constitution of Ukraine must be applied, which stipulates the requirement of timeliness of such notices, and the implementation of such restrictions can only be established by a court.

In the practice of the European Court of Human Rights, the decision in the case «Verentsov v. Ukraine» (the decision became final on 11.07.2013) [13] states: «... while the Constitution of Ukraine requires advance notification of the authorities about the intention to hold a demonstration and stipulates that any its limitation can only be imposed by a court, the 1988 Decree, drafted in accordance with the 1978 USSR Constitution, stipulates that those wishing to hold a peaceful demonstration must obtain permission from local authorities, who also have the right to prohibit any such demonstration. It is clear from the preamble of the Decree that it was intended for completely different purposes, namely, the provision by authorities of the means to express their views in favor of a certain ideology only to certain categories of persons, which in itself is incompatible with the very essence of freedom of assembly, which is guaranteed by the Constitution of Ukraine . ... The court also notes that, as is generally recognized, the resolution of the Verkhovna Rada of Ukraine «On the procedure for the temporary effect on the territory of Ukraine of certain acts of the legislation of the Union of the SSR» refers to the temporary application of the legislation of the Soviet Union, and so far the Parliament of Ukraine has not enacted any law that would regulated the procedure for holding peaceful demonstrations, although Articles 39 and 92 of the Constitution clearly require that such procedure be established by law, that is, by an act of the Parliament of Ukraine. While the Court agrees that the State may need some time to enact legislation during the transition period, it cannot agree that a delay of more than twenty years is justified, especially when it comes to such a fundamental right as the freedom of peaceful assembly» (p 54, 55) [10; 13].

The Supreme Court came to the conclusion that the period from 29.07.2015 (the date of submission of the notification letter) to 15.08.2015 (the date of the event) is sufficient for the Odesa City Administration to take measures to ensure safety and public order.

The European Court of Human Rights has repeatedly expressed its position on this issue and emphasized: «it goes without saying that any demonstration in a public place can cause a certain level of disruption in ordinary life and cause a

conflict» (Decision of the European Court of Human Rights in the case « Oya Ataman v. Turkey; similarly in the case of «BALCIK AND OTHERS».

The European Court of Human Rights, in the context of solving the issue of provocations during peaceful assemblies, substantiates that «the right to freedom of peaceful assembly is ensured for everyone who intends to organize a peaceful demonstration. The possibility of violent counter-demonstrations or the possibility of extremists with violent intentions to join demonstrations cannot, as such, take away this right» («ARZTE FUR DAS LEBEN» V. AUSTRIA) [15].

Therefore, the ban on holding peaceful assemblies in general, and in particular, with the participation of LGBT representatives, must be based on the existence of a reality of the threat of a violation of public order, which must be justified both by already existing precedents and by an analysis of objective and subjective characteristics, respectively, of the social situation that prevails in society. At the same time, the European Court of Human Rights has repeatedly emphasized that the realization of its rights by the minority should not depend on the approval of the majority. Even if the interests of a certain group of people are strikingly different from the interests of the main mass of the population, such interests must be respected.

Thus, in particular, the European Court of Human Rights notes: «although in some cases the interests of the individual may be subordinated to the interests of the group, democracy is not reduced to the fact that the views of the majority must necessarily prevail; it is necessary to observe a balance that would ensure fair and correct treatment of minorities and exclude any abuses by the dominant group» (paragraph 63 of the judgment in the case of Bachkowski and others v. Poland of May 3, 2007 [15]).

In case No. 815/4612/15, the Administrative Court of Cassation as part of the Supreme Court adopted a resolution dated October 23, 2019, where it was substantiated that the restriction of the right to a rally should be applied by the court based on the existence of a real threat to public order, which must be confirmed by relevant evidence.

Conclusion. Taking into account the fact that peaceful assembly is one of the means for a person and a citizen to defend their rights, freedoms and interests in a democratic society, the right of citizens to freedom of peaceful assembly in Ukraine must be guaranteed and protected by the state, which is obliged to ensure its effective implementation. The exercise of this right is not subject to any restrictions, except for cases established by law in the interests of national security and public order in order to prevent riots or crimes, to protect public health or to protect the rights and freedoms of other people.

At the same time, it is necessary to emphasize that efforts to hold peaceful gatherings based on gender identification, which is determined at the level of emotional and intuitive sympathy by a person for his gender or lack of a clear definition of such perception, that is, a feeling of uncertainty (ambivalence), is not a basis for recognizing such actions that pose a threat to national security.

Summary

The purpose of the article is to characterize the national judicial practice and the practice of the ECtHR in guaranteeing the right to peaceful assembly for LGBT representatives. The author clarified that restrictions on the exercise of the right to peaceful assembly can be established by the court in accordance with the law and only in the interests of national security and public order - in order to prevent riots or crimes, to protect the health of the population or to protect the rights and freedoms of other people. Based on the analysis of Article 68 of the Constitution of Ukraine, the Convention on the Protection of Human Rights and Fundamental Freedoms of 1950, it was determined that the inadmissibility of restrictions on human rights and freedoms in their exercise should be guaranteed in Ukraine. Based on the content of the provisions of the acts of the current legislation of Ukraine, it is determined that the exercise of the rights to freedom of assembly and association is not subject to any

restrictions, with the exception of those established by law and necessary in a democratic society in the interests of national or public security, to prevent riots or crimes , to protect health or morals or to protect the rights and freedoms of others. The work concludes that peaceful assembly is one of the means of defending one's rights, freedoms and interests by a person and a citizen in a democratic society, so the right of citizens to freedom of peaceful assembly in Ukraine must be guaranteed and protected by the state, which is obliged to ensure its effective implementation. The exercise of this right is not subject to any restrictions, except for cases established by law in the interests of national security and public order in order to prevent riots or crimes, to protect public health or to protect the rights and freedoms of other people. It was determined that efforts to hold peaceful gatherings based on gender identification, which is determined at the level of emotional and intuitive sympathy by a person for his gender or the lack of a clear definition of such perception, that is, a feeling of uncertainty (ambivalence), is not a basis for recognizing such actions that pose a threat to national security .

Key words: legal regulation, sexual orientation, peaceful assembly, subjective public rights, LGBT.

Легеза Ю.О. Національна судова практика та практика єспл у гарантуванні права на мирні зібрання для представників ЛГБТ

Метою статті визначено здійснення характеристики національної судової практики та практики ЄСПЛ у гарантуванні права на мирні зібрання для представників ЛГБТ. Автором з'ясовано, що обмеження реалізації права на мирні зібрання може встановлюватися судом відповідно до закону і лише в інтересах національної безпеки та громадського порядку - з метою запобігання заворушенням чи злочинам, для охорони здоров'я населення або захисту прав і свобод інших людей. На основі аналізу статті 68 Конституції України, Конвенції про захист прав людини і основоположних свобод 1950 року визначено, що в Україні має гарантуватися неприпустимість обмеження прав і свобод людини при їх здійсненні. Виходячи із змісту положень актів чинного законодавства України визначено, що здійснення прав на свободу зібрань та об'єднання не підлягає жодним обмеженням, за винятком тих, що встановлені законом і є необхідними в демократичному суспільстві в інтересах національної або громадської безпеки, для запобігання заворушенням чи злочинам, для охорони здоров'я чи моралі або для захисту прав і свобод інших осіб. У роботі зроблено висновок, що мирні зібрання є одним із засобів відстоювання людиною і громадянином своїх прав, свобод та інтересів у демократичному суспільстві, то право громадян на свободу мирних зібрань в Україні має гарантуватися та захищатися державою, яка зобов'язана забезпечити його ефективну реалізацію. Здійснення цього права не підлягає жодним обмеженням, крім випадків, установлених законом в інтересах національної безпеки та громадського порядку з метою запобігання заворушенням чи злочинам, для охорони здоров'я населення або захисту прав і свобод інших людей. Визначено, що намагання провести мирні зібрання за гендерною ідентифікацією, яка визначається на рівні емоційного та інтуїтивного співчуття людиною своєї статевої приналежності або відсутності чіткого визначення такого сприйняття, тобто почуття невизначеності (амбівалентності), не є підставою для визнання таких дій, що створюють загрозу національній безпеці.

Ключові слова: нормативно-правове регулювання, сексуальна орієнтація, мирні зібрання, суб'єктивні публічні права, ЛГБТ.

Literature:

1. Кобрусєва Є.А. Щодо питання адміністративно-правового забезпечення права на мирні зібрання в суспільстві. *Юридичний науковий електронний журнал*. 2018. № 4. С. 195–197

2. Безпалова О.І. Адміністративно-правовий механізм реалізації правоохоронної функції держави: монографія.Харків. нац. ун-т внутр. справ. 2014. 544 с.
3. Конституція України від 28 червня 1996 року. URL.: https://zakon.rada.gov.ua/laws/show/254к/96-вр
4. Конвенція про захист прав людини і основоположних свобод 1950 року. URL.: https://zakon.rada.gov.ua/laws/show/995_004#Text
5. Про ратифікацію Конвенції про захист прав людини і основоположних свобод 1950 року: Закон України від 17 липня 1997 року № 475/97-ВР. URL.: https://zakon.rada.gov.ua/laws/show/475/97-вр#Text
6. Міжнародний пакт про громадянські і політичні права, ратифікований Указом президії Верховної Ради Української РСР від 19 жовтня 1973 року № 2148-VIII. URL.: https://zakon.rada.gov.ua/laws/show/995_043#Text
7. Цивільний кодекс України від 16 січня 2003 року. URL.: https://zakon.rada.gov.ua/laws/show/435-15
8. Про місцеве самоврядування в Україні: Закону України від 21.05.1997 № 280/97-ВР. URL.: https://zakon.rada.gov.ua/laws/show/280/97-вр
9. Легеза Ю.О., Кулініч К.А. Розгляд питання поняття «публічне адміністрування». *Право і суспільство*. 2016. №6. Ч. 2. С. 107-111.
10. Постанова Касаційного адміністративного суду у складі Верховного суду у справі № 815/4612/15 від 23 жовтня 2019 року. URL.: https://reyestr.court.gov.ua/Review/85154116
11. Про порядок організації і проведення зборів, мітингів, вуличних походів і демонстрацій в СРСР: Указ Президії Верховної Ради СРСР від 28.07.1988 № 9306-XI. URL.: https://zakon.rada.gov.ua/laws/show/v9306400-88#Text (станом на 01.05. 2022 року не застосовується на території України – авт.)
12. Рішення Конституційного Суду України від 19 квітня 2001 року №4-рп/2001 (справа щодо завчасного сповіщення про мирні зібрання). URL.: https://zakon.rada.gov.ua/laws/show/v004p710-01#Text
13. Справа «Вєренцов проти України» (Заява № 20372/11). URL.: https://zakon.rada.gov.ua/laws/show/974_945
14. "ARZTE FUR DAS LEBEN" V. AUSTRIA. URL. https://hudoc.echr.coe.int/fre?i=001-57558#:~:text=Plattform%20"Ärzte%20für%20das%20Leben"%20is%20an%20association%20of%20doctors,Austrian%20legislation%20on%20the%20matter.
15. Рішення ЄСПЛ у справі Бачковський та інші проти Польщі від 3 травня 2007. URL.: https://ccu.gov.ua/sites/default/files/ccu/5_3007.pdf