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Limits of human rights restrictions in criminal proceedings under martial law in Ukraine

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Abstract: This article studies the impact of martial law on human rights and freedoms in criminal trials in Ukraine, focusing on the balance between national security and individual rights. The establishment of martial law in 2022 stipulated significant amendments to the Criminal Procedure Code of Ukraine, altering pre-trial investigations, detention procedures, and judicial oversight. These changes, including restrictions on defence rights, extended detention periods, and increased prosecutorial powers, raise concerns regarding their compatibility with constitutional principles and human rights standards. Using a comparative legal methodology, the authors analyse Ukrainian legislation alongside international legal frameworks and case law from the ECtHR. The article highlights discrepancies between the newly implemented restrictions and the principles of legality, proportionality, and necessity in a democratic society. While some measures are justified for maintaining public order, others risk undermining fundamental rights, particularly due to the lack of judicial oversight and the potential for abuse. The findings indicate that while emergency legal regimes require temporary limitations on rights, democratic societies must ensure such measures remain transparent, proportionate, and subject to judicial review. The study concludes that Ukraine must introduce stronger safeguards against the misuse of emergency powers, ensure compliance with constitutional and international norms, and establish mechanisms for effective legal recourse. Strengthening judicial oversight and maintaining the rule of law is essential to prevent arbitrary restrictions and uphold human dignity.

Keywords: Human Rights and Freedoms, Martial Law, Private Life, Detention, Limitations of Rights and Freedoms, Balance of Interests, Armed Conflict.

Resumo: Este artículo estudia el impacto de la ley marcial en los derechos humanos y las libertades en los juicios penales en Ucrania, centrándose en el equilibrio entre la seguridad nacional y los derechos individuales. La instauración de la ley marcial en 2022 impuso importantes modificaciones al Código de Procedimiento Penal de Ucrania, modificando las investigaciones previas al juicio, los procedimientos de detención y la supervisión judicial. Estos cambios, que incluyen restricciones a los derechos de defensa, períodos de detención prolongados y mayores facultades procesales, plantean dudas sobre su compatibilidad con los principios constitucionales y las normas de derechos humanos. Utilizando una metodología jurídica comparada, los autores analizan la legislación ucraniana junto con los marcos jurídicos internacionales y la jurisprudencia del TEDH. El artículo destaca las discrepancias entre las nuevas restricciones implementadas y los principios de legalidad, proporcionalidad y necesidad en una sociedad democrática. Si bien algunas medidas están justificadas para mantener el orden público, otras corren el riesgo de socavar los derechos fundamentales, en particular debido a la falta de supervisión judicial y al potencial de abuso. Las conclusiones indican que, si bien los regímenes jurídicos de emergencia exigen limitaciones temporales de derechos, las sociedades democráticas deben garantizar que dichas medidas sean transparentes, proporcionadas y estén sujetas a revisión judicial. El estudio concluye que Ucrania debe implementar salvaguardias más sólidas contra el abuso de poderes de emergencia, garantizar el cumplimiento de las normas constitucionales e internacionales y establecer mecanismos para un recurso legal efectivo. El fortalecimiento de la supervisión judicial y el mantenimiento del Estado de derecho son esenciales para prevenir restricciones arbitrarias y defender la dignidad humana.

Palavras-Chave: Derechos Humanos y Libertades, Ley Marcial, Vida Privada, Detención, Limitaciones de Derechos y Libertades, Equilibrio de Intereses, Conflicto Armado.

1. Introduction

Among the theoretical and legal studies, the problem related to the limitation of human rights is important, since human rights are fundamental and inalienable and can be subject to only reasonable restrictions caused by the threat to national interests and public security. This research utilises the paradigm of the legislative changes introduced to the Ukrainian criminal procedural legislation following the implementation of martial law.

Prior to these events, the prevailing criminal procedural legislation in Ukraine failed to incorporate the distinct characteristics associated with pre-trial investigations and the court's consideration of criminal trials in the period of martial law. As a result, during 2022-2024, the Criminal Procedure Code of Ukraine⁶ (hereinafter - the CPC of Ukraine) was amended by 35 laws, the vast majority of which provided for the specific characteristics of criminal process under martial law and introduced restrictions on the rights of defence and additional powers of the prosecution in criminal cases. Certain norms of the criminal procedure legislation were justified by the need to stabilise the situation in Ukraine and minimise the destructive impact of the warfare⁷.

Following Article 64 of the Constitution of Ukraine⁸, the establishment of limitations on fundamental human rights and freedoms is only permissible under the provisions of martial law, with the explicit delineation of their temporal scope. These limitations must not result in racial, sex, religious, language, ethnic discrimination. Certain rights may not be subject to the restrictions. Such basic rights include the right to change citizenship, the right to life, the right to protect one's own life and health, the right to dignity, which includes the prohibitions of torture, inhumane and cruel treatment, or any form of degrading treatment, and the prohibition of experimentation on human subjects without their consent. The right to liberty and security ensures that detainment may only occur as a consequence of a reasoned court decision. Moreover, the right to appeal is guaranteed. Citizens who require social protection are guaranteed the right to adequate housing, which is the responsibility of the state. Marital and child rights are similarly protected. Everyone has the right to be protected by the courts and to be compensated for any harm, both material and moral, that they may have suffered as a result of the wrongdoings or inactions of state or municipal government officials. People also have the right to know their rights and obligations. Finally, legal acts must be both valid and applicable over time. Individuals have the right to professional legal aid and are not required to follow illegal orders⁹.

Despite the ongoing war in Ukraine since 2014, the criminal procedure legislation proved to be unsuitable for criminal cases in times of warfare. This led to immediate modernisation of legislation, accompanied by a range of amendments to the CPC of Ukraine. However, these amendments were shown to be conflicting with both the Constitution of Ukraine and international legal acts. Meanwhile, during martial law, the Constitutional Court of Ukraine conducted a review of specific changes to the CPC of Ukraine concerning detention proceedings¹⁰.

⁶ VERKHOVNA RADA OF UKRAINE. Criminal Procedure Code of Ukraine, 2012. Available at: <https://zakon.rada.gov.ua/laws/show/4651-17#Text>. Accessed on: April 16th, 2025.

⁷ VERKHOVNA RADA OF UKRAINE. Law of Ukraine No. 2108-IX "On amendments to certain legislative acts of Ukraine on criminalisation of collaboration activities" of 3 March 2022, 2022. Available at: <https://zakon.rada.gov.ua/laws/show/2108-20#n34>. Accessed on: April 16th, 2025.

⁸ VERKHOVNA RADA OF UKRAINE. Constitution of Ukraine, 1996. Available at: <https://zakon.rada.gov.ua/laws/show/254к/96-вр#n4239>. Accessed on: April 16th, 2025.

⁹ SHATILO, V. A.; KHARYTONOV, S. O.; KOVBASA, V. M.; SVINTSYTSKYI, A. V.; LYSEIUK, A. M. "Prospects for State and Individual Responsibility in Cases of Aggression in the Context of Russia's Armed Aggression Against Ukraine", *International Criminal Law Review*, V. 23, n° 4, 2023, p. 626-641. <https://doi.org/10.1163/15718123-bja10154>

¹⁰ VERKHOVNA RADA OF UKRAINE. Law of Ukraine No. 2429-IX "On amendments to the Criminal Procedure Code of Ukraine on the application of forced feeding measures to convicts and persons in custody" of 19 July 2022, 2022. Available at:

The amendments to the CPC of Ukraine introduced distinct approaches and specifics of procedural mechanisms in criminal proceedings¹¹. Therefore, it is crucial to study them for their compliance with the Constitution of Ukraine, international acts, and the ECtHR case law in terms of needs in a democratic society. It is also essential to balance interests of criminal proceedings and human rights to guarantee the basic principles of criminal justice.

This study investigates the correlation between issues related to restrictions on human rights and freedoms and the introduction of an emergency legal regime in Ukraine in 2022. Since the worldwide COVID-19 pandemic was identified in late 2019 and the Russian Federation launched its armed aggression on February 24, 2022, this correlation has gained significance. The regulation of limits on human rights and freedoms under martial law in Ukraine was studied by Bolshakova and Polykha¹². The concept of application of such restrictions was studied by Prots¹³. The researchers conducted a detailed investigation into the specific limitations imposed by Ukrainian legislation on the basic rights and freedoms of individuals and citizens. They examined the extent to which these limitations align with international standards.

Popovych et al.¹⁴ analyse the experience of introducing human rights restrictions during emergency regimes on an international level, comparing this with the legislation of Germany, Poland and France. They consider the introduction of specific measures and restrictions in the laws of Ukraine in comparison with these countries. In addition, Babikov et al. (2024) focus on establishing the balance of interests in criminal cases, particularly against the background of military threats that may impact this balance for the participants in such proceedings.

2. Methodology

The study of specifics of criminal process under martial law employs a range of research methods. Using the comparative legal method, the author analyses international legislation, laws of Ukraine in terms of the conditions, grounds, and procedure for the establishment of a state of emergency. It is also applied to examine the division of powers between public authorities in decision-making in this area. This method is employed to examine the mechanisms used to maintain the rule of law and guarantee human rights and freedoms during a state of emergency. The dogmatic legal approach made it possible to determine the content of legal norms and regulatory requirements during the examination of legal positions in the rulings of the ECtHR and the Constitutional Court of Ukraine. It also made it possible to determine the regularities of law by using the principles of legal logic.

The historical method enabled the investigation of origins, evolution, and progression of the subjects of inquiry in chronological sequence. This approach was used to explore the mechanisms of limitations on human rights and freedoms in situations of emergency worldwide. The study focused on the delineation of powers

<https://zakon.rada.gov.ua/laws/show/2429-20#n2>. Accessed on: April 16th, 2025.

¹¹ MERNIK, A. M.; STOYAN, E. O.; ARTEMENKO, K. S. "Restriction on Human Rights and Fundamental Freedoms under the Conditions of Martial Law in Ukraine", *Legal Scientific Electronic Journal*, V. 11, 2022, p. 49-52. <https://doi.org/10.32782/2524-0374/2022-11/7>

¹² BOLSHAKOVA, O.; POLYKHA, YU. On the issue of limitation of human rights under the conditions of marital state according to the legislation of Ukraine. In: *Human rights during armed conflicts: Collection of Materials of the International Scientific and Practical Conference on the 25th Anniversary of the National University "Odesa Law Academy"* (Odesa, November 18, 2022) (pp. 203-207). National University "Odesa Law Academy", 2022. Available at: <https://hdl.handle.net/11300/23743>

¹³ Prots, I. M. "Certain Organisational and Legal Mechanisms of Limitation of Fundamental Rights and Freedom of Human and Citizen under the Legislation of Ukraine", *Comparative and Analytical Law*, V. 1, 2020, p. 381-384. Available at: <https://dspace.lvduvs.edu.ua/handle/1234567890/3450>. Accessed on: April 16th, 2025

¹⁴ POPOVYCH, T.; BARYSKA, YA.; MASLYUK, O.; PERESH, I.; POHORYELOVA, Z. "Restrictions on Human Rights and Extraordinary Legal Regimes", *Social & Legal Studios*, V. 7, n^o 1, 2024, p. 106-115. <https://doi.org/10.32518/sals1.2024.106>

among different branches of government and the establishment of boundaries for permissible restrictions of human rights.

The systematic analysis of documents and structural and functional methods were used to identify the consequences of the introduction of a state of emergency on the example of the application of the quarantine by EU countries. It was also used to consider the laws that amended the criminal procedure legislation of Ukraine after the establishment of martial law on 24 February 2022. Through a systematic analysis of these legal provisions, the authors identify the principal changes that were implemented and the impact of such amendments on the mechanisms for balancing the interests of the state and human rights and freedoms. The authors also assess them for their adherence to the legal principles and standards.

The authors conduct an extensive review of the relevant scientific sources, historical documents, legal monuments, and international legislation that governs the regulation of limits on human rights during states of emergency. The Constitution and its implications for the legal framework were also examined. The study particularly focused on the legislative changes made to the CPC of Ukraine following the implementation of martial law in the years 2022 to 2024. The core tenets and procedures of criminal processes, which are meant to maintain the equilibrium of interests among the parties engaged during the criminal proceedings, served as the foundation for this research. The authors analyse the rulings of the ECtHR, the Supreme Court, and the Constitutional Court of Ukraine. The study also involves a review of analytical documents published by international organisations to assess the outcomes of the state of emergency in the EU. A particular emphasis was placed on the measures undertaken by EU countries during the pandemic, and the subsequent ramifications these measures have had on democratic processes, the rule of law, and basic rights¹⁵.

3. Results and discussion

3.1. Legal standards for rights restrictions under martial law

We are accustomed to perception of human rights as basic and inalienable, accessible to all, with the possibility of their restriction as an exception, under certain exceptional conditions, for good reason and in a legitimate manner. The advent of the pandemic in 2019, followed by the beginning of the full-scale Russian-Ukrainian war in 2022, has raised questions about the legal standards for the application of legal limits on citizens' rights and freedoms under martial law. In Ukraine, Article 64 of the Constitution of Ukraine stipulates a framework within which limitations on rights and freedoms can be imposed in times of martial law. These restrictions are subject to the provisions outlined in the International Covenant on Civil and Political Rights¹⁶. For example, Article 4 specifies restrictions that can be imposed in a state of emergency that menaces the life of the nation and is officially declared. Article 4 of this Covenant also declares that states may take certain measures. However, the exercise of such discretion is permitted solely insofar as is necessary to address the situation, with the proviso that these measures must remain consistent with the states' other legal obligations and may not be employed in a discriminatory manner based on factors such as racial, ethnic, sexual, language, religious, or social background.

Nevertheless, the proportionality of limitations on the rights and freedoms imposed in Ukraine due to the war remains debatable. In this regard, Babikov et

¹⁵ RAZUMKOV CENTRE. Ensuring human rights and freedoms in Ukraine in the context of the spread of coronavirus infection (COVID-19): features and ways to improve. Kyiv: Zapovit, 2020. Available at: https://razumkov.org.ua/uploads/article/2020_covid_prava.pdf. Accessed on: April 16th, 2025.

¹⁶ UNITED NATIONS HUMAN RIGHTS. International Covenant on Civil and Political Rights, 1966. Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>. Accessed on: April 16th, 2025.

al.¹⁷ conclude that they comply with criteria of necessity, proportionality, foreseeability and thus are legal. Such conclusions were grounded on the comparison of the experience of regulation of similar issues in Poland, Germany, and France. Moreover, in case No. 24429/03, the ECtHR concluded that the introduction of certain restrictions under martial law is consistent with the principles of public security and is aimed at preventing greater harm¹⁸. Bolshakova and Polykha¹⁹ asserted that Ukraine's legislation on the assurance of rights and freedoms during martial law is consistent with international best practices. They further concluded that such legislation is essential in ensuring national defence and security, while abiding by the established rules of proportionality and legality.

At the same time, Prots²⁰ claims that an absence of adequate oversight of state authorities' operations may result in the excessive curtailment of basic rights and freedoms, along with dire consequences which are often associated with such actions. Without denying the fact that limits on human rights and freedoms are possible and permissible under martial law, their compliance with the rule of law is essential.

Furthermore, according to Venice Commission²¹, actions taken in a crisis must comply with the rule of law, which provides for built-in safeguards against abuse. Thus, even in the presence of military, terrorist, epidemiological and other threats, the state is obliged to ensure a balance of interests in criminal cases.

3.2. Key amendments to the Criminal Procedure Code of Ukraine

The introduction of martial law in Ukraine led to significant changes in the criminal justice system, impacting the rights of participants in criminal trials. One of the key modifications was establishment of a legal framework for conducting special court investigations *in absentia* for cases involving collaboration and certain other national security offenses, as stipulated by the Law of Ukraine No. 2111-IX²². Apart from that, a special regime was introduced for the commencement of pre-trial investigations and the extension of detention periods during court trials during martial law, as outlined in the Law of Ukraine No. 2125-IX²³.

Further amendments expanded the competencies of the prosecution. The head of the prosecutor's office was granted the power to impose preventive detention for a maximum of 30 days and extend the terms of preliminary investigation and detention by the Law of Ukraine No. 2111-IX. Another significant change involved the postponement of appeals against prosecutorial actions, omissions, and decisions, which limited the ability of defendants to challenge

¹⁷ BABIKOV, O.; BOZHYK, V.; BUGERA, O. I.; KYRENKO, S. H.; VIUNYK, M. "Balancing Interests: Criminal Proceedings & Private Life Interference under Martial Law in Ukraine", *German Law Journal*, V. 25, n° 4, 2024, p. 553-577. <https://doi.org/10.1017/glj.2024.12>

¹⁸ European Court of Human Rights. ECtHR Judgment in Case of Solomakhin v. Ukraine, Application no. 24429/03, of 15 March 2012, 2012. Available at: <https://hudoc.echr.coe.int/fre?i=001-109565>. Accessed on: April 16th, 2025.

¹⁹ Ibid 12

²⁰ Ibid 13

²¹ VENICE COMMISSION. Interim Report on the measures taken in the EU member States as a result of the Covid-19 crisis and their impact on democracy, the Rule of Law and Fundamental Rights, adopted by the Venice Commission at its 124th Plenary Session (Online, 8-9 October 2020), 2020. Available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)018-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)018-e). Accessed on: April 16th, 2025.

²² VERKHOVNA RADA OF UKRAINE. Law of Ukraine No. 2111-IX "On amendments to the Criminal Procedure Code of Ukraine and the Law of Ukraine "On Pre-trial Detention" on additional regulation of ensuring the activities of law enforcement agencies under martial law" of 3 March 2022, 2022. Available at: <https://zakon.rada.gov.ua/laws/show/2111-20#n5>. Accessed on: April 16th, 2025.

²³ VERKHOVNA RADA OF UKRAINE. Law of Ukraine No. 2125-IX "On amendments to the Criminal Procedure Code of Ukraine on the procedure for the abolition of a preventive measure for military service upon conscription during mobilization, for a special period or its amendment on other grounds" of 15 March 2022, 2022. Available at: <https://zakon.rada.gov.ua/laws/show/2125-20#n2>. Accessed on: April 16th, 2025.

procedural violations. Moreover, the period of detention was automatically extended in cases where the court had not yet commenced the trial, as per the Law of Ukraine No. 2429-IX. Furthermore, adjustments were made regarding preventive measures for individuals subject to military conscription. The Law of Ukraine No. 2125-IX created the possibility of removing a preventative measure to allow military duty during mobilization. These legislative changes reflect an adaptation of Ukraine's criminal justice system to the extraordinary conditions imposed by martial law. While these measures aim to strengthen national security and the efficiency of legal proceedings in times of war, they also introduce significant constraints on individual rights within the judicial process.

As part of the efforts to facilitate the procedure for obtaining and recording evidence, several significant changes were introduced. Primarily, the use of expert opinions was substituted with that of specialist certificates when their evidentiary value was considered to be less significant within the framework of legal proceedings. Secondly, investigators and prosecutors were granted the ability to draft resolutions exclusively in electronic form, as stipulated by Law of Ukraine No. 2137-IX²⁴. Moreover, the judicial control over the removal of information from electronic information systems was also abolished, facilitating access to digital evidence.

Furthermore, provisions were introduced to allow the seizure of corporate rights and virtual assets from individuals who had not yet acquired the legal status of a suspect. Yet, the obligation of the prosecution to preserve original data carriers and technical devices used in covert investigative actions was eliminated, thereby hindering the possibility of conducting expert examinations to detect potential forgery of technical records. The maximum period during which a person could be detained without being informed of the charges against them was extended to 72 hours. In addition, investigators and prosecutors were granted the authority to seize documents without obtaining prior court approval, further altering the balance between investigative efficiency and legal oversight²⁵. The next step was to introduce changes to the procedure for detention. The court was given the opportunity not to set bail for suspects of crimes against national security and some other crimes, i.e. to apply for detention without alternative²⁶. The regulations governing the particularities of criminal proceedings during warfare are distinct, and the distinctive regime of criminal procedure under martial law was specified.

Furthermore, the Law of Ukraine No. 2201-IX²⁷ introduces several procedural changes to criminal procedure under martial law. Thus, the law allows for searches to be conducted without the presence of witnesses (Article 30). Furthermore, it grants prosecutors the authority to apply interim measures in cases where the investigating judge is unable to fulfil their duties (Article 124). Apart from that, the law permits the distribution of cases in court without relying on the auto-distribution system (Article 150). It authorises the detention of individuals for

²⁴ VERKHOVNA RADA OF UKRAINE. Law of Ukraine No. 2137-IX "On amendments to the Criminal Procedure Code of Ukraine and the Law of Ukraine "On Electronic Communications" on improving the effectiveness of the pre-trial investigation "in hot pursuit" and countering cyber-attacks" of 15 March 2022, 2022. Available at: <https://zakon.rada.gov.ua/laws/show/2137-20#n5>. Accessed on: April 16th, 2025.

²⁵ BABIKOV, O.; AMANBAY, Z.; PLAKHOTNIK, O.; KHOVPUN, O.; LYSEIUK, A. M. "Ensuring Procedural Guarantees and the Right to a Fair Trial During the Examination of Motions to Conduct Covert Investigations", *Via Inveniendi et Iudicandi*, V. 18, n° 2, 2023, p. 95-111. <https://doi.org/10.15332/19090528.9733>

²⁶ VERKHOVNA RADA OF UKRAINE. Law of Ukraine No. 2198-IX "On amending the Criminal and Criminal Procedural Codes of Ukraine to improve responsibility for collaboration activities and specifics of applying preventive measures for committing crimes against the foundations of national and public security" of 14 April 2022, 2022. Available at: <https://zakon.rada.gov.ua/laws/show/2198-20#n12>. Accessed on: April 16th, 2025.

²⁷ VERKHOVNA RADA OF UKRAINE. Law of Ukraine No. 2201-IX "On amending the Criminal Procedure Code of Ukraine to improve the procedure for conducting criminal proceedings under martial law" of 14 April 2022, 2022. Available at: <https://zakon.rada.gov.ua/laws/show/2201-20#n2>. Accessed on: April 16th, 2025.

up to 216 hours without a court order (Article 131). In circumstances where judicial review does not permit the extension of detention, the law stipulates an automatic extension. Moreover, it facilitates the transfer of cases to different courts through the adjustment of jurisdiction. It also eliminates the requirement for witness testimony in court, thereby allowing the utilisation of pre-trial interrogations recorded by technical means as admissible evidence. The provisions presuppose the capacity for remote participation by defence counsel during trials, and they grant prosecutors the authority to function as interpreters for suspects.

Simultaneously, amendments were made to the Ukrainian legislation in order to provide for the possibility of not setting bail for individuals against whom the International Criminal Court has issued a request for a temporary arrest or arrest and transfer²⁸. Subsequently, a mechanism was initiated to facilitate the forced feeding of an individual suspected or accused of an offence and who was subject to detention. Furthermore, the investigating judge was authorised to undertake a remote evaluation of the prosecution's motions for preventive measures, using the available technical means. In addition, the procedures for the exchange of persons detained as prisoners of war were regulated²⁹.

3.3. Judicial and international assessment of legislative changes

The key changes to the legislation on criminal proceedings in Ukraine under martial law indicate that they affected the main mechanisms established to ensure human rights and freedoms and balance interests of parties to criminal trials. Thus, it is important to determine which of the introduced changes comply with the rule of law in terms of necessity, proportionality, and predictability. In other words, during the warfare, it is crucial to determine the balance between effective actions aimed at overcoming the emergency and democratic constitutionalism, public interest, and the rule of law³⁰.

Hence, it is imperative to examine the key issues that arose in a consequence of the introduction of martial law. In this regard, differences in views concerning such mechanisms and the ways to develop a consolidated position on the issues at hand must be analysed. One of the earliest endeavours to regulate the limitations of rights and freedoms in the events where public safety necessitates such action, as a result of an invasion or rebellion, was initiated in the US Constitution of 1787. At the initial stage, the implementation of these provisions caused a conflict between the President and Congress. The US Supreme Court addressed this issue in the case of *Ex Parte Merryman*, determining which branch of government possesses the authority to restrict human rights and freedoms³¹. The President's actions satisfied the criteria of necessity, while the delegation of this matter to the jurisdiction of Congress was determined to be consistent with legal norms.

Despite the Supreme Court's ruling, the President retained the right to restrict human rights to judicial protection on the basis of his decision, and the arrested persons were considered to be under the President's authority. In turn, this led to ambiguous practice in the courts. The Supreme Court refused to

²⁸ VERKHOVNA RADA OF UKRAINE. Law of Ukraine No. 2236-IX "On amendments to the Criminal Procedure Code of Ukraine and other legislative acts of Ukraine on cooperation with the International Criminal Court" of 3 May 2022, 2022. Available at: <https://zakon.rada.gov.ua/laws/show/2236-20#n5>. Accessed on: April 16th, 2025.

²⁹ VERKHOVNA RADA OF UKRAINE. Law of Ukraine No. 2472-IX "On Amendments to the Criminal and Criminal Procedural Codes of Ukraine and other legislative acts of Ukraine on the regulation of the procedure for the exchange of persons as prisoners of war" of 28 July 2022, 2022. Available at: <https://zakon.rada.gov.ua/laws/show/2472-20#n11>. Accessed on: April 16th, 2025.

³⁰ SOBKO, G.; MOLOTAI, V.; LYSEIUK, A.; KRYZHANOVSKYI, O.; NIKOLAIENKO, T. "Military Violent Crime in the Ukrainian Criminal Law System: Analysis, Gaps and Prospects", *Archiwum Kryminologii*, V. 46, n^o 2, 2024, p. 5-27. <https://doi.org/10.7420/AK2024.01>

³¹ JACKSON, J. D. "The Power to Suspend Habeas Corpus: An Answer from the Arguments Surrounding *Ex Parte Merryman*", *University of Baltimore Law Review*, V. 34, 2004, p. 11-54.

recognise its jurisdiction in cases decided by military courts, while at the same time recognising that military courts were not empowered to make decisions in cases where civilian courts were operating in the same territory. Therefore, it is possible to identify three key issues around which the debate was held: 1) delimitation of powers of the President (executive) and legislative (representative) authorities with regard to the competence to decide on restrictions on rights and freedoms; 2) grounds for imposing such restrictions; 3) delimitation of jurisdiction of civilian and military courts in the territories where they operate simultaneously.

In order to comprehend the implications of martial law, it is crucial to determine which rights and freedoms should be adequately restrained for achieving the purpose of martial law. In conjunction with some rights and freedoms that must not be limited even under martial law, a substantial number of such rights emerged as a consequence of violations by imperfect legislation. As Posner³² points out, that uncontrolled expansion of the content of human rights may become a factor in reducing their provision by the state. Hence, the country's legislation must meet the requirements of democracy, rule of law, and human rights protection.

The implementation of these requirements obliges the government to guarantee that legislation clearly defines the scope and manner of exercising discretionary powers granted to public authorities. This is necessary to guarantee a minimum level of protection in a democracy. Meanwhile, such measures must be justifiable, reasonable, and appropriate to the lawful goals. Moreover, they should be adequate in achieving their intended purpose while sustaining a balance between public and private interests³³.

Article 3 of the Constitution of Ukraine establishes that despite the primacy of the rule of law over state interests, the violation of these requirements to the legislation leads to the state gaining more powers, which subsequently turns into arbitrariness of public authorities. In its Decision No. 8-r(II)/2024 of 18 July 2024³⁴, the Constitutional Court reviewed certain provisions of Article 615 of the CPC of Ukraine. Thus, the Court established that the provision in Part 6 of Article 615 of the CPC of Ukraine stipulates that in the event of the court order's expiration and the inability of the court to consider the extension of detention is to be considered unconstitutional.

In making this decision, the Constitutional Court of Ukraine drew attention to the fact that Article 41(2) of the Charter of Fundamental Rights of the European Union³⁵ defines everyone has the right "to be heard, before any individual measure which would affect him or her adversely is taken". This right is one of the core tenets of legal procedures. Thus, the Decision of the Constitutional Court of Ukraine of 19 June 2024 No. 7-r (II) 2024³⁶ stipulates that the deprivation of the right of a person to be heard and to stand trial cannot be justified by martial law.

The norms contained in part 12 of Article 615 of the CPC of Ukraine were declared unconstitutional. This part says that if a language barrier stops an interpreter from participating in criminal proceedings, the court can translate explanations, testimony and documents on their own, as long as the interpreter speaks one of the languages of the suspect or victim. The Court noted these provisions contradicted the requirements of paragraph (a) of part 2 of Article 6 of the European Convention on Human Rights³⁷. This article ensures that every

³² Posner, E. *The twilight of human rights law*. Oxford University Press. Oxford, 2014.

³³ SHEVCHENKO, T. S.; ROZKLADAI, I. E. *Judgments of the European Court of Human Rights on access to information*. Media Law Institute, Kyiv, 2014.

³⁴ VERKHOVNA RADA OF UKRAINE. Decision of the Constitutional Court of Ukraine of 18 July 2024 No. 8-r (II)/2024, 2024. Available at: <https://zakon.rada.gov.ua/laws/show/v008p710-24>. Accessed on: April 16th, 2025.

³⁵ EUROPEAN UNION. Charter of Fundamental Rights of the European Union, 2000. Available at: https://www.europarl.europa.eu/charter/pdf/text_en.pdf. Accessed on: April 16th, 2025.

³⁶ VERKHOVNA RADA OF UKRAINE. Decision of the Constitutional Court of Ukraine of 19 June 2024 No. 7-r (II) 2024, 2024. Available at: <https://zakon.rada.gov.ua/laws/show/v007p710-24>. Accessed on: April 16th, 2025.

³⁷ European Court of Human Rights; COUNCIL OF EUROPE. European Convention on Human Rights, 1950. Available at: https://www.echr.coe.int/documents/d/echr/convention_ENG.

accused has the right "to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him". At the same time, this article conflicted with part 3 of Article 29 of the CPC of Ukraine, which enshrines that participants in criminal processes who do not speak or have insufficient knowledge of the state language must be granted specific privileges by the investigating judge, court, prosecutor, and investigator. These include the right to submit formal declarations, file petitions and grievances, and appear in court using their native or another language, provided they are accompanied by an interpreter if required.

Furthermore, the provisions contradicted paragraph 18, part 3, Article 42 of the CPC of Ukraine. They guarantee that suspects have the right to utilise their native language and that copies of procedural material are supplied in their native language or another language of their choice, if needed. If necessary, the suspect is guaranteed the right to be accompanied by an interpreter at the cost of the state. The victim, the accused, and all parties involved in the legal process are all entitled to the same protections. Finally, these provisions were inconsistent with the restrictions established in Article 77 of the CPC of Ukraine, which prohibits the use of an interpreter at the state's expense. This, in turn, may be considered discrimination on the grounds of language, forbidden by Article 24 of the Constitution of Ukraine.

However, the vast majority of changes to the criminal procedure legislation introduced under martial law were not considered by the Constitutional Court due to the heavy workload of other cases and the lack of a quorum. As rightly noted by Kuchuk³⁸, the primary function of the state is to maximise the assistance to a person in the realisation of his or her capabilities. To accomplish this function, a person transfers part of his or her freedom to the state. Fulfilling this purpose, the state wants to gain more and more powers and may turn into a police state. Thus, uncontrolled, excessive, and unjustified restriction of rights and freedoms during the warfare leads to a significant risk of turning a democratic, law-based state into a totalitarian state where any limits on rights and freedoms can be justified by the state interests, national security, fight against terrorist or other internal or external threats.

These changes indicate non-compliance with requirements of proportionality, necessity in a democratic society, and the balance of interests. In order to guarantee the right to life, and thus protect the lives and health of both oneself and other individuals as outlined in Article 27 of the Constitution of Ukraine, it is critical to consider the possibility of considering a court's application for a preventive measure against a person remotely, using technical means, introduced under martial law. The introduction of this provision puts the parties in criminal cases in different conditions: the court, which is located in a safe place, and the suspect, whose place of detention may be near the front line or in other dangerous places. Taking into account that a number of other adopted rules providing for the participation of a defence counsel remotely, the inability of a suspect to engage a defence counsel at his/her own discretion, the possibility of participation of a defence counsel by appointment remotely using technical means, create preconditions for formal consideration of the issue of applying a preventive measure and arrest of a person in conditions when the decision taken by the investigating judge is not based on the principles of competition and without real assurance of the right to defence.

It also appears that the mechanism of forced feeding of a suspect, introduced by Article 206-1 of the CPC of Ukraine, is open to scrutiny in the context of violations of the right to respect for dignity. This right is guaranteed by Article 28 of the Constitution of Ukraine which forbids torture, cruel, inhuman, and degrading treatment. In the case of *Yakovlev v. Ukraine*³⁹, the ECtHR determined a violation

Accessed on: April 16th, 2025.

³⁸ KUCHUK, A. M. *Theoretical foundations of legal polycentrism*. Dnipro State University of Internal Affairs, Dnipro, 2017.

³⁹ European Court of Human Rights. ECtHR Judgment in Case of *Yakovlev v. Ukraine*, Application

of Article 3 of the Convention (and emphasised the lack of sufficient judicial control and its procedural formalism).

It should also be noted that the WMA Declaration of Malta on Hunger Strikers⁴⁰ provides for a number of principles on which the activities of the authorities and authorised persons in cases of hunger strike are based, and states that "Forced feeding is never ethically acceptable. Even if intended to benefit, feeding accompanied by threats, coercion, force or use of physical restraints is a form of inhuman and degrading treatment. Equally unacceptable is the forced feeding of some detainees in order to intimidate or coerce other hunger strikers to stop fasting". The WMA Declaration of Tokyo on Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment⁴¹ provides: "Where a prisoner refuses nourishment and is considered by the physician as capable of forming an unimpaired and rational judgment concerning the consequences of such a voluntary refusal of nourishment, he or she shall not be fed artificially, as stated in WMA Declaration of Malta on Hunger Strikers".

It is also important that, according to part 6 of Article 539 of the CPC of Ukraine, the filing of a complaint against the decision of the investigating judge on forced feeding does not suspend its execution, and the Procedure for forced feeding and conditions of detention of convicts and detainees who refuse to eat does not regulate the key principles and requirements for the implementation of decisions on forced feeding⁴². Paragraph 14 of the said Procedure stipulates that forced feeding is exercised by the ECtHR case law. It is realised exclusively in the presence of a doctor who supervises such a person, and is aimed at humane treatment of a person refusing to eat, respect for his or her rights, in particular, respect for honour and dignity, and does not allow any humiliation or torture of such a person. Such an approach, which does not ensure proper regulation of the procedure for forced feeding, is unable to ensure the human dignity of the person to whom it is applied.

3.4. Challenges and risks of human rights limits under martial law

Venice Commission⁴³ establishes that in emergency situations, the basic principles of the rule of law should be upheld. They involve that the authorities are obliged to act within the legislation, and their measures should be reviewed by independent courts. Legal protection of individuals must be guaranteed. In addition, §41 of the Report states that derogation is defined as the temporary restrictions of some human rights, including fundamental judicial guarantees, which are regarded as inviolable.

In evaluating the provisions enshrined in the Constitution of Ukraine, particularly Articles 55 (Right to judicial defence), 59 (Right to competent legal

no. 42010/18, of 8 December 2022, 2022. Available at: <https://hudoc.echr.coe.int/fre?i=001-221265>. Accessed on: April 16th, 2025.

⁴⁰ WORLD MEDICAL ASSOCIATION. WMA Declaration of Malta on Hunger Strikers, 1991. Available at: <https://www.wma.net/policies-post/wma-declaration-of-malta-on-hunger-strikers>. Accessed on: April 16th, 2025.

⁴¹ WORLD MEDICAL ASSOCIATION. WMA Declaration of Tokyo on Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment, 1975. Available at: <https://www.wma.net/policies-post/wma-declaration-of-tokyo-guidelines-for-physicians-concerning-torture-and-other-cruel-inhuman-or-degrading-treatment-or-punishment-in-relation-to-detention-and-imprisonment/>. Accessed on: April 16th, 2025.

⁴² VERKHOVNA RADA OF UKRAINE. Resolution of the Cabinet of Ministers of Ukraine No. 385 "On approval of the Procedure for forced feeding and conditions of detention of convicts and detainees who refuse to eat" of 25 April 2023, 2023. Available at: <https://zakon.rada.gov.ua/laws/show/385-2023-n#n10>. Accessed on: April 16th, 2025.

⁴³ VENICE COMMISSION. Report - Respect for Democracy Human Rights and Rule of Law during States of Emergency - Reflections. 2020. Available at: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2020\)005rev-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)005rev-e). Accessed on: April 16th, 2025.

assistance), and 62 (Presumption of innocence), it is crucial to recognise the core tenet of the rule of law that the accused is deemed innocent unless and until proven guilty in accordance with the current judicial procedure⁴⁴.

The possibility of using emergency powers may be justified by the state in order to overcome the challenges associated with the establishment of martial law. Yet, as the Venice Commission noted, the use of emergency powers ensures inherent safeguards against any potential abuse. These principles, which include necessity, proportionality and temporality, are essential in maintaining the integrity of the process. Adherence to these principles should be subject to efficient governmental oversight and judicial control by independent courts. In this regard, a distinction between the normal state and the state of emergency does not inherently imply a dichotomy between emergency action and constitutionalism. Furthermore, this distinction does not necessitate a choice between the protection of public health and the rule of law.

It should be noted that a range of legislative changes to the CPC of Ukraine were related to simplifying the evidence gathering procedure. A witness-free search, temporary access to items and documents, the removal of data from electronic information systems without judicial supervision, the ability to use in court the testimony of a witness who was not heard by the court, the removal of the requirement to ensure the security of primary (original) media containing data recorded in the course of undercover (detective) investigations, etc. are all options that must be taken into consideration in relation to the right to a fair trial. Hence, the lack of proper control over evidence collection, independence and impartiality in the actions and decisions of investigators, compliance with other principles of criminal justice, taking into account the principle of *in dubio pro reo* (in case of doubt - in favour of the accused) as an element of the presumption of innocence, will make it impossible or difficult to make a lawful and reasonable decision.

The study of the mechanism for limiting human rights and freedoms under martial law will be incomplete if it is not compared with the measures introduced by many countries during the pandemic. The prohibition of attending certain events, free movement, restrictions on transport, limits of human rights and freedoms depending on vaccination, for example, the access to medical and educational services, censorship, and other restrictions imposed by the state were found to be not always in line with constitutional provisions. Therefore, in order to avoid arbitrariness of public authorities, the regulation of limits on rights and during the warfare should provide mechanisms for appealing against them, cancelling them, liability, including legal liability, for the persons who adopt them, and mechanisms for compensation for harm resulting from illegal or disproportionate restrictions on rights and freedoms.

4. Conclusions

Limitations of human rights and freedoms under martial law are a necessary component of national security, subject to the following conditions: 1) the existence of legal grounds for the imposition of martial law; 2) decision-making by an authorised authority; 3) restrictions only on those rights and freedoms which can be limited under martial law in compliance with the requirements of the Constitution of Ukraine and international legal acts; 4) the criterion of being necessary in a democratic country, guaranteeing a balance of human rights and freedoms, and state interests; 5) providing for safeguards against abuse by competent branches of power, senior officials and the impossibility of its application. Establishing a balance between the interests of the state and human rights and freedoms requires the introduction of a mechanism for prompt review by higher courts of decisions that set restrictions both in the order of control over rule-making and in specific cases.

⁴⁴ UNITED NATIONS. General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 2007. Available at: <https://www.refworld.org/legal/general/hrc/2007/en/52583>. Accessed on: April 16th, 2025.

The protection of rights and freedoms during the warfare becomes ineffective and might pose a threat to the legal order of the state if there is no mechanism of judicial control to assess the existence of grounds for the imposition of martial law, validity, necessity and justification of limitations of human rights and freedoms, the laws and regulations adopted in this connection, their quality and conformity with the Constitution of Ukraine and international legal acts.

In order to guarantee proper regulation and strike a balance between the interests of the government and human rights, the public authorities must develop and implement appropriate preventive mechanisms, their public discussion and evaluation by legal experts prior to the establishment of martial law.

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