



Supreme
Court

RESTRICTIONS OF THE RIGHTS AND FREEDOMS UNDER CONDITIONS OF MARTIAL LAW (ART. 64 OF THE CONSTITUTION OF UKRAINE) AND DEROGATING (ART. 15 OF THE CONVENTION)

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BILATERAL COOPERATION BETWEEN THE SUPREME COURT OF UKRAINE AND THE SUPREME COURT OF ESTONIA

Court in the Context of War

19-20 October 2022

Tartu, ESTONIA

Annual conference of EU ambassadors 2022:
opening speech of the High Representative of the European Union for Foreign Affairs and Security Policy Josep Borrell
(10 October 2022)

https://www.eeas.europa.eu/eeas/eu-ambassadors-annual-conference-2022-opening-speech-high-representative-josep-borrell_en

You - the United States - take care of our security. You - China and Russia – provided the basis of our prosperity. This is a world that is no longer there.
Whatever we do, there are taboo-breaking decisions.

Annual conference of EU ambassadors 2022:
opening speech of the High Representative of the European Union for Foreign Affairs and Security Policy Josep Borrell
(10 October 2022)

We break taboos on the Ukrainian war, using the European Peace Facility to buy arms.

“We have never done it” is not a recipe.

Maybe we have to start doing things that we have never done in the past.

We had been discussing about the Ukrainian Training Mission for months, is it worth doing – and then *boom*, the war comes, people said: “we should have done it.”

This is a world that is no longer there.

I think that we Europeans are facing a situation in which we suffer the consequences of a process that has been lasting for years in which we have decoupled the sources of our prosperity from the sources of our security.

State of the Union 2022 – Address of the President of the European Commission Ursula von der Leyen (14 August 2022)

https://state-of-the-union.ec.europa.eu/index_en

The EU began to pay billion-euro bills and supply weapons to Ukraine (breaking an unwritten taboo), canceled trade restrictions, etc.

Europeans have found the courage to do the right things...

Our response this time was immediate and that is something we should be proud of.

This is far from the end of the path.

The three-fold test for solving a public-law dispute assumes that the court, making a decision within the limits of judicial discretion (court discretion), checks it for compliance (consistency) to the *principles of*:



1. National security
2. Public interest
3. Effectiveness of protection of a person's violated right

National security




this is a complex concept that encompasses the state of peaceful and stable existence of the state and its institutions, as well as the state of the absence of real existential threats in the sphere of public-management and interstate relations, in which it is impossible in advance to legislate all features (definitions) of possible challenges to the state in a specific period of time

A threat to national security




means, in particular, the presence of risks to state sovereignty, constitutional order and territorial integrity of the country, which may lead to the termination of the existence of the country or its part.

Public interest



is an evaluative concept that covers a wide and at the same time not clearly defined circle of legal and morally based interests that make up a certain set of private interests or needs that are important for a significant number of individuals and legal entities, and in accordance with the legally established competence are provided by subjects of authority (subjects of public administration);



this concept does not lend itself to unambiguous qualification (definition), and therefore the existence of public interests must be the subject of an independent assessment by the court in each specific case; this is a complex question of law that concerns an "indeterminate" interest, since it does not have a specific entity with a name, legal personality, as well as an immediate opportunity to exercise its procedural rights in a certain administrative procedure or in a dispute pending in court.

Features of public interest are:



1) directly related to morality and moral principles;



2) can and should coincide with national interests and/or cover local interests of a certain territorial community or social group;



3) reflects the aspirations of the entire society as a whole or its major part; maximally reproduces (defends) the interests of all social groups to achieve justice in society as the highest good;

Features of public interest are:



4) can be national (covering such important areas as the preservation of state sovereignty, territorial integrity of the state, development of settlements, subsoil use, environmental protection, citizen safety, access to public information, protection of cultural heritage objects, etc.) or international in nature (covering, mainly such issues as ensuring environmental safety and solving global environmental problems, health care, overcoming poverty in the world, etc.);



5) its content is determined in each specific case, taking into account all the peculiarities of the situation, however, such an interest is always connected with the need to guarantee the safety of people in all its dimensions, in particular, the preservation of human life and health, as well as the preservation of state and interstate entities, which are called to ensure these guarantees using appropriate civilized legal and other mechanisms.

As it is noted in

The separate opinion of judge of the Supreme Court dated 14 August 2020
In the case No. 240/10153/19

in the practice, in particular, of administrative proceedings, one can find examples of the application of the principle of *in dubio pro tributario* (priority with the most favorable interpretation of the legal norm for the person), which is borrowed from criminal proceedings and generally understood as follows: in the event that the norm of the law or other regulatory act issued on the basis of the law, or if the norms of various laws or regulations allow an ambiguous or multiple interpretation of the rights and obligations of a person in his/her relationship with the state (represented by relevant subjects of power), the interpretation of such a law shall be carried out in favor of the person (the subject of private law).

Constitution of Ukraine

Article 64

Constitutional human and citizen's rights and freedoms shall not be restricted, except in cases envisaged by the Constitution of Ukraine.

Under conditions of martial law or a state of emergency, specific restrictions on rights and freedoms may be established with the indication of the period of effect of these restrictions. The rights and freedoms envisaged in Articles 24, 25, 27, 28, 29, 40, 47, 51, 52, 55, 56, 57, 58, 59, 60, 61, 62 and 63 of this Constitution shall not be restricted.

Constitution of Ukraine

Article 24

Citizens have equal constitutional rights and freedoms and are equal before the law.

Article 25

A citizen of Ukraine shall not be deprived of citizenship and of the right to change citizenship.

Article 27

Every person has the inalienable right to life.

Constitution of Ukraine

Article 28

Everyone has the right to respect of his or her dignity.

Article 29

Every person has the right to freedom and personal inviolability.

Article 40

Everyone has the right to file individual or collective written petitions, or to personally appeal to bodies of state power

Constitution of Ukraine

Article 47

Everyone has the right to housing.

Article 51

Marriage is based on the free consent of a woman and a man.

Article 52

Children are equal in their rights.

Constitution of Ukraine

Article 55

Human and citizen's rights and freedoms are protected by the court.

Article 51

Everyone has the right to compensation, at the expense of the State or bodies of local self-government, for material and moral damages inflicted by unlawful decisions, actions or omission of bodies of state power.

Article 52

Everyone is guaranteed the right to know his or her rights and duties.

Constitution of Ukraine

Article 58

Laws and other normative legal acts have no retroactive force, except in cases where they mitigate or annul the responsibility of a person.

Article 59

Everyone has the right to professional legal assistance.

Article 60

No one is obliged to execute rulings or orders that are manifestly criminal.

Constitution of Ukraine

Article 61

For one and the same offence, no one shall be brought twice to legal liability of the same type.

Article 59

A person is presumed innocent of committing a crime and shall not be subjected to criminal punishment until his or her guilt is proved through legal procedure and established by a court verdict of guilty.

Article 63

A person shall not bear responsibility for refusing to testify or to explain anything about himself or herself, members of his or her family or close relatives in the degree determined by law.

Judgment of the Constitutional Court of Ukraine (case based on appeals from residents of the city of Zhovti Vody) dated 25 December 1997 No. 9-зп

Article 55 of the Constitution of Ukraine contains a general norm, which means the right of everyone to apply to the court if his/her rights or freedoms are violated or being violated, obstacles to their implementation are created or being created, or other infringements of rights and freedoms occur.

Judgment of the Constitutional Court of Ukraine (case based on appeals from residents of the city of Zhovti Vody) dated 25 December 1997 No. 9-зп

The specified norm obliges the courts to accept applications for consideration even in the absence of a special provision in the law on judicial protection.

The refusal of the court to accept claims and other statements or complaints that meet the requirements established by law is a violation of the right to judicial protection, which cannot be limited in accordance with Article 64 of the Constitution of Ukraine.

International standards of application of the national security principle

Convention for the Protection of Human Rights and Fundamental Freedoms (with Protocols) (European Convention on Human Rights)

Article 6. Right to a fair trial

1. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or **national security in a democratic society**, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Article 15. Derogation in time of emergency

1. In time of war or other **public** emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

International standards of application of the national security principle

Convention for the Protection of Human Rights and Fundamental Freedoms (with Protocols) (European Convention on Human Rights)

Article 4. Prohibition of slavery and forced labour

3. For the purpose of this Article the term “forced or compulsory labour” shall not include:
c) any service exacted in case of an **emergency** or calamity threatening the life or well-being of the community;

International Covenant on Civil and Political Rights (ratified by the Decree of the Presidium of the Supreme Council of the Ukrainian SSR No. 2148-VIII dated 19.10.1973)

Article 4

1. In time of public emergency which **threatens the life of the nation** and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

International Covenant on Civil and Political Rights (ratified by the Decree of the Presidium of the Supreme Council of the Ukrainian SSR No. 2148-VIII dated 19.10.1973)

Article 4

2. No derogation from articles 6 (right to life), 7 (prohibition of torture), 8 (prohibition of slavery), 11 (prohibition of imprisonment merely on the ground of inability to fulfil a contractual obligation), 15 (prohibition of retroactive effect in time of the law that defines criminal liability), 16 (right to recognition everywhere as a person before the law) and 18 (freedom of thought and conscience) may be made under this provision.

International Covenant on Civil and Political Rights (ratified by the Decree of the Presidium of the Supreme Council of the Ukrainian SSR No. 2148-VIII dated 19.10.1973)

Article 4

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

International Covenant on Civil and Political Rights (ratified by the Decree of the Presidium of the Supreme Council of the Ukrainian SSR No. 2148-VIII dated 19.10.1973)

Article 12

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary **to protect national security**, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

International Covenant on Civil and Political Rights (ratified by the Decree of the Presidium of the Supreme Council of the Ukrainian SSR No. 2148-VIII dated 19.10.1973)

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling **reasons of national security** otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

International Covenant on Civil and Political Rights (ratified by the Decree of the Presidium of the Supreme Council of the Ukrainian SSR No. 2148-VIII dated 19.10.1973)

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) **or national security in a democratic society**

International Covenant on Civil and Political Rights (ratified by the Decree of the Presidium of the Supreme Council of the Ukrainian SSR No. 2148-VIII dated 19.10.1973)

Article 14

or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

International Covenant on Civil and Political Rights (ratified by the Decree of the Presidium of the Supreme Council of the Ukrainian SSR No. 2148-VIII dated 19.10.1973)

Article 18

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect **public safety**, order, health, or morals or the fundamental rights and freedoms of others.

International Covenant on Civil and Political Rights (ratified by the Decree of the Presidium of the Supreme Council of the Ukrainian SSR No. 2148-VIII dated 19.10.1973)

Article 19

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

International Covenant on Civil and Political Rights (ratified by the Decree of the Presidium of the Supreme Council of the Ukrainian SSR No. 2148-VIII dated 19.10.1973)

Article 19

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary **for the protection of national security** or of public order (ordre public), or of public health or morals.

International Covenant on Civil and Political Rights (ratified by the Decree of the Presidium of the Supreme Council of the Ukrainian SSR No. 2148-VIII dated 19.10.1973)

Article 21

The right of peaceful assembly shall be recognized.

No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in **the interests of national security or public safety**, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

International Covenant on Civil and Political Rights (ratified by the Decree of the Presidium of the Supreme Council of the Ukrainian SSR No. 2148-VIII dated 19.10.1973)

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society **in the interests of national security or public safety**, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

The Siracusa Principles

(The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights E/CN.4/1985/4; clauses 2,10,11 of section A of part 1)

on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, adopted in 1984 by the Economic and Social Council of the United Nations, provide that in matters of interpretation of permissible limitations of rights and freedoms, it is necessary, in particular, to adhere to the following principles:

The Siracusa Principles

"the scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned";

"whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation pursues a legitimate aim and is proportionate to that aim",

"in applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation".

In accordance with Article 4 of the Association Agreement (the Agreement was ratified with Law No. 1678-VII dated 16.09.2014), in all areas of mutual interest, political dialogue shall be further developed and strengthened between the Parties, which will promote gradual convergence (rapprochement) on foreign and **security matters with the aim of Ukraine's ever-deeper involvement in the European security area.**

The main principles of European security are defined in:

1. Helsinki Final Act

Final Act of the Conference on Security and Cooperation in Europe,

2. The Charter of Paris

The Charter of Paris for a New Europe.

Constitution of Ukraine

The term "security" in the aspect of our review is mentioned in the Constitution of Ukraine more than 30 times.

Four main areas of application of the principle of national security can be identified as follows:

1. protection of the sovereignty of Ukraine,
2. protection of the territorial integrity of Ukraine,
3. ensuring the economic security of Ukraine,
4. ensuring informational security of Ukraine.

Constitution of Ukraine

Article 17

Part 1. To protect the sovereignty and territorial indivisibility of Ukraine, **and to ensure its economic and informational security are the most important functions of the State and a matter of concern for all the Ukrainian people.**

Part 3. **Ensuring state security** and protecting the state border of Ukraine are entrusted to the respective **military formations and law enforcement bodies of the State.**

Constitution of Ukraine

Article 18

The foreign political activity of Ukraine is aimed at ensuring its **national interests and security** by maintaining peaceful and mutually beneficial co-operation with members of the international community, according to generally acknowledged principles and norms of international law.

Exceptions both in the Convention and the Covenant:

1. The right to privacy (Article 32)
2. The freedom of speech (Article 34)
3. The right to join political parties and public organizations (Articles 36, 37)
4. The right to peaceful assembly (Article 39)
5. The right to strike (Article 44)

Constitution of Ukraine

Article 32

No one shall be subject to interference in his or her personal and family life, except in cases envisaged by the Constitution of Ukraine.

The collection, storage, use and dissemination of confidential information about a person without his or her consent shall not be permitted, **except in cases determined by law, and only in the interests of national security**, economic welfare and human rights.

Constitution of Ukraine

Article 34

Everyone is guaranteed the right to freedom of thought and speech, and to the free expression of his or her views and beliefs.

Everyone has the right to freely collect, store, use and disseminate information by oral, written or other means of his or her choice.

The exercise of these rights may be restricted by law in the interests of national security, territorial indivisibility or public order, with the purpose of preventing disturbances or crimes, protecting the health of the population, the reputation or rights of other persons, preventing the publication of information received confidentially, or supporting the authority and impartiality of justice.

Constitution of Ukraine

Article 36

Citizens of Ukraine have the right to freedom of association in political parties and public organisations for the exercise and protection of their rights and freedoms and for the satisfaction of their political, economic, social, cultural and other interests, **with the exception of restrictions established by law 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.

Constitution of Ukraine

Article 37

The establishment and activity of political parties and public associations are prohibited if their programme goals or actions are aimed at the liquidation of the independence of Ukraine, the change of the constitutional order by violent means, the violation of the sovereignty and territorial indivisibility of the State, **the undermining of its security**, the unlawful seizure of state power, the propaganda of war and of violence, the incitement of inter-ethnic, racial, or religious enmity, and the encroachments on human rights and freedoms and the health of the population.

Constitution of Ukraine

Article 39

Citizens have the right to assemble peacefully without arms and to hold meetings, rallies, processions and demonstrations, upon notifying in advance the bodies of executive power or bodies of local self-government.

Restrictions on the exercise of this right may be established by a court in accordance with the law **and only in the interests of national security** and public order, with the purpose of preventing disturbances or crimes, protecting the health of the population, or protecting the rights and freedoms of other persons.

Constitution of Ukraine

Article 44

Those who are employed have the right to strike for the protection of their economic and social interests.

The procedure for exercising the right to strike is established by law, taking into account **the necessity to ensure national security**, health protection, and rights and freedoms of other persons.

Constitution of Ukraine

Article 92

The following are determined exclusively by the laws of Ukraine:

17) **the fundamentals of national security**, the organisation of the Armed Forces of Ukraine and ensuring public order;

Constitution of Ukraine

Article 106

The President of Ukraine:

1) ensures state independence, **national security** and the legal succession of the state;
17) is the Commander-in-Chief of the Armed Forces of Ukraine; appoints to office and dismisses from office the high command of the Armed Forces of Ukraine and other military formations; **administers in the spheres of national security** and defence of the State.

Constitution of Ukraine

Article 107

The Council of National Security and Defence of Ukraine is **the co-ordinating body** to the President of Ukraine on issues of national security and defence which **co-ordinates and controls** the activity of bodies of executive power in the sphere of national security and defence.

Constitution of Ukraine

Article 116

The Cabinet of Ministers of Ukraine:

7) takes measures to ensure the defence capability and **national security** of Ukraine, public order and to combat crime;

The Decision of the Constitutional Court of Ukraine dated July 16, 2019 No. 9-r/2019 in the case upon the constitutional petition of 46 People's Deputies of Ukraine on compliance of the Law "On the condemnation of the communist and national socialist (Nazi) totalitarian regimes in Ukraine, and the prohibition of propaganda of their symbols" with the Constitution (constitutionality)

"The Constitutional Court of Ukraine proceeds from the fact that the Law was adopted "with the aim of preventing the repetition of the crimes of the communist and national socialist (Nazi) totalitarian regimes, any discrimination based on national, social, class, ethnic, racial or other characteristics in the future, restoration of historical and social justice, elimination of the threat to the independence, sovereignty, territorial integrity **and national security of Ukraine.**"

The Decision of the Constitutional Court of Ukraine dated July 16, 2019 No. 9-r/2019 in the case upon the constitutional petition of 46 People's Deputies of Ukraine on compliance of the Law "On the condemnation of the communist and national socialist (Nazi) totalitarian regimes in Ukraine, and the prohibition of propaganda of their symbols" with the Constitution (constitutionality)

In terms of the constitutional appeal the provisions of the said Law concerning the order of the official use of the copy of the Victory Flag dated April 21, 2011 No. 3298-VI shall be understood in such a way that the Constitution provides an exhaustive list of state symbols of Ukraine which are the State Flag of Ukraine, the State Coat of Arms of Ukraine and the State Anthem of Ukraine.

In addition, the Court recognised as non-conforming with the Constitution (unconstitutional) provisions of paragraph 6 Article 2 of the Law (The Law was repealed on the basis of Law No. 315-VIII dated April 9, 2015).

The Code of Administrative Proceedings of Ukraine

Article 87

Execution in Ukraine of letters rogatory from foreign courts

1. The courts of Ukraine execute the letters rogatory from foreign courts to provide legal assistance in serving subpoenas or other documents, etc.
2. A letter rogatory shall not be accepted for execution if it:
 - 1) may lead to a violation of the sovereignty of Ukraine **or create a threat to its national security.**

The Code of Administrative Proceedings of Ukraine

Article 280

Features of the proceedings in cases of administrative claims by executive authorities, local self-government bodies on the establishment of restrictions on the exercise of the right to freedom of peaceful assembly
Part 9. The court shall grant the plaintiff's claims **in the interests of national security and public order** if it recognizes that the holding of an assembly, meetings, marches, demonstrations or other assemblies may create a real risk of disturbance or criminal offences, threats to public health or the rights and freedoms of others.

In the case of establishing a restriction on the right to freedom of peaceful assembly, the court must substantiate in its ruling the necessity of imposing a restriction on the exercise of the right to freedom of peaceful assembly, as well as the proportionality of the method of such restriction.

The Code of Administrative Proceedings of Ukraine

Article 266-1

Features of the proceedings in cases concerning the appeal of individual acts of the National Bank of Ukraine, the Deposit Guarantee Fund, the Ministry of Finance, the National Securities and Stock Market Commission and the decisions of the Cabinet of Ministers of Ukraine regarding the withdrawal of banks from the market

The article provides special rules on the time and reasons for their renewal, the form of judicial proceedings (summary or general proceedings), the limits of judicial discretion and the manner of recovery of damages.

The Code of Administrative Proceedings of Ukraine

Article 266-1

2. A statement of claim to appeal against an individual act/decision shall be filed with the court within **three months from the date of promulgation** of such act/decision in the manner prescribed by law. **This period is a deadline and is not subject to renewal.**
4. Administrative cases defined in part 1 of this Article shall be considered **in the order of general legal proceedings.**
5. The Court shall verify whether an individual act or decision has been adopted on the basis, within the limits of the powers and in the manner prescribed by the Constitution and laws of Ukraine, which determine the powers of the relevant body.

The Code of Administrative Proceedings of Ukraine

Article 266-1

6. The Court shall use as a basis for its own assessment and shall be entrusted with quantitative, qualitative assessments and conclusions made by the National Bank of Ukraine, the Deposit Guarantee Fund, the Cabinet of Ministers of Ukraine, the Ministry of Finance of Ukraine, the National Securities and Stock Market Commission, on the basis of which decisions have been taken, unless:

- 1) the contested decision/act was adopted **with a fundamental violation of the established procedure for its adoption (a violation which significantly affected the outcome of the assessment);**
- 2) quantitative, qualitative assessments and conclusions **are based on obviously false information and/or do not take into account significant circumstances (facts) under the condition of taking into account which the contested decision/act could not be made;**

The Code of Administrative Proceedings of Ukraine

Article 266-1

- 3) obvious differences and/or logical inconsistencies between quantitative, qualitative assessments and/or conclusions;
 - 4) the contested decision/act was made in the absence of authority or using authority contrary to the purposes for which it was granted by law.
8. The features of **determining the amount of damage** caused by unlawful (illegal) individual acts/decisions referred to in paragraph 1 of this article shall be established by the Law of Ukraine "On Banks and Banking Activities".

The Code of Administrative Proceedings of Ukraine

Article 266-1

9. Recognition as unlawful (illegal) and cancellation of an individual act/decision specified in part 1 of this Article, or its individual provisions:

- 1) **does not reinstate the position of the bank** that existed prior to the adoption of such an act/decision, including the legal status of the bank, nor does it reinstate the positions/rights of persons who were members of the bank at the time the act/decision was made;
- 2) **shall not be a ground for declaring** null, void, unlawful or revoking any decision, transaction or other act/finding unlawful omission, accepted, completed or admitted in the procedure of withdrawal of the insolvent bank from the market/ liquidation of the bank;

The Code of Administrative Proceedings of Ukraine

Article 266-1

3) **does not give rise to any rights of persons** who were members of the bank at the time of the adoption of such individual act/decision, except for the right to compensation for damage caused.

10. **The court may not decide otherwise**, which may result in the cessation/termination of the procedure initiated for withdrawal of the insolvent bank from the market and/or liquidation of the bank.

Case Law of the UK

Council of Civil Service Unions v Minister for the Civil Service (The GCHQ case) [1985] AC 374, [1985] ICR 14

In the 1980s, during the Conservative government of the United Kingdom led by Margaret Thatcher, it was decreed that all employees of the Government Communications Headquarters (GCHQ) were prohibited from joining any trade unions. This decision was justified due to a potential threat to national security.

Case Law of the UK

By limiting or denying workers access to trade unions altogether, certain individuals could not rely on certain provisions of employment law or be represented by a trade union.

Case Law of the UK

The court case was initiated by the Council of Civil Service Unions, taking the case to court through a judicial review.

At first instance, the case was heard in the High Court of Justice, where it was found that the order was invalid, however, this was overturned on appeal to the Court of Appeal.

It was held that national security considerations are of paramount importance and therefore such considerations and decisions made on that basis should not be taken into account.

Case Law of the UK

The case was then heard on appeal in the House of Lords: the House ruled that such decisions could be subject to judicial review, but given the scope of national security, it was correct.

Following the GCHQ case, it was found that prerogative powers (bans on national security grounds) could be judicially tested for legality.

Case Law of the UK

The grounds for judicial control over individual administrative acts have been established: (1) illegality; (2) irrationality and (3) violation of procedure.

In this case, irrationality or unreasonableness means the doctrine of Wednesbury unreasonableness, which was formulated in 1948 in the case of *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation*.

Case Law of the UK

In this case, the English court held that a court cannot intervene and overturn the decision of a regulatory authority simply because the court disagrees with it. To be entitled to intervene, the court must conclude that:

- (1) the authority took into account factors that should not have been taken into account when making the decision, or
- (2) the authority failed to take into account factors that should have been taken into account, or
- (3) the decision is so unreasonable that no reasonable official or body would ever have thought of taking it.

Case law of the Supreme Court

Resolution of the Supreme Court of 29 December 2020 on the case
No. 1540/4556/18

Compliance by the subject of information activity with the legislation in the field of television and radio broadcasting is important, in particular, for ensuring the national security of Ukraine.

In each case, to resolve the issue of violation by the subject of information activity of the requirements of the Law of Ukraine "On Television and Radio Broadcasting", it is important to take into account not only the content of the transcript of the audiovisual product, but also to assess the general tone of the statement, the emotional perception of the video recording of the broadcast, which is impossible to carry out on the basis of linguistic examination of the transcript of the video recording.

Risks of applying the principle of national security and preventing possible abuses
Study of the European Commission for Democracy through Law (Venice Commission)
"Rule of law checklist" (developed and approved at the 106th plenary session on
March 11-12, 2016)

The security of the state and its democratic institutions, as well as the security of its officials and population, constitute vital interests of a public and private nature that deserve protection and may entail the temporary derogation from certain human rights and the introduction of an extraordinary distribution of powers.

However, autocratic governments have abused emergency powers to stay in power, silenced opposition and restricted human rights in general. That is why strict limits on the duration, conditions and scope of such powers are so important.

State security and public safety can only be achieved in an effective manner in a democracy that fully respects the rule of law (Opinion on the protection of human rights in emergency situations, adopted by the Venice Commission at its 66th plenary session (17-18 March 2006, No. 35 CDL-AD(2006)015, § 33).

This requires parliamentary control and judicial oversight of the validity and duration of the declared state of emergency in order to prevent abuse.

Recommendation (2004)20 of the Committee of Ministers of the Council of Europe **on judicial review of administrative acts** (adopted on 15 December 2004 at the 909th meeting at the level of permanent representatives)

Item 13. States may establish certain exceptions to the concept of administrative acts, which should be enshrined in law, in particular with regard to acts relating to international relations and national security.

Case law of the Supreme Court

Item 64. The right to a fair hearing implies the principle that documents and other materials in the case should be submitted to the court by the administrative authorities. Under certain conditions, it is permissible to apply special measures to protect the content of certain documents (for example, when it comes to **national security**).

Case law of the Supreme Court

Items 65, 66. The right to a fair hearing provides for the principle of adversarial process, which according to the ECtHR case law "means the opportunity for the parties to know and comment on the statements or evidence submitted by the other party". This applies to documents and any other information submitted to the court. This does not prevent the court from applying various protective measures when it comes to documents containing secret information (for example, **to protect national security**, professional secrets or intellectual property rights).

European Court of Human Rights

Communaute genevoise d'action syndicale (CGAS) v. Switzerland (No. 21881/20)

The applicant association in this case complained about the deprivation of the right to organize and participate in public events following the restrictions imposed by the Government to combat COVID-19 under COVID-19 Regulation O.2. According to this Resolution, public and private events were banned from 16 March 2020. Violation of this ban was punishable by imprisonment or a fine.

European Court of Human Rights

The applicant association's aim was to defend the interests of workers and member organisations, especially in the area of trade union and democratic freedoms. According to the association, it organizes and participates in dozens of events in the Canton of Geneva every year.

On 26 May 2020, the applicant association complained to the ECtHR that after the adoption of this Resolution, it was forced to cancel the rally scheduled for 1 May 2020 and withdraw its request for authorization.

European Court of Human Rights

Referring to Article 11 of the Convention, the applicant association complained about the deprivation of the right to organize and participate in public events.

On the issue of the status of the victim, the ECtHR found that the applicant association, which was forced to change its behavior or even refrain from organizing public events that could contribute to the achievement of the declared purpose in order to avoid criminal penalties, could claim to be a victim of a violation of the Convention.

European Court of Human Rights

With regard to the exhaustion of domestic remedies, the ECtHR emphasized that at the time the applicant association had no effective remedy available in practice by which it could complain of a violation of its right to assembly within the meaning of Article **11** of the Convention.

In particular, although federal regulations may normally be subject to a prior ruling on constitutionality by the Federal Supreme Court; that court, in the rather special circumstances of the general lockdown imposed by the Federal Council as part of measures to counter the spread of **COVID-19**, did not examine the merits of the freedom of assembly claims and did not assess the constitutionality of **COVID-19** Regulation 0.2.

European Court of Human Rights

The ECtHR also took into account the competing interests in the rather difficult circumstances of the pandemic and, in particular, the positive obligation of the States Parties to the Convention to protect the life and health of individuals within their jurisdiction under Articles 2 and 8 of the Convention.

First of all, the ECtHR concluded that **the complete prohibition of a certain type of conduct was a serious measure that required compelling reasons to justify it, in particular through supervision by courts empowered to balance competing interests.**

European Court of Human Rights

Regarding the need for such a measure in a democratic society, the ECtHR recalled the principles set out in its judgment in the case of **Kudrevičius and Others v. Lithuania (no. 37553/05, paras. 142-146)**.

In this case, the ECtHR recognized that the threat to public health due to **COVID-19** was very serious, awareness at the beginning of the pandemic of the symptoms and danger of the virus was quite limited; accordingly, states had to respond quickly during the period under consideration.

European Court of Human Rights

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First of all, the ECtHR concluded that **the complete prohibition of a certain type of conduct was a serious measure that required compelling reasons to justify it, in particular through supervision by courts empowered to balance competing interests.**

European Court of Human Rights

According to the established practice of the ECtHR, a general measure of this kind requires serious reasons for its justification and particularly careful scrutiny by the courts, which are empowered to balance competing interests.

Even assuming that there was such a reason - the need to effectively counter the global COVID-19 pandemic, the ECtHR's consideration raises the issue of exhaustion of domestic remedies, which the courts, as well as the Federal Supreme Court, did not exercise any such control over.

European Court of Human Rights

Therefore, the balancing of competing interests required by the ECtHR for the purposes of assessing the proportionality of such a drastic measure was not carried out. This is of particular concern from the point of view of the Convention, as the general ban remained in place for a considerable period.

European Court of Human Rights

The ECtHR added that, given the urgency of taking appropriate measures to counter the unprecedented threat posed by COVID-19 in the early stages of the pandemic, **it was not necessarily expected that detailed discussions would take place at the national level, especially in Parliament, before taking urgent measures to combat this global scourge.** However, in these circumstances, **an independent and effective judicial review of the measures taken by the executive branch was all the more important.**

European Court of Human Rights

Regarding the punishment for violation of the ban on holding public events under the controversial Resolution, the ECtHR reiterated that the application of criminal penalties must be justified by particularly compelling grounds and that the organization of a peaceful assembly should not normally entail the risk of such penalties.

European Court of Human Rights

According to the Ordinance, any person who intentionally violates the prohibition of public events under Article 6 of the Resolution will **be liable to imprisonment for a term not exceeding three years or a fine** (unless a more serious criminal offence under the Criminal Code exists).

In the ECtHR's view, **these excessively harsh penalties could have a chilling effect on potential participants or groups who would attempt to organise such events.**

European Court of Human Rights

In the end, the ECtHR emphasized the fact that, **faced with a global health crisis, Switzerland did not take advantage of Article 15 of the Convention, which allowed States Parties to the Convention to take certain measures to derogate from their obligations under the Convention in time of war or other public emergency threatening the life of the nation/society.**

Accordingly, it was required to comply with the Convention under Article 1 thereof and, in the present case, with the requirements of Article 11 of the Convention in respect of the margin of appreciation granted to the respondent State.

European Court of Human Rights

The ECtHR by no means ignores the threat posed by COVID-19 to society and public health. However, it concluded that, in light of the importance of freedom of peaceful assembly in a democratic society, in particular with regard to the themes and values disseminated in accordance with its statute by the applicant association, the general nature and considerable duration of the ban on public events that impeded the activities of the association, and the nature and severity of the possible penalties, the interference with the exercise of the rights protected by Article 11 of the Convention was **not proportionate to the aim pursued**.

European Court of Human Rights

Furthermore, the domestic courts did not effectively review the disputed measures during the relevant period.

Therefore, Switzerland in this case exceeded the margin of appreciation granted to it. The interference was therefore not necessary in a democratic society within the meaning of Article 11 of the Convention and there was a violation of that provision.

European Court of Human Rights

Šeks v. Croatia (No. 39325/20)

The case concerned the applicant's complaint that his request for access to classified presidential archives for research purposes had been rejected on national **security** grounds. In June 2017, the applicant submitted a request to the State Archives for access to 56 documents from the archives of The President's Office for his book on the founding of the Republic of Croatia. These documents were marked "state secret - strictly confidential".

European Court of Human Rights

The President's Office appealed to the National Security Council for declassification. The Council indicated that 31 documents could be declassified, while the declassification of the remaining 25 materials could harm the **independence, integrity, national security and international relations of the state**.

The applicant filed a complaint with the Information Commissioner, an independent body in the field of protection, oversight and enforcement of the right to access information. After verifying the requested documents, the **Ombudsman rejected the applicant's complaint in July 2018**. She agreed with the conclusion that their declassification could harm the national security and international relations of the state, and did not conclude that the executive body was arbitrary.

European Court of Human Rights

It also stressed that the applicant had not explained in his complaint why his interest in access to this information outweighed such important public interests.

The High Administrative Court in October **2018** and the Constitutional Court in March **2020** dismissed the applicant's complaints.

In his application to the ECtHR, the applicant complained that the refusal to declassify the documents constituted a violation of his right to receive information under Article **10** of the Convention. In addition, he pointed to the injustice of the proceedings in his case.

European Court of Human Rights

First of all, the ECtHR noted the applicability of Article 10 of the Convention in the applicant's case. It was convinced that the applicant, a former politician, intended to publish a historical book, exercised the right to disseminate information on a matter of public interest and for this purpose tried to gain access to information.

The parties agreed that the interference with the applicant's freedom of expression was in accordance with the law, namely Article 22 of the Law on Archives and Archival Institutions. The ECtHR agreed that such interference **pursued the legitimate aim of protecting the independence, integrity and security of Croatia and its international relations.**

European Court of Human Rights

In addition, the ECtHR found that the way the applicant's request was assessed by the national authorities was not manifestly wrong or devoid of due process guarantees. In particular, the documents requested by the applicant were thoroughly reviewed/evaluated by the holder (owner) of the information (The President's Office) with the assistance of a specialized advisory body (the National Security Council). To a large extent, the applicant's request for access to the materials was satisfied.

European Court of Human Rights

In addition, the President's decision to refuse to declassify some of the requested materials was reviewed and upheld by the Information Commissioner, the High Administrative Court and the Constitutional Court.

In the end, the ECtHR found no violation of Article 10 of the Convention (freedom of expression), taking into account, in particular, **that in the context of national security, public authorities cannot be required to provide the same detailed justification as, for example, in ordinary civil or administrative cases.**

European Court of Human Rights

Case of Al-Dulimi and Montana Management Inc. v. Switzerland; No. 5809/08

The applicants claimed, in particular, that the confiscation of their property by the Swiss authorities pursuant to the UN Security Council resolution had been carried out without observing the procedure established by Article 6 of the Convention.

European Court of Human Rights

103. The applicants denied that the UN can order states to violate human rights, as it follows from the Preamble to the UN Charter that sanctions must be adopted with due respect for human rights. It is now evident at the level of the UN itself that the targeted sanctions regimes and the corresponding lists of individuals lack basic procedural safeguards, hence the numerous challenges, interventions and statements on this at the national and international levels.

European Court of Human Rights

104. In the applicants' view, the restriction imposed in the present case on their right of access to a court under Article 6 § 1 of the Convention was manifestly disproportionate and therefore not justified. They doubted that the measures taken were necessary for the maintenance of peace.

In their view, Resolution **1483 (2003)** had clearly pursued a legitimate aim from the outset, namely the maintenance of international peace and **security** at a time of genuine threat from the former Iraqi regime.

European Court of Human Rights

Measures such as the temporary freezing of assets or other traditional restrictions like embargoes for a limited period might pass the proportionality test. Otherwise, Resolution **1483 (2003)** had no objective or direct link to the maintenance of peace and **security**.

European Court of Human Rights

105. The applicants emphasized that the confiscation of assets in the present case concerned individuals who had never been charged or brought before any criminal or civil court. In those circumstances, the total denial of their right of access to a judicial remedy could in no event meet the conditions of necessity and proportionality required for restrictions to the fundamental guarantees of the Convention. In that connection, the applicants referred to the reasoning of the Chamber judgment.

107. The Government reiterated the argument that they had submitted in respect of admissibility, to the effect that the State authorities had no room for manoeuvre in implementing Resolution **1483 (2003)**, thus acting as if they were agents of the UN Security Council.

European Court of Human Rights

In that connection they emphasized the absolute and general primacy of the international obligations stemming from the UN Charter over any other obligation under international agreements, pointing out that such primacy was recognized by all States, was clearly and expressly enshrined in Article **103** of the Charter and was confirmed by the case-law of the International Court of Justice and legal opinion.

It was only by respecting that primacy that the Security Council's fundamental role in maintaining peace and **security** in the world could be preserved.

European Court of Human Rights

108. The Government observed that it was erroneous to argue that the obligation to respect fundamental rights prevailed in general over the obligation to enforce Security Council resolutions.

The UN organs had never asked States to examine, in each specific case, whether the implementation of the sanctions was, in their opinion, consonant with human rights protection and the proportionality principle.

The Government drew the Court's attention to Article **46** of the ICCPR, which stated that nothing in that instrument could be interpreted as impairing the provisions of the UN Charter.

European Court of Human Rights

109. In the Government's submission, there was thus a clear conflict in the present case between the obligations created by the Security Council resolutions, on the one hand, and those of the European Convention on Human Rights, on the other. That conflict existed for all UN member States which had ratified the Convention, regardless of whether the State in question had joined the United Nations first or, on the contrary, had ratified the Convention first (like Switzerland).

European Court of Human Rights

The conflict could not be resolved; the situation in the present case was such that it was impossible to reconcile the various obligations by means of a harmonious interpretation. **This position was supported by the Government of the United Kingdom and the French Government (paragraphs 118-125)**

European Court of Human Rights

146. The Court takes account of the nature and purpose of the measures provided for by the Resolution in question, in order to strike a fair balance between the necessity of ensuring respect for human rights and the imperatives of the protection of international peace and security.

153. The Swiss State Government themselves have admitted that the system applicable in the present case, enabling applicants to apply to a “focal point” for the deletion of their names from the Security Council lists, does not afford satisfactory protection.

Access to these procedures could not therefore replace appropriate judicial scrutiny at the level of the respondent State or even partly compensate for the lack of such scrutiny.

European Court of Human Rights

155. Having regard to the foregoing, the Court finds that there has been a violation of Article 6 § 1 of the Convention in the present case (holds, by fifteen votes to two).

159. The Court shares the respondent Government's opinion and finds that there is no causal link between the finding of a violation of Article 6 § 1 and the allegation of pecuniary damage, the existence of such damage remaining for the time purely hypothetical.

Legislation of Ukraine

Law of Ukraine «On sanctions»

In accordance with **Article 1 of the Law of Ukraine "On Sanctions"**, entitled «The sovereign right of Ukraine to protection», in order to protect the national interests, national security, sovereignty and territorial integrity of Ukraine, to counteract terrorist activity, and to prevent violation and restore violated rights, freedoms and lawful interests of the citizens of Ukraine, society and the state, special economic and other restrictive measures may be imposed. The imposition of sanctions shall not exclude the application of other measures for the protection of national interests, national security, sovereignty and territorial integrity of Ukraine, its economic independence, rights, freedoms and legitimate interests of the citizens of Ukraine, society and the state.

The Commercial Code of Ukraine

Article 6. Basic principles of economic activity include, in particular, the principle of **safety of the society and the state**.

Part 3 of Article 18. Government authorities, local governments and their officials shall be prohibited from adopting acts and taking actions that eliminate competition or unreasonably support certain competitors in business activities, or introduce restrictions in the market not envisaged by law. The legislation may provide for certain exceptions to this rule **in order to ensure national security, defence or meet other general public interests**.

The Commercial Code of Ukraine

Part 2 of Article 31. Discrimination of economic entities shall be prohibited.

The legislation may establish exceptions from this Article's provisions **in order to ensure national safety, defence, and meet general public interests.**

Part 5 of Article 116. The law may define economic sectors and/or territories in which the total amount of participation of a foreign investor is established, as well as territories in which the activity of enterprises with foreign investment shall be restricted or prohibited **on the basis of national security requirements.**

The Commercial Code of Ukraine

Part 2 of Article 117. Foreign enterprises shall not be established in industries defined by law that are of **strategic importance for the security of the state**.

Part 4 of Article 394. The law may restrict or prohibit the activities of foreign investors and enterprises with foreign investments in certain sectors of the economy or within certain territories of Ukraine **based on the concerns of the national security of Ukraine**.

Legislation of Ukraine

The Civil Code of Ukraine

Part **6** of Article **313**. The law can establish specific rules of access to certain territories provided the **interests of state security**, protection of public order, life and health of people require them.

Legislation of Canada

The Emergencies Act

The preamble of this Law provides that **the safety and security of the individual and the preservation of the sovereignty, security and territorial integrity of the state are fundamental obligations of government;**
and whereas the fulfilment of those obligations in Canada may be seriously threatened by a national emergency and, in order to ensure safety and security during such an emergency, the Governor in Council **should be authorized, subject to the supervision of Parliament, to take special temporary measures that may not be appropriate in normal times;**

The Emergencies Act

The Governor in Council, in taking such special temporary measures, would be subject to the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights* and must have regard to the *International Covenant on Civil and Political Rights*, **particularly with respect to those fundamental rights that are not to be limited or abridged even in a national emergency.**

The Emergencies Act

For the purposes of this Act, a **national emergency** is an urgent and critical situation of a temporary nature that

- (a) seriously endangers the lives, health or safety of Canadians and is of such proportions or nature as to exceed the capacity or authority of a province to deal with it, or
- (b) seriously threatens the ability of the Government of Canada to preserve the sovereignty, **security** and territorial integrity of Canada
- (c) and that cannot be effectively dealt with under any other law of Canada.

CONCLUSION

- National security is a complex concept that encompasses the state of peaceful and stable existence of the state and its institutions, as well as the state of absence of real existential threats in the sphere of social, administrative and interstate relations, in which it is impossible to legislatively regulate all the characteristics (definitions) of possible challenges to the state in a specific period of time.

- A threat to national security means, in particular, the existence of risks to the state sovereignty, constitutional order and territorial integrity of the country, which may lead to the cessation of the existence of the country or a part of it.
- National interests are the right of each state to preserve and obtain certain, primarily economic, benefits in international trade..
- It is a great crime on an international scale to substitute the concept of "protection of national security" with the intention to secure exclusively national interests.

- National interests may compete with global interests, which should be prioritized (protecting the environment, preventing global warming and other cataclysms, as well as pandemics, combating unequal distribution of wealth, controlling migration, exercising control over the proliferation of weapons, combating terrorism and genocide, preventing any manifestations of discrimination and hatred).

- Decisions of public authorities based on the principle of priority of national security:
 - ✓ should be taken immediately (promptly);
 - ✓ should provide for the involvement of several subjects and/or the adoption of such decisions by a collegial body;
 - ✓ should be adopted in secrecy;
 - ✓ should be single exceptions to the rule;
 - ✓ should not give rise to the lack of control and/or impunity;
 - ✓ should be subject to judicial control within the framework defined by law.

- Application of the principle of national security priority in certain cases is a legal basis for interference and/or restriction of
 - ✓ property rights;
 - ✓ the right to privacy;
 - ✓ right to access to information;
 - ✓ freedom of speech.

- This principle may also act as a criteria for the legitimacy of certain deviations from the general rules (approaches) relating to the application of the law in time, compliance with the principle of legality, the principles of competitiveness and equality of participants in the judicial process, the binding nature of the court decision, and may also limit the freedom of judicial discretion

- The safeguards against arbitrary use of the principle of national security priority by public authorities to make arbitrary decisions include the following:
- ✓ guarantee of the right of a person to effective judicial protection;
 - ✓ an effective system of checks and balances in the state power system,
 - ✓ the existence of a well-developed civil society,
 - ✓ integration of the state into the international community,
 - ✓ high level of legal culture among the population,
 - ✓ regular democratic elections,
 - ✓ the work of independent mass media.

- The main criteria (principles, measures) for determining the legitimacy of the application of the principle of national security for decision-making by the subjects of power may include the following:
 - ✓ justice (morality),
 - ✓ humanity,
 - ✓ proportionality,
 - ✓ existence of a legitimate goal,
 - ✓ lack of alternatives.

- The decision of the authority based on the principle of national security priority, should immediately provide for the formation of a compensation mechanism if such a decision in the future turns out to be erroneous (unlawful).

➤ According to the already established practice of the Grand Chamber of the Supreme Court, the reasonable grounds for deviation from the already established legal position of the Supreme Court are as follows:

- 1) change in legislation;
- 2) adoption of the decision of the Constitutional Court of Ukraine;
- 3) ambiguity of the law (inconsistency with the criterion "quality of the law");
- 4) ECHR judgment, which should be taken into account by national courts;
- 5) changes in legal understanding due to the expansion of the scope of application of a certain principle; changes in doctrinal approaches to solving complex issues in certain areas of social and administrative relations;
- 6) **threats to national security** and changes in the financial capacity of the state.

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Supreme
Court

Thank you for your attention!