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The principle of proportionality in the restriction of human rights during the war in Ukraine

Принцип пропорційності в обмеженні прав людини під час війни в Україні

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Abstract


The purpose of the article is to study restrictions on human rights and freedoms from the perspective of proportionality, which is determined by the nature of public interests which are the legitimate purpose of restrictions on human rights and freedoms, which is especially relevant in the context of armed aggression against Ukraine, since ignoring their threatens the functioning of the state. The research methods used are systematic analysis, synthesis, generalization, historical method, etc. The peculiarities of the implementation with the principle of proportionality under extraordinary conditions have been considered. It has been emphasized that in a situation of full-scale war and the introduction of martial law in Ukraine, the interests of the state lie primarily in ensuring security, territorial integrity of the state, protection of state sovereignty and repelling armed


Анотація


У статті аналізуються обмеження прав людини в Україні під час війни, досліджується принцип пропорційності між інтересами держави і основними фундаментальними правами людини. Використовується методологія правового аналізу вітчизняних та міжнародних джерел, зокрема законодавства, судової практики та доктрини. Результати показують, що, хоча держава може обмежувати права під час війни, ці обмеження мають бути пропорційними загрозі та виправдані необхідністю захисту основних суспільних інтересів. У дослідженні зроблено висновок, що застосування принципу пропорційності має вирішальне значення для захисту прав людини, зокрема під час конфлікту, і наголошено на важливості аналізу кожного конкретного випадку для забезпечення належного балансу

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aggression. In the event of a threat to these interests, the state resorts to the application of restrictions on human rights and freedoms, applying the principle of proportionality between the interests of the state and basic fundamental human rights. This is manifested in the application of a number of restrictions on personal rights and freedoms, restrictions and special regulation in the field of economic activity, financial transactions, labour relations, and civil law obligations.

Keywords: state interests, principle of proportionality, martial law, human rights, restriction of human rights, state.

Introduction

After the Second World War, the world's views on the protection of fundamental human rights, freedoms and legitimate interests changed significantly. Democratic, legal, social states began to understand the true value of human rights and freedoms, as all people are born free, equal in their rights and freedoms, and their protection and defense began to be recognized as a priority for the state, which declared its democratic development (Ablamskyi et al., 2022).

The Constitution of Ukraine enshrines that the protection and promotion of human rights is the primary duty of the state. At the same time, the institution of human rights protection is a fundamental asset of any democratic legal system. The issue of restrictions on rights and freedoms, their balancing with the general interests of society and the need to fulfill the tasks of the state are relevant for any society. The problem of restrictions on human rights is special, since restrictive measures or derogation from their guarantees in the interests of the state and society directly depend on the conditions in which the state functions. Therefore, an important scientific problem is to determine the scope and focus of such restrictions.

An important standard for the permissibility of restrictions on rights and freedoms is the principle of proportionality. It is fair to say that this principle has an impact on the entire sphere of human rights protection, since theoretical interpretation and approaches to its application largely determine the introduction, implementation, improvement and effectiveness of human rights guarantees. The functioning and development of the human rights institution as a whole depends on this. In addition, the principle of proportionality is recognized at the level of international law, as well as in many national legal systems. This also applies to the legal system of Ukraine. The principle of proportionality remains the standard for the legitimacy of human rights restrictions under any conditions of state functioning. However, its application has certain peculiarities in situations where there is a special need to ensure the interests of the state.

In this article, an attempt is made to develop, on the basis of provisions of national and international law, theoretical approaches to understanding the peculiarities of the principle of proportionality as a criterion for the admissibility of restrictions on human rights and freedoms.

This article contains the following sections: Literature Review, Methodology, Results and Discussion, Conclusions. The "Literature Review" section presents an analysis of the main approaches of international and national science relevant to the study of the State's powers to restrict human rights in the context of the principle of proportionality. The "Methodology" section describes the research methods used to examine the selected issues. The "Results and Discussion" section contains an analysis of the significance of the principle of proportionality in the modern legal system of Ukraine, a review of national and international sources enshrining this principle, a description of the content of the principle of proportionality in terms of domestic law of Ukraine and international law, as well as the peculiarities of its understanding and application in Ukraine during the war, given the importance of public interests. The "Conclusions" section includes a brief summary of the role and peculiarities of the application of the principle of proportionality in the context of armed aggression against Ukraine.

між потребами держави та захистом основних прав.

Ключові слова: державні інтереси, принцип пропорційності, воєнний стан, права людини, обмеження прав людини, держава.

Literature Review

The problem of applying the principle of proportionality is one of the central ones at the level of world jurisprudence, where the focus of legal science is on understanding the construction of an effective system of protection of rights and freedoms as the main task of a democratic state (Parkhomenko, 2017); balancing the right to freedom of expression with the need to regulate harmful content online (Stovpets et al., 2023); study of international legal principles of protection of human rights and the problem of state responsibility for non-compliance with international legal standards in this area (Kriebaum et al., 2022), analysis of the role of the state in ensuring the protection of human rights (Shemshuchenko & Skripnyuk, 2017), especially after hostilities and the occupation of certain territories of the state (Ustymenko et al., 2022).

An important area of scientific research is the problem of correlation between individual rights and the sovereign powers of the state to protect public interests for the benefit of society (Schill, 2015). This includes the regulation of relations in the general interest (Levashova, 2019) by limiting certain guarantees of protection of rights and freedoms (Titi, 2014), including the potential risk of deprivation of property rights as a result of nationalization or re-privatization (Teremetskyi et al., 2020). Some scholars in their studies have identified the absence of an effective mechanism for national protection and implementation of the rights and freedoms granted in the field of property rights protection. Some of them focused on analyzing the existing judicial and extrajudicial ways of compensation for damages caused by armed conflicts, using the example of national legislation (Onishchenko et al., 2023). Others referred to the case law of the European Court of Human Rights (hereinafter – the ECtHR) as an effective tool for restoring violated rights, identifying the main criteria for considering such disputes (Kurylo et al., 2020).

In recent years, the study of problems related to the protection of human rights has been carried out mainly in the context of analyzing the principle of proportionality. This principle is seen as a guarantee of ensuring a fair balance between the state's powers and human rights, as well as a means of limiting the state's freedom of action in relation to a person (Ucaryilmaz, 2021). At the same time, the nature, content and place of the principle of proportionality in the legal system, including its role in the system of legal principles and standards, remain controversial in a number of aspects. Some scholars emphasise the independent importance of proportionality as a standard of international legal protection of human rights and freedoms in the practice of international institutions (Pohrebniak, 2012, p. 269); as a leading legal concept in the legal systems of European countries and in the activities of supranational European institutions (Scaccia, 2019, p. 2-3); as a central element of jurisprudence of the most influential national and international courts (Stone Sweet & Della Cananea, 2014, p. 916).

At the same time, other researchers interpret the principle of proportionality as a specific, derivative principle that is based on the fundamental principle of the rule of law and is an aspect of it (Pohrebniak, 2012; 2006, p. 35-36). Proportionality is also considered as one of the criteria, along with the criterion of legality, which determines the admissibility of state interference with human rights and freedoms (Terletsy, 2022, p. 21-50). In this regard, an interesting article is a scientific article in which the authors revealed the relationship between the restriction of certain human rights and the availability of material resources for such restriction (Teremetskyi et al., 2023, p. 199). In particular, scientists have proven that self-isolation in the context of the COVID-19 pandemic is possible only if there is housing that meets sanitary and technical standards and requirements stipulated by building regulations. This includes natural insulation, water supply, sewerage, electricity, heating, etc.

At the same time, proportionality as a standard for restrictions on human rights and freedoms requires further scientific research.

Methodology

A number of scientific and theoretical methods were used in the course of studying the issues of proportionality of restrictions on human rights in the public interest. The study was carried out on the basis of a systematic analysis of domestic and international law, decisions of national and international courts, as well as doctrinal provisions of domestic and foreign science.

The method of analysis was used to identify specific features of regulatory and theoretical approaches to certain aspects of the issues of human rights restrictions and the principle of proportionality. Within this method, certain characteristics of the key provisions of normative regulation and scientific research

regarding the problem of understanding proportionality, its features, role, restriction of human rights by the state, as well as the meaning of the principle of proportionality in this context were determined, which made it possible to analyze important components, aspects of normative regulation and theoretical approaches to understanding proportionality and relationships between them.

The method of synthesis was used to draw systematic conclusions based on the materials studied in scientific papers, legislation and case law. Within the framework of this method, the obtained results were generalized and integrated in order to form a comprehensive approach to the theoretical understanding of issues related to the nature of the principle of proportionality and its application both at the international level and in the legal system of Ukraine.

The method of generalization was used to study doctrinal, regulatory approaches and case law at the national and international levels on certain aspects of the problems of human rights restrictions and the application of proportionality requirements to develop general theoretical provisions for understanding the issue of proportionality in the context of human rights restrictions in the public interest. The historical method was used in the process of studying the development and transformation of the understanding of proportionality, state interests and human rights restrictions in the legal system of Ukraine.

Results and Discussion

The value and importance of the institution of human rights protection, the system of guarantees of rights and freedoms, which includes the provisions of international agreements in the field of protection of human rights and foreign investment, as well as the approaches of international jurisdictional institutions to their application, necessitate an extremely balanced approach to the restriction of human rights and freedoms. Therefore, the guarantees for the protection of human rights and freedoms enshrined in the laws and international agreements and developed in the jurisprudence of national and international judicial and arbitration institutions stipulate that restrictions on human rights must meet the proportionality criterion. Thus, the principle of proportionality is recognized at the level of international law in the field of human rights protection and foreign investment, as well as in the legal system of Ukraine.

When considering whether the restrictions on rights and freedoms applied by the state comply with the human rights guarantees established by the Convention for the Protection of Human Rights and Fundamental Freedoms, the ECtHR assesses whether such restrictions are lawful, as well as whether they are applied in the public interest and whether these restrictive measures are proportionate. In other words, the principle of proportionality is a criterion for assessing the admissibility of measures to restrict human rights, regardless of the legality of such restrictions and their (restrictions) focus on achieving a legitimate goal. According to the ECtHR, even if measures to restrict human rights and freedoms are lawful and in the public interest, such measures must always meet the criterion of proportionality (*Bogdel v. Lithuania*, 2013). In the context of the ECtHR's case law on cases based on the Convention, the principle of proportionality is universal and is applied by the ECtHR when interpreting the entire range of provisions of the Convention and its additional protocols and assessing the compliance of the state's restrictive measures with these provisions.

The application of the principle of proportionality at the level of international legal protection of human rights has also been developed in the field of disputes between states and foreign investors on the basis of bilateral and multilateral agreements on mutual protection of investments within the framework of investment arbitration, where disputes between investors and a state that has signed the relevant international conventions may be considered. At the same time, the arbitration proceedings analyze and evaluate the state's activities in this area. The problem of proportionality in the sense of its understanding as a problem of maintaining a balance between the sovereign right of states to exercise power in the public interest and compliance with guarantees of protection of foreign investments is one of the key issues. It is in the center of attention of scholars, appears in the practice of investment dispute resolution and significantly affects the further development of the institution of investment arbitration (*Henckels*, 2013), which in itself contributes to the protection of not only investors but also the interests of the state.

The proportionality of restrictions on human rights and freedoms is interpreted in the decisions of international courts as implying the existence of a legitimate aim for which the state applies restrictive measures. For example, the ECtHR notes that in order for restrictions on rights and freedoms to be considered compatible with the requirements of the Convention, they (restrictions) must be aimed at a

legitimate aim and there must be a reasonable relationship between the state measures and the aim they pursue (Radunović and others v. Montenegro, 2016). This approach is also supported by scientific works on the issues of international legal protection of human rights: the existence of a legitimate (lawful) purpose of the measures by which the state authorities restrict rights and freedoms is recognized as a necessary condition for the proportionality of such measures. Accordingly, restrictive measures that are not aimed at a legitimate goal are considered disproportionate (Kingsbury & Schill, 2010, p. 86), which is important for understanding the nature of possible restrictive measures.

The analysis of court decisions related to the issue of proportionality makes it possible to state that the approaches of international law to the interpretation of the principle of proportionality have been adopted in Ukrainian legislation and court practice. The Code of Administrative Procedure of Ukraine defines proportionality as ensuring the necessary balance between adverse consequences for the rights, freedoms and legitimate interests of a person and the goals of the actions or decisions of the authority. The Supreme Court, in detailing this definition, identified a list of conditional components of the understanding of proportionality: the exercise of powers, as a rule, should not cause any negative consequences that would not correspond to the goals to be achieved; if a decision or action may restrict the rights, freedoms or interests of individuals, such restrictions must be justified by the need to achieve more important goals; adverse consequences for the rights, freedoms and interests of a person as a result of a decision or action of a public authority should be significantly less than the harm that could have occurred in the absence of such a decision or action; to achieve socially useful goals, it is necessary to choose the least “harmful” means (Unified State Register of Court Decisions, 2019), which should be objective and have practical parameters.

According to legal practice, the principle of proportionality plays the role of a balancing mechanism, ensuring a “balance” between the need for the state to take measures to protect the public interest, fulfill state tasks, regulate public relations in the public interest and respect the rights, freedoms and legitimate interests of the individual. This principle was applied in Ukrainian law even before the outbreak of full-scale war. It is an important factor that contributes to the effectiveness of human rights protection and prevents arbitrary actions by state authorities. In particular, in the light of the proportionality criterion, the judiciary assessed the legitimacy of state measures that restricted human rights and freedoms in the interests of general (public) needs. Often, such measures, although formally legal, were found to be disproportionate, which led to the cancellation or recognition as unlawful of decisions of state bodies that applied these restrictive measures, or to the recognition as unconstitutional of legislative acts that provided for the relevant restrictions on human rights and freedoms.

An illustrative example is the case of mandatory vaccination of employees in connection with the spread of the SARS-CoV-2 coronavirus, which was considered by the courts in 2021-2022 and was referred to the Grand Chamber of the Supreme Court as raising an exceptional legal issue. Thus, an employee of a state-owned railway transport enterprise was suspended from work by order of the company's administration due to the absence of a supporting document on mandatory preventive vaccination or a medical certificate on the presence of contraindications to vaccination, which restricted the employee's access to work in order to protect the public interest in preventing the spread of the pandemic among the population.

The restrictions imposed on the employee constituted an interference with his right to respect for private life, so they were also assessed by the Grand Chamber in terms of compliance with constitutional and international legal guarantees of human rights protection. Although the Grand Chamber acknowledged that the suspension of the employee from work on the grounds of absence of preventive vaccination and non-payment of his salary during the suspension period was provided for by law and had a legitimate aim, the said measures did not comply with the principle of proportionality.

In particular, the Grand Chamber noted that the application of such measures was not accompanied by any individual assessment of the duties performed by the employee in his position, and no facts were established that would justify the need to suspend this particular employee from work. Relevant circumstances, such as the number of social contacts of the employee at the workplace, working conditions, etc. were not taken into account. On this basis, the Grand Chamber concluded that the order to suspend the employee from work did not meet the requirement of proportionality and was therefore subject to cancellation (Grand Chamber of the Supreme Court, 2022).

The criterion of proportionality is also applied by the Constitutional Court of Ukraine when assessing the constitutionality of legislative provisions that restrict the rights, freedoms and legitimate interests of a

person and citizen. For example, in the decision of the Constitutional Court of Ukraine dated 21.07.2021 No. 3-p(II)/2021, the provisions of Article 471 of the Customs Code of Ukraine, which provided for the confiscation of goods that are the subject of an offence as a mandatory sanction for violation of the customs control procedure in the simplified customs control zones, were declared unconstitutional (Constitutional Court of Ukraine, 2021).

In this decision, the Constitutional Court of Ukraine, referring to the interpretation of the principle of proportionality as requiring a reasonable balance between the interests of the individual and society, noted that the restriction of property rights in the form of confiscation of property must, *inter alia*, be appropriate and necessary to achieve a legitimate goal, as well as ensure a fair balance between the requirements of the public interest and the protection of property rights, without undue influence on the persons to whom such restriction is applied. In paragraph 2.1 of the judgement, the court ruled that the confiscation of goods under the challenged provision of Article 471 of the Customs Code of Ukraine is arbitrary and excessive and does not ensure a fair balance between the requirements of the public interest and the protection of property rights (Constitutional Court of Ukraine, 2021).

The principle of proportionality is a guarantee that, on the one hand, allows the state to achieve socially important goals through the use of state measures, and, on the other hand, prevents arbitrariness on the part of the state authorities in the application of human rights restrictions. At the same time, the application of the principle of proportionality, the nature of the balance between the protection of human rights and the general (public) interests, as well as the understanding of the fairness of such a balance always depend on the socio-political, economic and legal situation in which the state applies measures to restrict rights and freedoms. In the case of modern Ukraine, the armed aggression against the state and the imposition of martial law on its territory are the main factors affecting the application of the proportionality principle.

The conditions prevailing in Ukraine determine the specifics of understanding the legitimate purpose for which the state applies restrictions on rights and freedoms. Such a goal is the public (general) interests, the protection of which is aimed at the restrictive measures of the state authorities. The principle of proportionality implies ensuring an appropriate balance between the public interests in the protection of which the state imposes restrictions on rights and freedoms and the need to respect the rights of individuals, which is also relevant in martial law. However, the nature of these public interests is determined by the need to protect the state, society, state institutions and the constitutional order from a military threat. This is in line with the approaches of international law in the field of human rights protection, which recognize that public interests and their priority depend on the actual needs of society and the state in a particular historical period. International law recognizes a certain prerogative of the state authorities to determine the public interest and decide whether specific actions are in line with these interests based on the actual needs.

An analysis of the ECtHR case law suggests that this court widely applies the concept of “margin of appreciation,” i.e., freedom of discretion. It means that the state authorities, in particular the legislature, have considerable freedom in determining what is in the public (general) interest, since it is the national institutions of the state that are better aware of the needs of the country and society. In times of war, the public interests to which Ukraine should direct measures to restrict rights and freedoms are to ensure the defense of the state, deterrence and repulsion of armed aggression, restoration of territorial integrity within internationally recognized borders, increase of defense capabilities and effectiveness of national security and law enforcement. Of course, these interests were recognized as public at the constitutional level even before the start of Russia’s full-scale aggression.

Today, in the context of a war waged by an aggressor country, the state has grounds, and in some cases an immediate need, to apply more extensive, intensive and severe restrictions on rights and freedoms to protect the public interest than in peace. This is due to the nature of the potential consequences that may arise due to the lack of proper protection of the public interest or damage to it. Such consequences are more destructive and socially dangerous for the foundations of the state and social order, democratic development of the country and the ability of the state to effectively fulfill its tasks, as well as for the functioning of state and legal institutions, compared to the consequences in the absence of direct military aggression.

The exceptional importance of public interests related to defense, protection of territorial integrity and ensuring state sovereignty in times of war gives the state authorities grounds to apply increased restrictions on rights and freedoms that could be considered disproportionate in peacetime. This view is consistent with the concept of balancing competing interests, which is central to the understanding of the principle of

proportionality at the level of international law and national legal systems. Its essence lies in the fact that in case of competing interests or principles, it is necessary to compare and contrast them. The higher the importance of one interest or principle, the more significant restrictions on other interests or principles the state has the right to apply (Kingsbury & Schill, 2009 p. 30).

For example, the public national security interests recognized by the state in the area of ensuring freedom of conscience and the activities of religious organizations aimed at countering anti-state propaganda, preventing social conflicts, preventing interethnic and interreligious hatred, and preventing the use of religion and the church in political activities in the context of Russia's military aggression require an increased level of protection. In peacetime, insufficiently effective protection of these interests by the state, as well as violations by certain political and pseudo-religious organizations over the past decades, have led to encroachments on the freedom of conscience and religion of citizens, violations of the principle of separation of church and state, and cases of religious discrimination. In the context of Russia's full-scale war against Ukraine, these consequences are much more serious and pose a higher level of threat, as they include assisting the aggressor state in carrying out armed aggression, encroachment on the territorial integrity and sovereignty of Ukraine, spreading anti-state propaganda and undermining the state's defense capabilities. Therefore, in the context of martial law imposed due to Russian aggression, it became necessary to ban the activities of the Russian Orthodox Church (ROC) and its subordinate religious centers in Ukraine, which became the basis for submitting a relevant draft law to the Verkhovna Rada of Ukraine in November 2022 (Draft Law of Ukraine No. 8221, 2022).

Understanding the public interest, the protection of which is a legitimate purpose for the state to impose restrictions on rights and freedoms, is important. Special external and internal circumstances, such as a state of war, armed aggression against the state, pandemics, etc., may lead to the emergence of new public interests or the transformation of existing ones that would not have occurred under other conditions. For example, at the legislative level, the state has recognized the public interest in protecting the financial security of the state in the field of combating money laundering and preventing the financing of terrorism. These interests remain relevant under martial law, but undergo a certain transformation. Such "transformed" public interests are expanding and consist of ensuring the protection of the financial system of Ukraine from attempts to use it (the financial system) to assist the aggressor state in conducting activities aimed at violating the national security, territorial integrity, and defense capabilities of Ukraine, as well as preventing attempts by the aggressor state and its residents to establish control or influence the activities of financial institutions in Ukraine. This led to the adoption of the Law of 04.11.2022 (Law of Ukraine No. 2736-IX, 2022), which provides for: strengthening financial monitoring measures in relation to financial transactions and business relations involving citizens and residents of the aggressor state, a ban on the participation of such persons in the management of primary financial monitoring entities, as well as the introduction of monitoring mechanisms aimed at preventing the financing of collaboration and aiding the aggressor state.

There may be situations when certain public interests, which have long been a priority and determined the direction of development of legal institutions, lose their significance in the context of armed aggression. This happens in cases where full protection of such interests may pose a threat to the protection of interests that have become particularly relevant during the war. Public interests, the significance of which increases under martial law, are more important in terms of defence of the state, protection of its security and territorial integrity than the interests that had priority in the absence of armed aggression. For example, over the decades of development of private law in Ukraine, the principles of binding civil law obligations and freedom of contract were recognized by the state as public interests. These principles were considered fundamental conditions for the establishment of a market economy model, ensuring economic diversity and protection of all forms of ownership, which were enshrined in the constitution. Today, however, such interests are, relatively speaking, losing their priority over the state's interests in defence, security, monetary circulation, the functioning of the financial system and the protection of the state's property interests.

In particular, in March 2022, Ukraine introduced a moratorium (ban) on the execution of monetary and other obligations, the creditors (collectors) of which are the Russian Federation or citizens of the Russian Federation (except for those legally residing in Ukraine), legal entities established and registered in accordance with the laws of the Russian Federation, as well as legal entities established in accordance with the laws of Ukraine, the ultimate beneficial owner, member or participant (shareholder) of which with a share in the authorized capital of 10% or more is the Russian Federation (Resolution No. 187, 2022).

In other words, the public interests of the state in the field of defence and security took precedence over other public interests, in particular the interests of establishing the principles of binding civil law obligations, which were traditionally considered fundamental to private law and the economic life of the country. This decision was due to the fact that in the context of the war started by the aggressor state, the priority provision of traditional private law principles in the law of obligations in relations involving the Russian Federation, as well as citizens and residents of the Russian Federation, poses a threat to Ukraine's interests in the field of defence and security, as it actually contributes to the financing of the actions of the aggressor state by Ukrainian citizens and organizations.

Another example is the regulation of labour relations during the war. Traditionally, labour law has given priority protection to the public interest in guaranteeing the rights of employees, which is reflected in most mandatory labour law provisions, in particular, regarding the form of an employment contract, the procedure for dismissing an employee and changing essential working conditions, labour standards, the duration and procedure for granting leave, and the effect of collective bargaining agreements. However, in times of war, other public interests are also becoming more relevant, including the interests in adapting the economy to the conditions of war, using labour resources more efficiently and promptly, and eliminating staff shortages and labour shortages.

The need to protect such new public interests leads to restrictions on traditional interests in labour relations. This is confirmed by the provisions of the Law of Ukraine 'On the Organization of Labour Relations under Martial Law' (Law of Ukraine No. 2136-IX, 2022), aimed at regulating labour issues in wartime, which introduces special rules on the conclusion of employment contracts, changes in working conditions, granting of leave, dismissal, working hours and rest periods, etc.

These provisions are aimed at balancing the public interest of protecting employees, traditionally enshrined in labour law, with the new public interest of ensuring the functioning of the national economy in times of war. This is done through certain restrictions on employees' rights and by providing the employer with greater flexibility and discretion in these labour matters.

There may also be situations where certain public interests have long been a priority and have guided the development of legal institutions, but in the context of armed aggression, their importance is somewhat reduced. This occurs when ensuring these interests in full may pose a threat to the protection of interests that have become relevant in times of war. The public interests, the importance of which increases under martial law, are more important in terms of state defense, protection of its security and territorial integrity than the interests that were prioritized in the absence of armed aggression. For example, in March 2022 (Resolution No. 187, 2022) a moratorium (ban) was introduced on the fulfillment of monetary and other obligations for which the Russian Federation or citizens of the Russian Federation (except those residing in Ukraine legally), legal entities, created and registered in accordance with the legislation of the Russian Federation, as well as legal entities created in accordance with the legislation of Ukraine, if their ultimate beneficial owner, member or participant (shareholder) with a share in the authorized capital of 10 percent or more is the Russian Federation.

Over the decades of development of private law in Ukraine, the principles of binding civil law obligations and freedom of contract have been recognized by the state as public interests. This was seen as a fundamental condition for the establishment of a market economy model, economic diversity and protection of all forms of ownership, which were also enshrined in the constitution. Today, these interests are, relatively speaking, losing priority to the interests of protecting the state in the areas of defense, security, money circulation, the functioning of the financial system and the property interests of the state. In the context of the war started by the aggressor state, the priority provision of traditional private law principles in the law of obligations in relations involving the Russian Federation and citizens and residents of the Russian Federation poses a threat to Ukraine's interests in the field of defense, as it will actually mean permission to finance the actions of the aggressor state by Ukrainian citizens and organizations. Thus, in the context of martial law, not only the issue of understanding the public interests (legitimate purpose) to which the measures of the state authorities are directed and the correlation (balance) between public interests and human rights and freedoms is relevant, but also the issue of the correlation between the public interests themselves and the determination of the priority among them.

The impact of extraordinary threats to the state, society and national security, such as the spread of the pandemic in 2020-2021 and a full-scale war in 2022, on the application of the principle of proportionality

of restrictions on rights and freedoms is related to the understanding of the legal means by which the state restricts human rights in the public interest. These means must not only be necessary to achieve the goal of protecting the relevant public interest, but also take into account the nature of the emergency circumstances - an increased threat to the life and health of the population, as well as armed aggression against the state.

The same public interests often require different legal remedies depending on whether they are protected in normal circumstances or in times of war. If state measures to restrict rights and freedoms do not take into account the situation of armed aggression and are identical to those applied in peacetime, such measures may harm the priority public interests that have become particularly relevant during the war, in particular, ensuring the defense and security of the state, as well as countering armed aggression. For example, in the context of military aggression by the Russian Federation, the means of protecting public interests, in particular, the seizure of private property for reasons of public necessity - interests that exist even in normal peacetime conditions - have specific features in relations involving the Russian Federation and its residents. According to the Law of 03.03.2022 (Law of Ukraine No. 2116-IX, 2022) such legal means consist in the seizure of property owned by the Russian Federation and residents of the Russian Federation without any compensation and by decision of the National Security and Defense Council of Ukraine, which is enacted by the Decree of the President of Ukraine. The use of "ordinary" legal mechanisms in these legal relations in wartime, including the seizure of property with compensation for its value, could create an additional threat to the public interest related to ensuring the security and defense of the state.

State measures applied in a situation of extraordinary threat, including under martial law, may be more restrictive of human rights and freedoms than measures aimed at protecting the relevant public interests in the absence of an immediate military threat to the state. However, such increased restrictiveness of state measures should not only be accompanied by more intensive restrictions on rights and freedoms, but also ensure that the priority public interests themselves, due to extraordinary circumstances, such as martial law, are not harmed.

Conclusions

Based on the established provisions of science and legal practice, both at the national and international levels, regarding the interpretation of the principle of proportionality, the institute of human rights, the role and powers of the State in the field of protection of citizens' rights and freedoms, the author develops approaches to understanding the nature, features and place of the principle of proportionality as a legal phenomenon in the legal system of Ukraine in the context of armed aggression. It also helps to improve the practical application of the principles of proportionality in Ukrainian law.

Both the national legal system of Ukraine and international law consider proportionality as an important criterion for the admissibility of restrictions on rights and freedoms that the state applies in the public interest. Being a universal principle, the principle of proportionality of restrictive measures of the state is also valid in the context of emergency threats, including in the context of martial law in Ukraine. However, in such situations, proportionality as a criterion for human rights restrictions has specific features.

Firstly, restrictions on human rights are conditioned by the understanding of the legitimate purpose of restrictions, i.e. public interests, in defense of which the state applies restrictive measures to the rights and freedoms of an individual: for example, in a state of war, the interests aimed at ensuring the defense and security of the state are given priority. The nature and significance of these interests, the potential consequences of insufficiently effective protection provide the state authorities with grounds for applying increased, more extensive restrictions on rights and freedoms in these interests.

Secondly, the extraordinary nature of threats to the state and society leads to competition between public interests and the need to identify among them the priority interests that need to be protected by the use of state restrictive measures on human rights.

Third, extraordinary conditions, such as armed aggression against the state, affect the specifics of restrictive measures used by the state authorities to protect certain public interests in a situation of extreme threat, compared to measures to be applied in these public interests in the absence of such a threat.

A theoretically grounded and comprehensive approach to understanding the principle of proportionality, its features and application in the legal system of Ukraine in wartime is a key factor contributing to the

efficiency of the state mechanism, achievement of the goals of the State's tasks at the present stage, as well as strengthening of guarantees for the protection of human rights, prevention of arbitrary actions of state bodies, and ensuring an appropriate balance between public interests, in particular, those that are of priority in wartime, and human rights and freedoms.

Bibliographic references

- Ablamskyi, S. Ye., Ansari, F. A., & Nosach, A. V. (2022). Evaluating the current state of realization of victims' rights in the criminal process: An explanation under Ukrainian and Indian criminal procedure codes. *Novum Jus*, 16(2), 23-48. <https://doi.org/10.14718/NovumJus.2022.16.2.2>
- Bogdel v. Lithuania (Application no. 41248/06) *ECHR Judgment*, 26 November 2013, § 63. <https://hudoc.echr.coe.int/eng?i=001-138559>
- Constitutional Court of Ukraine. (2021). *In the case of the constitutional complaint of Olena Odintsova on the compliance of certain provisions of the second paragraph of Article 471 of the Customs Code of Ukraine with the Constitution of Ukraine (constitutionality): Decision of the Constitutional Court of Ukraine of 21.07.2021 No. 3-p(II)/2021*. <https://zakon.rada.gov.ua/laws/show/v003p710-21#Text>
- Draft Law of Ukraine No. 8221. On Ensuring the Strengthening of National Security in the Sphere of Freedom of Conscience and Activities of Religious Organizations. *Verkhovna Rada of Ukraine*, 24.11.2022. <https://itd.rada.gov.ua/billInfo/Bills/Card/40832>
- Grand Chamber of the Supreme Court. (2022, December 14). *Resolution of 14.12.2022, case No. 130/3548/21*. <https://reyestr.court.gov.ua/Review/109075195>
- Henckels, C. (2013). Balancing investment protection and the public interest: The role of the standard of review and the importance of deference in investor-state arbitration. *Journal of International Dispute Settlement*, 4(1), 197-215.
- Kingsbury, B., & Schill, S. W. (2009). Investor-state arbitration as governance: Fair and equitable treatment, proportionality and the emerging global administrative law. *NYU School of Law, Public Law Research Paper*, (09-46).
- Kingsbury, B., & Schill, S. W. (2010). Public law concepts to balance investors' rights with state regulatory actions in the public interest - The concept of proportionality. In S. Schill (Ed.), *International investment law and comparative public law* (pp. 75-104). Oxford: Oxford University Press.
- Kriebaum, U., Schreuer, C., & Dolzer, R. (2022). *Principles of international investment law* (3rd ed.). Oxford: Oxford University Press.
- Kurylo, V., Teremetskyi, V., & Duliba, Ye. (2020). Property protection in the decisions of the European Court of Human Rights in the field of taxation. *Journal of Law and Political Sciences*, 23(2), 215-247. <https://drive.google.com/file/d/14Gqe-knVVnz3fkEVlrACZxb1mK19EWnC/view>
- Law of Ukraine No. 2116-IX. on the basic principles of compulsory seizure in Ukraine of property rights of the Russian Federation and its residents of 03.03.2022. *Verkhovna Rada of Ukraine*, 2022. <https://zakon.rada.gov.ua/laws/show/2116-20#Text>
- Law of Ukraine No. 2136-IX on the organization of labour relations under martial law of 15.03.2022. *Verkhovna Rada of Ukraine*, 2022. <https://zakon.rada.gov.ua/laws/show/2136-20#Text>
- Law of Ukraine No. 2736-IX on amendments to certain laws of Ukraine on the protection of the financial system of Ukraine from the actions of the state conducting armed aggression against Ukraine and the adaptation of Ukrainian legislation to certain standards of the Financial Action Task Force on Money Laundering (FATF) and the requirements of EU Directive 2018/843 of 04.11.2022. *Verkhovna Rada of Ukraine*, 2022. <https://zakon.rada.gov.ua/laws/show/2736-20#Text>
- Levashova, Y. (2019). *The right of states to regulate in international investment law: The search for balance between public interest and fair and equitable treatment*. Alphen aan den Rijn, the Netherlands: Kluwer Law International.
- Onishchenko, N., Teremetskyi, V., Bila, V., Chechil, Yu., & Kostenko, M. (2023). Judicial and extrajudicial proceedings to compensate for damages caused by armed conflicts: Experience of Ukraine. *Lex Humana* (ISSN 2175-0947), 15(3), 522-537. <https://seer.ucp.br/seer/index.php/LexHumana/article/view/2663/3585>
- Parkhomenko, N. (2017). Anthropocentrism as an entity of the state. *Almanac of Law*, 8, 31-35.
- Pohrebniak, S. P. (2006). The principle of the rule of law: Some theoretical problems. *Journal of the Academy of Legal Sciences of Ukraine*, 1(44), 35-36.
- Pohrebniak, S. P. (2012). The principle of proportionality in the Ukrainian legal practice and the practice of the ECHR. In *Legal support for the effective execution of decisions and application of the practice of the European Court of Human Rights: A collection of scientific articles of the International scientific and practical conference* (pp. 294-310). Odesa: Phoenix.



- Radunović and others v. Montenegro (Applications nos. 45197/13, 53000/13 and 73404/13). *ECHR Judgment*, 25 October 2016, § 62. <https://hudoc.echr.coe.int/eng?i=001-167803>
- Resolution No. 187. On Ensuring the Protection of National Interests in Future Claims of the State of Ukraine in Connection with the Military Aggression of the Russian Federation. *Cabinet of Ministers of Ukraine* of 03.03.2022. <https://zakon.rada.gov.ua/laws/show/187-2022-%D0%BF?lang=en#Text>
- Scaccia, G. (2019). Proportionality and the balancing of rights in the case-law of European Courts. *Federalismi.it*, 4, 2-3. <https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=38092>
- Schill, S. W. (2015). International investment law and the rule of law. In *Rule of law symposium 2014: The importance of the rule of law in promoting development* (pp. 81-102). Singapore: Academy Publishing.
- Shemshuchenko, Y. S., & Skripnyuk, O. V. (2017). Methodological problems of interaction of the state and civil society in modern Ukraine. *Lawful State*, 28, 3-12.
- Stone Sweet, A., & Della Cananea, G. (2014). Proportionality, general principles of law, and investor-state arbitration: A response to Jose Alvarez. *New York University Journal of International Law and Politics*, 46(3), 1-28. <http://dx.doi.org/10.2139/ssrn.2435307>
- Stovpets, O., Borinshtein, Y., Yershova-Babenko, I., Kozobrodova, D., Madi, H., & Honcharova, O. (2023). Digital technologies and human rights: challenges and opportunities. *Amazonia Investiga*, 12(72), 17-30. <https://doi.org/10.34069/AI/2023.72.12.2>
- Teremetskyi, V., Avramova, O., & Andriiv, V. (2020). Risks of deprivation of the ownership right by the examples of the nationalization and re-privatization. *Journal of Law and Political Sciences*, 23(2C), 83-103. https://drive.google.com/file/d/15r3HAXqJ7Mow4-jaoLcBKZo8hEeL_xJY/view
- Teremetskyi, V. I., Avramova, O. Ye., Rusnak, L. M., Avramova, O. Ye., Gorbenko, A. S., & Kyrychenko, T. S. (2023). Correlation between the right to health care and the right to housing within medical and law-enforcement practice in terms of the COVID-19 pandemic. *Georgian Medical News*, 7(340), 198-204. https://www.geomednews.com/Articles/2023/7_8_2023/198-204.pdf
- Terletskyi, D. S. (2022). Restriction of constitutional rights: In search of a balance between private and public interests. In M. V. Afanasieva (Ed.), *Human rights in special legal regimes: The experience of Ukraine: A monograph* (pp. 21-50). Odesa: Helvetica Publishing House.
- Titi, A. (2014). *The right to regulate in international investment law*. Baden-Baden: Nomos and Hart Publishing.
- Ucaryilmaz, T. (2021). The principle of proportionality in modern Ius Gentium. *Utrecht Journal of International and European Law*, 36(1), 14-32.
- Unified State Register of Court Decisions (2019). *Resolution of the Supreme Court of 05.06.2019 in case No. 817/1555/16*. <https://reyestr.court.gov.ua/Review/82194394>
- Ustymenko, V., Zeldina, O., Teremetskyi, V., Herasymenko, N., & Batryn, O. (2022). Legal instruments for solving socio-economic problems in Buchanskyi district of Kyiv region: International experience and legislation of Ukraine. *Cuestiones Políticas*, 40(75), 649-664. <https://doi.org/10.46398/cuestpol.4075.39>