

SOME ISSUED OF HUMAN RIGHTS RESTRICTION UNDER CONDITIONS OF MARTIAL LAW (VIA THE PRISM OF THE NEED APPROACH) AND METHODS OF THEIR OVERCOMING

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Annotation. The purpose of this article is a detailed analysis of the grounds for the restriction of fundamental human rights under conditions of martial law and distinguishing the methods of overcoming the issues of human rights restriction.

For the reduction of the events of personal information leakage, the mentioned publication of private information should be conducted in the interests of national security (right restriction), considering the understanding of the exercise of the legitimate interest of the state. Therefore, while publishing information, which has the content of private information, about an individual, a state should refer to the legal possibility which has an external expression form, is protected by the law and is ensured by it, and is directed on the realization of the interest of national security.

Regarding the restriction of the right of an individual to the freedom of thought and expression, to free expression of views and beliefs, it is necessary to refer to the fact, that a view, thought, word, or belief of an individual can contain data, posing a threat to the national security of Ukraine (when an individual expresses it for another individual or a number of individuals). In such a situation, it relates to the arousal of the legally protected interest of the state. The state develops a legal motivation which is relatively defined within standards or may not have an external form of expression at all, and therefore needs to be proved and its implementation fixed through judicial bodies.

For certain restrictions of the rights of an individual (for example, restriction of the right to freedom of personal philosophy and religion) a complex interest “default interest here with the purpose of further preservation of the interests of the society and state”, is an important method of overcoming the issues related to its fixation and realization.

The restriction of the right to freedom of association in political parties and public organisations may be achieved through establishing of legal and protected by the law interest only in relation to the consequences of actions (acts or failure to acts), which threaten national security and public order, and in other situations, established by part 1 of article 36 of the Constitution of Ukraine.

Key words: restriction of rights, restriction of human rights, national security, legitimate interest, legally protected interest, complex interest.

1. Introduction.

The legislators in Ukraine are known to use the terms-concepts “interest” (“інтерес”), “need” (“потреба”) and common root words to formulate the grounds for right restriction, which, according to the definition of Prof. P. Rabinovych are “certain personal, group, or all-social interests, to ensure which a law-making or law-enforcing body considers restriction of exercising such or other human

rights as necessary” [1, p. 377; 370, p. 53-54]. We examine it in detail on the example of the Constitution of Ukraine [3], which presents a description of basic human rights.

2. Analysis of scientific publications.

The important issues of the studied problem were considered in many works of scientists, in particular, P. Rabinovych, A. Marushchak, I. Pankevych, S. Bratus, A. Venedyktova, O. Vinnyk, Yu. Tykhomyrova. Without underestimation of the value of these and other studies, it is necessary to note that grounds for restriction of fundamental human rights remain understudied today. Furthermore, there are no approaches to overcoming the issue of the restriction of fundamental human rights from the position of legitimate and legally protected interest.

3. The aim of the work.

The purpose of this article is a detailed analysis of the grounds for the restriction of fundamental human rights under conditions of martial law and distinguishing the methods of overcoming the issues of human rights restriction.

4. Review and discussion.

The right to personal and family life without interference may be restricted only in the interest of national security, economic well-being and human rights, which is discussed in clause 2 of article 32 of the Fundamental Law.

According to para. 3, 5 of subclause 3.3 of clause 3 of the decision of the Constitutional Court of Ukraine of January 20, 2012 No. 2-пр/2012 [4], information on the personal and family life of an individual (personal data about them) is any data or totality of data on a natural person, who is identified or can be specifically identified, namely: nationality, education, family state, religious belief, health condition, material condition, address, date and place of birth, place of residence and stay, etc., data on personal property and non-property relations of this individual with other individuals, in particular family members, as well as data on the events, which occurred or are occurring in household, intimate, social, professional, business and other areas of the life of an individual, except for the data concerning fulfilment of the authorities by the individual, holding office, related to fulfilment of the functions of the state or local self-government bodies. Such information about an individual and members of their family is confidential and may be disclosed only on their consent, except for the events, foreseen by the law, and only in the interest of the national security, economic welfare and human rights.

Thus, under conditions of martial law, such information may be published without the consent of the individual in the interest of national security. Nevertheless, it is necessary to emphasize multiple episodes of illegal leakage of private information, which is made by specially sent individuals to publicly defame someone. We believe that to reduce the number of events of personal information leakage, the mentioned publication of private information should be conducted in the interests of national security (right restriction), considering the understanding of the exercising the legitimate interest of the state. Then, such right restriction will have a clearly regulated procedure of application and definition provided by the authorized state bodies, as in such a situation the advantage of public (in the meaning of social and public) interest over the private interest of an individual should be considered. Such an advantage will be defined as legal only if it is performed in accordance with procedure, established by a regulatory legal act. Furthermore, the issue of proving an interest of national security becomes important in practice, as it is one of the grounds for the application of the mentioned measures towards an individual. Considering the above-mentioned, we believe that while publishing information, which contains private information, about an individual, it is important to be guided by the legitimate interest; thus, a state should refer to the legal possibility which has external expression form, is protected by the law and is ensured by it, and is directed on the realisation of the interest of national security.

The exercise of the right to the freedom of thought and expression, to free expression of views and beliefs, may be restricted by the law in the interest of national security, territorial integrity or public order to prevent riots or crimes, what is stated in part 3 of article 34 of the Constitution of Ukraine.

The Order of Commander-in-Chief of the Armed Forces of Ukraine No. 73 of March 03, 2022, provides among others the list of the data, the disclosure of which may lead to the enemy's awareness of the actions of the Armed Forces of Ukraine and other components of the defence forces, negatively affecting the performance of tasks assigned during the legal regime of martial law, namely:

- names of military units (divisions) and other military facilities used in combat (special) missions and the geographical coordinates of their exact locations;
- the numbers of military units (divisions) personnel;
- the numbers of weapons, military equipment, logistical resources, their condition, and location;
- and others.

We believe that considering the restriction of the right of an individual to the freedom of thought and expression, to free expression of views and beliefs, it is necessary to refer to the fact that a view, thought, word, or belief of an individual can contain data, posing a threat to the national security of Ukraine (when an individual expresses it for another individual or a number of individuals). In such a situation, it relates to the development of the legally protected interest for the state, as in most cases such data are already expressed and disclosed by an individual. The issue of proving whether such data violates the interests of national security appears to be an important aspect for the state. The Order of Commander-in-Chief of the Armed Forces of Ukraine No. 73 of March 03, 2022, aimed to regulate this issue, although it is not enough in practice. A number of other regulatory legal acts do not also define all the data, which may threaten the national security of Ukraine. Therefore, we believe that the state develops a legal motivation which is relatively defined within standards or may not have an external form of expression at all, and therefore needs to be proved, and its implementation fixed through judicial bodies.

The exercise of the right to freedom of personal philosophy and religion may be restricted by the law only in the interests of protecting public order, the health, and morality of the population, or protecting the rights and freedoms of other persons, in accordance with part 2 of article 35 of the Fundamental Law.

Thus, in accordance with the Decree of the President of Ukraine No. 393 of November 26, 2018, temporary restriction of the constitutional right of citizens to assemble peacefully, which also includes religious events and processions, is permitted in case of necessity. Herewith, religious figures and church members may be subjected to restrictions on the right to freedom of movement, which can relate to missionary or other activity on the territory, where martial law acts.

The events, which took place in Vinnytsia and Chernihiv this year, may serve as examples of such necessity. During the Easter Holidays, many people died in Vinnytsia, as a major purposeful missile attack was carried out during the blessing of Easter bread in the city centre.

Several missile attacks were carried out during the ceremony of apple blessing in the city centre of Chernihiv on the day of the Apple Feast of the Saviour, which led to multiple victims.

The state will develop a so-called default interest here with the purpose of further preservation of the interests of the society and state. We agree that legitimate and legally protected interest cannot be a ground for such right restriction by its nature. It is appropriate to use a complex term-concept "default interest here with the purpose of further preservation of the interests of the society and state". As there is no legal possibility (the current prohibition, which is presented in the regulatory legal act and follows from the grounds clearly defined in the Law) and legal intention (which, in fact, results from the introduction of right restriction) in the state, it is appropriate to say that the state introduces such restriction of the rights on an individual with the purpose of further results prevention. We believe that such a complex interest should be clearly defined in a regulatory legal act and established for a clear list of the restrictions of rights by the state, as such an approach can further cause its crossover interpretation and pose a threat to the interests of the individual.

The right to freedom of association in political parties and public organisations may be restricted in the interests of national security and public order, the protection of the health of the population or the protection of rights and freedoms of other persons, in accordance with part 1 of article 36 of the Constitution of Ukraine.

According to para. 4 of subclause 3.2 of clause 3 of the reasoning part of the decision of the Constitution Court of Ukraine No. 2-пн/2007 of June 12, 2007 [7] providing certain public associations or their representatives with a certain competence or ensuring provision of their authorities by state government bodies or local self-government bodies in accordance with the legislation of Ukraine certifies acquiring of public nature of their activity by such associations of citizens and their representatives. Thus, representatives of the public can actually influence on decision-making by state government bodies within the process of exercising their possibilities in participation or realization of public polity, provided by the legislation. Due to this, the Constitutional Court of Ukraine considers that the state has a right to implement relevant control over the activity of associations of citizens and their representatives to prevent arousal of corruption risks in their activity, prevent illegal acquisition of material or immaterial goods, and other misfeasance while exercising the rights provided to them for participation in public administration.

The right to assemble peacefully without arms and to hold meetings, rallies, processions, and demonstrations is restricted only in the interests of national security and public order, to prevent disturbances or crimes, protect the health of the population, or protect the rights and freedoms of other persons (part 2 of article 39 of the Constitution of Ukraine).

This is stipulated by the fact that mass gatherings may be used in the work of sabotage groups, which need a large number of victims.

The events, which took place in Kherson in 20023, where mass shootings of people, who went out with the flags of Ukraine to support our Armed Forces, were made, may be used as an example of such a necessity.

The mentioned restriction may be achieved through establishing of legitimate and legally protected interest only in relation to actions (acts or failure to act), which threaten national security and public order, and in other situations, established by part 1 of article 36 of the Constitution of Ukraine. In case when the right to freedom of association in political parties and public organisations is restricted for a person before arousal of such consequences, it will violate the principles of supremacy of law, and legality. The state should implement restriction of these rights in events, presenting consequences of such action, determined by the law.

The expropriation of objects of the right of private property may be applied only as an exception for reasons of social necessity, on the grounds of and by the procedure established by law, and on the condition of advance and complete compensation of their value. The expropriation of such objects with subsequent complete compensation of their value is permitted only under conditions of martial law or a state of emergency, which is mentioned in part 5 of article 4 of the Constitution of Ukraine.

Thus, vehicles may be expropriated for the use of the Armed Forces of Ukraine, personal equipment – for monitoring the movement of the machinery of the opponent side, private buildings may be used for staff offices of the AFU, etc. Still, after the end of military actions, the property should be returned or in case when its return is impossible (loss) or damaged (partial loss), such property is subject to mandatory compensation.

In this event, the state develops a legitimate interest, and an individual develops an interest protected by the law. While using the property for the need of the AFU the state will exercise its legitimate interest, and after its realization, is obliged to return the property and in some cases – compensate for it. In case of failure to return or pay compensation for it, an individual has the right to protection of their interest protected by the law for the property, that was expropriated.

The right to freedom of movement, as A. Marushchak notes, plays a significant role in every democratic society. It is an essential element of individual rights. She underlines that freedom of movement is both a right and a guarantee, as well as a precondition for the exercising other rights.

For example, freedom of movement may be a necessary ground for the effective realization of the right to education, the right to work, and the right to marriage and family.

Article 33 of the Constitution of Ukraine determines that everyone who is legally present on the territory of Ukraine is guaranteed freedom of movement, free choice of place of residence, and the right to freely leave the territory of Ukraine, with the exception of restrictions established by law [3]. In particular, part 2 of article 64 specifies the conditions for establishing certain restrictions on human rights: martial law or emergency state.

Such an article, according to her, completely complies with the Universal Declaration of Human and Citizen Rights, namely article 29 of the Fundamental Law: "In the exercise of rights and freedoms, everyone shall be subject only to such restrictions as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society [8].

The International Court of Justice, citing the Human Rights Committee's general comment No. 27 (1999) on freedom of movement, noted that the restrictions on human rights "must comply with the principle of proportionality" and "must be the least intrusive instrument among those which might achieve the desired result" [9].

The legal grounds for restricting the right to freedom of movement in Ukraine are the Laws of Ukraine "On mobilization training and mobilization", "On the procedure for leaving Ukraine and entering Ukraine by citizens of Ukraine", "On military duty and military service", a resolution of the Cabinet of Ministers of Ukraine dated January 27, 1995 No. 57 "On approval of the Rules for crossing the state border by citizens of Ukraine", Resolution of the Cabinet of Ministers dated December 29, 2021 No. 1455 "On approval of the Procedure for establishing a special regime of entry and exit, restriction of freedom of movement of citizens, foreigners and stateless persons, as well as the movement of vehicles in Ukraine or in some of its localities where martial law has been imposed," etc.

The researcher indicates that on February 24, 2022, the departure of men in the age of 18-60 at the state border of Ukraine was terminated. The corresponding announcement was made public by the State Border Service of Ukraine.

However, she believes it needs to address a whole set of issues related to the specifics of the implementation of such a prohibition.

This announcement caused many discussions and debates, the centre of which was the question "does the State Border Guard Service of Ukraine have the appropriate powers?", as apart from the Decree of the President No. 64/2022 of February 24, 2022, a direct rule on the prohibition to travel abroad was officially promulgated nowhere else. Furthermore, the decree itself does not contain details on the rights of citizens subjected to derogation, but simply provides a list of what "may" be restricted.

In this regard, the provision of the Law of Ukraine "On the State Border Service of Ukraine" is important, as it defines that "in accordance with the laws and other regulations exclusively for the purpose of national security of Ukraine to provide controlled (under operational control) admission through the state border of Ukraine of persons at checkpoints or outside them. Such a decision is made by the Head of the State Border Service of Ukraine" [10].

Additionally, the Law of Ukraine "On the legal regime of martial law" gives the military command in Ukraine or in some of its areas where martial law is imposed, the right independently or with the involvement of executive authorities to establish a special regime of entry and exit, restrict freedom of movement of citizens, foreigners and stateless persons, as well as traffic of vehicles, in the manner determined by the Cabinet of Ministers of Ukraine [11].

Therefore, it seems that all legal frameworks have been respected in this matter, as in this case, it is necessary to refer that a state develops a legitimate interest, stipulated by the interests of national security, state and society. The legitimate interest in its turn requires clear fixation in regulatory legal acts, which arises in this situation.

She also notes that at the same time as the question of the legal grounds for the decision to prohibit men from departing abroad was raised, special attention began to be paid to the question of delineating the circle of men whose right to cross the border remained unrestricted.

She believes that this is quite fair since there are different categories of citizens who, for one or another reason cannot be involved in the mobilization, and therefore their departure will not cause deterioration of the situation in the defense of Ukraine.

Restrictions on the prohibition for the period of validity of the legal regime of martial law to travel outside of Ukraine for male citizens of Ukraine aged from 18 to 60 years do not apply to the following categories of persons, who:

- have a certificate of deferment from conscription and notification of enrollment in the special military register;
- have a certificate from a military medical commission on unfitness for military service during wartime;
- raise three or more children under 18 years of age;
- raise a child (or children) under 18 years of age on their own;
- support a disabled child under the age of 18 or an adult child who is a person with a group I or II disability until he or she reaches the age of 23;
- adoptive parents, guardians, custodians, foster parents, or foster parents who are supporting orphans or children without parental care under the age of 18;
- are engaged in the permanent care for persons in need in the absence of other persons who can provide such care;
- have left for other states of permanent residence, which is documented accordingly;
- applicants for professional higher and other higher education, trainee-assistants, post-graduate and doctoral students studying abroad on a full-time or dual form of education (students, trainees) [12].

Subsequently, the list was somewhat expanded. In particular, another category of individuals was added – drivers engaged in international cargo transportation, transportation for the needs of the AFU, medical cargo and humanitarian aid. There is a kind of reservation of drivers engaged in international transportation. The responsibility for the return of the driver to the territory of Ukraine after transportation lies on the carrier [13, 58–63].

We completely agree with the mentioned list, as it is permitted to prohibit departure abroad only for men with a proper health condition and physical training, as they can (based on the health condition) defend the state. Herewith, it is possible to emphasize on the number of illegal acts. In particular, men are handed draft notices on the streets, in metropolitan, in stores, electronically, and applying force methods and threats. Individuals, who have the right to a postponement and are not subject to conscription, are also called up to territorial centres of recruitment and social support.

Herewith, a number of men cross the border “by agreement with the border guards.” Such a situation, in our opinion, may be caused by the misbehaviour of law-enforcement bodies and territorial centres of recruitment and social support. In this situation, prohibitive norms of the state and sanctions for their violation shall apply. Improvement of the system of the state bodies, conducting investigation and disclosure of the above-mentioned violation of rights is an important priority of the state nowadays.

5. Conclusions.

Thus, restriction of human rights should have exclusively legal grounds and be introduced in the interest of the state and society on the basis, established in regulatory legal acts.

For the reduction of the events of personal information leakage, the mentioned publication of private information should be conducted in the interests of national security (right restriction), considering the understanding of the exercising of the legitimate interest of the state. Therefore, while publishing information, which has the content of private information, about an individual, a state should refer to the legal possibility which has an external expression form, is protected by the law and is ensured by it, and is directed on the realisation of the interest of national security.

Considering the restriction of the right of an individual to the freedom of thought and expression, to free expression of views and beliefs, it is necessary to refer to the fact that a view, though, word, or belief of an individual can contain data, posing a threat to the national security of Ukraine (when an individual expresses it for another individual or a number of individuals). In such a situation, it relates to the arousal of the legally protected interest of the state. The state develops a legal motivation which is relatively defined within standards or may not have an external form of expression at all, and therefore needs to be proved and its implementation consolidated through judicial bodies.

For certain restrictions of the rights of an individual (for example, restriction of the right to freedom of personal philosophy and religion) a complex interest “ default interest here with the purpose of further preservation of the interests of the society and state”, which should be clearly defined in a regulatory legal act and established for the clear list of the restrictions of rights by the state, as such an approach can further cause its crossover interpretation and pose the threat to interests of the individual, is an important method of overcoming the issues related to its fixation and realisation.

The restriction of the right to freedom of association in political parties and public organisations may be achieved through establishing legitimate and legally protected interests only in relation to actions (acts or failure to acts), which threaten national security and public order, and in other situations, established by part 1 of article 36 of the Constitution of Ukraine.

Thus, the article offers a new approach to the methods of solution of problems related to fixation and realisation of restriction of rights by the state through detection of the legitimate interest, legally protected interest and complex interest of the object of power entity.

References:

1. Rabinovych P.M. Restrictions on human rights. Great Ukrainian legal encyclopedia: in 20 vols. Vol. 3: General theory of law / editor: O.V. Petryshyn (head) and others; National Acad. rights Sciences of Ukraine; Institute of State and Law named after V.M. Koretsky National Academy of Sciences of Ukraine; National law Yaroslav Mudry University. Kharkiv: Pravo, 2017. P. 375–377.
2. Rabinovych P.M., Pankevich I.M. Realization of human rights: problems of limitation (general theoretical aspects). Proceedings of the Lviv Laboratory of Human and Citizen Rights of the Research Institute of State Construction and Local Self-Government of the Academy of Legal Sciences of Ukraine / Redcol.: P.M. Rabinovych (chief editor) and others. Series I. Studies and essays. Vol. 3. Lviv: Astron, 2001. 108 p.
3. Constitution of Ukraine dated June 28, 1996 No. 254k/96-BP (with subsequent amendments). URL: <https://zakon.rada.gov.ua/laws/show/254k/96-bp>.
4. Decision of the Constitutional Court of Ukraine in the case based on the constitutional submission of the Zhashkiv District Council of the Cherkasy Region regarding the official interpretation of the provisions of the first and second parts of Article 32, the second and third parts of Article 34 of the Constitution of Ukraine dated January 20, 2012 No. 2-pn/2012 No. 2-pn /2012.
5. Order of the Commander-in-Chief of the Armed Forces of Ukraine dated March 3, 2022 No. 73.
6. Decree of the President of Ukraine dated November 26, 2018 No. 393 “On the introduction of martial law in Ukraine”.

7. The decision of the Constitutional Court of Ukraine in the case based on the constitutional submission of 70 People's Deputies of Ukraine regarding the conformity of the Constitution of Ukraine (constitutionality) with the provisions of the first part of Article 10, paragraph 3 of the second part, the fifth and sixth parts of Article 11, Article 15, the first part of Article 17, Article 24, Clause 3 of Chapter VI "Final Provisions" of the Law of Ukraine "On Political Parties in Ukraine" (Case on the Formation of Political Parties in Ukraine) dated June 12, 2007 No. 2-пп/2007.
8. United Nations Universal Declaration of Human Rights of December 10, 1948: website. URL: http://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=995_015. (date of application: 12.10.2022).
9. International legal protection of human rights in armed conflict.. UN. Office of the High Commissioner for Human Rights. 2011. Website. URL: https://www.ohchr.org/sites/default/files/Documents/Publications/HR_in_armed_conflict.pdf (access date: 12.10.2022).
10. On the State Border Service of Ukraine: Law of Ukraine dated April 3, 2003 No. 661-IV. URL: <https://zakon.rada.gov.ua/laws/show/661-15#Text> (date of application: 10.10.2022).
11. On the legal regime of martial law: Law of Ukraine dated May 12, 2015 No. 389-VIII. URL: <https://zakon.rada.gov.ua/laws/show/389-19#Text> (date of application: 10.10.2022).
12. Regarding the procedure for organizing travel abroad during the period of martial law: Letter of the Administration of the State Border Service of Ukraine dated March 17, 2022, N 23-6855/0/6-22-Ex.
13. Marushchak A.V. Restrictions on the right to movement under martial law: the practice of Ukraine. Legal Bulletin. 2022. No. 3. P. 58–63.

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