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ENSURING THE LEGALITY OF THE APPLICATION OF ADMINISTRATIVE COERCION MEASURES BY THE POLICE IN THE SPHERE OF PUBLIC ORDER AND SECURITY UNDER MARTIAL LAW

Андрій Собакарь, Олександра Нестерцова-Собакарь. ЗАБЕЗПЕЧЕННЯ ЗАКОННОСТІ ЗАСТОСУВАННЯ ПОЛІЦІЄЮ ЗАХОДІВ АДМІНІСТРАТИВНОГО ПРИМУСУ У СФЕРІ ГРОМАДСЬКОГО (ПУБЛІЧНОГО) ПОРЯДКУ ТА БЕЗПЕКИ ПІД ЧАС ДІЇ ПРАВОВОГО РЕЖИМУ ВОЄННОГО СТАНУ. У статті на основі аналізу чинного законодавства України та практики його застосування, теоретичного осмислення ряду наукових праць з різних галузей знань, з'ясовано сутність, значення та особливості дотримання принципу законності застосування поліцією заходів адміністративного примусу у сфері забезпечення громадського порядку та громадської безпеки під час дії правового режиму воєнного стану.

Доведено пряму залежність ефективності забезпечення громадського порядку та громадської безпеки та якісного виконання працівниками поліції своїх повноважень від дотримання принципу ними принципу законності під час застосування заходів адміністративного примусу.

Встановлено, що основною передумовою законності застосування заходів адміністративного примусу є дотримання суб'єктами владних повноважень вимог законодавства, зокрема, підстав та особливостей застосування зазначених заходів працівниками поліції у межах здійснення ними правоохоронної діяльності у сфері забезпечення громадського порядку та громадської безпеки. Визначено характерні порушення законності та службової дисципліни в діяльності поліції під час застосування заходів адміністративного примусу у сфері забезпечення громадського порядку та громадської безпеки в умовах дії правового режиму воєнного стану.

Сформульовано низку пропозицій та рекомендацій, спрямованих на підвищення ефективності адміністративно-правового забезпечення законності та дисципліни в діяльності поліції, у тому числі шляхом: продовження розбудови зовнішніх та внутрішніх механізмів контролю над діяльністю поліції, зокрема за участю експертів, представників громадянського суспільства, зосередження уваги на заходах, які би надали змогу ефективно запобігти зловживанням поліцейських владою тощо.

Ключові слова: законність, адміністративний примус, заходи адміністративного примусу, громадський (публічний) порядок, громадська безпека, поліція, воєнний стан, правовий режим, порушення законності.

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Relevance of the study. Law enforcement agencies in general and structural divisions of the National Police of Ukraine, in particular, play one of the main roles in the process of implementing the functions of a democratic, legal, and social state. Therefore, the main goal of the National Police is to serve the people of Ukraine, protect the rights, freedoms and legitimate interests of citizens, ensure public safety and order, and provide law enforcement services. The level of law and order and legality in the state and society largely depends on the effectiveness of the tasks assigned by the state to the National Police of Ukraine. An employee of the National Police of Ukraine, as an official endowed with state authority, as well as as a citizen, during the performance of his duties and in everyday life, must strictly observe official discipline, without appeal and accurately fulfill the requirements of all legal regulations, ensuring public order and public safety.

The state of law and order in the state directly depends on how effective the activities of the police will be in protecting and protecting the rights and freedoms of citizens. This also applies to the sphere of ensuring public order and security, where police officers are endowed with a significant arsenal of powers, including the use of administrative coercion measures and the bringing of the guilty to administrative responsibility, which allows timely and prompt termination of any criminal and administrative offenses, providing emergency assistance to injured persons.

Recent publications review. Unfortunately, despite the urgency of the need to ensure legality and discipline in the activities of police units, the issue of using the available tools to achieve the stated goal was left out of the attention of domestic lawyers. At the same time, there are many scientific works directly devoted to the study of the legal status, peculiarities of the organizational structure of the police, measures to increase the efficiency of its functioning and ensure legality in the activities of the public administration, among which, in particular, the works of O. Bezpalova, D. Kalayanov, T. Kolomoets, A. Komzyuk, R. Melnyk, R. Myronyuk, O. Muzychuk, V. Olefir, O. Yunin and other scientists. However, along with significant achievements in solving existing scientific and applied problems of domestic theory and practice of police activity, not all tasks have been solved. In the conditions of the legal regime of martial law, the issue of compliance with the principle of legality of the use of administrative coercive measures by the police in the sphere of ensuring public order and public safety remains poorly studied.

The article's objective. Therefore, the insufficiency of developments at the theoretical level and the presence of practical legal problems indicate the need to clarify the essence and peculiarities of ensuring legality and discipline in the activities of police units during the application of administrative coercion measures in the field of public order and public safety, and also emphasize the relevance of the chosen research direction.

Discussion. Any actions of officials, including the National Police, must be carried out only within the limits of the law, on the basis of and in compliance with the law. Without it, subjectivism and dilettantism, spontaneity, anarchy, lawlessness and arbitrariness are inevitable. However, the scope of application of legality is not limited to its impact on the process of implementation of legal norms. Legality affects the entire system (mechanism) of legal regulation, ensuring its reality and effectiveness. Regime of legality is a necessary condition for the existence of the legal order, which characterizes social relations from the point of view of their systematicity, orderliness, which occurs as a result of the implementation of legal norms in accordance with the requirements of the regime of legality.

In police activity, legality is understood as the creation of such a legal regime in which police officers, performing law enforcement functions, are obliged to strictly comply with the requirements of regulatory and legal acts and at the same time demand from officials and citizens' unconditional compliance with the provisions of laws and by-laws, carry out other law enforcement and law enforcement measures aimed at strengthening law and order in the state [1, p. 15].

According to D. Polonskyi, legality in police activity is a legal regime of its functioning, aimed at strengthening law and order in society, under which the system of police services and units is obliged to strictly comply with the requirements of current legislation and ensure the unconditional fulfillment of general and special legal norms by other participants in relevant legal relations [2, p. 12].

It is clear that loudly proclaiming the need to observe the principle of legality in the activities of the patrol police is not enough, it must be ensured, which, according to representatives of the Kharkiv Scientific School of Police Law, is understood as "the formation

of such an administrative and legal regime in society, under which the police in the process of performing their functions ensuring the rights and freedoms of citizens, maintaining public safety and order, combating crime is obliged, on the one hand, to implement its activities based on the norms of current legislation, and on the other hand, to control and supervise the activities of officials and citizens with regard to the implementation of universally binding rules in order to ensuring law and order in the state" [3, p. 295].

It follows from paragraph 3 of the European Code of Police Ethics that the legality of its operations is assessed not only in the context of national law, but also international human rights standards. Paragraph 38 of this Code stipulates that the police have an ex-officio duty, which consists in checking the legality of their operations before and during their conduct: "The police must always verify the legality of their planned actions". This principle is applied to the police as an organization, as well as to its officials and employees [4, pp. 20-21].

Among the factors that have a negative impact on the state of ensuring legality in the activities of the National Police, we can name: unsatisfactory organization of operational search and investigative actions aimed at identifying persons involved in the kidnapping and murder of citizens, as well as the commission of other serious crimes; delay in the immediate initiation of criminal proceedings based on these facts, the initiation of operational-investigative cases and the implementation of the entire complex of urgent operational-investigative measures and investigative actions in them; improper verification and response to available negative information regarding the personnel of law enforcement forces; low-quality examination of candidates for service, ignoring the requirements of regulatory acts, which regulate the procedure for the organization of verification and collection of information regarding their moral and business qualities and psychophysiological characteristics; lack of control of direct managers over the behavior of subordinates, their ignorance of living conditions and personnel needs; untimely and formal conduct of attestations and special inspections of personnel; improper fulfillment of the requirements of the orders on issues of work with personnel and strengthening of discipline and legality in the activities of law enforcement agencies [5, p. 75].

Legality is a fundamental principle of police activity. Police officers are obliged to comply with the normative prescriptions of the Constitution of Ukraine, Laws of Ukraine, Presidential decrees, resolutions of the Cabinet of Ministers of Ukraine, etc. In general, compliance with legislation, generally recognized principles and norms of international law, and execution of court decisions should be mandatory for any police officer [6, pp. 63-68].

Such requirements also follow from Article 245 of the Code of Ukraine on Administrative Offenses, because the tasks of proceedings in cases on administrative offenses are: timely, comprehensive, complete and objective clarification of the circumstances of each case, its resolution in strict accordance with the law, ensuring the execution of the issued resolutions, as well as identifying the causes and conditions that contribute to the commission of administrative offenses, prevention of offenses, education of citizens in the spirit of law-abiding, strengthening of legality [7].

A police officer is obliged to stop various types of offenses and to fight crime, therefore the requirement of the Law "On the National Police" to prohibit directly or indirectly encouraging someone to commit illegal acts is quite logical. For the successful implementation of the principle of legality in police activities, it is necessary for the police officer to be clearly aware that under no circumstances can he carry out the criminal orders of higher officials. And in case of fulfillment of such, will bear responsibility in accordance with the law. A police officer can and must be guided only by legal orders and orders. Legality helps to strengthen the law and order, and also creates conditions for combating corruption, legality itself needs to be ensured by a whole complex of legal, organizational, economic and other means. Law is a coercive requirement for the realization of a certain minimum good or an order that does not allow known manifestations of evil. Based on this, the principle of legality acquires special importance when it comes to the possibility of applying measures of state coercion to counter criminal and other illegal encroachments for procedural purposes, as well as to protect the rights of citizens.

Legality as a regime of relations between the police and citizens, officials, representatives of legal entities is considered through the prism of compliance by the subject of authority with norms that establish the rights of a police officer and an official performing control and supervision activities in the field of road safety. It is about the legality of using the authority granted to the subject of management. It is more appropriate to pay attention to the

other side of the National Police's activities – ensuring that the police observe the law and the rights of citizens, which are guaranteed by the Constitution of Ukraine under martial law. Together with the increase in the competence of the police, the legislator significantly changed the balance of control over its activities, in particular, in the part of forms of control with the participation of the public, which were carried out in peacetime. In the conditions of war, none of the manifestations of public control over police activities provided for by the Law of Ukraine "On the National Police" (except for joint projects with the public) is carried out. In this regard, a logical question arises of clarifying the competence of the National Police upon the introduction of martial law, because the clarification of these powers is a guarantee of legality in the exercise of their powers by its officials during martial law, and contributes to the effectiveness of the relevant services and units.

The extreme difficulty of ensuring public order and security in the conditions of martial law requires high professional training of the employees of the National Police. Protecting public order in conditions of martial law, the National Police authorities use such methods of social regulation as persuasion and coercion, as well as administrative termination [8, p. 178]. Explanatory work as the main method of law enforcement activity, convincing citizens of the need for conscious and voluntary compliance with legal requirements, stopping anti-social behavior, preventive work with individuals is a necessary condition for promoting effective mobilization. Enlightenment work can be combined with coercion, when it is necessary to take certain important objects under protection, block communication routes, ensure the blocking of the location, document illegal activities, and establish an identity.

Therefore, the introduction of martial law does not exempt the police from observing the law while maintaining public order [9].

Also, the police are authorized to apply special measures, which are used much less often, compared to general purpose measures, and only in exceptional cases, when otherwise it is impossible to stop illegal behavior. The system of these measures consists of measures of physical impact, special means and the use of firearms, that is, those that are combined with the use of force. Such measures can be applied, as a rule, only after a warning about their use, subject to strict compliance with the requirements of the law [10, p. 46].

Despite the positive dynamics in the change of public opinion towards the police, the state of compliance with the law and official discipline in the activities of its units remains at an insufficient level. The facts of illegal administrative detention of citizens are not unique; violation of the requirements of the law when using special means (handcuffs) when detaining persons; unjustified detention of detainees for more than three hours and cases of entering into protocols on administrative detention an inaccurate time of actual detention of violators; unjustified stops of vehicles; violation of the requirements of Article 221 of the Code of Administrative Offenses regarding the consideration of cases of administrative offenses committed by minors; ignoring the requirements to inform the Regional Center for the provision of free secondary legal assistance about the detention of a person; failure to inform relatives of citizens detained for committing administrative offenses about their whereabouts; violation of the requirements of Art. 33, 36, 277-284 of the Code of Administrative Offenses on the terms and procedure of consideration of cases, the limits of the imposition of fines, the content of resolutions, their delivery to violators; abuse of power and official authority by the police; violation of norms of professional ethics, etc.

Cases of violations of the legality of the application of administrative coercion measures by police officers at checkpoints are not rare, even despite the entry into force a month before the start of the war, on January 26, of the Procedure for checking documents of persons, inspecting things, vehicles, luggage and cargo, office premises and citizens' housing in the provision of measures of the legal regime of martial law, which defines the mechanism of checking documents of persons, inspecting things, vehicles, luggage and even the housing of citizens during the provision of measures of the legal regime of martial law [11].

"Human rights in the conditions of war are an integral value of a progressive modern society; it acts as a key object of constitutional and legal regulation, which is an unconditional function of national legislation. During an armed conflict, the priority of observing human rights is not only evidence of the achievement of a high level of democracy in the state, the degree of development of society, but also an indicator of the recognition of citizens as the highest social value, a national priority" [12, p. 282]. Police officers have a special responsibility to counter misconduct, but police officers who misbehave should also be able to expect proper treatment [13].

Conclusions. Thus, the content of the implementation of the principle of legality of the use of administrative coercion measures by the police in the sphere of public order and security during the operation of the legal regime of martial law is that:

- firstly, all decisions made by police officers must comply with current legislation and by-laws;
- secondly, such decisions should not go beyond their powers, i.e. they can be made only on issues that fall within their competence;
- thirdly, the decisions of police officials must be made in such an order and in such forms that correspond to normative prescriptions.

Today, it is appropriate to improve the legislative provision of the principle of legality in the activities of the National Police by developing a mechanism for its implementation, outlining these provisions in Article 8 of the Law of Ukraine "On the National Police".

The implementation of the specified legislative proposals will significantly affect the effectiveness of the police, bring the public closer to their activities, which will ultimately contribute to ensuring the legality of the police's use of administrative coercion measures in the field of public order and security and higher indicators of the level of public trust in the police.

Conflict of Interest and other Ethics Statements

The authors declare no conflict of interest.

References

1. Новіков В.В. Внутривідомчий контроль як засіб забезпечення законності і дисципліни в органах внутрішніх справ: дис. ... канд. юрид. наук / 12.00.01. Х., 2006. 200 с.
2. Полонський Д. М. Забезпечення правопорядку та режиму законності патрульно-постовою службою міліції України (організаційно-правовий аспект): автореф. дис. ... канд. юрид. наук. / спец. 12.00.07. Київ. 2013. 18 с.
3. Адміністративна діяльність органів поліції України: підручник / за ред. д-ра юрид. наук, доц. В.В. Сокурєнка; / О. І. Безпалова, О. В. Джафарова, В. А. Троян та ін.; передм. В.В. Сокурєнка; МВС України, Харків. Нац. Ун-т внутр. справ. Харків: ХНУВС, 2017. 432 с.
4. Науково-практичний коментар Закону України «Про Національну поліцію» [текст] станом на 1 січня 2016 р. К. : Центр учбової літератури, 2016. 400 с.
5. Сахно А. П. Значення законності й дисципліни в діяльності ОВС України та шляхи їх зміцнення. *Проблеми правознавства та правоохоронної діяльності*. 2010. № 3. С. 71-77.
6. Денисюк Д. С. Принципи діяльності національної поліції України: теорія та практика реалізації [Текст]. *Митна справа*. 2015. № 5. С. 63-68.
7. Кодекс України про адміністративні правопорушення : Закон України від 07.12.1984 № 8073-Х. URL : <https://zakon.rada.gov.ua/laws/show/80731-10>.
8. Адміністративна діяльність: навч. посіб. / М. В. Ковалів, З. Р. Кісіль, Д. П. Калайнов та ін.. К.: Правова єдність, 2009. 432 с.
9. Подоляка А. Громадський порядок: сутність, поняття та форми забезпечення. *Вісник національної академії прокуратури України*. 2009. № 2. С. 98. URL : http://www.irbisnbuv.gov.ua/cgi-bin/irbis_nbuv/cgiirbis_64.exe?C21C OM=2&I21DBN=UJRN&P21DBN=UJRN&IMAGE_FILE_DOWNLOAD=1&Image_file_name=PDF/Vnapu_2009_2_11.pdf.
10. Адміністративна діяльність органів внутрішніх справ. Загальна частина: підручник/ за заг. ред. І. П. Голосніченка, Я. Ю. Кондратьєва. Київ: Укр. акад. внутр. справ, 1995. 155 с.
11. Про затвердження Порядку перевірки документів в осіб, огляду речей, транспортних засобів, багажу та вантажів, службових приміщень і житла громадян під час забезпечення заходів правового режиму воєнного стану: постанова Кабінету Міністрів України від 29 грудня 2021 р. № 1456. URL : <https://zakon.rada.gov.ua/laws/show/1456-2021-%D0%BF#Text>.
12. Моца А.А., Моца В.В. Права людини в умовах воєнного стану. *Наукові перспективи*. 2022. № 4 (22). С. 280-291.
13. Meershoek Guus. (2023). Creating modern, community-oriented police: some dutch experiences. *Philosophy, economics and law review*. Vol. 3. No. 1. Pp. 210-217.

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1. Novikov, V. V. (2006). Vnutrividomchy kontrol yak zasib zabezpechennia zakonnosti i dystsypliny v orhanakh vnutrishnikh sprav [Internal departmental control as a means of ensuring legality and discipline in internal affairs bodies]: dys. ... kand. yuryd. nauk / 12.00.01. Kh.. 200 p. [in Ukr.].
 2. Polonskyi, D. M. (2013). Zabezpechennia pravoporiadku ta rezhyму zakonnosti patrolno-postovoiu sluzhboiu militsii Ukrainy (orhanizatsiino-pravovyi aspekt) [Ensuring law and order and the regime of legality by the patrol service of the militia of Ukraine (organizational and legal aspect)]: avtoref. dys. ... kand. yuryd. nauk. / spets. 12.00.07. Kyiv. 18 p. [in Ukr.].
 3. Administrativna diialnist orhaniv politsii Ukrainy [Administrative activity of police bodies of

Ukraine] (2017): pidruchnyk / za red. d-ra yuryd. nauk, dots. V. V. Sokurenka / O. I. Bezpalova, O. V. Dzhararova, V. A. Troian ta in.; peredm. V. V. Sokurenka; MVS Ukrainy, Kharkiv. Nats. Un-t vnutr.. sprav. Kharkiv: KhNUVS. 432 p. [in Ukr.].

4. Naukovo-praktychnyi komentar Zakonu Ukrainy "Pro Natsionalnu politsiiu" [Scientific and practical commentary on the Law of Ukraine "On the National Police"]. (2016). [tekst] stanom na 1 sichnia 2016 r. K. : Tsentri uchbovoi literatury. 400 p. [in Ukr.].

5. Sakhno, A. P. (2010). Znachennia zakonnosti y dystsypliny v diialnosti OVS Ukrainy ta shliakhy yikh zmitsnennia [The importance of legality and discipline in the activities of the Ukrainian Security Service and the path to their elimination]. *Problemy pravoznavstva ta pravookhoronnoi diialnosti*. № 3. Pp. 71-77. [in Ukr.].

6. Denysiuk, D. S. (2015). Pryntsypy diialnosti Natsionalnoi politsii Ukrainy: teoriia ta praktyka realizatsii [Principles of activity of the National Police of Ukraine: theory and practice of implementation] / D. S. Denysiuk. *Mytna sprava*. № 5. Pp. 63-68. [in Ukr.].

7. Kodeks Ukrainy pro administratyvni pravoporushennia [Code of Ukraine on administrative offenses] : Zakon Ukrainy vid 07.12.1984 № 8073-Kh. URL : <https://zakon.rada.gov.ua/laws/show/80731-10>. [in Ukr.].

8. Administratyvna diialnist [Administrative activity] : navch. posib. (2009) / M. V. Kovaliv, Z. R. Kisil, D. P. Kalaiianov ta in. K.: Pravova yednist. 432 p. [in Ukr.].

9. Podoliaka, A. (2009). Hromadskyi poriadok: sutnist, poniattia ta formy zabezpechennia [Public order: essence, concepts and forms of provision]. *Visnyk natsionalnoi akademii prokuratury Ukrainy*. № 2. P. 98. URL : http://www.irbisnbuv.gov.ua/cgi-bin/irbis_nbuv/cgiirbis_64.exe?C21COM=2&I21DBN=UJRN&P21DBN=UJRN&IMAGE_FILE_DOWNLOAD=1&Image_file_name=PDF/Vnapu_2009_2_11.pdf. [in Ukr.].

10. Administratyvna diialnist orhaniv vnutrishnikh sprav. Zahalna chastyna [Administrative activities of internal affairs bodies. General part] : pidruchnyk. (2015) / za zah. red. I. P. Holosnichenka, Ya. Yu. Kondratieva. Kyiv: Ukr. akad. vnutr. sprav. 1995. 155 p. [in Ukr.].

11. Pro zatverdzhennia Poriadku perevirky dokumentiv v osib, ohliadu rechei, transportnykh zasobiv, bahazhu ta vantazhiv, sluzhbovykh prymishchen i zhytla hromadian pid chas zabezpechennia zakhodiv pravovoho rezhymu voiennoho stanu: postanova Kabinetu Ministriv Ukrainy vid 29 hrudnia 2021 r. № 1456 [On the approval of the Procedure for checking documents in person, inspecting things, vehicles, cargo and cargo, office premises and citizens' housing during the provision of measures of the legal regime of military status: Decree of the Cabinet of Ministers of Ukraine dated December 29, 2022, No. 1456]. URL : <https://zakon.rada.gov.ua/laws/show/1456-2021-%D0%BF#Text>. [in Ukr.].

12. Motsa, A.A., Motsa, V.V. (2022). Prava liudyny v umovakh voiennoho stanu [Human rights under martial law]. *Naukovi perspektyvy*. 4 (22). Pp. 280-291. [in Ukr.].

13. Meershoek Guus. (2023). Creating modern, community-oriented police: some dutch experiences. *Philosophy, economics and law review*. 3 (1). Pp. 210-217.

ABSTRACT

In the article, based on the analysis of the current legislation of Ukraine and the practice of its application, the theoretical understanding of a number of scientific works from various fields of knowledge, the essence, significance and peculiarities of compliance with the principle of legality of the use of administrative coercion measures by the police in the sphere of ensuring public order and public safety during the operation are clarified the legal regime of martial law.

It has been proven that the effectiveness of public order and public safety and the quality performance of their powers by police officers are directly dependent on their compliance with the principle of legality during the application of administrative coercion measures. It has been established that the main prerequisite for the legality of the application of administrative coercion measures is compliance by subjects of power with the requirements of the legislation, in particular, the grounds and features of the application of the specified measures by police officers within the scope of their law enforcement activities in the field of public order and public safety.

Characteristic violations of legality and official discipline in the activities of the police during the application of measures of administrative coercion in the sphere of ensuring public order and public safety under the conditions of the legal regime of martial law have been identified.

A number of proposals and recommendations aimed at increasing the effectiveness of administrative and legal enforcement of lawfulness and discipline in police activities have been formulated, including by: continuing the development of external and internal control mechanisms over police activities, in particular with the participation of experts, representatives of civil society, focusing on measures, which would make it possible to effectively prevent police abuse of power, etc.

Keywords: *legality, administrative coercion, measures of administrative coercion, public order, public safety, police, martial law, legal regime, violation of legality.*