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Regulatory activities of the government of Ukraine during marital status conditions

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Abstract

The peculiarities of the exercise of powers and the procedure for the implementation of regulatory activities of the Government of Ukraine under the conditions of martial law from February 24, 2022 are examined. This research was conducted through the classification of types of special legal regimes and current legislation on martial law in Ukraine, the requirements of the Constitution of Ukraine and the experience of introducing martial law in general, along with the analysis of the subject powers and the decisions made by them in the humanitarian, socio-economic and defense sphere. In addition, selected problematic issues granting legislative powers to the government are indicated. Axiological, analytical, historical-comparative, comparative-historical, comparative-legal, hermeneutical and formal-legal methods were used to achieve the research objectives. It is concluded that, despite the conditions of martial law, the government powers meet the requirements of the current Constitution of Ukraine. A significant simplification of the order of its normative activities requires the existence of appropriate mechanisms for their fulfillment. With the principles of the rule of law and the protection of human rights in these conditions.

Keywords: special legal regimes; martial law; government of Ukraine; normative powers; normative procedure.

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Actividades reguladoras del gobierno durante las condiciones de estado civil

Resumen

Se examinan las peculiaridades del ejercicio de los poderes y el procedimiento para la implementación de las actividades normativas del Gobierno de Ucrania, bajo las condiciones de la ley marcial, a partir del 24 de febrero de 2022. Esta investigación se llevó a cabo a través de la clasificación de los tipos de regímenes legales especiales y la legislación actual sobre la ley marcial en Ucrania, los requisitos de la Constitución de Ucrania y la experiencia de introducir la ley marcial en general, junto al análisis de los poderes sujetos y las decisiones tomadas por ellos en la esfera humanitaria, socioeconómica y de defensa. Además, se indican temas problemáticos seleccionados que otorgan poderes legislativos al gobierno. Para alcanzar los objetivos de la investigación se utilizaron métodos axiológicos, analíticos, histórico-comparativos, jurídico-comparativos, hermenéuticos y jurídico-formales. Se concluye que, a pesar de las condiciones de la ley marcial, los poderes del gobierno cumplen con los requisitos de la actual Constitución de Ucrania. Una simplificación significativa del orden de sus actividades normativas requiere la existencia de mecanismos apropiados para su cumplimiento. Con los principios del Estado de derecho y la protección de los derechos humanos en estas condiciones.

Palabras clave: regímenes legales especiales; ley marcial; gobierno de Ucrania; poderes normativos; procedimiento normativo.

Introduction

Attention to the rule-making activity of the Cabinet of Ministers of Ukraine has always been very high due to its significant role in the implementation of Government policy and influence on public relations. Therefore, the tasks of improvement of this activity and the improvement of the quality of Government acts have always been considered urgent. Although much has been done in this area in recent years, there is still a need to increase the level of systematization of the Government's rule-making activities, which would include proper planning, close coordination and effective control over rule-making activities.

The relevance of these issues has not diminished in the conditions of the introduction of martial law in Ukraine from February 2022, although the Government has focused on solving the most urgent problems of the country's vital activities, leaving for the future the general issues of optimizing rule-making activities.

Despite the existence of general legislation on martial law in Ukraine (The Law of Ukraine “On the legal regime of martial law”, 2015), its introduction called for a more in-depth study of the conditions and requirements for the application of its many provisions regarding the entire spectrum of human rights and freedoms as well as citizen’s rights and freedoms, the activities of state authorities and local self-government, and thereby also regarding the understanding of the requirements for the Government’s rule-making activity in the conditions of martial law, the limits of the Government’s rule-making powers, the rules and procedure for their implementation.

The developers of the Ukrainian legislation on martial law relied on the practice of state authorities in the conditions of martial law in November-December 2018 in ten regions of Ukraine, considered European and world experience in this field, used the works of domestic and foreign scientists devoted to theoretical and legal aspects of introducing martial law in different countries.

1. Literature review

Many academic works in Ukraine are focused on the study of theoretical and legal aspects and experience of introducing martial law. They covered, in particular, emergency legislation in foreign countries (Koliushko, 2020), the issue of the administrative and legal regime of the state of emergency (Andriy Basov, 2006), foreign experience and the Ukrainian model of martial law (Kuznichenko and Golub, 2019), problems of legal regulation of “martial law”, “state of war” and “wartime” (Topolnitsky and Tychna, 2019), certain aspects of the procedure for the introduction and termination of the legal regime of martial law in Ukraine (Lobko *et al.*, 2019) observance of human rights in the conditions of martial law (Hvoz, 2018) etc.

Researchers from other countries considered the use of emergency powers in peacetime (Bonner, 2019), the emergency powers of the US President (Goitein, 2019), the conditions for the use of emergency powers in democratic countries and international conflicts (Rooney, 2019), practical and theoretical aspects of emergency powers (Head, 2016), typology of extraordinary powers (Ferejhon and Pasquino, 2004), extraordinary powers of the executive power (Friedman, 2009), etc.

2. Methodology

The methodological grounds of this research lie primarily in the following general scientific methods as axiological, analytical, comparative-historical, comparative-legal, hermeneutic methods, as well as the formal-

legal method. The axiological method has made it possible to focus the conducted research on the significant aspects of law-making activity, which consist in the need to ensure a high level of perfection of the current legislation adopted by the parliament, considering the need to observe human dignity, freedom, justice, and ensure free entrepreneurship.

The analytical method was aimed at a qualitative comprehensive analysis of the law-making activity of the parliament and the rule-making activity of the Government of Ukraine. Comparative-historical, comparative-legal, and hermeneutic methods were used to critically assess the state of legislation in the field of martial law in comparison with modern European and world achievements. The formal-legal method was used to assess the state of the regulatory framework of the Government's regulatory framework, the rule-making process.

3. Classification of types of emergency situations, their constitutional and legal regulation, experience of introducing martial law in different countries

In the constitutional legislation of foreign countries, several types of emergency situations (emergency situations; state of emergency) are enshrined, which entails the granting of emergency powers, in particular, a state of emergency (this includes such countries as the USA, Great Britain, Canada, India, Portugal, France, Germany, Spain, Poland, Finland, Turkey and others), martial law regime (USA, Great Britain, Poland, Romania and others) state of siege (Belgium, Italy), state of war (Belgium, Italy), state of defense (Germany, Finland). Legislation on emergency situations is quite heterogeneous, as is the scope of powers granted to state authorities or the military in the context of the introduction of martial law or other state.

Since the 19th century, more than 80 countries, including the USA, China, Canada, Japan, Turkey, Japan and many others, have faced the need to introduce martial law. The introduction of martial law mostly took place in peacetime and without a declaration of war. So, for example, in the USA, Article 1 of the Constitution allows the declaration of martial law in the event of an uprising or a situation that threatens public safety and traditional methods of security protection are insufficient.

According to the legislation in force today (National Emergencies Act, 1976), during a state of war, the President of the United States can perform actions necessary to maintain public order, in particular, to remove administrative bodies from performing their duties, transferring their performance to the Ministry of Defense, introduce military tribunals. The Emergency Powers (Defence) Act was passed in Great Britain in 1939.

This law allowed the Government to adopt the so-called “defense decrees”, which allowed the Government to carry out a wide range of actions, in particular, to make arrests, enter premises and even impose the death penalty for certain crimes (breaking through roadblocks and robbery). The law was in effect until 1964.

In Canada is legislation on emergency powers (Emergencies Act, 1985), which provides for the introduction of a state of war and the granting of appropriate powers to the Government.

Article 16 of the Constitution of the French Republic (Constitution du 4 octobre, 1958) states that when the institutions of the Republic, the independence of the nation, the integrity of its territory are under serious and immediate threat, and the normal functioning of constitutional public bodies is suspended, the President of the Republic takes measures dictated by these circumstances, after official consultation with the Prime Minister, heads of chambers, as well as the Constitutional Council. These measures should be dictated by the desire to provide constitutional public bodies with the opportunity to fulfil their tasks as soon as possible.

The Constitution of Spain (Article 116) provides for three types of state of emergency regulated by organic law: state of threat, state of emergency and state of siege and establishes the corresponding powers and limitations and also provides that the declaration of a state of threat and state of emergency and siege does not cancel the principle of responsibility of the Government and its representatives. It is the Government of Spain that has the right to declare a state of emergency.

Martial law in the countries of the world was mainly introduced in peacetime and was accompanied by restrictions on the rights and freedoms of people and citizens (primarily, restrictions on freedom of movement and change of residence), the introduction of curfews, expansion of the powers of the Government and restrictions on the powers of local authorities.

The extent of these restrictions depended on the severity of threats to internal security. In democratic countries, such restrictions were minimal in nature and based on the requirements of the relevant legislation, and the specifics of the exercise of powers by state authorities were largely determined by the form of state government.

On June 19, 2020, the European Commission “Democracy through Law” (Venice Commission) issued a Report (Report respect for democracy, human rights and the rule of law during states of emergency, 2020), which summarizes the constitutional and legal regulation of emergency situations (state of emergency): war or other emergency situation threatening the life of the nation, as well as emergency powers for all member states and observers of the Venice Commission and presents general legal standards in this area.

According to the general rules, the provisions of the International Covenant on Civil and Political Rights provide for the possibility of a derogation from a simple limitation of guaranteed rights, and the impossibility of a derogation from the so-called “absolute rights” (the right to life, the prohibition of torture and inhuman or degrading treatment and punishment, slavery, the principle of *nullum crimen, nulla poena* and others).

General legal standards include the presence of parliamentary and judicial control over the executive power to prevent the abuse of emergency powers by national authorities, the application of the principles of subsidiarity and proportionality of emergency measures and their compliance with the rule of law.

4. Limits of normative powers of the Cabinet of Ministers of Ukraine

The question of the limits of the Government’s rule-making powers and the specifics of their implementation under martial law should be considered primarily in the context of the specifics of the legal regime of martial law as one of the important type of special legal regimes (along with the regime of a state of emergency, emergency situation, quarantine, etc.), as it is connected with the possibility of introducing the most significant restrictions on the rights and freedoms of a person and a citizen.

After all, that is why it is determined at the level of the Constitution of Ukraine that the introduction of martial law or a state of emergency must be accompanied by the indication of the term of these restrictions and a list of rights and freedoms that cannot be limited is established (Constitution of Ukraine, 1996: article 64). The Constitution of Ukraine regulates only the most general issues of the procedure for introducing martial law, not touching either the specifics of the application of the martial law regime or the powers of state authorities in the conditions of martial law.

The acuteness and need to protect the country determine the measures that can be implemented under the legal regime of martial law, as well as the scope of powers of state authorities and the procedure for their implementation (Articles 9 - 18 of the Law “On the legal regime of martial law”, 2015). In 2021-2022, the current legislation of Ukraine on martial law was significantly adjusted. The Law comprehensively regulates the activities of the Government in the conditions of martial law.

It is established, in particular, that the Cabinet of Ministers of Ukraine in the event of the introduction of martial law in Ukraine or some of its localities works in accordance with its Regulations; organizes and directs

central and other executive bodies under martial law; after the start of an armed conflict, takes measures to create safe zones in accordance with the norms of international humanitarian law, organized in a way that makes it possible to ensure the protection of civilians.

To fulfill these provisions and in connection with the need for further improvement of legal relations, the Verkhovna Rada of Ukraine during the period of the introduction of martial law from February 24, 2022, adopted a number of legislative decisions of a sectoral nature aimed at clarifying and expanding the powers of the Government during the period of introduction of martial law.

5. Discussion

The most significant, exclusive powers of the Government should be considered by the proposed changes to the current legislation (the Law of Ukraine “On amendments to certain laws of Ukraine on ensuring state management in martial law”), which, however, did not enter into force because the bill is not yet signed by the President of Ukraine.

Thus, this Law stipulates that the Cabinet of Ministers of Ukraine, in the event of the introduction of martial law in Ukraine or some of its localities, makes decisions on all issues that require legislative regulation under martial law conditions, in compliance with Article 64 of the Constitution of Ukraine regarding the restriction of constitutional human rights and freedoms and citizen, including decisions on determining tax payers, taxable objects, tax base, tax rates, tax calculation procedure, tax period, tax payment term and procedure, tax reporting term and procedure, tax benefits and their application procedure.

Within two days after the adoption of such a decision, the Government submits to the Verkhovna Rada of Ukraine a draft law regulating the relevant issues. If, based on the results of consideration by the Verkhovna Rada of Ukraine, such a draft law is rejected, the relevant decision of the Cabinet of Ministers of Ukraine loses its validity from the day following the day of adoption of the decision to reject the draft law.

If, within one month from the date of registration of such a draft law, the Parliament does not make a decision on its rejection or acceptance as a whole, the relevant decision of the Government becomes invalid after the expiration of the specified period or from the day following the day of termination or cancellation of martial law, if this happens earlier. Decisions of the Cabinet of Ministers of Ukraine provided for in this part shall not be applied in the event of adoption and entry into force of a law defining the specifics of resolving relevant issues under martial law. The procedure for entry into force of Government resolutions is also regulated.

Despite the fact that the introduction of martial law requires a significant strengthening of the Government's powers, giving it the power to regulate social relations by law actually means the transfer (delegation) of the Government's legislative function.

This is inconsistent with the requirements of the Constitution of Ukraine, Article 75 of which stipulates that the only body of legislative power in Ukraine is the Parliament - Verkhovna Rada of Ukraine. The specified provision of the project contradicts the requirement the Law of Ukraine on the legal regime of martial law, which states that "[d]uring the period of martial law, the powers of the President of Ukraine, the Verkhovna Rada of Ukraine, the Cabinet of Ministers of Ukraine cannot be terminated..." (Part 1 of Art. 10 of the Law of Ukraine "On the legal regime of martial law", 2015).

Pursuant to the powers granted by law, the Government adopted several of its own decisions from February 24, 2022, which concern important issues of legal regulation of economic, social, humanitarian, financial relations and the budget, as well as a complex of issues of popular resistance, territorial defense under martial law. Decisions on humanitarian issues concern child protection, evacuation, children, etc.

The economic decisions connected with providing the Ukrainian army with everything necessary, simplifying the procedure for public procurement, food security, supporting the Ukrainian producer, regulating critical imports, compensation for material damage caused by the aggressor, and housing reconstruction.

The procedure for carrying out rule-making activities of the Government has also undergone changes, while preserving the general rule set forth in Article 12-1 of the Law of Ukraine that the Government "operates in accordance with the Regulations of the Cabinet of Ministers of Ukraine under martial law".

After all, all the key provisions of the Government's rule-making activity, including multi-stage control over the quality of the Government's normative acts, are reflected in the Regulation (Resolution of the CM "On Approval of the Regulations of the Cabinet of Ministers of Ukraine", 2007), and technical and legal norms - in the Rules for the preparation of draft acts of the Cabinet of Ministers of Ukraine (Resolution of the Cabinet of Ministers "On approval of the Rules for the preparation of draft acts of the Cabinet of Ministers of Ukraine", 2005).

It should be emphasized that the procedure of the Government's rule-making activity under normal conditions, namely before the introduction of martial law in Ukraine, provided for by the Regulation, was democratic and considered the holding of public consultations this, took into account the interests of the regions, compliance with the necessary examinations.

In the conditions of the introduction of martial law, the Government significantly simplified the procedure for consideration at the Government meeting of draft acts on urgent issues prepared during the period of martial law.

The amendments to the Regulations introduced in December 2022 established that during the period of martial law in Ukraine or in some of its localities, in urgent cases requiring immediate decision-making, the Prime Minister or another member of the Government, with the agreement of the Prime Minister the Minister may submit a draft act for consideration by the Government without complying to the requirements of this Regulation regarding approval and consultations, legal examination by the Ministry of Justice, consideration at a meeting of the Government Committee

In December 2021, the mandatory requirement for consideration of draft decisions by government committees, as well as the mandatory holding of public consultations with representatives of interested parties regarding draft acts of the Cabinet of Ministers, was abolished.

Obviously, these decisions should be considered as stringent, temporary, and extraordinary measures. After all, the Government's activity in the conditions of martial law does in fact require extraordinary and fast decisions, but it is hardly possible to neglect the fundamental principles of rule-making activity, in particular, the principles of democracy, the rule of law, the protection of human rights, the scientific validity of rule-making decisions, and others.

Therefore, in any case, the following examination of this kind of adopted acts should be carried out in order to have the possibility of adjusting them in the future. This is also important in view of the fact that the procedure for the implementation of rule-making activity and its separate stages and elements of its mechanism, although they indicate that in recent years the professionalism and quality of Government acts have improved, however, the entire mechanism of rule-making activity did not constitute a single highly effective training system, adoption, publication, implementation and monitoring of relevant Government acts; many of its elements worked inefficiently and needed improvement.

It is obvious that with the return to peaceful life, measures aimed at improving the government's rule-making activities should be developed. This necessity is recognized by the Government itself (Strategy for reforming public administration of Ukraine for 2022-2025, 2021).

Regarding the activities of the already mentioned Government committees and public consultations, we believe that they should be restored as fast as possible after the abolition of martial law. Government committees should be the "sieve" that would sift out the lion's share of imperfect projects and correct the shortcomings of the procedure for

passing and approving Government acts. It should be emphasized that the positive role of Government committees at many stages of the formation of the Ukrainian state has not been fully utilized.

What has been said about the role and importance of the activities of Government committees fully applies to the importance and importance of public consultations with representatives of interested parties regarding draft acts of the Government.

In such public consultations, a wider participation of public organizations as institutions of civil society should be ensured, since public consultations are not only a form of dialogue between executive authorities and the public, but also contribute to the quality and real testing of Government decisions on important issues of state and public life.

Even under the conditions of martial law, there is a need to ensure free access to information on government decisions that are being prepared for consideration, including the publication of draft government acts on the Government website for their public testing, a thorough generalization of the expressed critical assessments of these projects and their consideration in the final drafts, which submitted to the Government for consideration.

Conclusions

The constitutional and legal principles of regulating states of emergency in Ukraine, in particular, martial law, are generally similar to the corresponding practice of democratic countries. The introduction of martial law in Ukraine based on the current Constitution of Ukraine and the corresponding legislation led to a significant expansion of the Government's powers and significant changes in the procedure for the exercise of its rule-making powers. In general, it should be recognized that the Government has actively used the given powers by making a significant number of decisions in all spheres of public life.

It is positive that despite attempts to grant the Government the authority to legislate social relations, which would contradict the Constitution of Ukraine, the final adoption of this decision did not occur. As for the rule-making activity of the Government, it has been significantly simplified in comparison to the procedure for the rule-making activity of the Government under normal conditions provided for by the Regulation, including the cancellation of public consultations on important issues of Government policy, the possibility of suspending the activities of Government committees, the need to hold legal and other types of examinations.

Considering the application of these measures as temporary and extraordinary, it is necessary to emphasize the need for the existence of

appropriate mechanisms for compliance with the principles of the rule of law and protection of human rights in these conditions. For this purpose, legal and other types of examination of Government decisions should be preserved in the form of examination of already adopted decisions, which would make it possible to review decisions that contradict the Constitution or current legislation.

Despite the state of war in the country, the issue of improving the rule-making activity remains relevant, as well as the task of improving the sub-legal regulation of social relations with the aim of carrying out urgent socio-economic and management reforms, comprehensive reforming of the Government's rule-making activity itself.

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