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## Constitutional human rights under martial law: legal realities

### Конституційні права людини в умовах воєнного стану: правові реалії

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#### Abstract

The military aggression of the Russian Federation and its full-scale invasion of the territory of Ukraine forced the introduction of martial law in Ukraine and the transition of the state apparatus and society in general to functioning in new legal realities. The introduction of martial law is reflected in the provision of constitutional human rights under martial law conditions. The purpose of the work is the analysis of constitutional human rights under martial law, the study of the state of ensuring such rights, and the difficulties in implementing some constitutional guarantees. The research methodology consisted of the following groups of research methods: general methods of thinking; general scientific methods; interdisciplinary and special legal methods. In particular, it is worth highlighting: the analysis, abstraction, formalization, dialectical, structural-functional method, systemic, statistical, concrete-sociological, formal-legal, special-legal, and hermeneutic methods. Attention was drawn to peculiarities of the legal regime of martial law; what limitations of constitutional rights are implemented and how such limitations affect society; whether restrictions on constitutional human rights are justified and expedient. Based on the analysis of legislation and scientific works, it was concluded that

#### Анотація

Військова агресія російської федерації та її повномасштабне вторгнення на територію України змусили запровадити в Україні воєнний стан та перейти державному апарату і загалом суспільству до функціонування в нових правових реаліях. Неабияк запровадження воєнного стану відображається на забезпечення конституційних прав людини в умовах воєнного стану. Метою роботи є аналіз конституційних прав людини в умовах воєнного стану, дослідження стану забезпечення таких прав та труднощів у реалізації деяких конституційних гарантій. Методологію дослідження склали такі групи методів дослідження: загальні методи мислення; загальнонаукові методи; міждисциплінарні та спеціально-юридичні методи. Зокрема, варто виокремити: аналіз, абстрагування, формалізацію, діалектичний, структурно-функційний метод, системний, статистичний, конкретно-соціологічний, формально-юридичний, спеціально-юридичний, герменевтичний методи. Було звернено увагу на: особливості правового режиму воєнного стану; на те, які обмеження конституційних прав впроваджені та як такі обмеження впливають суспільство; чи є обмеження конституційних прав людини виправданими і доцільними. З огляду на

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despite the new legal realities, constitutional human rights are subject to exclusive legal protection, and their protection is a key duty of the state. However, in the conditions of martial law, restrictions on such rights are possible, but such restrictions must be carried out exclusively in the manner and by the means provided for by the current legislation.

**Keywords:** constitutional rights, human rights, martial law, ensuring human rights, guarantees of human rights, restrictions.

## Introduction

One of the methods that contributes to determining the damage and losses caused to Ukraine as a Military actions on the territory of Ukraine determine the urgency of studying the issue of ensuring constitutional human rights in the conditions of martial law.

First of all, it is worth noting that martial law is a special legal regime that is introduced in Ukraine or some of its localities in the event of armed aggression, as well as in other cases provided for by law, and provides for the granting of the relevant authorities the powers necessary to repel armed aggression and ensure of national security. Therefore, to achieve the goal of introducing martial law, it is possible to temporarily limit the constitutional rights and freedoms of a person and a citizen with an indication of the period of validity of these restrictions.

But at the same time, constitutional human rights are subject to exclusive protection. Thus, the Constitution of Ukraine recognizes the highest social value of a person, his life and health, honor and dignity, inviolability, and security. The Constitution also defines that the protection of legal rights and freedoms of citizens is one of the main duties of the state. At the same time, there are cases when restrictions on the rights defined by the Constitution are unavoidable, but such restrictions must be carried out exclusively in the manner and by the means determined by the current legislation. In particular, Article 64 of the Constitution of Ukraine establishes exceptions that make it possible to limit human rights and freedoms. One of these reasons is the introduction of martial law (Law 254k/96-VR, 1996).

The decree 64/2022 (2022) of the President of Ukraine dated 24.02.2022 introduced martial law in Ukraine (Law 2102-IX, 2022).

здійснений аналіз законодавства та наукових праць, зроблено висновок, що незважаючи на нові правові реалії, конституційні права людини підлягають виключній правовій охороні, а їх захист є ключовим обов'язком держави. Та в умовах воєнного стану можливі обмеження таких прав, однак такі обмеження повинні здійснюватися виключно у спосіб та за допомогою засобів, передбачених чинним законодавством.

**Ключові слова:** конституційні права, права людини, воєнний стан, забезпечення прав людини, гарантії прав людини, обмеження.

Provisions of Art. 1 of the Law "On the Legal Regime of Martial Law" defines that martial law provides for the provision of the relevant state authorities, military command, military administrations, and local self-government bodies with the powers necessary to avert a threat, repulse armed aggression and ensure national security, eliminate threats to state independence of Ukraine, its territorial integrity, as well as a temporary, threat-induced, restriction of the constitutional rights and freedoms of a person and a citizen and the rights and legal interests of legal entities with an indication of the period of validity of these restrictions (Law 389-VIII, 2015).

Thus, the introduction of a special legal regime of martial law is a potential threat to the provision and realization of constitutional human rights. Therefore, the current legislation provides several essential guarantees for the protection of human rights. For example, the provided restrictions on the constitutional rights and freedoms of citizens, which can be applied under the conditions of martial law, are exhaustive and are not subject to extended interpretation. The period of their application cannot exceed the period during which the martial law lasts. In the conditions of a state of emergency and martial law, the rights and freedoms of a person and a citizen, are specified in Part 2 of Art. 64 of the Constitution of Ukraine (Law 254k/96-VR, 1996).

Thus, as can be seen from the provisions of the current legislation, it is vital to ensure the constitutional rights of a person in the conditions of martial law, but some restrictions are possible in these special conditions. Given these circumstances, the study of constitutional human

rights in new legal realities is relevant and necessary.

### Theoretical Framework or Literature Review

Vasyliiev and Malyar (2022) analyzed the legal basis for the introduction of martial law in Ukraine. In particular, the authors emphasized that the legal regime of martial law has the following characteristics: it can be introduced only in certain cases provided for by the law, and only in the manner established by the law, it provides for the granting of additional powers to the military command and military administrations, it allows the restriction of constitutional rights and freedoms of a person and citizen. The article also draws attention to what should be foreseen, to determine exactly which restrictions on the rights of citizens military administrations can introduce independently, and which - to agree with local self-government bodies, and suggests that among the powers of military administrations, only those that are materially related to - technical support of military units, organization of mobilization, curfew, compulsory labor and conscription of citizens for military service.

The constitutional rights and freedoms of a person and a citizen and the martial law regime were analyzed by the researcher Gula (2018). The author focuses on the fact that the essence of the martial law regime is to ensure an unhindered and operational possibility of averting the threat, repelling armed aggression and ensuring national security, eliminating the threat of danger to the state independence of Ukraine, its territorial integrity, by providing the state authorities, military command, as defined by legislation, military administrations and local self-government bodies certain powers necessary for this. Therefore, certain constitutional rights and freedoms of a person and a citizen may be temporarily (for the period of martial law) limited to protect national security, independence of Ukraine, and its territorial integrity in the conditions of martial law prevails over some constitutional rights and freedoms of a person and a citizen.

Moreover, Derevyanko (2019) considered the political and legal aspects of the restriction of political rights under martial law. The author analyzed the legal grounds and political motives for the introduction of martial law in Ukraine and expressed considerations regarding the content of the political rights of citizens and the expediency of their restriction in the latest Ukrainian realities.

What is more, Zanfirova (2017) considered the provision of the principle of freedom of labor in the conditions of martial law. Kaida (2022) also investigated the issue of the right to work under martial law.

The general principles of the legal regime of martial law and state of war were studied by Kyrychenko, Lobko, and Semenchenko (2019). Furthermore, the issue of legal regulation of the introduction of martial law in Ukraine was analyzed by Koval (2016).

Peculiarities in guaranteeing human rights and freedoms under martial law in Ukraine became the subject of research by Lazarev and Malinovska (2022). The researchers concluded that in the modern world, the application of restrictions on human rights and freedoms is one of the fundamental elements of the relationship between a person and the state and is carried out to find a compromise between society and the state, which is manifested in the protection of the person, the rights and freedoms of other persons from arbitrariness. In Ukraine, this thesis is enshrined at the level of the Constitution in Article 23. Therefore, the limitation of the basic rights and freedoms of a person is a legitimate, targeted quantitative, and (or) qualitative reduction in the process of the legal implementation of those possible models of behavior (powers) that make up the fundamental right (freedom) of a person, by other persons. It has an exclusively legal, temporary, targeted, non-discriminatory, socially reasonable character and consists in narrowing the scope and content of a person's fundamental potential capabilities. The possibility of limiting basic human rights and freedoms by the state is provided for in all international legal acts that regulate human rights and fundamental freedoms.

Besides, Marusiak (2022) considered problematic issues of the implementation of special legal regimes in Ukraine using the example of the introduction of martial law in 2018. In the opinion of the author, the existing constitutional and legal model of implementation of special legal regimes is completely ineffective and unbalanced, if the situation requires the adoption of urgent, immediate decisions, in particular in cases of the President of Ukraine adopting a decision on the use of the Armed Forces of Ukraine in the event of armed aggression against Ukraine.

Melnyk (2015) considered the normative and legal aspects of limiting freedom and personal

integrity in the conditions of an anti-terrorist operation. Prots (2020) considered the organizational and legal mechanisms of limiting the basic rights and freedoms of a person and a citizen under the legislation of Ukraine.

Additionally, Slavko (2016) considered the comparative legal aspect in the context of restrictions on human and citizen rights. The article analyzes the foreign experience of legal regulation of martial law. Among other things, Slavko notes that the legislation of most countries of the world does not contain exceptional grounds for the introduction of martial law, but the practice of the ECtHR shows that threats must be unavoidable and extraordinary and require the involvement of military formations.

Sklyar (2022) studied in detail the limitations of the constitutional right to the inviolability of housing under martial law. The author noted that the constitutional guarantee of the inviolability of housing does not apply to cases when public interests require a legitimate restriction of human rights, in particular, to protect the rights and legitimate interests of other members of society. The limitation of the individual's right to the inviolability of housing, which is defined in the Constitution of Ukraine and international legal acts, is recognized as a legitimate intervention of the state in human rights to ensure the common good.

Also, Figel (2015) investigated the issue of restrictions on human rights under martial law. The scientist found out that restrictions on rights and freedoms during martial law, as a rule, do not apply to the basic rights of citizens; are limited in scope and time of effect, and are applied only based on relevant normative legal acts. It has been investigated that martial law means the possibility of legal restrictions on the rights and freedoms of citizens and a temporary deviation from the provisions of the Convention on Human Rights and Fundamental Freedoms and the Constitution of Ukraine.

Therefore, as can be seen from the above-analyzed list of literary sources, the issue of limiting constitutional human rights under martial law arouses considerable interest among scientists, but the legal realities of today's limitations of constitutional human rights under martial law are insufficiently researched and require a more detailed analysis.

## Methodology

Several groups of research methods formed the methodological basis of the study of constitutional human rights under martial law: general methods of thinking; general scientific methods; interdisciplinary and special legal methods.

Together with other methods of thinking used during the research, it is possible to single out: analysis (made it possible to single out the characteristic features of restrictions on constitutional human rights in the conditions of martial law, which made it possible to understand which rights can be limited and which should be ensured under any conditions), abstraction (emphasized attention to the forms of ensuring human and citizen rights under martial law in practice), formalization (contributed to the formalization of the recommendations developed in the work regarding the mechanisms for ensuring constitutional human rights under martial law in Ukraine and other countries in the form of proposals for introducing amendments and additions to certain provisions of the legislation of Ukraine).

Among the general scientific methods of cognition, the following were utilized: dialectical (with the help of this method, certain features of the provision of human and citizen rights in the conditions of martial law were singled out and objectively considered various forms of implementation of the legal foundations of such interaction, including attention was paid to how the legislation changed and the interpretation of its individual provisions in the conditions of martial law and how this affects the provision of constitutional human rights); structural-functional (helped to carry out a study of the structural-functional connections between the state-guaranteed rights for every person and citizen and the mechanisms of their provision in the conditions of martial law at the national, local and supranational level); system method (helped to study constitutional rights as a specific system and, based on this, to single out the peculiarities of the interaction of the state, civil society and each person in ensuring constitutional rights under martial law as elements of a particular system).

Also, during the study of the legal realities of observing constitutional human rights under martial law, interdisciplinary (statistical, specifically sociological) and special-legal (formal-legal, special-legal, hermeneutic) methods were used, which made it possible to

conduct a conceptual scientific investigation of the researched issues and develop specific proposals for improving the mechanisms of interaction between civil society and public authorities in Ukraine. It is worth noting that these methods helped to understand and define key concepts in the field of human rights enforcement and the mechanisms (tools) of such enforcement under martial law conditions.

As for the normative legal acts that were operated when writing this article, it is worth highlighting among them:

- Constitution of Ukraine (Law No. 254k/96-VR, 1996);
- Convention on the Protection of Human Rights and Fundamental Freedoms (United Nations, 1950);
- Law of Ukraine "On the Legal Regime of Martial Law" (Law 389-VIII, 2015);
- Law of Ukraine "On transfer, forced alienation or confiscation of property under conditions of war or state of emergency" (Law 4765-VI, 2012);
- Decree of the President of Ukraine "On the introduction of martial law in Ukraine" (Decree 64/2022, 2022);
- Law of Ukraine "On approval of the Decree of the President of Ukraine "On the introduction of martial law in Ukraine" (Law 2102-IX, 2022), and;
- Resolution of the Cabinet of Ministers of Ukraine "On approving the procedure for involving able-bodied persons in socially beneficial works under martial law" (Resolution 753, 2011).

## Results and Discussion

As already mentioned, the Constitution of Ukraine recognizes that the observance of constitutional human rights is the duty of the state. The same position is followed in the European Convention on the Protection of Human Rights and Fundamental Freedoms. According to the provisions of the Convention, human rights and freedoms are of absolute value, are inalienable, and belong to everyone from birth, and in any society, they are a significant institution, through which the legal status of a person is regulated, the limits of intrusion into his personal sphere, guarantees are established protection and realization of her rights and freedoms. That is why their provision is one of the main functions of the state (United Nations, 1950).

Simultaneously, to ensure national security in the conditions of martial law, some of the constitutional human rights may be limited. Let's consider the issue of the possibility of limiting constitutional rights in more detail.

The provisions of Part 3 of Decree 64/2022 (2022) determine that during the period of the legal regime of martial law, the constitutional rights and freedoms of a person and a citizen, provided for in Articles 30 - 34, 38, 39, 41 - 44, 53 of the Constitution of Ukraine, may be limited, namely:

- the inviolability of housing;
- non-interference in personal and family life, except for cases stipulated by the Constitution of Ukraine;
- freedom of movement, free choice of place of residence, the right to freely leave the territory of Ukraine, except restrictions established by law;
- the right to freedom of thought and speech, to free expression of one's views and beliefs;
- the right to participate in the management of state affairs, in all-Ukrainian and local referendums, to freely elect and be elected to state and local self-government bodies;
- the right to assemble peacefully, without weapons, and hold meetings, rallies, marches, and demonstrations;
- the right to strike to protect one's economic and social interests, and;
- the right to education.

In addition, the Law 389-VIII (2015) provides for the possibility of introducing compulsory labor for able-bodied persons who are not involved in work in the defense sphere and the sphere of ensuring the livelihood of the population and who are not reserved for enterprises, institutions and organizations for the period of martial law to fulfill works of a defensive nature. At the same time, employees involved in the performance of socially useful works have certain guarantees during the performance of such works. For example, the previous place of work (position) is kept for such employees. It is worth noting that for employees involved in the performance of socially useful works, the previous place of work (position) is preserved during the performance of such works. In accordance with the above-mentioned law and the Resolution 753 (2011) appropriate restrictions of rights are determined, including: the possibility of using the capacities and labor resources of enterprises, institutions and organizations of all forms of ownership for the needs defense, changing their work regime;

checking documents of persons, and, if necessary, conducting an inspection of things, vehicles, luggage and cargo, office premises and housing of citizens, with the exception of restrictions established by the Constitution of Ukraine; prohibition of holding peaceful meetings, rallies, marches and demonstrations, other mass events; establishment of military housing obligation for individuals and legal entities for housing servicemen, rank and file officers of law enforcement agencies, personnel of the civil protection service, evacuated population and accommodation of military units, units and institutions.

All the above-mentioned measures must be carried out following the current legislation and cannot significantly limit the fundamental rights of citizens. In addition, when implementing restrictions, it is necessary to pay attention to their proportionality to the goals for which they are implemented.

The Constitution of Ukraine defines a list of rights that cannot be limited even during martial law. Among them: restrictions cannot be established on the basis of race, skin color, political, religious and other beliefs, gender, ethnic and social origin, property status, place of residence, language or other characteristics; citizens of Ukraine cannot be deprived of citizenship and the right to change citizenship; the inalienable right to life cannot be violated; on respect for dignity, freedom and personal integrity; the right to send individual or collective written appeals or to personally address state and local self-government bodies is not subject to restriction; the right to housing, marriage and equal rights and obligations in marriage and family cannot be limited; it is unacceptable to violate the equality of children in their rights, regardless of origin; the right to protect rights and freedoms in court is not subject to limitation; for compensation with the funds of the state or local self-government bodies for material and moral damage caused by illegal decisions of state authorities; the right to professional legal assistance cannot be limited; the right not to be held twice liable for the same kind of legal responsibility for the same offense; presumption of innocence; the right to protection and refusal to testify or to give explanations or statements about oneself, family members or close relatives, whose circle is defined by law (Law 254k/96-VR, 1996).

The Law 389-VIII, (2015) provides for a guarantee of compliance with such standards as the minimum wage, the minimum vacation

period, and rest time between changes to the time of the involvement of citizens in the performance of labor obligations and compensation of the value of property in the event of its forced expropriation.

In particular, Article 3 of the Law 4765-VI (2012) defines the possibility of compulsory alienation of property under the legal regime of martial law, subject to prior full reimbursement of its value. And in case of impossibility of prior full compensation for forcibly expropriated property, such property is forcibly expropriated with subsequent full compensation of its value.

So, as can be seen from the above analysis of the legislation and literature, the provision of constitutional human rights in the conditions of martial law is possible provided that the requirements of the legislation are strictly observed. It is equally essential in the context of ensuring human rights to establish communication and clear interaction between all state authorities and officials in the performance of their duties. If such requirements are met, the martial law introduced in Ukraine will minimally affect the restriction of the rights of Ukrainian citizens and in fact, will not affect their interests and everyday life and will make it possible to ensure national security, protect the person, rights, and freedoms of other persons from arbitrariness.

## Conclusions

1. The constitutional rights and freedoms of a person and a citizen are an essential element in the process of formation and socialization of each individual because they allow him to satisfy his needs and realize his potential in various spheres of social life. The level of their guarantee determines the degree of democratic development of the state.
2. In the conditions of martial law, some constitutional human rights are subject to restrictions. At the same time, the Constitution of Ukraine defines which rights cannot be limited even in the conditions of martial law, because their provision and guarantee are meaningful for the existence of a person and the state in a legal democratic field.
3. The introduction of a special legal regime of martial law in Ukraine is a potential threat to the provision of constitutional rights and human freedoms, therefore, the current legislation of Ukraine contains several necessary guarantees for the protection of human rights. However, to avoid threats, the

Constitution of Ukraine defines restrictions on the constitutional rights and freedoms of citizens, which can be applied under conditions of emergency and martial law, are exhaustive, and are not subject to extended interpretation.

4. The application of limitations of constitutional rights is one of the fundamental elements of the relationship between a person and the state. Therefore, restriction of the basic rights and freedoms of a person is possible only as a legitimate, purposeful quantitative, and qualitative reduction in the process of the legal implementation of those possible models of behavior that make up the basic right of a person, on the part of other persons. Such restrictions have an exclusively legal, temporary, targeted, non-discriminatory, socially useful nature and consist in narrowing the scope and content of a person's fundamental potential capabilities for the sake of the security of states and people in such a state.

Regarding further scientific research, it is vital to carry out a comparative legal analysis of foreign experience in the field of ensuring constitutional human rights under martial law.

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