



## Research Article

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# Balance of Private and Public Interest Law in Matters of Restricting Human Rights for the Purposes of National Security

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## Abstract

The work deals with the issues of determining the balance of private (individual) and public (state) interests in terms of admissibility of limiting human rights and freedoms in cases where it increases or prevents threats to national security. This was the aim of the study, as this issue has become highly relevant because of the growing number of hybrid threats to national security, which can be countered through the introduction of separate restrictions on human rights by the state. The systemic approach, the hermeneutic, and doctrinal approach were used to conclude that almost all constitutions, constitutional acts and constitutional laws of the EU and NATO member states provide for the possibility of restricting human rights. Such restrictions are imposed for the purposes of national security, public necessity or national interests of the state. Moreover, the list of cases where the restrictions on civil rights may be applied in the national security interests in national legislation is often much wider than in international legal acts. This demonstrates the primacy of national interests over individual interests, which is defined by national legislators as the common good at the constitutional level. The lack of detailed cases and models of state response to these processes determines the conclusions on the need to introduce a system of legally determined conditions for the application of restrictive measures. That is why further research should focus on identifying and detailing the criteria for applying measures to restrict civil rights for the purposes of national security at the constitutional level.

**Keywords:** human rights, civil rights and freedoms, national security, public interest, state interests, constitutional regulation

## 1. Introduction

The development of democratic institutions, as well as the dominance of the good governance principles in state-building processes in most countries implies increased attention of the state to ensuring the full realization of human rights. National law-making bodies in the constitutions, constitutional laws and other state-wide legal acts declare that a person, his rights and interests. the inadmissibility of their violation or limitation of scope are the highest value for a democratic state. National governments contribute to the practical implementation of state guarantees in this area, developing national policies in such a direction as to ensure the freedoms and rights of citizens to the maximum possible extent. At the same time, the state machinery and all state authorities without exception direct their managerial influence to another equally important existential goal — ensuring national security and the inviolability of sovereignty and territorial integrity. It is simply impossible for the state to fully implement the guarantees it provides to its citizens regarding realization of the entire set of civil rights and freedoms without achieving this goal.

So, the relevance of this study is revealed through the dichotomy of the state's duty to ensure national security. On the other hand, it implies full realization by the population of this state of civil rights and freedoms proclaimed and guaranteed by the legislation. A dilemma arises: which of the specified tasks is of primary importance, and whether it is possible to talk about the interdependence of these state development goals. The world scientific community, politicians and lawyers are trying to find an answer to this question. The current objective reality is that it is quite difficult for the state to ensure the simultaneous and effective achievement of both of these goals, because sometimes the government needs to introduce certain restrictions on democratic freedoms in order to ensure national security. The main questions are how justified such a decision should be, as well as how long the imposed restrictions themselves should last. The actualization of these problems opens wide opportunities for finding an appropriate unified model of public regulation of the complete guarantee of civil rights and freedoms, which takes into account the needs of national security. But each state is trying to develop an independent vision and legal justification for the necessary scope of restrictions on human rights and freedoms, if national security goals require.

That is why the aim of the research is to determine a unified balance of private and public interest law in matters of limiting human rights for the purposes of national security. The aim involved the fulfilment of the following research objectives:

- analyse the existing scientific concepts in the field of correlation between the models of public regulation of national security issues and the policy of observing civil rights and freedoms at the national level;
- determine the extent and the way at which the rights and freedoms of a person and a citizen can be limited for the purposes of national security;
- establish how similar restrictions are regulated or can be regulated at the level of international legal acts and national legislation.

The most important issue is determining the criteria of the circumstances and the need to reduce the scope of human rights and freedoms for the purposes of national security. As this study demonstrates, this issue has only a nominal solution without determining the practical aspects of the full provision of human rights.

## 2. Literature Review

The national security discourse has changed dramatically over the years, especially since the post-Cold War period. The traditional concept focused on state security and national security, which is mainly based on realist and neorealist paradigms, is inferior to the concept of synthesis of national (state) and public interests (Lahiry, 2020). The latest approach covers the duty of the state to ensure the full scope of human rights in all spheres of social life (Blanchette, 2020). Phelan (2021)

admits that the classical view of security involves the protection of the state from threats to its existence and the protection of borders, also through the involvement of armed forces. Human security is used to describe the desired state of existence of society, provided the achievement of the national security goals. In his works, Kaplan (2021) generally defends the position of the situational nature of national security and the state's ability to introduce certain restrictions on civil rights in order to make the national security environment more stable. We do not recognize this approach. Regilme (2019) recognizes that the reform of the global human rights order requires not only a transition to a more emancipatory concept of human security. It also requires an emphasis on global justice and material compensation for cases of restriction of human rights and security for the purposes of the security of states and societies.

Despite the growing academic interest in the convergence of humanitarianism and security in contemporary European border governance, much of the existing literature neglects the role of human rights in this process. Therefore, Perkowski (2018) stipulates the need for determining and detailing cases of restriction of human rights for the purposes of national security.

An important element of solving this problem is improving the balance of state, public and individual interests in the field of public administration (Stimson Center, 2019). This is recognized as a global trend and requires appropriate detailing in the legislation of individual countries. In NATO countries, the cases of restriction of human rights for the purposes of national security are primarily based on the global interests of the entire alliance. However, quite often such restrictions are a means of justifying or substantiating the need for intervention in third countries in order to protect the stability of NATO borders (Arts & Keil, 2021).

In this context, Russo and Wooley (2020) point out that the state should expand the legislative regulation of ways to ensure human rights, including in cases where it is necessary to limit or reduce them. Durbin (2020) generally considers the problems of limiting human rights for the purposes of national security through the prism of the inadmissibility of reducing the economic opportunities and potential of society. Therefore, the researcher considers this restriction to be a preventive measure. Sky (2020) points out that the restriction of civil rights and freedoms is an element of preserving national security and state sovereignty.

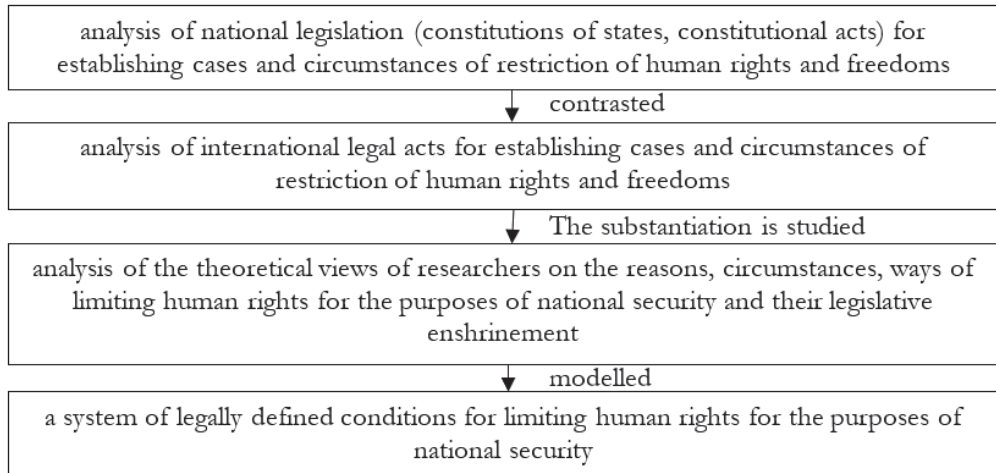
Slough and Faris (2021) indicate that the researchers recognize the restriction of human rights for the purposes of national security as an objective need that does not require additional legal consolidation. Their point of view will be refuted in this study. In turn, T. Squatrito et al. (2019) prove that sometimes the state does not have time to adequately justify or regulate the introduced restrictions on civil rights. This indicates the need to legislate the limits and conditions of such restrictions in advance. This point of view will be developed in this study.

Chyzhov (2022) states that the system of human rights, their observance and maximum realization are the basic conditions for the development of the state. The state of national security is the same basic condition. Chasnyk (2020) determines that human rights act is an object of national security. The protection of individual interests is an object of security and subordinate to the concept of society in its conceptual scope. Prots (2020) emphasizes the fact that the entire system of national interests is determined by the set of basic interests of a person, society, and the state. Therefore, the rights and freedoms of a person, his security, must be a priority. In this case, a person, his rights and freedoms are the highest value. Mernyk et al. (2020) prove that constitutional provisions are built in such a way that does not enable any additional content. This means that the imperatives of implementing the state policy of ensuring human rights in the field of security are established at the level of the national constitution.

At the same time, the issues of the complete legislated definition of methods and cases and, most importantly, justification of the reasons for applying restrictions on human rights for the purposes of national security remain unresolved. When that critical balance of private and public interests is reached, when the interests of the state and national security are recognized as a priority over civil rights, their scope is allowed to be restricted.

### 3. Methods and Materials

The research methodology was built in such a way to identify the specifics of the application of human rights restrictions in different countries. Such restrictions are examined with due regard to the national security goals. The following logical research scheme was implemented (Figure 1).



**Figure 1:** Research methodology implementation algorithm

So, the study was focused on the international legal acts in the field of regulation of the totality and completeness of civil rights and freedoms; national legal acts (constitutions, constitutional laws, etc.), which determine or establish the scope of human rights guaranteed by the respective state, and the cases of their limitation. We did not study the completeness of the enshrinement of a set of civil rights, the emphasis was placed on determining the ways of limiting any of the civil rights and freedoms for the purposes of national security at the legislative level. The studied international legal acts included: European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms): Council of Europe Convention with Protocols of 4 November 1950; the UN Universal Declaration of Human Rights of 10 December 1948; UN International Covenant on Civil and Political Rights of 16 December 1966.

We have chosen the Constitutions of all EU member states, the Constitutional acts of Great Britain; Constitutions and constitutional acts of NATO member countries, as well as other democratic states (Australia, New Zealand, Ukraine, Japan) for the study among the national legislative acts. We did not consider the study of the Constitutions of countries ruled by totalitarian, authoritarian regimes or frankly absolute or theocratic monarchies, as the observance of the rights and freedoms of citizens (nationals) in such countries is nominal.

We chose the circumstances or conditions of restriction of human rights for the purposes of national security, which are enshrined in the above-mentioned legal acts as the main subject of interest. So, the legal framework used by different states to justify the appropriateness of limiting the rights and freedoms of their own citizens (nationals) was determined.

The next stage of the methodology is a critical analysis of studies of the most important specialists in the field of public administration, constitutional law and practitioners of state-building processes in order to find the trends that the scientific community offers. The main focus of the cognitive impact was on how the scientific community justifies the necessity and appropriateness of restricting human rights in the interests of national security, and what risks to national security are

defined as those that really provide all the grounds for the application of relevant restrictions by national governments. In this way, we obtained the results that come from the analysis of the utilitarianism and adequacy of the constitutional and legal regulation of cases of restriction of civil rights. The final stage of the research provided for attempts to determine the admissibility of the legislative enshrinement of a certain list of criteria for the imposing restrictions on human rights. Such studies were conducted on the example of European countries, including Ukraine. This made it possible to clearly determine the cases, circumstances and duration of the restriction of human rights for the purposes of national security.

The research methodology was based on a set of methods of systemic analysis, hermeneutics and doctrinal approach to the content of regulatory and legal acts. Those results that can be achieved by applying a certain combination of generally philosophical methods of scientific knowledge were also taken into account. In particular, hermeneutics was used to identify the method of legislating cases and conditions of restriction of human rights in different countries. The doctrinal approach was applied to identify the mechanisms and models of state regulation of ways of restricting human rights for the purposes of national security. The application of the legal modelling was explained by the need to determine the same balance of private and public interest law in matters of restricting human rights for the purposes of national security.

#### 4. Results

The current stage of human development is the opposition between two socio-political concepts: liberal democracy and elitist authoritarianism (when authority is exercised by the collective image of a certain elite expressed in a specific figure). The dominance of each socio-political concept is connected with the creation of appropriate regulatory and legal support for the development of domestic processes. One of such processes, which determines the very trend of the development of state regulation, is the realization by citizens of the scope of rights and freedoms recognized by the state. We emphasize that the term “recognized” should be distinguished from the terms “legislatively enshrined”, “proclaimed”, “guaranteed”. Democratic states recognize the scope of human rights and freedoms that are actually legislatively enshrined and vice versa. Instead, authoritarian states nominally enshrine the full range of civil rights in the constitution, so that there are no formal reasons to apply international legal restrictive measures to them for the violation of such rights. In fact, the civil rights are fully observed in practice in countries with an authoritarian regime only to the extent that does not contradict the interests of the ruling elite or the “collective” leader. Therefore, it is clear that in such countries, the interests of the ruling elite are most often identified for public consumption with national interests, the national security interests, which enables the political leadership to justify the restriction of human rights in this way.

In democratic countries, such an option is not recognized by society, and any restriction of civil rights and freedoms must be either predetermined at the legislative level or justified by the political leadership of the state. In democracies, human rights are an object of state power relations in which they act simultaneously as a managed subsystem and as a system of guidelines for establishing the goals of state policy to ensure these rights. Therefore, even the application of restrictions on human rights for the purposes of national security requires appropriate justification for society.

National security and human rights are categories existing in a dialectical relationship that paradoxically involves both unity and opposition. On the one hand, human rights, the realization of which involves freedom of action, may be limited due to the requirements of national security, public order, public interest, and territorial integrity. On the other hand, national security is aimed at establishing a regime of appropriate and effective implementation of the subjective rights of each citizen in particular and human rights in general.

A balance of private and public interest law in matters of restriction of human rights for the purposes of national security is being achieved in two areas: national security and civil rights. The first and more general area is national security — the first-order area, in which the state policy for

ensuring human rights is implemented. Instead, state guarantees of the realization of human rights are the second legally defined area, within which the analysed type of policy is implemented. This is the area that affects the choice of specific mechanisms and tools for its implementation, while the legally defined contour of the policy in the field of national security introduces only certain corrections regarding the method of application or conditions of functioning of the relevant state policy mechanisms.

We emphasize the proportionality of restrictions, that is, the need to ensure a balance between national security and the observance of fundamental human rights. Assessment of the fairness and proportionality of the balancing of public and private interests should be determined by the specific situation and circumstances. At the same time, we draw attention to the fact that the criteria for legitimate restrictions on human rights and freedoms are enshrined in international legal acts, which turns these criteria not so much into guidelines, but into imperatives of state policy for those countries that have ratified the relevant international acts.

Article 29 of the Universal Declaration of Human Rights adopted in 1948 states that “in the exercise of his rights and freedoms, everyone shall be subject only to such limitations 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”.

Articles 15-18 of the European Convention on Human Rights adopted by the Council of Europe in 1950 define the criteria for restricting human rights, dividing them into general restrictions, which are mostly enshrined in the Universal Declaration of Human Rights, and special ones related to personal human rights.

The UN International Covenant on Civil and Political Rights establishes the system of guarantees of the international community in the event of imposing restrictions on civil rights, and also details some criteria for their introduction.

A significant drawback of the system of international legal acts in this area is that they do not provide a unified approach to the reasons for restricting human rights and interests, generally recognizing the following three: a threat to national security, violation of the rights of other citizens, violation of public order. But even the system of criteria for the imposition of restrictions on human rights set forth in the European Convention on Human Rights is not followed or detailed in the national legislation of the EU member states. The system of such criteria is not determined at the national level, and human rights are restricted in the general case — by declaring a martial law or emergency (where the scope of restrictions is also different). In some cases, acts, which apply a temporary restriction of human rights in a certain territory or in relation to a particular area of social life, can be legislated.

In fact, the state resolves the issue of realization of sovereignty through the observance of human rights, which is manifested not only by observing the full scope of human rights, but also by regulating cases of their limitation. So, the state demonstrates the generally accepted nature of its power through the establishment of cases of restriction of human rights, as well as through the creation of a system of guarantees of their observance.

This conclusion is applicable for countries with a democratic socio-political system. National security is the basis for the development and implementation of the system of human rights, which fully opens in state guarantees and provision of appropriate state management tools. If national security is interpreted as a prerequisite or the only condition for the free development of statehood, the system of human rights should be interpreted as an element of this system aimed at the implementation of its duties.

So, at the legislative level the state determines the model of the balance of private and public interest in matters of restricting human rights for the purposes of national security through legal norms.

Figure 2 illustrates the study of legal frameworks for achieving such a balance.

The reasons for restricting human rights and freedoms established in the constitutions and constitutional acts of the states		
<b>PUBLIC INTERESTS</b> (Australia, Austria, Belgium, Bulgaria, Great Britain, Holland, Denmark, Ireland, Italy, Canada, New Zealand, Norway, Poland, Romania, Slovakia, Ukraine, Switzerland)	<b>NATIONAL INTERESTS</b> (Denmark, Ireland, Italy, Canada, New Zealand, Germany, Portugal, USA, France, Japan)	<b>NATIONAL SECURITY</b> (Spain, Latvia, Lithuania, Germany, USA, Slovenia, Hungary, Ukraine, Finland, France, Croatia, Sweden, Japan)
Ways of restricting human rights and freedoms for the purposes of national security		
<b>AT THE LEVEL OF THE CONSTITUTION AND CONSTITUTIONAL ACTS</b> (Spain, Latvia, Lithuania, Germany, Slovenia, Hungary, Ukraine, Finland, France, Croatia, Sweden, Japan)	<b>AT THE LEVEL OF CONSTITUTIONAL LAWS</b> (Australia, Austria, Belgium, Bulgaria, Great Britain, Holland, Greece, Estonia, Spain, Cyprus, Luxembourg, Norway, Poland, Romania, Slovakia, Ukraine Switzerland)	<b>AT THE LEVEL OF INDIVIDUAL LAWS OR SITUATIONAL GOVERNMENT ACTS</b> (Denmark, Ireland, Italy, Canada, New Zealand, Portugal, USA)

**Figure 2:** Legal frameworks of restricting human rights for the purposes of national security

It was established that the vast majority of national constitutions, constitutional or other equivalent legislative acts define public interest or public necessity as the main criterion for the need of restricting human rights. This means that the legislator determines the primacy of the law and interests of the majority (society) over the individual human rights. This is a peculiar manifestation of democratic collectivism, which necessitates observing the classical formula of democracy, which involves subordinating the interests of the minority to the interests of the majority. At the same time, any of the states has no clear definition of public necessity or public interest in any of the legislative acts at the level of the constitution or constitutional law. Separate attempts have been made in Great Britain, Norway, Denmark, Canada, Australia, Switzerland where the formula “public interests are the interests of the majority of citizens or subjects of the state” prevails.

National interests or state interests (USA, Canada, France, Germany, Italy, Baltic states, etc.) rank second among the circumstances or reasons for restricting human rights and freedoms. In other words, the primacy of national interests over individual interests is recognized, which, in our opinion, is far from the logic of international legal regulation of the guaranteeing human rights and freedoms.

It should be noted that human rights may be limited in case of threats to national security in some constitutions (USA, Canada, other countries of Anglo-Saxon law, with the exception of Great Britain, France, Ukraine, etc.). Although the legislation of these countries does not provide an exhaustive list of those threats to national security. It neither clearly establishes the moment when the impact of such threats becomes so significant that there is a need to impose restrictions on human rights and freedoms.

So, human rights are always restricted for the purposes of national security, and such interests may not be legislated in advance. The legislation only declares a system of signs by which a violation of national security is recognized. This means the primacy of the public interest law over the private interest law in matters of restriction of human rights in the interests of national security.

This is explained by the fact that the state has an obligation to society to respect human rights, while citizens have an obligation to the state to observe laws and exercise their rights within the

outlined scope. At the same time, the state ensures a stable state of national security, while meeting the security needs of citizens, for which certain restrictions on civil rights and freedoms may be introduced.

Human rights in terms of interests and determinants of national security are considered as a reference point or a system of indicators for achieving security goals. If the state restricts human rights, we get the opposite situation, when indicators signal the need to adjust state policy. Therefore, there is an acute issue of justifying the permissibility of restricting some human rights in the event that the indicators of the national security system signal a worsening security situation. This means the need to introduce emergency mechanisms and tools of public administration, for example, the introduction of martial law, the announcement of mobilization, which entails the reduction of economic, labour and other human rights. But we emphasize that even under such conditions, the state creates the necessary legal framework in order to explain the need to restrict civil rights and develop a clear model of public relations, which implies that such restrictions become the object of state regulation.

## 5. Discussion

The obtained results find both their confirmation in the studies and counter-evidence, in particular regarding the potential possibility of establishing cases of restriction of human rights and freedoms for the purposes of national security. For example, Joffe (2019) concludes about the abstractness of such rights, arguing that they are not the protection of individual will, needs or dignity, but are a multibillion-dollar industry and a global secular religion that seeks to overturn the Westphalian order of sovereign nation states. In other words, the researcher states that even their existence and legal enshrinement is a way for the relevant political elites to retain power (Abramov et al., 2016; Drobotov, 2020).

Blanchette (2020) claims that human rights are a category derived from human security, which actually focuses on the most important rights — the right to life, dignity. He also emphasizes the importance of the local context in which these fundamental rights are realized. In turn, national security is a separate expression of human security in the context of the development of state-citizen relations. Therefore, national security, as it is a component of human security, determines the need to vary the balance of human rights. But the researcher does not recognize such a variation as a limitation of the right as a means of its maintenance and provision (Fluri & Badraka, 2016; Getman & Yakoviyk, 2019).

Using the example of the USA, Dalton (2019) proves that the restriction of human rights for the purposes of national security is always a situational objective need, and therefore does not require additional detail in legislation. On the contrary, Kaplan (2018, 2021) demonstrates double standards in the field of ensuring national security, while the US, defining its strategic orientation, manipulates any country by violating the scope of civil rights in it justifying the spread of their own expansion. De Bartolo (2018) makes the same conclusion, but in the context of the fight against terrorism and threats of violation of civil rights. Although, unlike his predecessors, he considers US intervention in other countries under the pretext of fighting terrorism as a means of ensuring full civil rights and freedoms for the population of these countries. But for the population of such countries the very expansion of the USA already means a violation of their sovereign rights, because state sovereignty, the axis of which is the people, is limited (Irkha, 2015; Kynoch, 2018; Schrempf-Stirling, 2018).

Bachelet (2020) should be distinguished among the researchers whose points of view are identical to the results of this study. He comes to the conclusion about the inadmissibility of reducing the scope of human rights and freedoms in a way which is not provided in the legislation in advance. Zad (2020) draws the same conclusion. In a system where power and military force are vested in the state at the national level and clearly separated from each other at the global level, the issue of observing human rights and freedoms becomes a defining factor of the global security paradigm. In this dual paradigm of global security, the development of the state becomes the main reference point



for the observance of the full scope of human rights with an emphasis on the general awareness of the common human interests and values. The scope of human rights and freedoms established in international legal acts is the reference point of universal human values (Shcherbaniuk, 2019; Titko, 2016).

Farmer (2017) and Ipek-Demirsu (2017) prove that the restrictions of human rights are admissible only if they are imposed to prevent the commission of crimes. The researchers use criminal law and criminological elements as a restriction criterion. The state acts as a guarantor of the inadmissibility of committing a crime, as the crime is directed against a person or society in one way or another.

On the contrary, Finnane (2008) generally holds that the restriction of human rights in the field of national security is only a precautionary measure against more destructive consequences for the state. In turn, Tykhomyrov (2019) significantly expands the list of circumstances or reasons for the introduction of restrictions on human rights for the purposes of national security, recognizing that even the existence of potential risks to national security is sufficient for their introduction. Mozghova (2020) points out that human rights and freedoms are the primary object. This means the state policy for ensuring human rights should be based on the existing threats to their full realization. Therefore, their restrictions should be introduced at the national level in order to eliminate such threats (Shmotkin, 2017).

## 6. Conclusions

Current international legal acts recognize the possibility of limiting human rights and freedoms in national and general societal interests without equating them. The national legislation of most democratic countries recognizes the admissibility of limiting human rights in order to achieve the public interest, which is often understood as the interest of the state or national security. It should be concluded that the restriction of human rights for the purposes of national security is allowed under the following conditions:

- 1) the possibility of such a restriction is enshrined at the constitutional level and a clear reason or factors for such a possibility are defined;
- 2) the circumstances, limits and terms of limiting human rights for the purposes of national security are clearly legislated;
- 3) the concepts of national security interests and public interests are defined at the legislative level.

Among other things, achieving the national security goals implies full realization of civil rights and freedoms by the state. Therefore, in the event of objective reasons for their limitation, such limitation should always be temporary, clearly justified, have a compensatory mechanism determined by the state, and also be provided with a special legal regime. The development of international legal regulation of the system of guarantees of human rights and cases of their limitation requires further unification. At the national level, this process should focus on a clear and detailed determination of a system of indicators that should signal the potential opportunity for the national government to limit human rights for the purposes of national security.

For Ukraine, the findings are relevant in terms of countering aggression of the Russian Federation, when the state restricts civil rights in order to minimize the negative consequences of the aggression and reduce the number of victims among the civilian population. In this context, the introduction of a special legal regime — martial law — justifies the application of a system of restrictions on civil rights. On the other hand, it creates the necessary legal field for imposing additional restrictions.

The prospects of further research may be the issue of detailed legislating of methods, cases and, most importantly, substantiating the appropriateness of restricting civil rights for the purposes of national security. In practical terms, the problem of developing an appropriate state policy, which would determine the potential model of state power relations when imposing a system of restrictions

on civil rights and freedoms, with the help of strategic legal acts, needs to be solved.

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