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LEGAL ASPECTS OF THE REGULATION OF THE STATE OF WAR IN UKRAINE

The article highlights some problematic issues of legal regulation of the state of war in Ukraine, existing conflicts and contradictions in Ukrainian legislation in view of the events of the Russian-Ukrainian war. The author proposes relevant amendments to the legal acts regulating the algorithm of actions of public authorities in the context of a real threat to national security.

Keywords: *armed conflict, military conflict, martial law, wartime, state of war, special period.*

Statement of the problem. Since 24 February 2022, Ukraine has been engaged in unprecedented in its intensity and ferocity hostilities to defend its territorial integrity and state sovereignty. Almost for the first time since the Second World War, a military conflict of such scale and power, with such heavy human casualties, devastating consequences and threats of humanitarian, environmental and even nuclear disaster across the continent, has broken out in the centre of Europe.

The war has raised many vital questions for the state and society, which, unfortunately, do not always have answers. Obviously, the situation requires a significant rethinking and adjustment of the legal framework governing the political, economic, social and legal foundations of the state's defence capability. The imprecision, uncertainty, and vagueness of some legal categories and provisions of the current legislation in wartime conditions lead to their free interpretation, which inevitably leads to negative legal consequences.

Analysis of recent research and publications. At different times, from different perspectives, Ukrainian statesmen and scholars have worked professionally on the problems of national security and defence. Among them are V. Antonov, V. Vorobiev, V. Horbulin, O. Istraatov, O. Kuzmuk, V. Lipkan, V. Pashynskiy, S. Poltorak, V. Radetskiy, I. Rusnak, O. Semeniuk, H. Sytnyk, V. Sokurenko, V. Stolbovyi and many other prominent scientists. In their works, through the prism of the functioning of state institutions, they have substantively, constructively, critically and systematically investigated the genesis of security problems and the possibilities of their administrative and legal regulation. However, even

today there is still a wide range of issues for studying the phenomenon of national security. One of these important areas is the legal regulation of defence issues in the context of full-scale aggression against Ukraine.

The purpose of the article is to draw the attention of the national scientific community and legislative initiators to certain inconsistencies, inaccuracies and imperfections of certain provisions of current Ukrainian legislation on the State's defence capability; to formulate proposals for amending the content of a number of legal acts of Ukraine regarding the protection of the territorial integrity and sovereignty of the State in accordance with the challenges, threats and realities of today.

Summary of the main material. Let us consider only certain aspects of the legal regulation of the state of war in Ukraine. First of all, it makes sense to clarify the essence of the term "war". Article 1 of the Law of Ukraine "On National Security of Ukraine" defines this term as a type of military conflict. The term "military conflict" itself is interpreted as "a form of resolving interstate or intrastate disputes with the bilateral use of military force; the main types of military conflict are war and armed conflict" [2]. The same article of the mentioned above Law defines armed conflict as follows: "an armed conflict between states... or between warring parties within the territory of one state..." [2]. The law does not provide an interpretation of the term "war", its criteria, or the definition of other types of armed conflicts, provided that the two mentioned above are only the main ones. The question arises: are the hostilities on the territory of Ukraine to repel aggression a "war" or an "armed conflict" from a legal point of view?

Judging by the features formulated in the law, as well as by the subjects of the warring parties, these events can be qualified as an "armed conflict".

It is equally important to clarify the functional content of such categories as "martial law", "wartime", "state of war", and "special period". The Constitution of Ukraine (Article 106) entitles the President of Ukraine, as the Supreme Commander-in-Chief, to submit to the Verkhovna Rada a proposal to declare a state of war and, in the event of armed aggression against Ukraine, to decide on the use of the Armed Forces of Ukraine and other legally formed military formations. In addition, in the event of a threat of an aggressor attack, the President of Ukraine decides on general or partial mobilisation and the introduction of martial law in Ukraine [1].

At least two conclusions can be drawn from these constitutional provisions. Firstly, the "state of war" and "martial law" are not synonymous and are adopted by separate legal acts. Secondly, both the "state of war" and the "martial law" can be declared even in the event of a threat of invasion, i.e. before the actual start of aggression. At the same time, Article 4 of the Law of Ukraine "On Defence of Ukraine" already mandates the President of Ukraine in the event of armed aggression or a threat of attack on Ukraine to make a decision on mobilisation, introduction of martial law and declaration of a state of war with subsequent approval of these decisions by the Verkhovna Rada of Ukraine [3]. Thus, the legislatively defined algorithm of actions of the head of state during the threatening period and with the beginning of aggression against Ukraine requires its clear and consistent implementation.

Almost two years have passed since the beginning of the aggression against Ukraine. During this time, several waves of mobilisation have been announced, and martial law has been introduced. The martial law introduced by the Decree of the President of Ukraine No. 64/2022 dated 24.02.2022 and approved by the Law of Ukraine No. 2102-IX dated 24.02.2022 was repeatedly extended by the relevant decrees. However, the Law of Ukraine "On the Legal Regime of Martial Law" does not provide for such a procedure, namely the extension of martial law. Therefore, it would be advisable to supplement Article 5 of this document with a clause on the possibility of extending the martial law with a mandatory indication of whether the relevant Decree of the President of Ukraine must be approved by the Verkhovna Rada of Ukraine each time [4].

However, one of the key requirements of the law to declare a "state of war" upon the outbreak of

aggression has not yet been implemented by the Supreme Commander-in-Chief. This is a matter of principle, because from the moment of declaration of a state of war or actual commencement of hostilities, "wartime" begins, which ends on the day and time of termination of the "state of war" [3]. It turns out that even after the fact of military actions to resist the aggressor, we can consider "wartime" to be a reality, but we will not be able to get out of it, since the "state of war" has not been declared.

Moreover, this issue contradicts another term – "special period". Article 1 of the Law of Ukraine "On Mobilisation Preparation and Mobilisation" defines a special period as the period of functioning of the national economy, public authorities, the Armed Forces of Ukraine and other military formations for the defence of the Motherland, which begins from the moment of mobilisation or from the moment of martial law and covers the time of mobilisation, wartime and partially the reconstruction period after the end of hostilities [5].

As we can see, a special period does not imply the declaration of a "state of war". Therefore, if there is no "state of war", then there is no "wartime" and no "special period".

It is also unclear from the definition of the special period, for example, whether demobilisation, i.e. the transition to a peacetime organisation and staff, can be carried out during the special period, since the legislator has not defined the boundaries of the reconstruction period after the end of hostilities. In general, with regard to the declaration of a state of war, it is appropriate to draw attention to the ambiguity and contradiction of this provision in Ukrainian legislation. The Law of Ukraine "On the Legal Regime of Martial Law" defines the term "martial law" as a special legal regime introduced in Ukraine or in certain areas of Ukraine in the event of armed aggression or threat of attack, threat to the state independence of Ukraine, its territorial integrity and provides for the granting of powers to the relevant state authorities, military command, military administrations and local self-government bodies necessary to avert the threat to the state independence of Ukraine, its territorial purpose. The Law contains norms on the content of the martial law regime, the procedure for its introduction and cancellation, and the legal basis for the activities of state authorities, including the President of Ukraine, who exercises general control over the introduction and implementation of measures under this regime. While the regime of "martial law" is clearly defined, the legal regime of "state of war", especially "hybrid war", is not defined at all. This fact gives rise to a debate on the qualification of a military conflict: is the

country in a state of war despite the fact that hundreds of people, and not only military personnel, are killed every day around us; is it time to transfer all the resources of the state to the military; can it be that there is an aggressor state, the Ukrainian army is fighting bloody battles with the occupier, but there is no "state of war"? And these are not purely theoretical speculations on the rationality of legal constructions. Behind every legal provision are the fates of people, their political, economic, social and legal protection, and the existence of the country itself.

During the aggression against Ukraine, significant territories of Luhansk, Donetsk, Kherson, Zaporizhzhia regions and the Autonomous Republic of Crimea have been occupied, but the country has not yet become a single military unit. Even the severance of diplomatic relations with the aggressor state is half-hearted, as consular relations continue. Economic cooperation with the aggressor state continues. Thus, Ukraine continues to receive funds for gas transit through its territory [6, 7]. Of course, all these facts cause certain misunderstandings in society.

Conclusions

Summing up the above, it is necessary to recognise the urgent task of the state to bring national defence legislation in line with the requirements of the times.

It is imperative to amend and supplement the legislative and other regulatory acts of Ukraine to define and interpret key definitions of defence policy and the state's defence capability.

This article examines only some of the gaps in Ukrainian legislation regarding one of the most pressing issues of our time – the state of war. However, this is by no means an exhaustive list of unregulated legal norms of legislative practice in the context of actual warfare. Among them are the problems of mobilisation and demobilisation of citizens, formation and functioning of volunteer formations of territorial communities, legitimacy of state authorities and local self-government bodies whose statutory term of office has expired, provided that elections are prohibited during martial law, and many others.

In view of the above, the issues highlighted in this article require further scientific research and professional discussion to specify and refine the legal framework on defence issues.

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ПРАВОВІ АСПЕКТИ ВРЕГУЛЮВАННЯ СТАНУ ВІЙНИ В УКРАЇНІ

Висвітлено деякі проблемні питання правового врегулювання стану війни в Україні, наявні колізії та суперечності в українському законодавстві з огляду на події російсько-української війни. Запропоновано актуальні зміни до нормативно-правових актів, що регламентують алгоритм дій органів державної влади в умовах реальної загрози національній безпеці.

Так, стаття 4 Закону України «Про оборону України» в імперативному порядку передбачає, що Президент України у разі збройної агресії або загрози нападу на Україну приймає рішення про мобілізацію, введення воєнного стану та оголошення воєнного стану з наступним затвердженням цих рішень Верховною Радою України. Проте Закон України «Про правовий режим воєнного стану» не передбачає порядку продовження воєнного стану.

Крім того, одна з ключових вимог законодавства щодо оголошення «стану війни» з початком агресії досі не виконана Верховним Головнокомандувачем. Питання є принциповим, оскільки з моменту оголошення воєнного стану або фактичного початку бойових дій починається «воєнний час», який закінчується в день і час закінчення «воєнного стану».

Також це питання суперечить іншому терміну – «особливий період». Статтею 1 Закону України «Про мобілізаційну підготовку та мобілізацію» особливий період тлумачиться як період функціонування народного господарства, органів державної влади, Збройних Сил України та інших військових формувань для захисту Вітчизни, який починається з моменту оголошення мобілізації або з моменту введення воєнного стану і охоплює час мобілізації, воєнний час і частково відбудовний період після закінчення бойових дій. Ця законодавча норма не передбачає оголошення «воєнного стану». Отже, якщо немає «воєнного стану», то немає «воєнного часу» і немає «особливого періоду».

Автор статті ставить риторичне запитання: чи може бути так, що є держава-агресор, українська армія веде кровопролитні бої з окупантом, а «воєнний стан» не оголошено? І це не суто теоретичні роздуми про раціональність правових конструкцій. За кожною правовою нормою стоять долі людей, їх політичний, економічний, соціальний і правовий захист, існування самої країни.

Ключові слова: збройний конфлікт, воєнний конфлікт, воєнний стан, воєнний час, стан війни, особливий період.

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