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Aspects of implementation of the law enforcement function of the state under the legal regime of martial law in Ukraine

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Abstract

The aim of the article was to analyze the main scientific and practical provisions with respect to the aspects of ensuring the implementation of the law enforcement function of the state under the legal regime of martial law in Ukraine. The object of the analysis were the social relations arising in the sphere of its implementation under the legal regime of martial law. The diversity of the posed object of research gave rise to the use of a wide range of methods, namely: analysis, logical, generalization, interpretation, system and structural, comparative and legal method. It was concluded that the most essential mechanism for the functioning of complicated legal regimes for the state is the provision of human and citizens' rights and freedoms (performance of law enforcement functions) regardless of varying circumstances, situations and factors. In practical terms, the rights violated as a result of the martial law regime must be restored by the state, which includes a set of relevant actions and means. The implementation aspects of the State's law enforcement function are defined as the main vectors that are grouped according to common characteristics.

Keywords: State functions; law enforcement; martial law; rights and freedoms; war in Ukraine.

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Aspectos de la implementación de la función de aplicación de la ley del Estado bajo las condiciones del régimen legal de la ley marcial en Ucrania

Resumen

El objetivo del artículo fue analizar las principales disposiciones científicas y prácticas con respecto a los aspectos de garantizar la implementación de la función de aplicación de la ley del Estado, bajo el régimen legal de la ley marcial en Ucrania. El objeto del análisis fueron las relaciones sociales que surgen en el ámbito de su implementación bajo el régimen legal de la ley marcial. La diversidad del objeto de investigación planteado dio pie a la utilización de una amplia gama de métodos, a saber: análisis, lógico, generalización, interpretación, sistema y método estructural, comparativo y jurídico. Se concluyó que el mecanismo más esencial para el funcionamiento de los regímenes jurídicos complicados para el Estado es la provisión de los derechos y libertades humanos y ciudadanos (desempeño de las funciones de aplicación de la ley) independientemente de las circunstancias, situaciones y factores variables. En términos prácticos, los derechos vulnerados como consecuencia del régimen de ley marcial deben ser restituidos por el Estado, lo que incluye un conjunto de acciones y medios pertinentes. Los aspectos de implementación de la función de aplicación de la ley del Estado se definen como los principales vectores que se agrupan de acuerdo con características comunes.

Palabras clave: funciones del Estado; aplicación de la ley; ley marcial; derechos y libertades; guerra en Ucrania.

Introduction

The rights and freedoms of a person and citizen in Ukraine and the world are the important indicators that provide a reference point in the activities of the State. Ensuring them is one of the main tasks of all State institutions without exception, which in turn belongs to one aspect and literally permeates the institution of law enforcement in the system of State functions. However, the invasion of the Russian Federation on the territory of Ukraine changed both the world order and the state of protection of the rights of individuals on the territory of Ukraine (Prytuliak *et al.*, 2022).

The introduction of martial law is reflected in the provision of constitutional human rights under martial law conditions (Panasiuk *et al.*, 2022). That is why the law enforcement function of the State, the procedure for its implementation and the main vectors (directions) are almost the most important and relevant in the conditions of a large-scale military invasion of Ukraine by Russian troops.

The content and essence of the concept of the law enforcement function has been studied by many scientists and scholars; it is fragmentarily highlighted in a number of regulatory and organizational and administrative acts, but some aspects of its implementation, especially during the operation of the legal regime of martial law, remain neglected.

The legal regime of martial law, its administrative essence, fundamentally changes the work algorithms of State authorities and, accordingly, dynamizes and globalizes law enforcement processes in general. In such circumstances the risk of significant violation of the citizens's liberties remains extremely high.

The Office of the United Nations High Commissioner for Human Rights also notes this in a declarative format, emphasizing that during the investigation of the circumstances and events related to the beginning of the Russian invasion of Ukraine at the end of February and in March 2022 in Kyiv, in the Chernihiv, Kharkiv and Sumy regions, the use of explosive weapons with a wide range of action in populated areas was recorded, causing 1,495 deaths and injuries in these four regions alone during the reporting period, which represents 70% of the civilians killed and harmed in these areas and the damage or destruction of thousands of residential buildings, schools, hospitals and basic infrastructure facilities (Korotkyi 2022).

The above, as well as the absence of standardized and thoroughly developed scientific works on the issues of determining aspects of the law enforcement function of the State, which in the general legal sense create prerequisites for fragmented implementation by specially authorized subjects of various law enforcement branches, necessitate the need for research in the indicated direction.

1. Methodology

The outlined object of research gives grounds for the use of a wide methodological toolkit. Thus, the authors used the method of analysis, which made it possible to establish the basic views on law enforcement as a function of the State mechanism, which should be implemented in any, including complicated conditions (for example, during martial law), as a basic theoretical legal category.

Logical method was applied in the context of the need to structure important State processes and functions assigned to it, made it possible to consistently investigate all the necessary processes, draw scientifically based and accessible conclusions.

The generalization method revealed the prospects for composition and logically correctly presentation of the text, which should clearly convey to the reader the scientific opinion and position held by the authors, and also allowed, as a result of the application of other methods, to complementarily present the proposals based on the results of the discussion.

The method of interpretation in the legal sense was used to clarify the legal content of legal instruments regulating the implementation of the law enforcement function of the State and, in fact, the operation of the legal regime of martial law in Ukraine.

The system-structural method, as one of the forms of analysis of legal validity, allowed to combine all the information obtained in relation to the object of research and to present it consistently, logically and in an orderly manner.

The comparative legal method was applied in the context of making analogies and parallels in the interpretation of aspects of the law enforcement function of the State under the legal regime of martial law in Ukraine and in other countries.

2. Literature Review

It should be noted that a number of researchers analyzed the problematic issues of implementing the law enforcement function of the State and its aspects. For example, Vakarova (2019) drew attention to the issue of constitutional and legal status of law enforcement agencies, which, in our opinion, is an element of ensuring certain aspects of the law enforcement function of the State, and needs to be used in our research.

Bilas (2016) also paid considerable scientific attention to the issues of law enforcement activities of the European Union countries, proposing to incorporate the relevant experience into the activities of Ukraine.

Mamchur (2019) in her scientific research thoroughly characterized the law enforcement function of the state and noted the presence of significant shortcomings.

Shay (2012) studied the issues related to the theoretical and legal understanding of the law enforcement function of the legal State (its theoretical and practical aspects).

However, a prominent place is occupied by the work by Bezpalova (2014), who examined the issues related to the administrative and legal mechanism of implementing the law enforcement function of the state at the doctoral dissertation level.

At the same time, the effect of the legal regime of martial law in Ukraine significantly complicated the functioning of the State apparatus and caused the need for additional scientific study of the law enforcement function of the State in wartime conditions. Another important argument for the need to research this topic is that Ukraine, having chosen the course of European integration and received the status of a candidate for the European Union membership, took democracy and law and order as the formats and concept of life of the entire society, which, in turn, requires systematic provision of effective functioning of all State institutions and the State as an entity in general.

3. Results and discussion

First of all, the issue of the conceptual-categorical relationship, which is currently used in the scientific article, needs to be clarified, since, depending on the content of the basic principles, it is possible to substantiate logical conclusions. The essence of the term of «function» can be established by means of lexical and legal analysis of the corresponding definition, since the content of its main features is laid down in this way. “Functio”, from Latin, literally means the performance of something, some activity; it serves to determine the role of a separate part in the general system of a certain phenomenon.

Khamula (2013) emphasizes that in the theory and philosophy of law, as well as the history of the State, the use of this term in the national sense and through the prism of law enforcement as a socio-political phenomenon, the general structure is personified by the State as the main subject of ensuring human and citizen’s rights and freedoms, and law enforcement agencies act as tools for achieving the outlined. That is, the function of the State in the context of law enforcement is a regulatory obligation, which is implemented with the help of a certain authority (or specifically authorized service).

Besides, one should pay attention to the fact that there is a certain terminological inconsistency with the interpretation of the very phenomenon of «protection» and «defense» of law. For example, Parshak (2014) justifies that they differ because their content and essence direct their main characteristics to achieve different goals and in various ways. For example, the author emphasizes that protection is aimed at preventing violations of rights, while their defense is performed during the actual breach of rights, the threat of it, or when preventing their implementation. This means that the categories cannot be equated, since «rights protection» in the legal sense means a static state of legal norms aimed directly at preventing rights violations.

Thus, we should note that through the prism of legal statehood, the prerequisites for the implementation of the law enforcement function of the State are those principles and fundamental categories that make it impossible to violate and even attempts or the emergence of tendencies to encroach on other people's rights.

Since the most characteristic features of modern civilization are the rule of law, the priority of public interests and the supremacy of human rights in general – the issue of implementing the law enforcement function of the state is quite acute. Law enforcement activity, the organization of which is entrusted to the State as the central institution in the legal relations of society, involves the use of force and coercion, which are actually forms (tools) of the State law enforcement mechanism, which can be implemented only by the authorities.

Since the state authorities, their officials are obliged to act exclusively within the limits and in the manner provided for by the legislation of Ukraine, specifically coercion and force (as forms of ensuring the implementation of the law enforcement function of the State) must be clearly regulated within outlined limits and correspond to the principles of legality and proportionality of the damage caused and the averted offense; in addition, such activity cannot be carried out by anyone, but only by the authorized actors.

When referring to the concept of «law enforcement function of the State», it should be noted that the scientists put different meanings into it, which can negatively affect the further study of this phenomenon in synergy with the essence and content of the legal regime of martial law. That is why it is suggested to describe it briefly.

Thus, it is an independent and priority direction of the State policy, which is carried out with the help of legal means to achieve a certain social effect, such as the protection of law in general, the foundations of the constitutional system, including rights, freedoms and legitimate interests of an individual, strengthening legality and law and order, and at the same time acts as a legal form of achieving other goals of society and the country.

Thus, the corresponding phenomenon has a clear direction – the protection of laws and interests of a person by all legal instruments and means available, as well as the expansion of the number and pluralization of their forms, taking into account the development of society and civilizational assets.

Some researchers draw attention to the fact that the law enforcement function of the State is a tool and direction of exclusively internal State activity, which is designed to ensure the prevention of violations of all social relations established and regulated by law (Moskovets, 2011). In our opinion, this interpretation can be considered only in a narrow understanding (in

the work of a separate sectoral law enforcement institution), since the activity of Ukraine, as the actor of international humanitarian law, also extends its boundaries to the protection of citizens, including abroad, as well as the prosecution of persons who have committed offenses, including on international level.

As a rule, researchers distinguish the following sub-functions among the internal elements of the law enforcement function of the State: protection of the constitutional order; protection of human rights and freedoms; property protection; protection of public order; protection of natural resources and environment; fight against crime (Buhaichuk 2017).

At the same time, such a view should be based on the classification criteria, since, for example, the above classification is more than applicable (even practically oriented) in terms of the scope of law enforcement, and through the prism of the characteristics of the tools of achievement, it can be a set of the list of measures of persuasion and coercion enshrined in the legislation.

A number of scientists justify the position that the types of law enforcement functions of the State can be: restrictive, proactive, preventive, resocialization, etc., which in turn can also be considered as structural elements of the corresponding theoretical and legal category.

However, since we have outlined the aspects of this term as a dynamic element of social and legal structure of society, which will allow us to characterize the relevant phenomenon through the prism of risks and threats of systematic violation of human and citizen rights and freedoms under the legal regime of martial law in Ukraine, it is proposed to provide their meaningful characteristics by outlining the content and differences.

Thus, relying on the position by Kritcak (2009), which, in our opinion, should become the main one in the issue of defining aspects of the law enforcement function of the State, the following targeted programs for its implementation will be distinguished in jurisprudence: prevention of individual violations of public order that may occur; termination of current violations of public order; general deterrence of potential violations of public order in the future; restoration of public order after it has been violated; correction of behavior that causes a violation of public order; rehabilitation of victims of public order violations; restoration in a broader social sense in order to eliminate conditions that may cause violation of public order.

By accepting this interpretation, we state that without a meaningful characterization of the essence and circumstances created by the legal regime of martial law in Ukraine, it will be impossible to unify the relevant aspects.

The aggression of the Russian Federation against Ukraine, first of all, had a significant negative impact on the observance of the rights of every person and citizen living not only on the territory of Ukraine, but also throughout the world, since it provoked a commodity crisis, the impossibility of maintaining Ukraine's grain turnover; the usual level of migration of the world's population, tourist routes and other civilized aspects of the functioning of society are at risk.

First of all, through the prism of people-centrism, the freedoms of an individual are under threat, since the cruel atrocities of the Russian invaders, who illegally started hostilities on the territory of peaceful Ukraine, negatively (and in some places destructively) affect the observance of the institutions of laws in general, the possibility of State provision of social and individual benefits.

At the same time, the legislation of most countries of the world contains an indication of a special legal structure that would grant additional rights to the public administration in cases when the State is faced with unforeseen situations that make the normal functioning of society impossible, overcoming which requires the mobilization of all available resources – the so-called emergency regimes or martial law regimes state (Slavko, 2016).

The legislation of Ukraine defines that martial law is a special legal regime introduced in Ukraine or in some of its localities in the event of armed aggression or threat of attack, danger to the independence of Ukraine, its territorial integrity, and grants the relevant State agencies, military command and administrations and local self-government bodies of authorities necessary to avert the threat, repulse armed aggression and ensure national security, eliminate the threat of danger to the State, its territorial integrity, as well as temporary restriction of the constitutional rights and freedoms of a person and citizen and the laws and interests of legal entities resulting from the threat with an indication of the period of validity of these restrictions (Law No. 389-VIII, 2015).

Thus, the legal regime of martial law is the introduction of the series of measures aimed at ensuring the prevention of violation of the liberties of a person and a citizen under significant threat in the manner of consolidation of all State law enforcement institutions and providing them with tools to achieve the goals of establishing law and order and protecting the population.

Kyrychenko *et al.*, (2019), analyzing the relevant direction, draw attention to the fact that under the introduction of martial law, the task of ensuring the rights and freedoms of a person and a citizen acquires special importance. Clearly, when the normal functioning of the State and society becomes impossible, individual interests are subject to certain restrictions.

Precisely because any State activity is directed and regulated by the legislation of Ukraine, its individual norms directly «determine the rules», even in matters of narrowing the limits of the rights. For example, the Law of Ukraine “On the Legal Regime of Martial Law” (Law No. 389-VIII, 2015) establishes the main mechanisms for the operation of such a regime, the limitations that are permissible and a clear list of the functions and powers of authorities, in order to ensure law and order and repel armed aggression or the threat of attack, other danger, respectively to the legislation of Ukraine.

Fihel (2015), in turn, draws attention to the fact that the operation of the legal regime of martial law in Ukraine is regulated not only by national legislation, but also by the international instruments ratified by Ukraine, since each person should undergo restrictions established by law solely for the purpose of ensuring proper recognition and respect for the rights and freedoms of others and ensuring fair requirements of morality, public order and general welfare in a democratic society.

However, according to Topolnitskyi (2019) in relation to the specifics of the Russian armed aggression against Ukraine, which, in his opinion, lies not in the general methods and goals of war, but in the unconditional violation of the system of basic international legal agreements, all customs of warfare, the issue of the ratio of limited liberties of an individual with the aim of averting the likely damage is gaining considerable seriousness and urgency, since, as we have noted, the level of damage already caused by the Russian invaders both to the State as an actor of international legal relations and to the society and each of its members individually, is extremely high.

Senatorova (2018), having analyzed international legal provisions and in particular judicial practice, notes that restrictions on human rights and freedoms are applied only under clearly defined conditions, namely: 1) their determination by legislation and clear delineation of the boundaries and methods of their implementation (law must be sufficiently accessible; the rule of law must be formulated clearly enough to enable a person to foresee the consequences of the relevant actions); 2) be necessary in a democratic society (proportional in terms of limiting the liberties of an individual and the achieved (protected) interests of society); 3) interest-oriented (since legislation, including international one, enshrines the list of goals for limiting each specific right, corresponding restrictions and vice versa; the procedures for ensuring them should be properly incorporated).

Therefore, the legal regime of martial law in Ukraine in the conditions of undeclared war by Russia Federation, determines the situation in which the law enforcement function of Ukraine as the actor of international legal relations and the central element in the system of national legal relations plays a key role in all types of relation. The content of this function and its main purpose, individual aspects and directions are clear.

Among the most important are: the cessation of further violations of rights and freedoms that have already been violated; the prevention of violations of the rights and freedoms of vulnerable persons; introduction of comprehensive preventive programs to avoid the spread of deviant manifestations in society at all levels.

Conclusions

Thus, on the basis of the analyzed approaches to the concept and essence of the law enforcement function of the State as a theoretical and legal structure, the mechanism and content of the legal regime of martial law, its close mutual (dualistic) relationship with law enforcement, as well as other views and opinions of scientists and researchers regarding of the studied phenomenon, the main aspects of the law enforcement function of the State under the legal regime of martial law, in our opinion, may be such as:

- Organization and prevention of re-occupation of the de-occupied territories, or centralized provision of resettlement of local residents in order to ensure the highest social value – human life.
- Establishment of the main mechanisms and structural subdivisions of law enforcement agencies to ensure the compliance with the inviolable and those that cannot be limited rights and freedoms of an individual and citizen both on the territory of the entire State and, first of all, on the de-occupied territories.
- Ensuring the implementation of State programs and strategies aimed at improving and raising the level of public understanding of potential and real threats of occupation of their permanent residences by enemy troops.
- Creation of mechanisms for the social rehabilitation of injured persons, which in turn will contribute to both the restoration of violated rights and within the scope of the law enforcement function, - to the prevention of further violations.
- Introduction of a wide range of social and legal instruments and regulators of State influence on the issues related to the reconstruction of destroyed territories (first of all – critical infrastructure, and immediately after – civilian objects and housing stock).
- The prospect of further research, in our opinion, lies in the need to outline the main actors of such activity and determine their competence in relation to each of the outlined aspects with a simultaneous justification of the interconnectedness of the functions and duties specified and available in the legislation.

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