

# JUDICIARY AND LEGAL PROCEEDINGS UNDER MARTIAL LAW

## PROCESSOS JUDICIÁRIOS E LEGAIS SOB LEI MARCIAL

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**Received:** 16 May 2023

**Accepted:** 05 Aug 2023

**Published:** 16 Aug 2023

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**Abstract:** The article is devoted to the topical issues of the influence of the legal regime of martial law in Ukraine on the judiciary and legal proceedings in the country. The issues related to the organization of the judicial system, the conduct of trials and the provision of justice during martial law are considered. The challenges faced by courts during hostilities are analyzed, including those that negatively affect the limitation of guarantees of justice, the speed of court processings, the protection of human rights and freedoms, etc. With the aim of forming promising ways of improving the implementation of the judicial process in the conditions of martial law, the experience of countries that faced martial law throughout their history was studied. Various models of judiciary are highlighted, which can be used to ensure the right to a fair trial and the effective functioning of the system of legal proceedings in wartime. Attention is drawn to the need to ensure the independence of the judicial system, compliance with the principle of justice and equality of all before the law, even under martial law.

**Keywords:** Legal proceedings. Judiciary. Martial law. Legal regime. Restriction of civil liberties. Speed of court proceedings. Rule of law.

**Resumo:** O artigo é dedicado às questões atuais da influência do regime legal da lei marcial na Ucrânia no judiciário e nos procedimentos legais do país. São consideradas as questões relacionadas com a organização do sistema judicial, a condução dos julgamentos e a prestação de justiça durante a lei marcial. São analisados os desafios enfrentados pelos tribunais durante as hostilidades, incluindo aqueles que afetam negativamente a limitação das garantias de justiça, a celeridade dos processos judiciais, a proteção dos direitos humanos e das liberdades, etc. o processo judicial nas condições de lei marcial, a experiência de países que enfrentaram a lei marcial ao longo de sua história foi estudada. São destacados vários modelos de judiciário, que podem ser utilizados para garantir o direito a um julgamento justo e o funcionamento efetivo do sistema de processos judiciais em tempo de guerra. Chama-se a

atenção para a necessidade de garantir a independência do sistema judicial, o cumprimento do princípio da justiça e da igualdade de todos perante a lei, mesmo em regime de estado de sítio.

**Palavras-chave:** Processos judiciais. Judiciário. Lei marcial. Regime legal. Restrição de liberdades civis. Celeridade dos processos judiciais. Estado de direito.

## 1. Introduction

Ensuring the national interests and security of the state requires a constant process of searching for and improving strategic management in the field of combating crime, especially in the context of the Russian-Ukrainian war. Nowadays, the activities of the national law enforcement sector are closely linked to the implementation of European standards in the field of crime prevention, so there is an urgent need to adopt the best international experience in combating crime (Ablamskyi, Koniushenko, 2023). Modern Ukrainian judiciary is based on adversarial principles and typologically belongs to the public-adversarial type of judicial process, aimed at maintaining the balance of private and public interests, which is achieved with the goal of establishing the objective truth under the inviolability of the presumption of innocence. Competitiveness serves as the driving force of the judicial process of learning the objective truth, a method of researching evidence, a way for subjects to prove their procedural functions, a means of establishing facts and circumstances that are important for court proceedings. The legislative guarantee of ensuring the balance of private and public interests in the judicial proceedings should be established along with the adversarial nature of the principle of official investigation by the court of all the circumstances in the case, which means its obligation to take the measures required by law to clarify all the circumstances in the case, in particular regarding the conduct of procedural actions for the purpose of obtaining and examining evidence on its own initiative. In the conditions of martial law, these issues become especially important. First of all, this is due to the fact that martial law conditions have a serious impact on all spheres of society, including judiciary and legal proceedings, as they require a quick and effective response from law enforcement agencies and the judicial system. However, there are a number of difficulties and problems that arise in connection with the functioning of courts under martial law, one of which is to ensure the principle of justice and independence of the court.

Martial law can create an environment in which the authorities can use the courts to exert political pressure or interfere with the fair trial process, which can lead to violations of citizens' rights and undermine confidence in the judicial system as a whole. Prompt and fair trial of cases, ensuring the safety of judges and execution of court decisions under martial law is a difficult task. Inadequate training of judges to work in the conditions of a military conflict has the effect of

prolonging court processes and inefficiency of the judiciary. Therefore, the judicial system faces the task of ensuring justice, independence and efficiency of the judiciary under martial law. Understanding these problems and finding rational solutions can contribute to the further development of the judicial system in crisis situations.

## **2. Purpose and Objectives of the study**

The purpose of this article is to study the peculiarities of the practical functioning of the state's judicial system in the conditions of martial law, as well as to determine the key dangers that occur in the judicial system during the period under study.

The following tasks are aimed at achieving the above-mentioned goal: understanding the essence of the legal regime of martial law; research of the views of leading researchers by direction; provision of specific recommendations regarding the preservation and improvement of the independence and efficiency of the judiciary in the state under the conditions of the legal regime of martial law.

## **3. Results and Discussion**

Everyone is born equal and expects to be treated similarly before the law in cases involving criminal activity and other obligations (Sokurenko, Morhunov, Ablamskyi, 2023). Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms guarantees everyone the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which shall determine the rights and obligations of a civil nature or the validity of any criminal charge against him. At the same time, the question arises as to how to comply with these requirements, since judiciary and legal proceedings undergo certain transformations under martial law. Moreover, there is currently no completely safe place in Ukraine, and sirens sound almost every day in every part of our country, which in turn requires a person (judge, party to a case or court employee) to move to a shelter.

Crime commission is an unavoidable singularity in any given and documented society functioning under the umbrella of established rules and regulations (Nguindip, Mohilevskyi, Ablamskyi, 2021). There is no instance in a given society that can successfully operate and function without respecting existing standards and principles set in place in ensuring the respect of fundamental human rights and dignity. The only way the rule of law can be respected during the

investigative stage, will only when those responsible for investigation respects the due process of the law in the course of its investigation so that them act should not contravene the right of the suspect or accused in question (Nguindip, Mohilevskiy, Ablamskiy, Kuzubova, 2021).

Please note that on 03.03.2022, the Verkhovna Rada of Ukraine adopted the Law of Ukraine "On Amendments to the Law of Ukraine "On the Judiciary and the Status of Judges", which provides that in connection with a natural disaster, military operations, measures to combat terrorism or other extraordinary circumstances, the work of the court may be suspended with the simultaneous determination of another court that will administer justice on the territory of the court that has ceased operations and which is most geographically close to the court which work has been suspended.

The current Law of Ukraine No. 389-VIII "On the legal regime of martial law" (May 12, 2015) states that martial law is a special legal regime that is introduced in the state in the event of a threat to national security or in the event of war. Martial law often includes orders and restrictions that affect the rights and freedoms of citizens, including justice. At the same time, in connection with the full-scale invasion of Russia on the territory of Ukraine, which took place on February 24, 2022, the President of Ukraine issued the Decree No. 64/2022 "On the imposition of martial law in Ukraine" (February 24, 2022). Since that time, state bodies and officials have been forced to work in conceptually new conditions, because the occupation of certain territories, constant active hostilities have led to the destruction of the buildings of state bodies, due to which officials are forced to work in other places. Of course, such a situation has also developed in the judicial system, which cannot have a positive effect on the implementation of an effective judicial process. Therefore, as K. Chernilevska (2022, p. 5) rightly points out, the conditions of martial law can have specific types of influence on judiciary and legal proceedings. In particular, martial law may provide for the creation of special military courts or commissions to consider war crimes or violations of military law. These bodies have broader powers than civilian courts to ensure an effective judicial process in wartime. The conditions of this specific legal regime, as well as objective security challenges, in particular the need to relocate certain courts to other regions, may lead to an increase in the government's control over the judicial system. Such increased control endangers the independence of courts and the principle of separation of powers.

Martial law may require expedited processing of cases, especially if the cases involve war crimes or collaborative activities. This manifests itself in the violation of the right to a reasonable period of legal proceedings and leads to a reduction in the guarantees of defense rights. Martial law conditions can also lead to temporary restrictions on the rights and freedoms of citizens. As

we can see, judiciary and legal proceedings in the conditions of martial law may undergo certain changes, because martial law is established in the country in the event of a threat to national security or in the event of armed aggression. In wartime, there is the possibility of introducing special military courts or special courts that deal with war crimes and violations of discipline in the armed forces. These courts may have special powers and procedures. According to T. Tyshchenko (2022, p. 33), with whose statement we agree, martial law can lead to restrictions on some basic rights and freedoms of citizens, such as the right to freedom of movement, freedom of speech, right to privacy, etc. These restrictions are also expected to affect the judicial process.

According to Ye. Liezin (2018, p. 29), courts in martial law can take measures to speed up the judicial process. This means shortening the terms of consideration of cases, the introduction of simplified procedures and the use of temporary judges. Also, in wartime, the publicity of court hearings may be limited, which applies to both military and civilian courts. In addition, during the war period, various special rules of evidence may be established, which take into account the specifics of military operations and the needs of ensuring national security. In some cases, such as war crimes or infractions of discipline in the armed forces, there may be rules under which certain facts or statements are assumed to be true without the need for further proof.

According to A. Voropaieva (2022, p. 73), under martial law, rules can be introduced that allow courts to access confidential information, such as state secrets in the field of defense, and use it in evidence. This includes sensitive data from intelligence activities or security investigations. The researcher rightly claims that special time limits can be set for consideration of cases under martial law. Courts consider cases more quickly, as time is of the essence in martial law. At the same time, special military experts can be involved, who provide their opinions on military issues or expert issues related to martial law. Their opinions will be of decisive importance during the trial due to the high influence of their professional and expert opinion on the judge's decision.

Prolonging martial law can have serious negative consequences for civil justice. For example, this will lead to a serious and long-term limitation of the rights and freedoms of citizens. Martial law is usually accompanied by restrictions on freedom of speech, assembly, free movement and other public rights. This may lead to violation of constitutional guarantees and fundamental rights of citizens. Therefore, under martial law, courts may be subject to military control or subordinated to military authorities, which will deprive people of access to a fair and independent judicial process.

N. Mykoliuk (2022, p. 72) draws attention to the fact that prolonging martial law creates favorable conditions for abuse of power. Government or military authorities can use their powers

to suppress opposition, political opponents or dissenting citizens. This carries the risk of systematic violation of human rights and escalation of the conflict. Also, it is often accompanied by hostilities and can lead to violations of humanitarian law, such as unjustified arrests, violence against civilians, robbery and looting of property.

Martial law can lead to serious economic and social disruption. The prolongation of the conflict will affect the reduction of production, the destruction of infrastructure, mass forced displacement of the population and the threat of famine. This will have long-lasting consequences for society and the country's economy. Thus, in our opinion, all these factors emphasize the importance of martial law being a temporary measure that is used only in critical circumstances for the state, with respect for human rights and legal guarantees. Moreover, we should be aware of the fact that the court does not accuse or defend anyone, it carries out knowledge of facts and circumstances significant for criminal proceedings. Its activity is aimed at maintaining the balance of public and private interests in order to ensure the legitimacy of state power, including legality and society's attitude to the judiciary. It is clear that any procedural action in the end may prove useful to one party and contradict the interests of the other. However, when the parties discuss the issue of conducting a judicial action of a cognitive nature, the court does not know and cannot know in advance its results. It can foresee, but cannot influence the consequences of investigative experiments, expert studies, court interrogations, etc. initiated by it. Some of the circumstances stated in the indictment, as a result of additional verification, may turn out to be unreliable, which will ease the situation of the accused, and some will be revealed in a new light, which may worsen his situation. However, for the court there is no evidence of the prosecution or evidence of the defense, in the situation of making a decision regarding the conduct of a certain legal action, it is not and by definition cannot be in a state of tactical risk, it does not care what its result will be, as long as it contributes to the establishment of the actual circumstances of the event under investigation. Therefore, a very important aspect is the implementation of judicial control over the observance of the rights, freedoms and legitimate interests of a person, in particular during martial law.

### ***The experience of foreign countries regarding the improvement of judiciary under martial law***

In history, there are examples of countries that maintained the independence of their judicial system even during the war. One of the most famous examples is Sweden during World

War II. The Swedish judicial system continued to work independently even under German occupation. Judges made their decisions in accordance with Swedish legislation and maintained independence in their decisions (Zemlytska, 2015, p. 68).

Another example is Switzerland. The Swiss judicial system has maintained its independence throughout many conflicts and wars in its history. Switzerland is known for its neutrality and increased attention to the protection of human rights, so its judicial system has always tried to maintain independence even during war.

During the American Civil War (1861-1865), the US federal judicial system continued to operate and maintained its independence from the warring parties. Despite the hardships of the war, the courts continued to consider cases and make decisions.

During World War I (1914-1918) and World War II (1939-1945), Canada's judicial system maintained its independence. Courts continued to perform their function, considering cases and protecting the rights of citizens. Even during World War II, when the Netherlands was occupied by Nazi forces, the country's judicial system continued to function. Although independence was limited, courts conducted trials in accordance with national laws.

Throughout its history, Israel has experienced many wars and conflicts, but the judicial system has remained independent. Israel's Supreme Court and lower courts continued to exercise their functions and decide cases in accordance with the law. These examples show that while military conflict can pose challenges to the judicial system, some countries have managed to preserve the independence of their courts and continue to ensure justice even in difficult circumstances.

However, it is worth noting the statement that not all countries managed to preserve the actual independence of the judicial system from the top leadership of the state during the war.

In 2016, after a failed military coup attempt, Turkish President Recep Tayyip Erdogan declared martial law. During this period, the authorities carried out mass arrests of judges, prosecutors and other members of the judiciary. A decision was made at the legislative level to change the composition and structure of the courts, which led to a significant weakening of the independence of the courts in the country.

In 2002, Zimbabwean President Robert Mugabe declared martial law during presidential elections. During this period, the authorities suppressed opposition by force and restricted civil liberties. The courts were used for political persecution and changing the balance of political power in the country. After the presidential elections in 2020, in which Lukashenko was again declared the winner, martial law was declared in Belarus. Many opposition leaders, journalists and activists

were arrested during this period. The courts have been used for political repression and to limit the independence of the judicial system.

During the war in Chechnya (1994-1996, 1999-2009), martial law was used to suppress civil liberties and control the judicial system. Cases of human rights violations, fabricated trials, and ill-treatment of prisoners have been documented.

During the war and internal conflicts in Myanmar (formerly known as Burma), the state leadership used martial law to suppress opposition and violate human rights. Martial law facilitated illegal arrests, torture and other forms of ill-treatment.

These examples, as noted by researchers D. Serkhovets and S. Khara (2019, p. 192), show that the political leadership of states can use the martial law regime as a means to suppress the independence of courts and limit civil liberties. However, we note that the leadership and power elites of the state should be interested in preserving the independence of the judicial system, because this independence is of great importance for the qualitative provision of stable development and preservation of the harmonious well-being of the country.

The independence of the judicial system is one of the main principles of the separation of powers in a democratic country. The leadership of the state must ensure a balance of power to avoid abuse and ensure that each branch of government performs its functions independently of the others. An independent judicial system helps prevent concentration of power and ensures control over actions and decisions at the highest political level. It is a common and established principle that, during the pre-trial process, it is the position of those ensuring justice in making sure that the life of persons is respected and safeguarded. In accordance with the national legislation of Ukraine, judicial control is a separate function of the court's activities at the stage of pre-trial investigation, directly carried out by the investigating judge. The situation will become precarious and detrimental when the private life of persons is not respected to the fullest. Therefore, it is the responsibility of those ensuring public order during the pre-trial investigation phase in ensuring the respect of the private life of the presumed suspect for the proper implementation of the justice process. In ensuring this right, it is established that the empirical and analytical methods of research are necessary in order to show the effective role played by the European Court of Human Rights in respecting the right to private life during the interrogative phase of inquiry (Galagan, Ablamskyi, Udoenko, Ablamska, 2021). The investigator is required to comply with the procedure for investigative actions prescribed by the provisions of the CPC of Ukraine in order to ensure human rights and freedoms (Ablamskyi, Havryliuk, Drozd, Nenia, 2021). An independent judicial system is a guarantor of the protection of the rights and freedoms

of citizens against possible abuses of power or other persons. This includes the right to a fair trial, equality before the law, protection from arbitrariness and non-discrimination. The leadership of the state must support the independence of the courts to ensure justice and give citizens faith in justice (Stefanchuk, 2020, p. 48).

Preserving the independence of the judicial system contributes to increasing public trust in justice. If the courts are perceived as independent and not subject to political influence, citizens have more faith in the results of judicial processes and respect the laws. This contributes to stability, the development of democracy and the recognition of the state as a legal one.

An independent judicial system is an important element of a favorable investment climate. Businesses and foreign investors are looking for guarantees that their rights and interests will be protected in court, regardless of political and corrupt influences. The independence of the judicial system increases the level of legal stability and contributes to the economic development of the country. Therefore, preserving the independence of the judicial system is a key task for the state leadership, as it guarantees the separation of powers, protection of citizens' rights, increases public trust in state institutions and contributes to the stability and development of the country. And while we fully understand that maintaining the independence of the judiciary during martial law may present additional challenges and limitations, we argue that there are several strategies that a state can adopt to preserve the values of judicial independence, even under such circumstances.

The state can pay special attention to strengthening the independence of the judicial system at the constitutional level. This may include ensuring the stability of the judicial system and guaranteeing the independence of judges in decision-making. The state leadership should introduce bans on any interference by the executive or legislative power in the work of the court and ensure the financial independence of the courts.

We emphasize the fundamental necessity in the conditions of martial law to ensure a sufficient budget for the courts, preserve the autonomy in the management of the courts and ensure the independence of judges from external pressure. An independent judicial system must guarantee citizens' access to judicial protection, even during martial law. The state can take measures to maintain unhindered access to court, including by ensuring the right to a lawyer and ensuring equal protection for all citizens. We are convinced that ensuring the protection of human rights, including the right to a fair trial, should be a priority for the state under martial law. Compliance with international standards in the field of human rights protection should be a priority regardless of the security situation.

International organizations, such as the UN, can monitor the state of the judicial system during martial law, which will provide additional oversight of judicial independence and human rights. The safety of judges and their independence from any pressure must be properly ensured. It is important to involve the public in monitoring the judicial system. This can be done through independent civil society organizations, human rights organizations and mass media that defend the independence of the courts and highlight any violations. Maintaining the independence of the judiciary during martial law is a difficult task, but it is fundamentally important to ensure the rule of law and justice. In our opinion, the state should pay special attention to this issue and take all necessary measures to preserve the independence of the judicial system under martial law.

#### **4. Conclusions**

Thus, summing up all the scientific views we have given, forming our author's position based on them, we note that martial law is a special legal regime that is introduced in the state in the event of a threat to national security or in the event of war. Martial law often includes orders and restrictions that affect the rights and freedoms of citizens, including the sphere of justice. Martial law can lead to restrictions on some basic rights and freedoms of citizens, such as the right to freedom of movement, freedom of expression, right to privacy, etc. These restrictions may also affect the judicial process.

Taking into account the specified limitations, we have established that the prolongation of the martial law regime may have serious negative consequences for the judiciary. For example, this will lead to a serious and long-term limitation of the rights and freedoms of citizens. Martial law is usually accompanied by restrictions on freedom of speech, assembly, free movement and other civil rights. This will result in the violation of constitutional guarantees and basic rights of citizens.

Considering the fact that an independent judiciary is one of the main principles of the separation of powers in a democratic country, the state leadership must ensure a balance of power to avoid abuse and that each branch of government performs its functions independently of the others. An independent judicial system helps prevent the concentration of power and ensures control over the actions and decisions of the government.

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