

THEORETICAL AND PRACTICAL JUSTIFICATION OF THE LIMITATIONS OF THE CONSTITUTIONAL RIGHTS AND FREEDOMS OF A MAN AND CITIZEN IN THE CONDITIONS OF MARITAL LAW IN UKRAINE

Shpis Nikita, Byelov Dmytro

Abstract. *The author reveals the theoretical and practical aspects of the introduction of restrictions on the rights and freedoms of a man and a citizen in Ukraine, provided by the Constitution of Ukraine, in the conditions of war, highlights the theoretical issue of the need to introduce such restrictions, analyzes the purpose of their introduction and substantiates the objective necessity and adequate proportionality of the measures taken by the state for restoration of normal life activities of the state and society. At the same time, the author analyzed the practical legislative basis for the introduction by the national authorities of a number of restrictions on constitutional rights and freedoms under martial law. The problem of reactivity and spontaneity of changes in legal regulation is highlighted and attention is focused on the exceptional importance of careful and high-quality provision of the rights and freedoms of every person and every citizen, even in special conditions for the state. The legal definition of martial law, as well as the judicial practice of the European Court of Human Rights regarding the principle of proportionality, are analyzed in the paradigm of the topic of this study.*

Key words: *Constitutional rights and freedoms, restrictions on man and citizen rights and freedoms, necessity in a democratic society, proportionality, military legal regulation, war.*

1. Problem definition.

At the beginning of the unjustified and unprovoked war that began in Ukraine on February 24, 2022, the Ukrainian state and Ukrainian society were forced to mobilize and put all the processes of life on a war footing. The Ukrainian legal system was not an exception, and faced a large number of spontaneous, sudden and sometimes unpredictable challenges, and therefore was forced to respond to all changes and transform the legal regulation of social relations and state processes.

In the conditions of war, which causes the spontaneous nature of changes, including in legal regulation, it is extremely important to ensure, as well as the maximum guarantee the realization and protection of the personal rights of a man and a citizen, primarily, constitutional rights and freedoms. However, upon the introduction of the legal regime of martial law in Ukraine, the legislation provides the restriction of such constitutional rights and freedoms by the state itself. A situation arises in which the state worsens the situation of the population (from a positivist point of view), narrowing the scope of its rights, at the same time, such actions on the part of the state are necessary to ensure law and order in the country in special conditions.

Therefore, there is an objective need to investigate the presence and objectivity of the reasons for the introduction of restrictions in the constitutional and legal dimension of a man and citizen rights and freedoms by the state under martial law, as well as an analysis of the need to introduce such restrictions, as well as proportionality with regard to the purpose of their establishment.

2. Degree of problem research.

Numerous Ukrainian and foreign scientists have been engaged in the theoretical development of the issue of limitations of a man and citizen rights in general, however, insufficient attention has been paid to the introduction of legal limitations of the constitutional rights and freedoms of a person and citizen in the case of the introduction of a special legal regime of martial law. In particular, such scientists as V. Obushko, M. Kornienko, G. Tatarenko, O. Arsentieva, T. Zanfirova made a qualitative and effective scientific contribution to this problem. However, given the speed of changes in legislation under martial law and the very fact of the war in Ukraine, the above topic is extremely relevant.

3. The aim of the article.

The aim of the article is to highlight the theoretical and practical aspects that determine the expediency, necessity, grounds and objective reasons for the introduction of restrictions on the rights and freedoms of a person and a citizen in the conditions of a special state of war, as well as an analysis of the legality of the introduction of such restrictions in Ukraine, the purpose of their introduction. In addition, this work can be used for the further development of specified issues.

4. Presentation of the main material.

Ukraine, being a sovereign and independent, democratic, social, legal state, on February 24, 2022 faced the biggest challenge in its history - an unjustified war launched by the Russian Federation against the Ukrainian state and people. The terrible wartime circumstances forced the state and society to quickly adapt to sudden changes and a real crisis, which caused corresponding changes in legislation, the introduction of new norms and rules of conduct, as well as changes in already existing legal regulations.

From 05:30 on February 24, 2022, by decree of the President of Ukraine, a legal regime of martial law was introduced in the country, Article 3 which regulates the possibility of temporary (for the period of martial law) restriction of constitutional rights and freedoms of a man and a citizen, in particular those provided in Articles 30- 34, 38, 39, 41-44, 53 of the Constitution of Ukraine [1].

This norm of the presidential decree fully corresponds to the powers and duties of the President of Ukraine provided by the Constitution of Ukraine itself, and is also an expression and implementation of Article 64 of the Constitution of Ukraine, which being a norm of direct effect, provides for the possibility of limiting certain restrictions of the constitutional rights and freedoms of a man and a citizen in the conditions establishing a legal regime of emergency or martial law [2].

However, taking into account the imperativeness and the highest legal force of constitutional and legal norms, it seems interesting to analyze the theoretical and philosophical aspect of the introduction of restrictions on those rights and freedoms of a man and a citizen, which are provided by the Constitution, and therefore are inalienable, inviolable and the most priority for their implementation and their protection a priori. And so, a theoretical question arises regarding the expediency, necessity and existence of the possibility, including a legal one, to limit the rights and freedoms of a man and a citizen, which are provided for by the basic law of the country as such.

Analyzing the legislation of Ukraine, in particular the law of Ukraine "On the Legal Regime of Martial Law" clearly provides for the legislative definition of martial law: "Martial law is a special legal regime ... granting of appropriate state authorities, ... as well as temporary, concerning the threat, limitations of constitutional rights and human rights and citizen ... with set the action string of these constrains [3]. Considering this norm from the point of view of positivism, the introduction of a legal regime of martial law is *impossible* without limiting the constitutional rights and freedoms of a person and a citizen for a clearly specified period, since the very concept of "martial law" *implies the presence* of restrictions on constitutional and legal rights and freedoms.

Therefore, from a practical point of view, Ukrainian legislation presumes that the introduction of martial law in the state will inevitably be connected with those rights and freedoms guaranteed by the Constitution, which will inevitably be limited in the interests of the state and in the interests of society. No wonder the Constitution of Ukraine itself and the Law of Ukraine "On the Legal Regime of Martial Law" contain relevant provisions, from which it is possible to reach the conclusions described above.

At the same time, it is in the above-mentioned legal act that the most important basis and the main reason for the introduction of restrictions on constitutional rights and freedoms is indicated - such restrictions are introduced in connection with a threat. Analyzing the above provision of the law, the following conclusions can be drawn:

1. In connection with the state of war, the introduction of restrictions on the rights and freedoms provided for by the Constitution of Ukraine is caused by objective threatening factors, in particular, active hostilities on the territory of Ukraine;
2. Restrictions on the constitutional rights and freedoms of a man and a citizen are of a temporary nature, the duration of which is determined by the duration of the threat to the population from hostilities or other military threats;
3. The decision to limit the rights and freedoms provided for by the Constitution of Ukraine is taken by the President of Ukraine, who is the Supreme Commander of the Armed Forces of Ukraine, and therefore has the opportunity to most fully and objectively assess the degree of threat to the population;
4. The decision to limit the constitutional rights and freedoms of a person and a citizen is taken in order to protect the population of the state and the integrity, sovereignty and the state itself.

It is worth agreeing with V. Obushko, who quite correctly claims that the rights and freedoms of a person and a citizen provided by the Constitution are exhaustive, which cannot be limited in any case, and the scientist also claims that the possibility of such a limitation in the event of the need to take urgent measures aimed at to ensure national security [4].

The scientist's opinion on this matter can be continued in the key that national security, for the sake of which, in fact, the legal regime of martial law is introduced in the state, is the priority task of the state in the conditions of hostilities and war as such. Therefore, it is the provision of national security, territorial integrity and state sovereignty that enables the state to effectively perform its functions, giving the population the opportunity to freely exercise the full range of rights and freedoms provided for by law, and therefore the protection of these foundations of the state's existence is a priority.

This view is also developed by M. Kornienko, who claims that martial law itself is introduced in order to restore the conditions under which people will be able to effectively exercise their rights and freedoms [5]. In this case, the restriction of the constitutional rights and freedoms of a person and a citizen is a means of achieving the goal, which is the protection of national security and the defense of the state, and therefore it can be concluded that the introduction of a temporary measure to limit the rights and freedoms provided for by the Constitution is completely objective and an adequate means to achieve a goal that is of the highest public and state interest.

At the same time, the fact that a de facto state of war means the possibility of legitimately applying restrictions on the rights and freedoms of a person and a citizen, and therefore a departure from the norms that, embodied in the Constitution of Ukraine, are provided for by the Convention on Rights and Fundamental Freedoms, seems interesting. However, the decisions of the European Court of Human Rights contain an interesting wording from the point of view of this study - the principle of proportionality and the concept of necessity in a democratic society.

The very idea of the principle of proportionality consists in the prohibition of excessive interference by the state in the rights and freedom of the individual. Therefore, the state may legitimately apply restrictions on the rights of the population only in the case when it is really necessary, and only to the extent and for such a period, which will be adequate to achieve the pursued goal [6].

Thus, the European Court of Human Rights in the case "Fressoz and Roire v. France", which deals with interference with the applicant's freedom of opinion, defines the following: " As a matter of general



principle, the “necessity” for any restriction on freedom of expression must be convincingly established. Admittedly, it is in the first place for the national authorities to assess whether there is a “pressing social need” for the restriction and, in making their assessment, they enjoy a certain margin of appreciation” [7]. Similarly, the European Court of Human Rights used the mentioned wording in the case “Lyashko v. Ukraine”, stating the following: “ The Court must next verify whether the interference was justified and necessary in a democratic society, and in particular whether it was proportionate and whether the reasons given by the national authorities in justification for it were relevant and sufficient” [8].

Limiting the constitutional rights and freedoms of a man and a citizen under the conditions of martial law in Ukraine is certainly an interference with the rights of a person and a citizen, however, even considering the above legal positions of the European Court of Human Rights, such measures can be considered necessary in a democratic society, as well as fully justified and proportionate, since they are introduced only in critical cases, such as military actions on the territory of the state. In addition, the position of the European Court of Human Rights also indicates the existence of a certain freedom of discretion in the national government, and therefore it can be concluded that the procedure provided by law for the introduction of constitutional and legal restrictions on the rights and freedoms of people and citizens in Ukraine fully corresponds to legal views and positions of the European Court of Human Rights.

Despite the above, it is worth knowingly assuming that the Ukrainian legal system will have to face new lawsuits to the European Court of Human Rights regarding the illegality of the introduced restrictions on the constitutional rights and freedoms of a man and a citizen. At the same time, it is worth realizing that the Ukrainian legal system faced the biggest challenge in the history of its independent existence, and therefore it can be considered that the legal regulation that exists today is reactive, and therefore it is worth applying the principle of proportionality again regarding the consequences of such legal regulation. and evaluate it at the national level.

5. Conclusions.

The Constitution, being the basic law of the state, guarantees and ensures the basic rights of a man and a citizen, however, the state is quite legitimate, based on the motives of social necessity, the principle of proportionality and in order to ensure the restoration of the normal life of the state and society, the right to limit certain rights and freedoms of a person provided for by the Constitution and citizen. Such restrictions are introduced in order to protect the state itself and protect the population, and are introduced only in the necessary volumes and for the necessary terms, which are determined from an objective assessment of the degree of threat that exists at the time of the introduction of such restrictions. Important for the most complete legal protection of the rights of a man and a citizen is the existence of an exhaustive list of rights and freedoms of a person and a citizen, which cannot be limited even under special legal regimes, and its provision in Art. 64 of the Constitution of Ukraine testifies to the high level of legal technique of the Ukrainian legislator.

References:

1. Decree of the President of Ukraine “On the implementation of the legal regime of martial law” No. 64/2022 dated February 24, 2022.
2. Constitution of Ukraine dated June 28, 1996 No. 254k/96-VR. Information of the Verkhovna Rada of Ukraine. 1996. No. 30.
3. On the legal regime of martial law: Law of Ukraine dated May 12, 2015. Verkhovna Rada information. 2015. No. 28.
4. Obushko V.V. Limitation of human and citizen rights in the conditions of the introduction of martial law in Ukraine. International and national security: theoretical and applied aspects: materials of the 3rd International Scientific and Practical Conference. Dnipro. March 15. 2019. Dnipro: DDUVS. 2019. P. 59–60. [in Ukrainian].

5. Kornienko, M. V. Human rights under the conditions of marital state: common law discourse. South Ukrainian legal journal. № 1-2. 2022 [in Ukrainian].
6. Pogrebnyak S.P. the principle of proportionality in Ukrainian legal practice and the practice of the ECtHR. URL: <http://dspace.onua.edu.ua/bitstream/handle/11300/9614/Pogrebniak%20294-310.pdf?sequence=1&isAllowed=y> [in Ukrainian].
7. Decision in the case "Fressoz and Roire v. France" (Fressoz and Roire v. France) dated January 21, 1999, application No. 29183/95, paragraph 45 (iii).
8. Decision in the case "Lyashko v. Ukraine" dated August 10, 2006, Application No. 21040/02, paragraph 47.

Nikita Shpis,

*Master of Law, Lawyer of the multidisciplinary mobile team
of the International Charitable Foundation "Ukrainian Public Health Foundation"*

Dmytro Byelov,

*Doctor of legal sciences, professor
Professor of the Department of Constitutional Law and Comparative Jurisprudence
"Uzhgorod National University"
Honored lawyer of Ukraine
ORCID ID: 0000-0002-7168-9488*