

Human Rights and Features of their Protection in Conditions of War: International Legal Standards, Administrative, Constitutional and Criminal Aspects

Yuliia Zaporozhchenko¹, Yuliia Leheza², Yuliia Volkova³, Olena Pushkina², Marat Koval⁴

¹University of Customs and Finance, Ukraine

²Dnipro University of Technology, Ukraine

³National Aviation University, Ukraine

⁴Fifth Administrative Court of Appeal, Ukraine

*Corresponding Author Email: yulyabar@ukr.net

ABSTRACT

The article is devoted to analysis of constitutional human rights and freedoms under martial law. The main focus is made on the analysis of human rights that may be restricted during martial law. Human rights are divided into absolute ones and relative ones. Absolute rights are determined as rights that cannot be limited under any circumstances. The legal definition of martial law is analyzed. It was found that martial law is the main legal basis for limiting the constitutional rights and freedoms of the person and of the citizen. Grounds for introducing martial law include threats to national security and territorial integrity. Attention is focused on the mechanisms and guarantees aimed at protection of human rights in conditions of martial law. Any restrictions on human rights must be justified, proportionate and necessary to achieve the legitimate goals of security and defense of the state. Affirmation and provision of human rights and freedoms is the main duty of the state. Therefore, during the legal regime of martial law the state cannot cancel its obligation to guarantee human rights. The list of rights which are not subject to restriction even during martial law, are human and citizen's rights guaranteed by the Constitution. Respect for human rights is a guarantee of state power both at the national and international levels.

Keywords: Martial law, guarantees, protection, human rights, international legal standards, restrictions, security

ABSTRAK

Artikel ini dikhususkan untuk analisis hak asasi manusia dan kebebasan konstitusional di bawah darurat militer. Fokus utama dibuat pada analisis hak asasi manusia yang mungkin dibatasi selama darurat militer. Hak asasi manusia terbagi menjadi hak absolut dan hak relatif. Hak absolut diartikan sebagai hak yang tidak dapat dibatasi dalam keadaan apapun. Definisi hukum darurat militer dianalisis. Ditemukan bahwa darurat militer adalah dasar hukum utama untuk membatasi hak konstitusional dan kebebasan seseorang dan warga negara. Alasan penerapan darurat militer mencakup ancaman terhadap keamanan nasional dan integritas wilayah. Perhatian difokuskan pada mekanisme dan jaminan yang ditujukan untuk perlindungan hak asasi manusia dalam kondisi darurat militer. Pembatasan apa pun terhadap hak asasi manusia harus dapat dibenarkan, proporsional, dan diperlukan untuk mencapai tujuan sah keamanan dan pertahanan negara. Penegasan dan pemberian hak asasi manusia dan kebebasan merupakan tugas utama negara. Oleh karena itu, dalam rezim hukum darurat militer negara tidak dapat membatalkan kewajibannya untuk menjamin hak asasi manusia. Daftar hak-hak yang tidak dibatasi bahkan pada masa darurat militer, adalah hak asasi manusia dan warga negara yang dijamin oleh Konstitusi. Penghormatan terhadap hak asasi manusia merupakan jaminan kekuasaan negara baik di tingkat nasional maupun internasional.

Kata kunci: Darurat militer, jaminan, perlindungan, hak asasi manusia, standar hukum internasional, pembatasan, keamanan.

* Copyright (c) 2023 **Yuliia Zaporozhchenko et al**

This work is licensed under a [Creative Commons Attribution-ShareAlike 4.0 International License](https://creativecommons.org/licenses/by-sa/4.0/).

Received: October 15, 2023; Revised: December 23, 2023; Accepted: December 28, 2023

INTRODUCTION

The notion of human and citizen's rights stands as a bedrock for the preservation of dignity, autonomy, and personal development (Łuków, 2018). These principles empower individuals to freely articulate their thoughts, beliefs, and aspirations. However, the complex interplay between these rights and martial law, a state triggered by severe security threats or aggression, adds layers of intricacy to the matter. This became acutely apparent in Ukraine when, in response to Russia's aggression starting in 2014, the country declared martial law for the first time in its independent history in 2022. This legal framework, while essential for national security, imposed restrictions on fundamental rights across the entire Ukrainian territory.

The conflict with Russia, spanning from the occupation of Crimea in 2014 to ongoing support for military actions in eastern Ukraine, created an unprecedented situation (Payne & Foster, 2017). Martial law brought about a paradigm shift in priorities, presenting new challenges that necessitated adaptive and effective mechanisms for safeguarding human rights. Amidst this context, the importance of actively discussing and developing such protective mechanisms became paramount (Nandy, 2023). The need for justice, the progression of democracy, and the restoration of peace in the country hinged on the formulation of strategies that could navigate the delicate balance between national security imperatives and the preservation of individual freedoms.

The Ukrainian experience during the war underscores the urgency of addressing this multifaceted issue. Novel approaches to protecting human rights under martial law are not just desirable; they are imperative for the resilience and well-being of society. The ongoing dialogue and development of innovative mechanisms in response to the unique challenges posed by martial law exemplify Ukraine's commitment to justice, democracy, and the ultimate goal of restoring peace in the face of adversity.

RESEARCH METHOD

The research is based on the works of foreign and Ukrainian researchers regarding constitutional human rights under martial law etc.

The methodology of researching international legal standards on the human and citizen's rights and freedoms is a set of methodological approaches, methods, principles of learning concepts, ideas, hypotheses, principles, regularities which, when used, give an opportunity to obtain true knowledge about these standards, the status of IDPs in order to improve them. Choice of specific principles, methodological approaches and research methods is conditioned by a defined goal and tasks. A multifaceted study of the issues concerning human and citizen's rights and freedoms presupposes application of general philosophical, general scientific and special legal methods of knowledge.

With the help of the epistemological method human constitutional rights and freedoms under martial law, etc. were clarified, thanks to the logical-semantic method, the conceptual apparatus was deepened, the peculiarities of human constitutional rights and freedoms under martial law, were determined. Thanks to the existing methods of law, we managed to analyze human constitutional rights and freedoms of a person in the conditions of martial law. etc..

RESULTS AND DISCUSSION

Human rights in conditions of war are an integral and core value of modern society. These rights must be protected and guaranteed both at the level of constitutional provisions and at the level of legal and regulatory environment. Considering the complex modern realities caused by

Russia's armed aggression and its full-scale invasion of Ukrainian lands, human rights are subject to exclusive protection (Shemshuchenko, 2017). This is determined by the constitutional norm, which recognizes a human, his/her life and health, honor and dignity, inviolability and security to be the highest social value. During an armed conflict, the priority of observing human rights is not only a sign of a high level of democracy and development of society, but also an indicator of recognizing a person to be the highest social value and national priority (Loizidou, 1996).

When considering human rights under martial law it is first of all necessary to find out what is embedded in the content of this phenomenon. Legal literature and legislation provide a fairly wide list of definitions of this concept. Thus, the legislator defines martial law as “a special legal regime introduced in Ukraine or in some of its localities in the event of armed aggression or threat of attack, danger to the state independence of Ukraine, its territorial integrity, and which presupposes provision of appropriate state authorities, military command, military administrations and local self-government bodies with powers necessary to avert the threat, repulse armed aggression and ensure national security, to eliminate the threat of danger to the state independence of Ukraine, its territorial integrity, as well as to temporarily restrict (due to the threat) the constitutional rights and freedoms of a human and a citizen and the rights and legitimate interests of legal entities with an indication of the period of validity of these restrictions” (Law of Ukraine, 2022). The cited definition describes martial law as the main legal basis for restricting the constitutional rights and freedoms of a human and a citizen (Hornsby V, 1997).

The legislation of Ukraine provides for the possibility of introducing martial law in the event of a threat to national security or the territorial integrity of the state. During martial law, some rights and freedoms of citizens may be restricted in order to ensure defense of the country and preserve its security. However, these restrictions cannot apply to all rights of citizens. According to Article 6 of the Law of Ukraine “On the Legal Regime of Martial Law”, the decree of the President of Ukraine on the introduction of martial law specifies an exhaustive list of the constitutional rights and freedoms of the person and of the citizen, which are temporarily limited in connection with the introduction of martial law, indicating the period of validity of these restrictions (Law of Ukraine, 2022).

Therefore, as a result, introduction of a special legal regime (in particular introduction of martial law) poses a threat to basic human rights and freedoms. However, it is important to note that the legislation of Ukraine provides for mechanisms and guarantees aimed at protecting human rights even under martial law. It is also important to note that the period of application of restrictions cannot exceed the duration of the state of emergency or duration of the martial law (Leheza et al., 2022). This means that after the end of such a regime, the full effect of constitutional rights and freedoms must be restored. It is important that any restrictions on human rights applied during martial law are justified should be proportionate and necessary to achieve the legitimate objectives of the security and defense of the state

The state being a participant in socio-economic relations is responsible to people for its activities, and therefore it is obliged to ensure the protection of the rights and freedoms of citizens, create conditions for their development, and be responsible to people for its activities. Affirmation and provision of human rights and freedoms is the main duty of the state regardless of the conditions, even under martial law. So, as we can see, it is the state that is entrusted with the duty to ensure human rights, which is what Article 3 of the Constitution of Ukraine tells us. Based on this

postulate, it can be stated that during the operation of the legal regime of martial law, the state cannot abandon its obligation to ensure human rights (Abramova et al., 2021).

In the modern theory of human rights, the division of rights into absolute ones and relative ones is foreseen, based on the criterion of possibility or impossibility of their restriction. Under such a division, absolute rights are those rights that cannot be limited under any conditions (Kuchuk, 2018: 81). This provision is clearly implemented in Ukraine in the context of ensuring human rights. According to Article 64 of the Basic Law of the State, human rights “may not be limited, except in cases provided for by the Constitution of Ukraine” (Law of Ukraine, 1996). The mentioned standard emphasizes the normative basis of the restriction of human rights - and this basis is represented by the Constitution of Ukraine.

Part 2 of Article 64 of the Constitution of Ukraine defines a list of rights and freedoms that cannot be restricted under martial law (Law of Ukraine, 2001). Such rights and freedoms include the following: the right to equality of citizens before the law regardless of race, skin color, political, religious and other beliefs, gender, ethnic and social origin, property status, place of residence, language and other characteristics (Article 24); the right to citizenship and the right to change citizenship (Article 25); the right to life (Article 27); the right to respect person’s dignity (Article 28); the right to freedom and personal inviolability (Article 29); the right to file individual or collective petitions, or to personally appeal to bodies of state power and bodies of local self-government (Article 40); the right to housing (Article 47); the right to marriage and equal rights and duties in the marriage and family (Article 51); equality of children in their rights regardless of their origin (Article 52); right to protection of human and citizens’ rights and freedoms are protected in the courts (Article 55); the right to compensation, at the expense of the State or bodies of local self-government, for material and moral damages inflicted by unlawful decisions of bodies of state power (Article 56); the right to know one’s rights and duties (Article 57); laws and other normative legal acts have no retroactive force, except in cases where they mitigate or annul the responsibility of a person (Article 58); the right to professional legal assistance (Article 59), the right to refuse to carry out rulings or orders that are manifestly criminal (Article 60); the right not to be brought twice to legal liability for the same offense (Article 61); presumption of innocence (Article 62); the right to protection and refusal to testify or to give explanations or statements about oneself, family members or close relatives, whose circle is defined by the law (Article 63) (Bonyak et al., 2019). Enshrining the list of rights that are not subject to restriction, even under martial law, is a constitutional guarantee of human and citizen’s rights. This is an important aspect to ensure the basic rights and freedoms of citizens at any time. It is namely respect for human rights that is the guarantee of state prestige at the national and international levels. Thus, building a state based on democratic values involves not only declaration of human rights, but also provision of these rights in any realities (Leheza et al., 2023).

In the conditions of an armed conflict, the right to life as a fundamental human right is practically defenseless. This is due to the fact that war leads to various forms of violence, including murder, bodily harm, kidnapping, torture, which directly violate the right to life, dignity and inviolability, which is a particularly serious problem today. Such actions are unacceptable, regardless of the circumstances, and they are subject to strict condemnation as a violation of international humanitarian law and international human rights. In view of this, the primary duty of the state is to protect human life as the greatest value of every state. Also, according to international customary law, the right to life is recognized as a fundamental human right. Therefore, it is obvious

that the Convention considers this right as one of its most fundamental provisions. In the Convention, as well as in the International Covenant on Civil and Political Rights, the right to life belongs to the rights which are inadmissible to deviated even in emergency situations (Volobuieva et al., 2023).

According to Article 15 Convention “In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation and provided that such measures are not inconsistent with its other obligations” (Leheza et al., 2023). It is significant that the war poses a threat to the life of the nation, and therefore the Convention notes this as a reason justifying the retreat of the state from fulfilling its obligations (Leonenko et al., 2019). Therefore, deviation from the Convention is possible only in exceptional crisis situations which affect the entire population

Separately, we would like to draw attention to human dignity, which is undoubtedly an important and inalienable value for humanity. It is generally accepted that every person has the right to be treated with dignity, respect for his/her personality as well as the right to protection from any form of abuse, torture or discrimination. Even during martial law, when some rights may be restricted, human dignity must remain intact (Leheza et al., 2019). International humanitarian law, also known as the law of armed conflict, establishes norms and principles that limit the use of violence and ensure protection of human dignity during armed conflicts. Protection of human dignity must be guaranteed both at the legislative level and at the level of public awareness (Manzhula et al., 2017).

Protection of the rights and freedoms of citizens is one of the main responsibilities of the state. However, there are cases when restriction of these rights and freedoms is unavoidable and must be exercised exclusively in a legally defined manner (Law of Ukraine, 1997). According to the Constitution of Ukraine, introduction of martial law or a state of emergency is the basis for such restrictions. The rights of natural persons that may be limited under martial law include: the right to inviolability of dwelling place (Article 30); the right to privacy of mail, telephone conversations, telegraph and other correspondence (Article 31); the right to non-interference in personal and family life (Article 32); the right to freedom of thought and speech, and to the free expression of his or her views and beliefs (Article 34); the right to participate in the administration of state affairs, in All-Ukrainian and local referendums, to freely elect and to be elected to bodies of state power and bodies of local self-government (Article 38); the right to assemble peacefully without arms and to hold meetings, rallies, processions and demonstrations (Article 39); the right to own, use and dispose of his or her property, and the results of his or her intellectual and creative activity (Article 41); the right to entrepreneurial activity (Article 42); the right to labor (Article 43); the right to strike (Article 44); the right to education (Article 53) (Law of Ukraine, 1996). Such restrictions are necessary for: crime prevention; saving people's lives and property; ensuring the interests of national security, territorial integrity, public order and economic well-being; provision of public health protection, protection of reputation, rights and freedoms of other people; prevention of disclosure of confidential information, etc (Korneyev et al., 2018).

In the modern world, restrictions of human rights and freedoms are a necessary element of the relationship between people and the state. Although these restrictions are not always perceived positively, their implementation has rational motives expressed in protection of human rights and freedoms from arbitrariness as well as in preservation of public security, etc (Leonenko et al.,

2019). Therefore, restriction of human basic rights and freedoms is a legitimate, purposeful reduction of person's potential capabilities, which is legal, temporary, and socially necessary. In fact, all international legal acts regulating human rights and freedoms provide for the possibility of their restriction. In addition to the above, one should agree with the opinion of Y. Leheza, who defines restriction of human rights and freedoms as a regime of temporary general or specific-individual suspension or narrowing of the scope of rights and freedoms defined and guaranteed by the Fundamental Law of the state in the interests of ensuring rights of other people and ensuring national security and defense of Ukraine (Leheza et al., 2023).

Separately, we should note that restriction of human rights must be distinguished from the violation of human rights, since these are two different categories. Restrictions on human rights occur when the state or other subjects limit the use of certain human rights in certain situations with legitimate goals, such as ensuring security, protection of public order, health protection, as well as protection of the rights and freedoms of other persons or the interests of society in general (Dymko et al., 2017). Restrictions on human rights are always linked to certain conditions and must be proportionate to the objective goals they have to achieve. At the same time, violation of human rights is always outside the limits of what is allowed (Shkuta et al., 2023)

CONCLUSION

In the conditions of martial law, protection of human rights is particularly difficult. The Constitution of Ukraine and other normative legal acts provide for a mechanism that allows restrictions on exercising separate rights of citizens. However, such restrictions must be justified, limited in time and resources, they must be used in accordance with the principles of democracy and the rule of law for the purpose of protecting interests of society, preserving public order and security, as well as rights and freedoms of other citizens. Compliance of such restrictions with international standards and human rights plays an important role in ensuring protection of these rights. Taking into account functioning of the principle of the rule of law, operation of the Convention and decisions of the European Court of Human Rights, today it was possible to form an established practice regarding determination of the legality and justification of restricting human rights and freedoms.

A certain mobilization of private rights performed by the state (which is entrusted with the duty to preserve the constitutional order) is a matter not only of state authorities, but also of all the people. After all, there is no constitutional order and state interest - the state is absent. And absence of the state makes existence of private rights impossible. Therefore, we consider the issue of applying minimally necessary restrictions on human and citizen's rights and freedoms before cancellation of such rights and freedoms as a social institution to be absolutely expedient and resolved.

REFERENCES

- Abramova, A., Shaposhnykov, K., Zhavoronok, A., ...Skvirskyi, I., Lukashev, O. (2021). The ecosystem of VAT administration in E-commerce: case of the eastern europe countries. *Estudios de Economia Aplicada*, 2021, 39(5), 1-5 DOI: <https://doi.org/10.25115/eea.v39i5.4909>
- Bonyak, V., Minka, T., & Mysliwa, O. (2019). Origins of the institution of corruption in post-socialist states: economic, legal and institutional aspects. *Economic Annals-XXI*, 177(5-6), 22-33. doi: <https://doi.org/10.21003/ea.V177-02>

- Dymko, I., Muradian, A., Manzhula, A., Rudkovskiy, O., Leheza, Ye. (2017). Integrated approach to the development of the effectiveness function of quality control of metal products. *Eastern European Journal of Enterprise Technologies*. 6/3 (90). 26-34. doi: 10.15587/1729-4061.2017.119500.
- Hornsby V, Greece. (1997). Judgement, European Court of Human Rights, §§40-45, no. 18357/91, March 19. Available online. In: <http://hudoc.echr.coe.int/eng?i=001-58020>
- Korneyev, M., Zolotukhina, L., Hryhorash, T., Leheza Ye., Hryhorash O., (2018). The development of small business as a source of formation of local budget revenues in Ukraine. *Investment. Management and Financial Innovations*. 15 (1). P. 132-140. DOI:10.21511/imfi.15(1).2018.12
- Kuchuk, A.M. (2018). Theory of the state and law. Part 1. Theory of the state: educational and methodological manual. Dnipro: Dnipropetrovsk State University of Internal Affairs, 112 p.
- Law of Ukraine. (1996). Constitution of Ukraine: Law of Ukraine of June 28, 1996 No. 254k/96-BP. Information of the Verkhovna Rada of Ukraine. 1996, No. 30, Art. 141. Retrieved from: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>
- Law of Ukraine. (1997). On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, the First Protocol and Protocols 2, 4, 7 and 11 to the Convention. Available online. In: <https://zakon.rada.gov.ua/laws/show/475/97-%D0%B2%D1%80>.
- Law of Ukraine. (2001). On Citizenship in Ukraine. Available online. In: <https://zakon.rada.gov.ua/laws/show/2235-14>
- Law of Ukraine. (2022). On the legal regime of martial law: Law of Ukraine dated 12.05.2015. № 389-VIII. Retrieved from: <https://zakon.rada.gov.ua/laws/show/389-19#Text>.
- Leheza, Y., Shcherbyna, Bogdan. Leheza, Yulia. Pushkina, Olena & Marchenko O. (2023). Features of Applying the Right to Suspension or Complete/ Partial Refusal to Fulfill a Duty in Case of Non-Fulfilment of the Counter Duty by the Other Party According to the Civil Legislation of Ukraine. *Revista Jurídica Portucalense*, 340–359. Retrieved from <https://revistas.rcaap.pt/juridica/article/view/29662>
- Leheza, Ye. O., Filatov, V., Varava, V., Halunko, V., Kartsyhin, D. (2019). Scientific and practical analysis of administrative jurisdiction in the light of adoption of the new code of administrative procedure of Ukraine. *Journal of Legal, Ethical and Regulatory Issues*. Vol. 22, Issue 5. 2019. P. 1-8. Retrieved from: <https://www.abacademies.org/articles/scientific-and-practical-analysis-of-administrative-jurisdiction-in-the-light-of-adoption-of-the-new-code-of-administrative-proced-8634.html>
- Leheza, Ye. Shablysty, V. Aristova, I. V. Kravchenko, I. A. Korniakova, T. (2023). Foreign Experience in Legal Regulation of Combating Crime in the Sphere of Trafficking of Narcotic Drugs, Psychotropic Substances, their Analogues and Precursors: Administrative and Criminal Aspect. *Journal of Drug and Alcohol Research*. Vol. 12 . No. 4, 1-8. DOI: <https://doi.org/10.4303/JDAR/236240>
- Leheza, Ye., Pisotska, K., Dubenko, O., Dakhno, O., Sotskyi, A. (2022). The Essence of the Principles of Ukrainian Law in Modern Jurisprudence. *Revista Jurídica Portucalense*, December, 342-363. DOI: [https://doi.org/10.34625/issn.2183-2705\(32\)2022.ic-15](https://doi.org/10.34625/issn.2183-2705(32)2022.ic-15)
- Leonenko, T.Y., Leonenko, M.I., Shkuta, O.O., Yurchyshyn, V.M. (2019). Features of group motivation for criminal acts committed on the grounds of religious hatred or hostility.

- Journal of Advanced Research in Law and Economics, 10(3), 842–849 DOI: [https://doi.org/10.14505//jarle.v10.3\(41\).19](https://doi.org/10.14505//jarle.v10.3(41).19)
- Leonenko, T.Y., Leonenko, M.I., Shyian, O.Y., Yurchyshyn, V.M., Shkuta, O.O. (2019). Pathological' Religiosity Phenomenon as Manifestation of Individual's Deviant Behavior: Religious Hatred or Discord Motive in Commission of Crimes in the Religious Denomination Sphere. *Journal of Advanced Research in Law and Economics*, , 10(1), 295–306 DOI: [https://doi.org/10.14505//jarle.v10.1\(39\).30](https://doi.org/10.14505//jarle.v10.1(39).30)
- Łuków, P. (2018). A difficult legacy: human dignity as the founding value of human rights. *Human Rights Review*, 19(3), 313–329.
- Loizidou V, Turkey. (1996). Judgement, European Court of Human Rights, §45, no. 15318/89, 18 December. Available online. In: <http://hudoc.echr.coe.int/eng?i=001-58007>
- Manzhula, A. Leheza, Ye. (2017). Foreign experience and public services through the implementation in national legislation Ukraine. *ScienceRise: Juridical Science*, (2 (2), 45–49. doi: 10.15587/2523-4153.2017.118829
- Nandy, D. (2023). Human Rights in the Era of Surveillance: Balancing Security and Privacy Concerns. *Journal of Current Social and Political Issues*, 1(1), 13–17.
- Payne, K. B., & Foster, J. S. (2017). Russian strategy Expansion, crisis and conflict. *Comparative Strategy*, 36(1), 1–89.
- Shemshuchenko, Yurii. (2017). "Constitution of Ukraine and human rights" In: *Law of Ukraine*. No. 8, pp. 13-16.
- Shkuta, O., Karbovskiy, D., Pushkina, O., Potip, M., Varhuliak, O. Object and Subject of State Control in the Sphere of Legal Turnover of Narcotic Drugs, Psychotropic Substances and their Precursors in Ukraine: Administrative, Criminal and Civil-Legal Aspect. *Journal of Drug and Alcohol Research*. 2023, 12(7), 236-255. DOI: <https://doi.org/10.4303/JDAR/236255>
- Volobuieva, O. Leheza, Ye. Pervii, V. Plokhuta, Ye. Pichko, R. (2023). Criminal and Administrative Legal Characteristics of Offenses in The Field of Countering Drug Trafficking: Insights from Ukraine. *Yustisia*. Vol 12, No 3. 262-277. DOI: <https://doi.org/10.20961/yustisia.v12i3.79443>