# Limitations on the exercise of human rights in Ukraine: Theory and Practice

*Limitações ao exercício de Direitos Humanos na Ucrânia: Teoria e Prática*

Jairo Lima*
*Universidade Estadual do Norte do Paraná*

*Tetiana Slinko***
*Yaroslav Mudryi National Law University, Ucrânia*

*Larisa Bayrachnaya****
*Yaroslav Mudryi National Law University, Ucrânia*

*Iryna Dakhova*****
*Yaroslav Mudryi National Law University, Ucrânia*

## 1. Introdução

Because each person has certain duties and responsibilities to society, the external manifestation of rights can often be the basis of conflict or interference with the rights of other people, national and international law recognizes the legality of certain restrictions on the use of rights. Art. 29 of the Universal Declaration of Human Rights, foreseeing the possibility of

* Doutor em Direito Constitucional pela Faculdade de Direito da Universidade de São Paulo (FD/USP). Professor do Programa de Pós-Graduação em Direito (Mestrado e Doutorado) da UENP e coordenador do Laboratório de Pesquisa em Teorias Constitucionais e Políticas (CPOL-LAB).Orcid: https://orcid.org/0000-0003-3346-7865. E- mail: jaironlima@uenp.edu.br.

** Professora do Departamento de Direito Constitucional na Yaroslav Mudryi National Law University, Ucrânia. ORCID: https://orcid.org/0009-0000-2688-264. E-mail: t.m.slinko@gmail.com.

*** Professora do Departamento de Direito Constitucional da Yaroslav Mudryi National Law University, Ucrânia. ORCID: https://orcid.org/0000-0003-3405-4368. E-mail: bayrachnayalara@gmail.com.

**** Professora do Departamento de Direito Constitucional da *Yaroslav Mudryi National Law University*, Ucrânia. ORCID: https://orcid.org/0000-0003-3252-2017. E-mail: dakhovairina77@gmail.com.

such a limitation, establishes that in the exercise of his rights and freedoms, every person should be subject only to such limitations as are established by law exclusively to ensure proper recognition and respect for the rights and freedoms of others and meet the just requirements of morality, public order and general well-being in a democratic society. According to Article 21 of the Constitution of Ukraine, human rights are inalienable and inviolable, by Part 2 of Art. 22 constitutional rights and freedoms are guaranteed and cannot be revoked, the Basic Law contains provisions on the impossibility of limiting the rights and freedoms of a person and a citizen. However, the functioning of society and the state necessarily creates situations that require the state to limit certain rights and freedoms. The legislation of many countries of the world provides the possibility of limiting the realization of particular human rights. Hence, according to Art. 19 of the Constitution of Germany, since according to the Basic Law any fundamental right can be limited by law or based on law, this law must have a general character and not refer to an individual case. At the same time, it is noted that the essence of the content of the fundamental right cannot be violated in any case. Article 31 of the Constitution of the Republic of Poland provides that restrictions on the exercise of constitutional freedoms and rights may be established only by law and only when they are necessary in a democratic state for its security or protection of public order, or the name of the protection of the environment, health and public morals, or freedoms and rights of other persons. These restrictions cannot change the essence of freedoms and rights.

Particular aspects of the restriction of human rights and freedoms have been the subject of scientific research by both Ukrainian and foreign scientists, but the practice of the European Court of Human Rights and national courts, both of the member states of the Convention for the Protection of Human Rights and Fundamental Freedoms and of other countries of the world, regarding the restriction realization of rights and freedoms is constantly expanding, which requires the continuation of scientific research on the mentioned issues. In addition, nowadays, in the conditions of full-scale military aggression of the Russian Federation against Ukraine, the issue of normative regulation and practical implementation of restrictions on the exercise of human rights requires a more in-depth analysis.

## 2. Approches to the category of "Limitations of Human Rights and Freedoms"

The Ukrainian constitutional solution to the issue of limiting rights and freedoms takes its genesis with the establishment of the principle of the impossibility of limiting them. Thus, Part 1 of Art. 64 of the Basic Law establishes that the constitutional rights and freedoms of a person and a citizen cannot be limited, except in cases provided for by the Constitution of Ukraine.

This constitutional provision should be considered about the prescriptions of Part 3 of Art. 22 of the Constitution of Ukraine, according to which the case when adopting new laws or making changes to existing ones, it is not allowed to narrow the content and scope of existing rights and freedoms. Thus, the Constitutional Court of Ukraine in its Decision of September 22, 2005 (the case on the permanent use of land plots) emphasized that the narrowing of the content and scope of rights and freedoms is their limitation. In the traditional meaning, the defining concept of "the content of human rights" is the conditions and means under which a person has opportunities to satisfy his needs, in particular, that ensure his existence and development. The scope of human rights is their essential property, expressed by quantitative indicators of human capabilities, which are embodied in the corresponding rights, which are not homogeneous and general[1].

Savchyn understands the restriction of human rights and freedoms as the intervention of public authorities in the sphere of private autonomy of an individual solely based on the law, which introduces certain measures aimed at ensuring the balance of private and public interests to protect national security, public order, life, and health other people, the authority of justice[2]. According to other authors, the restriction of rights and freedoms is a legislative narrowing of the content and (or) scope of human rights and freedoms about their ability to have, possess, use, and dispose of social values, freedom of action, and behavior to protect the sovereignty and territorial integrity or public order, ensuring economic and informational security, health care, social morality and ensuring the protection of human rights and freedoms and is an indicator of state standards of human living standards[3].

1 SLINKO, 2018, p. 43.

2 SAVCHYN, 2018, p. 291.

3 OSYNSKA, 2010, p. 5.

Limitation of rights and freedoms is a legitimate, purposeful quantitative and (or) qualitative reduction in the process of legal implementation of those possible models of behavior (powers), which constitute the basic right of a person, by other persons[4]. About this definition, it should be noted that such reduction of possible behavior patterns does not occur on the part of all persons, but only on the part of the state and public authorities. At the same time, by establishing the principles, goals, and legal form of restrictions, that is, the basic (general) conditions for restrictions on rights and freedoms, the Constitution thereby protects a person and his rights from permissive actions by the state, as it limits the state power in the possibility of encroaching on human rights[5].

The Constitutional Court of Ukraine notes that the legitimate restriction of the constitutional rights and freedoms of a person and a citizen should be understood as the possibility of state intervention by legal means in the content and scope of the constitutional rights and freedoms of a person and a citizen, provided by the Constitution of Ukraine, which meets the requirements of the rule of law, necessity, expediency, and proportionality in a democratic society. The purpose of such a restriction is the protection of fundamental values in society, which include, in particular, life, freedom and human dignity, health and morality of the population, national security, and public order[6].

The foundations established by the Constitution of Ukraine for the legal restriction of the rights and freedoms of a person and a citizen are a necessary element in the field of legal regulation of social relations. But we must not forget that the law itself is the measure of freedom, which cannot be absolute. It is necessary to distinguish between constitutional limitations and limitations of constitutional rights, which are related as general and special since the Constitution itself is a certain limiter of the activity of the state, state bodies, society, and citizen. Enshrined in the Constitution of Ukraine, the grounds for legal restriction of human and citizen rights and freedoms are based on the principle of combining private and public interests. In turn, the protection of public interests is represented in the legal mechanism on such grounds as the protection of the foundations of the constitutional order and ensuring the defense of the country and the security of the state[7].

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4 STREKALOV, 2010, p. 3.

5 SYDORETS, 2012, p. 65.

6 CONSTITUTIONAL COURT OF UKRAINE, 2019.

7 SYDORETS, 2012, p. 64-65.

When considering the problem of restriction of human rights, it is necessary to distinguish two concepts: the first is the direct restriction of rights (as depriving the owners of part of the rights or part of a certain right), the second is the restriction in the exercise of rights (as the complete or partial impossibility of realizing certain rights). The second approach to the understanding of restrictions assumes that all rights in their entirety remain with the person - the holder of the rights, and only the possibility of their realization ceases[8]. This type of restriction can be of a voluntary nature (when a person refuses to exercise the right, for example, in cases of private prosecution), as well as the nature of forced coercion, which is applied depending on external, mostly unpredictable, circumstances. For example, this restriction may be a consequence of a state of emergency or war, circumstances independent of the will of an individual, and, to a certain extent, of the will of the state authorities. Cases of application of such a restriction must be regulated by legislation.

Thus, when talking about the restriction of human rights and freedoms, it should be borne in mind that it is not the right itself that is subject to restriction, but its implementation[9]. This is indicated in the Convention on the Protection of Human Rights and Fundamental Freedoms (hereinafter - the Convention), which in Articles 8, 10, and 11 enshrines provisions according to which the exercise of individual rights is not subject to any restrictions, except those provided by law and are necessary for a democratic society in the interests of national security and public peace, to prevent crimes, protect health and morals, or protect the rights and freedoms of other persons.

At the same time, we should remember about absolute rights, the implementation of which cannot be limited under any circumstances. The European Convention on Human Rights and the ECHR include the rights provided for in Art. 3 of the Convention, which stipulates that no one can be subjected to torture or inhuman or degrading treatment or punishment, and the right enshrined in Part 1 of Art. 4, according to which no one can be held in slavery or servitude. According to the American liberal doctrine of “freedom of the press,” such freedom is absolute and cannot be limited under any circumstances. As noted in the literature, “Since the rights of society are nothing more than the individual rights of its members, each

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8 RAZMETAYEVA YU, 2013, p. 83.

9 DAKHOVA, 2018, p. 17-25.

individual has an unlimited right to express himself freely on any political issues. This theoretical position logically followed from the fact that society itself has the absolute freedom to investigate any problem that affects its interests"[10].

## 3. Legality of restrictions of Human Rights: conditions of such limitations

In the name of the limitation of the exercise of any right to be legitimate, it is necessary to comply with particular conditions, the set of which is known as the "three-syllable test". That is, the ECHR when determining whether the state's interference with a specific right was lawful, always checks compliance with a three-part test, which includes the following conditions: first, whether the possibility of limiting the exercise of the right was provided for by law; secondly, whether the purpose of such a restriction is legitimate and, thirdly, whether such a restriction is necessary in a democratic society.

Examining this, for example, in the case "Savin v. Ukraine" dated 18.12.2008. The ECHR indicates that the right of parents and children to be near each other is a fundamental component of family life and that the measures of national authorities aimed at preventing this are an interference with the rights guaranteed by Article 8. Such interference is a violation of the specified provision, if it is not carried out "by the law", does not meet the legal goals, and cannot be considered "necessary in a democratic society".

Analyzing the practice of the Constitutional Court of Ukraine, we can conclude that the Constitutional Court of Ukraine, when making decisions, refers to the already considered "three-fold test", and its elements. Thus, in the decision in the case based on the constitutional submission of the Commissioner of the Parliament of Ukraine on human rights regarding the conformity with the Constitution of Ukraine of the provisions of the third sentence of part 1 of Article 13 of the Law of Ukraine "On Psychiatric Assistance" (the case of judicial control over the hospitalization of incapacitated persons in a psychiatric institution dated June 1, 2016 No. 2-pn/2016) the Constitutional Court of Ukraine indicates that restrictions on the realization of constitutional rights and freedoms cannot be arbitrary and unfair, they must be established exclusively by the Constitution and laws of Ukraine,

10 SLINKO, 2017, p. 112.

pursue a legitimate goal, be conditioned by the social necessity of achieving this goal, proportional and justified, in the event of a restriction of a constitutional right or freedom, the legislator is obliged to introduce such legal regulation, which will make it possible to optimally achieve a legitimate goal with minimal interference in the realization of this right or freedom and not to violate the essential content of such a right[11].

As for legality, one should take into account the position of the ECtHR, repeatedly expressed by it in various cases, in particular, in the decision in the case "S. and Marper v. the United Kingdom" dated 4.12.2008: the wording "by the law" dictates that the challenged measures to limit the exercise of the right must have certain grounds in national legislation and correspond to the principle of the rule of law. The law must be adequately accessible and predictable, i.e., formulated precisely enough so that the citizen can – with appropriate help if necessary – reconcile his behavior with it.

At the same time, the concept of "law" in the practice of the ECHR generally means not only the act done by parliament but also any source of law of a certain state, judicial precedent law. Therefore, the latter can also be considered a "law" that provides grounds for establishing restrictions, provided that the relevant norms are clear and accessible[12].

The European Court of Human Rights refers to the jurisprudence, which determines that the concepts of "prescribed by law" in Articles 8-11 of the Convention not only require that the challenged measures take place in national law but also refer to the quality of that legislation, which must be sufficiently accessible and provide the possibility of foreseeing the consequences, that is, it must be formulated enough to allow a person - if necessary and with appropriate help - to adjust his behavior to it (The Sunday Times v. the United Kingdom dated 26.04./1979).

The European Court of Human Rights has repeatedly indicated that the law must comply with the principle of the rule of law (Malon v. the United Kingdom). In the decision taken in the case "Hashman and Harrup v. the United Kingdom" dated November 25, 1999. ECHR indicated that "one of the requirements arising from the phrase "established by law" is predictability. A norm cannot be considered a "law" if it is not formulated with sufficient clarity, which gives a person the opportunity to be guided

11 CONSTITUTIONAL COURT OF UKRAINE, 2016.

12 DUDASH, 2013, p. 237.

by this norm in his actions. These requirements are aimed, in particular, at guaranteeing individuals-addresses of the legal norm adequate legal protection against arbitrary encroachments by public authorities on one or another fundamental human right in cases where the law provides for freedom of law-enforcement discretion." The Court reproduced this position almost verbatim in the decision dated March 24, 1988, in the case "Olsson v. Sweden": "A norm cannot be considered a "right one" if it is not formulated with sufficient precision so that the citizen can, if necessary, with appropriate recommendations, predict to a certain extent the consequences that the committed action may entail[13].

In the decision taken in the case "Nasrulloyev v. Russia" dated 11.10.2007, the ECHR indicated, among other things, the fact that: "taking into account the inconsistent and mutually exclusive decisions of national authorities regarding the legal regulation of detention for extradition, the court does not consider that the deprivation of liberty of the applicant was accompanied by adequate guarantees against the arbitrariness of the authorities. The relevant provisions of Russian law were neither precise nor predictable and did not meet the standard of "law" as required by the Convention. Therefore, the detention of the applicant cannot be considered "lawful" for Art. 5 of the Convention"[14].

The next element of the "three-part test" is the existence of a legitimate (lawful) purpose for which the exercise of a particular right is restricted. So, for example, in the case "Bartik v. Russia" dated 12.21.2006 the ECHR indicates that the restriction on the exercise of individual rights was established by law, but the Court recognized a violation by the authorities of the Russian Federation of paragraph 2 of Article 2 of Protocol No. 4 to the Convention, which was manifested in the illegal restriction of the applicant's right to freedom of movement, due to the lack of another condition for the legality of such intervention is a legitimate goal. Thus, the applicant was refused a passport to travel abroad because he worked for a certain time in the design bureau and had access to secret information. The ECHR established that the specified restriction was provided for by law since the USSR Laws of 05/20/1991 on the procedure for leaving the USSR and entering the USSR for citizens of the USSR were in force at the time of the applicant's work

13 DAKHOVA; CHUB, 2017, p. 61.

14 MANUKYAN, 2017, p. 17.

at the KB, Federal Law of 08/15/1996 "On the procedure for leaving the Russian Federation and entering the Russian Federation", the Federal Law of 21.07.1993 "On State Secrets" provided for the temporary restriction of the right to travel abroad of persons who had access to information containing state secrets. Thus, the first part of the three-pronged test was met, since the specified restriction was implemented by the law. However, the ECHR concluded that such a restriction was not necessary in a democratic society and did not pursue a legitimate goal, since the purpose of the applicant's trip was exclusively private, the total duration of the restrictions on the applicant's departure abroad amounted to 24 years, while consideration by the authorized bodies of the Russian Federation of the issue of the possibility issuance of a foreign passport was limited only to the formal issue of access to state secrets. The court indicated that the authorized state body also did not address the question of whether the restriction of the applicant's right to travel abroad in private matters was still necessary to achieve the legitimate aim it was intended to serve, and whether a less severe measure of restriction could have been applied.

Instructions for ensuring the conditioning of the limitation of the exercise of this or that right with a legitimate fee are also created in the constitutional and legislative acts of many countries of the world. Thus, according to part 2 of Article 11 of the Basic Law of the Federal Republic of Germany, the right to freedom of movement may be limited by law or based on the law and only in cases where there are no sufficient means for its implementation and as a result a special burden would arise for society, or when such a restriction limited to prevent the threat of danger to bases of the free democratic order of the Federation or any land or their existence, or when sufficient to combat the danger of epidemics, to take measures against natural disasters or especially grave unfortunate attacks, to protect youth from homelessness, or to prevent criminal acts.

According to paragraph XI of Article 5 of the Constitution of the Federal Republic of Brazil, the home is the inviolable refuge of a person and no one can enter it without the consent of the person who uses it, except to stop a crime or avert a disaster, or to provide assistance, or, on the day - based on a court decision.

Thus, for the legality of interference with human rights, it is necessary that the possibility of such interference is not excluded by the law, but is also ensured to achieve a legitimate goal, which is always the protection of

certain values. By the principle of binding the state by law, the essence of the limitation of human rights arises in ensuring the legitimate intervention of the state in the private autonomy of an individual with the provision of the common good[15].

Almost always, the concept of "proportionality" is used along with the category "legitimate purpose", which means that the restriction of the exercise of rights and freedoms must correspond to the purpose for which it was introduced. The requirement of responsibility is intended to protect a person from unnecessary interference by state authorities. Proportionality requires compatibility between the exercise of the fundamental right and the validity of its limitations, precisely the criteria of proportionality, provided that the limitation of fundamental rights is justified and legitimate. The principle of proportionality includes the adequacy of the means to the goal, the inadmissibility of limited restrictions, the inadmissibility of one's will, and the prohibition of formalism[16].

In connection with the application of the "proportionality" category, one should refer to the legal position of the Constitutional Court of Ukraine, expressed in Decision No. 15-pn/2004 dated November 2, 2004 (the case of the court imposing a milder punishment), according to which one from the basic principles of law, decisive in determining it as a regulator of social relations, one of the universal dimensions of law is justice, which is considered as a property of law, expressed, in particular, in an equal legal scale of behavior and the proportionality of legal responsibility to the offense committed. A separate manifestation of justice is the question of the appropriateness of the punishment for the committed crime; the category of justice assumes that the punishment for a crime should be commensurate with the crime. The fair application of the law means not only that the composition of the crime provided by law and the scope of the punishment will correspond to each other, but also that the punishment should be in a fair proportion to the gravity and circumstances of the crime committed by the person. Adequacy of punishment to the degree of gravity of the crime follows from the principle of the rule of law, from the essence of the constitutional rights and freedoms of a person and a citizen[17].

15 SAVCHYN, 2018, p. 291.

16 SAVCHYN, 2008, p. 25-26.

17 CONSTITUTIONAL COURT OF UKRAINE, 2004.

During the consideration of the case "Vintman v. Ukraine" dated October 23, 2014, it was found that the applicant, who was sentenced to 15 years of imprisonment, and his mother repeatedly appealed to the State Department of Penalties of Ukraine with a request to transfer the applicant to a prison located closer to the place residence of his disabled mother to facilitate her process of visiting her son. The Department repeatedly refused applicants, never taking into account the applicant's personal situation and his interest in maintaining family ties, and without providing sufficient reasons for such refusal. In the opinion of the Court, such interference in the personal and family life of the applicant was not commensurate with the legitimate purpose, accordingly, there was a violation of Art. 8 of the Convention.

In the case "Shvydka v. Ukraine" dated October 30, 2014, the ECHR indicates the inconsistency of interference in the exercise of human rights with a legitimate goal. Shvydka, after the official ceremony of laying a wreath at the monument to Taras Shevchenko, tore off a part of the ribbon with the inscription "President of Ukraine V.F. Yanukovych", with which she wanted to express her position that, due to several reasons, Mr. Yanukovych cannot be called the President of Ukraine. The Shevchenkiv District Court of Kyiv found the applicant guilty of petty hooliganism and fined her in the form of administrative arrest for ten days. The ECHR concluded that there had been a violation of Article 10 of the Convention because the domestic courts had imposed on the applicant, a sixty-three-year-old woman with no criminal record, the most severe punishment for an offense that had not resulted in any violence or threat. The ECHR does not see any justification in this and considers the measure disproportionate to the pursued goal.

In the case "S.A.S. v. France" dated 07/1/2014 the ECHR ruled that there was no violation of Articles 8, 9, and 14 of the Convention in the case of a French citizen who is a practicing Muslim, who, due to the entry into force of the law on 04/11/2011, prohibited the covering of the face in public places, it is no longer allowed to wear a burqa that covers the entire face. According to the Court's decision, the conditions of coexistence are a legitimate goal of the restriction, and the state in this case has wide discretion.

The Convention does not contain a single, universal list of grounds, in the presence of which restrictions on the exercise of human rights (intervention) correspond to a legitimate purpose, however, the analysis of its individual articles allows us to assert that restrictions on the exercise of individual rights are legitimate when they are carried out to protect such

values as national and public security, public order, the economic well-being of the country, health or morals, rights and freedoms of other persons (Part 2, Article 8, Part 2, Article 9 of the Convention), territorial integrity (Part 2, Article 10) or to prevent riots or crimes (Part 2, Article 8), to prevent the disclosure of confidential information, or to maintain the authority and impartiality of the court (Part 2, Article 10).

The content of the criteria for limitations of fundamental rights is not clearly defined by the Constitution of Ukraine. The constitutional regulation of limitations of fundamental rights is differentiated and depends on the specifics of the exercise of a specific subjective right[18]. According to Part 2 of Art. 29, detention may be applied to a person to prevent or stop a crime; according to Part 2 of Art. 30, the right to inviolability of housing may be limited to save lives and property, direct prosecution of persons suspected of committing a crime; to ensure public health protection, protection of reputation or rights and freedoms of other people under part 3 of Art. 34 the right to freely collect, store, use, and disseminate information may be limited; to find out the truth during the investigation of a criminal case, by part of Art. 31, the exercise of the right to confidentiality of correspondence, telephone conversations, telegraphic and other correspondence may be limited; to protect interests of national security, territorial integrity, and public order since Part 2 of Art. 36 provides for the possibility of limiting the right to freedom of association in political parties and public organizations. Analysis of the Constitution allows us to conclude that the grounds for legal restriction of the rights and freedoms of a person and a citizen established in it are based on the principle of combining private and public interests[19].

Necessary intervention in a democratic society means that the state must prove to the ECHR an "urgent public need" for such intervention and the establishment of appropriate restrictions. At the same time, such an urgent social need must be commensurate with the legitimate goal outlined by the means of intervention. Without giving a comprehensive answer to the question of what the Convention considers a "democratic society", the Court points to such characteristics as tolerance, pluralism, the rule of law, the absence of arbitrary interference with the human rights provided for by the Convention ("Dudgeon v. United Kingdom from 2.10.1981)[20].

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18 SAVCHYN, 2008, p. 28.

19 SYDORETS, 2012, p. 65.

20 DUDASH, 2013, p. 238.

In the already mentioned earlier case "Savin v. Ukraine" the ECHR indicated that in determining whether a particular intervention was "necessary in a democratic society", the Court must assess - in the context of the entire case in general - whether the reasons given to justify the intervention were relevant and sufficient for the purposes of paragraph 2 of Article 8 of the Convention and whether the relevant decision-making process was fair and capable of providing adequate protection of interests as required by the Convention Article.

V. Rechytsky highlights that the Convention requires that the actual application of restrictions be preceded by the fulfillment of a necessary condition, namely the recognition of the need for such restrictions not just in the state, but in a democratic state. Simplifying this issue a bit, we can say that this means approximately the following: a "democratic state", unlike a "simple" state, resorts to imposing restrictions only in the last resort, i.e. when it is impossible to do without it. In most cases, the atmosphere of a democratic state is (should be) such that it in itself prompts individuals to correct their somewhat extravagant, defiant behavior for society. In addition, the high level of tolerance for manifestations of human individualism, selfishness, or egocentrism inherent in democratic states is also of significant importance here. Simply put, democracies prevent the abuse of rights by their tolerant atmosphere. In such states, human dignity is valued very highly, so they avoid manifestations of state coercion or violence at all costs[21].

## 4. Restrictions of the realization of Human Rights and Freedoms in conditions of war

As already mentioned, the introduction of martial law or a state of emergency entails restrictions on the realization of certain human rights. Thus, according to Part 2 of Article 64 of the Constitution of Ukraine, in the conditions of a state of war or emergency, separate restrictions on rights and freedoms may be established with an indication of the period of validity of these restrictions, which is fully in line with international standards. In that case, according to Art. 4 of the International Covenant on Civil and Political Rights, during a state of emergency, during which the life of the nation is under threat and the existence of which is officially announced,

21 BUTKEVICH; RECHYTSKYI, 2015, p. 48.

States Parties to this Covenant may take measures to derogate from their obligations under this Covenant. According to Art. 15 of the Convention on the Protection of Human Rights and Fundamental Freedoms, during war or other public danger that threatens the nation, any state may take measures deviating from its obligations under the Convention. However, part 2 of Art. 15 contains an indication that the above provision cannot be a basis for derogating from Article 2, except in cases of death as a result of legitimate military actions, and from Articles 3, 4 (clause 1) and 7, effectively recognizing the rights provided for in these articles as absolute. At the same time, the right to life, enshrined in Article 2, contains an exception even in the text of Part 2 of Art. 15 of the Convention.

The analysis of the ECHR's practice allows us to conclude that the Court recognizes the right provided for in Article 3 of the Convention, i.e. the right to respect for dignity, as absolute, i.e. one whose implementation cannot be limited in any case. Thus, in the decision in the case "Soering v. the UK" dated July 8, 1989. The ECtHR notes that Article 3 of the Convention has no exceptions, and Art. 15 does not allow a departure from it during a war or other state of emergency that threatens the life of the nation. This absolute prohibition of torture or inhuman or degrading treatment or punishment indicates that Article 3 embodies one of the fundamental values of the democratic states of the Council of Europe.

If we are about to analyze the grounds sufficient for the introduction of martial law, it is clear that the European Convention uses the terms "war or other public danger that threatens the life of the nation" on this matter. The practice of the European Court of Human Rights does not contain a definition of the term "war" (probably in this case it is worth referring to UN documents), however, it is understood that any case of serious or prolonged violence, mass riots or short-term armed clashes can fall under the concept "a public danger that threatens the life of the nation." So, in the case "Lawless v. Ireland" the Court found that a public danger is "an exceptionally critical or emergency situation that affects the entire population and poses a threat to the organized life of the community." In the decisions of the cases "Ireland v. the United Kingdom" and "Aksoy v. Turkey", the Court emphasized that the threat must be such that it has actually occurred or will inevitably occur. In addition, the negative consequences of the situation must be such that they cannot be averted by any commonly

used methods (the decision in the case Denmark, Norway, Sweden and the Netherlands v. Greece)[22].

In contrast to Ukrainian legislation, the practice of the ECtHR does not contain a mandatory requirement for the duration of the martial law regime (cases Brannigan and McBride v. the United Kingdom, Marshall v. the United Kingdom). The ECtHR also made a special provision that indicates the right of the state to take measures that will protect public security from future events. However, in such a case, these emergency measures must be based on reliable information possessed by the state government (A. and Others v. the United Kingdom). Recognizing the government's fairly wide discretion regarding the range of grounds that could potentially serve as the reason for the imposition of martial law, the Court emphasizes that such a right is not unlimited. For example, in the decision in the case of Denmark, Norway, Sweden, and the Netherlands v. Greece the court stated that there was no evidence that the government had a real need to impose martial law and restrict human rights[23].

Chapter I, Title 5 of the Constitution of the Republic of Brazil, which regulates the issue of declaring a state of siege and a state of defense, provides for the possibility of restricting such human rights as the right of assembly, secrets of correspondence, secrets of telegraphic and telephone messages, moreover, when a state of siege is introduced, according to the Constitution, the following measures must be taken: obligation to stay in a designated place; restrictions on the inviolability of messages and secrecy of correspondence, transmission of information and freedom of the press, radio and television broadcasts by the provisions of the law; searches and excavations in housing; interference in the affairs of public service enterprises; requisition of property.

If we pay attention to the normative settlement of the issue of limiting the exercise of human rights in the conditions of martial law in Ukraine, part 5 of Art. 6 of the Law of Ukraine "On the Legal Regime of Martial Law" stipulates that "the decree of the President of Ukraine on the introduction of martial law specifies an exhaustive list of the constitutional rights and freedoms of a person and a citizen, which are temporarily limited in connection with the introduction of martial law, indicating the period of validity

22 SLAVKO, 2016, p. 71.
23 SLAVKO, 2016, p. 71.

of these restrictions, as well as temporary restrictions on the rights and legal interests of legal entities with an indication of the period of validity of these restrictions"[24].

With the beginning of the full-scale military invasion of the Russian Federation in Ukraine, on February 24, 2022, the Decree of the President of Ukraine No. 64/2022 was issued, which introduced martial law in Ukraine and stated that "temporarily, during the period of the legal regime of martial law, constitutional rights may be limited and freedom of man and citizen, provided for in Articles 30-34, 38, 39, 41-44, 53 of the Constitution of Ukraine, as well as to introduce temporary restrictions on the rights and legitimate interests of legal entities within the limits and to the extent necessary to ensure the possibility of introducing and implementing measures of legal martial law regime"[25].

To implement this Decree, a curfew was introduced on the territory of the regions, which means a ban on the civilian population being on the streets and in public places without specially issued passes and certificates during a certain period of the day. The Law of Ukraine "On the Legal Regime of Martial Law" entitles the military command, together with the bodies of executive power and local self-government bodies, and if this is not possible, to independently introduce and carry out the following measures of the legal regime of martial law: to introduce a curfew, to establish a special entry regime and departure, restrict the freedom of movement of citizens, foreigners and stateless persons, as well as the movement of vehicles; to prohibit conscripts and conscripts from changing their place of residence without the knowledge of the military command. Thus, the realization of the right to freedom of movement is provided for in Art. 33 of the Constitution of Ukraine.

In accordance with Part 1 of Art. 34 of the Constitution of Ukraine, "everyone has the right to freely collect, store, use and disseminate information orally, in writing or in another way - at his choice". However, part 2 of the same article suggests the limitation of these rights "by law in the interests of national security, territorial integrity or public order". The order of the Commander-in-Chief of the Armed Forces of Ukraine dated March 3, 2022, No. 73 approved the algorithm for working with representatives of the mass

24 UKRAINE, 2015.
25 UKRAINE, 2022.

media, defined a list of information, the disclosure of which could become known to the enemy and have a negative impact. Information, the disclosure of which could lead to the enemy's awareness of the actions of the Armed Forces of Ukraine or negatively affect the performance of defense tasks, may include information about military units, personnel, information about the planning of the operation, data about the movement of troops and equipment, information that is propaganda or aims to justify the large-scale aggression of the Russian Federation, etc. The Law of Ukraine "On Amendments to Article 114-2 of the Criminal Code of Ukraine Regarding Improvement of Liability for Unauthorized Dissemination of Information About the Means of Countering Armed Aggression of the Russian Federation"[26] dated April 1, 2022 made appropriate amendments to the Criminal Code of Ukraine, which establish liability for unauthorized dissemination information about the sending, movement of weapons, armaments and war supplies to Ukraine, the movement, movement or placement of the Armed Forces of Ukraine or other military formations formed by the laws of Ukraine, committed under conditions of war or a state of emergency.

Talking about political rights, a number of these rights are also subject to restrictions during martial law: the right to participate in the management of state affairs, in all Ukrainian and local referendums, and to freely elect and be elected to state and local self-government bodies. In addition, Clause 9 of Article 8 of the Law of Ukraine "On the Legal Regime of Martial Law" gives the authorities the right "to raise the issue of banning the activities of political parties, public associations, if it is aimed at eliminating the independence of Ukraine, changing the constitutional order by violent means, violating the sovereignty and territorial integrity of the state, undermining its security, illegal seizure of state power, propaganda of war, violence, inciting inter-ethnic, racial, religious enmity, encroachment on the stability of critical infrastructure, human rights, and freedoms, population health". Thus, the restriction of citizens' right to association is determined by a legitimate goal, which is the protection of constitutional values, including national security. As the judge of the Constitutional Court of Ukraine V. Lemak noted in a separate opinion regarding the Decision of the Constitutional Court of Ukraine No. 4-p/2022 dated 27.12.2022 (the case regarding the full name of religious organizations), it is obvious and indisputable that during the war

26 UKRAINE, 2022.

there is no more compelling state interest than national security. The main idea of the Constitution of Ukraine in wartime, as in peacetime, remains unchanged and consists of establishing limits for public power to prevent arbitrariness and guarantee human rights and freedoms. At the same time, the outlined constitutional goals and priorities of the entire state's activities during the war have considerable specificity. The defense of the state and the protection of the Motherland as constitutional values, on the one hand, closely interact with respect for individual human rights and freedoms, on the other, and cannot be opposed to each other, since the state of the second depends on the real provision of the first. War crimes in many populated areas of Ukraine, which were temporarily occupied by Russian troops, in particular the mass murders of the civilian population committed by them, confirm the relationship between the defense of the Ukrainian state and the protection of individual human rights and freedoms, not only in doctrinal terms but also in the circumstances of tragic reality"[27].

Based on the above, on March 18, 2022, the National Security and Defense Council, "taking into account direct military aggression by the Russian Federation, taking into account anti-Ukrainian political and organizational activities, war propaganda, public statements and calls for a change in the constitutional order by violent means, real threats of violation sovereignty and territorial integrity of the state, undermining its security, as well as actions aimed at the illegal seizure of state power, taking into account programmatic and statutory goals containing an anti-Ukrainian position, dissemination of information about the justification, recognition as legitimate, denial of the armed aggression of the Russian Federation against Ukraine, to ensure national security and public order" decided to suspend for the period of martial law any activities of several political parties ("Opposition Platform - For Life", "Shariy Party", "Bloc of Volodymyr Saldo", etc.)[28]. It should be noted here that the National Security Council suspended the activity of these political parties because the banning of parties should only take place in court.

The realization of certain socio-economic rights (the property right, the right to entrepreneurship, and the right to work) may also be subject to restrictions under martial law. For example, upon the introduction of martial law, the possibility of forced alienation of property rights with mandatory

27 CONSTITUTIONAL COURT OF UKRAINE, 2022.
28 UKRAINE, 2022.

full compensation of the value of the property (requisition) is provided. If the requisitioned property is preserved after the termination of martial law, then the person who is its owner, by Art. 23 of the Law of Ukraine “On the Legal Regime of Martial Law” and Art. 353 of the Civil Code of Ukraine, has the right to demand its return in court.

As for limiting the exercise of the right to work in the conditions of martial law, first of all, one should refer to Clause 2, Part 1, Art. 8 of the Law “On the Legal Regime of Martial Law”, which states that the military command together with the military administrations can “introduce compulsory labor for able-bodied persons who are not involved in work in the field of defense and protection of critical infrastructure and are not reserved for enterprises, institutions and organizations on the period of martial law for the purpose of performing works of a defensive nature, as well as eliminating the consequences of emergency situations that arose during the period of martial law, and involving them in the conditions of martial law in socially useful works performed to meet the needs of the Armed Forces of Ukraine, other military formations, law enforcement agencies and civil defense forces, ensuring the functioning of the national economy and protection of critical infrastructure and do not, as a rule, require special professional training of individuals”[29]. At the same time, Part 3 of Art. 43 of the Constitution of Ukraine, enshrining the provision on the prohibition of forced labor, at the same time indicates that «military or alternative (non-military) service, as well as work or service performed by a person under a sentence or other court decision or in accordance with laws, is not considered forced labor on martial law and the state of emergency». Exceptions to the criteria of forced labor correspond to Article 4 of the Convention, among which the term «forced or compulsory labor» does not apply to: any service of a military nature, as well as any service required in the event of an emergency.

## 5. Concluding remarks

Wars are always major challenges from a humanitarian point of view, as in such conditions there is a great vulnerability of human rights. However, these rights have normative force precisely to serve as protection in adverse conditions. Even though the full exercise of human rights is threatened in

29 UKRAINE, 2015.

these circumstances, their content cannot be emptied in favor of state actions. For this reason, the limitation of the exercise of human rights is a relevant issue for the theory and practice of contemporary constitutional law.

Hence proved, the restrictions of the realization of human rights and freedoms are measures of a temporary nature prescribed by law, applied to a person by the state to protect public values, necessary in a democratic society, and consisting in the impossibility of a person exercising a certain subjective right. For the restriction of the exercise of any right to be legitimate, it is necessary to comply with certain conditions (the set of which is known as the "three-fold test"): first, whether the possibility of restricting the exercise of the right was provided for by law, which should exclude arbitrariness on the part of states; secondly, whether the purpose of such a restriction is legitimate and whether the restriction of the exercise of the right is proportional to those values that are protected by such a restriction, thirdly, whether such a restriction is necessary for a democratic society.

Both the Constitutional Court of Ukraine and the European Court of Human Rights apply that triple test to safeguard, at least, a minimum content of human rights in a democratic society and, at the same time, balance the interests of the state in exceptional circumstances. This test seeks to bring more rationality to decisions involving human rights and also allows them to be evaluated, thus ruling out restrictive measures being based solely on pure political force without complying with minimum standards of respect for human beings that human rights represent.

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**ABSTRACT:** The constant development of human rights in the European context engenders the challenge of their implementation in different circumstances. This is the case when human rights face factual limits for their full application, such as the case of martial law in Ukrainian war. Based on this statement, the article aims to demonstrate how the exercise of human rights could be restricted, examine the grounds of such restrictions, explore the legality of the restrictions and also the need of this restrictions in a democratic society. Based on theoretical arguments from the Constitution of Ukraine and the Convention on the Protection of Human Rights and Freedoms, we demonstrate how the Ukrainian Constitutional Court and the European Court of Human Rights (ECHR) handle these issues. We conclude that both courts refer to the three-fold test of legality, legitimacy and necessity in order to achieve reasonable restrictions to human rights, mainly in conditions of war.
***Keywords:*** Human rights; Martial law; Ukraine war; European Court of Human Rights; Three-fold test.

**RESUMO:** O desenvolvimento constante dos direitos humanos no contexto europeu gera o desafio de sua implementação em diferentes circunstâncias. Essa é a situação quando os direitos humanos enfrentam limitações fáticas para sua completa implementação, como é o caso na lei marcial na guerra da Ucrânia. Com base nessa afirmação, o artigo objetiva demonstrar como o exercício dos direitos humanos pode ser restringido, examinar os fundamentais de tais restrições, explorar a legalidade das restrições e também a necessidade dessas restrições em uma sociedade democrática. Baseados em argumentos teóricos a partir da Constituição da Ucrânia e da Convenção para a proteção dos direitos humanos e liberdades, demonstramos como a corte constitucional da Ucrânia e a Corte Europeia de Direitos Humanos (CEDH) lidam com essas questões. Concluímos que ambas as cortes referem-se ao teste triplo de legalidade, legitimidade e necessidade para alcançar restrições razoáveis aos direitos humanos, principalmente em condições de guerra.
***Palavras-chave***: Direitos humanos; Lei marcial; Guerra na Ucrânia; Corte Europeia de Direitos Humanos; Teste triplo.

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