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ENSURING THE RIGHT OF CITIZENS TO ACCESS THE INFORMATION OF PUBLIC INTEREST UNDER THE LEGAL REGIME OF MARTIAL LAW IN UKRAINE

The article focuses on the peculiarities of implementing the citizens' right to access information of public interest in the conditions of the legal regime of martial law in Ukraine. The essence of the concepts of "publicly necessary information" and "public interest", as well as their importance for the realization of the citizens' right of access to such information is defined. Challenges related to limitation of citizens' right of access to information representing public interest under martial law in Ukraine were reflected; proposals for their solution were elaborated and substantiated.

Keywords: *rights of citizens, access to information, socially necessary information, information of public interest, legal regime of martial law.*

Without providing proper assurance of the right to access for citizens to reliable, accurate, and complete information, the existence of democratic freedoms and human rights cannot be assured.

Without adequate ensuring the right of citizens to access reliable, accurate and complete information, the existence of democratic freedoms and human rights are impossible. At the same time, under the legal regime of martial law in Ukraine, many public services have suspended operation or operate with restrictions both because of the threat to national security, preservation of territorial integrity, protection of the democratic constitutional order and other national interests of Ukraine from real and potential threats, as well as the lack of real possibility of proper functioning, however, access of citizens to information representing public interest may save their lives, since timely informing citizens regarding the threat of attack or occupation can facilitate timely evacuation of the population, prevent a humanitarian catastrophe, etc.

Such scientists as I. Aristova, V. Bryzhko, V. Havlovskiy, V. Hrytsenko, M. Demkova, R. Kaliuzhnyi, T. Kostetska, B. Kormych, A. Marushchak, O. Nesterenko, A. Novitskyi, V. Tsymbaliuk, O. Selezniova, M. Shvets and other, in their scientific works paid considerable attention to the problems of implementation of the right of citizens to access to information and information relations in Ukrainian society. While paying

tribute to the conducted scientific research, we should note that further studies regarding the implementation of citizens' right of access to information of public interest under the legal regime of martial law in Ukraine are necessary, with determining the priority methods and means for the application of restrictions this right of citizens in current circumstances.

With this in mind, *the purpose* of the article aims at uncovering the peculiarities of realization of the citizens' right of access to information of public interest under the legal regime of martial law in Ukraine, covering problems related to the restriction of this right of citizens and substantiating proposals for their solution.

As A. Silenko notes, the most important factor ensuring the formation and development of civil society in Ukraine lies in the ability of public structures and citizens to promptly receive reliable and objective information concerning all issues of interest to them, as well as freely exchanging it. Free mass circulation of information serves as an effective means of protecting human rights and freedoms, forming public opinion adequate to the events and real influence on the society and state power [1, p. 217].

According to O. Selezneva, the defining role of information, both in building the structure of information legal relations and in the formation of an information society in Ukraine, reveals itself through the classification of the types of information by content, procedure of access, the subjects-holders, the territory of distribution, form, purpose, importance for society [2, p. 23].

Thus, we should primarily reveal the content of such concepts as “information”, “socially necessary information”, “public interest” and “the right of citizens to access the information”.

The Law of Ukraine “The Information” defines information as “any information and/or data stored on tangible media, or represented in electronic form” [3].

In accordance with Part 2 of Article 34 of the Constitution of Ukraine, “everyone has the right to freely collect, store, use and disseminate information orally, in writing, or in any other way of one's choice” [4].

Concerning publicly necessary information, such type of information includes a subject of public interest and the right of the public for knowing such information exceeds the potential damage from its dissemination. The subject of public interest may be information that: indicates danger for state sovereignty, territorial integrity of Ukraine; ensures implementation of constitutional rights, freedoms and obligations; provides information on possible violation of human rights, misleading of the public, harmful environmental and other negative consequences of the activities (inactivity) of individuals or legal entities, etc. [3]. Viewing the nature of publicly necessary information, the legislation does not provide an exhaustive list of such information. Flexibility of the legislation in this aspect justifiably enables courts to determine whether certain information is publicly necessary taking into account individual circumstances of a case (paragraph 6.4. of the Resolution of the Plenum of the Supreme Administrative Court of Ukraine of 26.09.2016 No 10 “On practice of application by administrative courts of the legislation on access to public information”. According to some scholars, which we assent, the difficulties of this definition lies in the fact that the categories, through which, in this case, the concept of “public

interest” is proposed to be disclosed, are evaluative. Thus, we can understand the public interest as a rather abstract legal phenomenon, evidencing the future benefit that society will receive from the disclosure of information.

At this point, the position of A. Nesterenko is fair, noting that publicly significant information means any information of state or political nature, as well as information belonging to private legal entities, if information regarding corruption or other abuses of public officials; usage of budgetary funds; environmental information; financial information, potentially negatively affecting the financial condition and income of citizens; information about public health care, food, cosmetics, information about the founders and owners of the media, along with other information that can greatly influence the life of society [5].

Consequently, the public interest should be understood as a range of issues concerning various spheres of social relations arising from the realization of everyone’s right of access to information considered socially necessary, while ensuring the observance and implementation of constitutional human rights and freedoms as well as the prevailing public right to know certain information about the potential harm from its dissemination, providing that the purpose of disseminating such information is legitimate, necessary and expedient in a democratic society.

Further, we should note that information of public interest can be open in terms of regime, in particular, information on human rights violations or illegal actions of the authorities, but can also be classified as information with restricted access in cases provided by law. As you know, limiting access to information occurs solely for the protection one of the following interests: national security; territorial integrity; public order; prevention of disorder or crime; public health; protection of other people’s reputation or rights; prevention of disclosure of information received in confidence; maintaining the authority and impartiality of justice.

In the cases when none of the mentioned legitimate interests would be affected by the disclosure of the information, the respective information should be open and the access to it can’t be restricted. Access to information should likewise be restricted if its disclosure may cause substantial harm for the mentioned interests, i.e. if the harm from the disclosure of information overrides the public interest in receiving it, such information should be restricted. Lacking this, information should be accessible to the public. Besides, according to paragraph 2 of Article 14 of the Law “Access to the Public Information”, publicly necessary information is subject for disclosure and provision upon request both by state authorities, local self-government bodies and officials, including business entities – if such information exists in their possession [6].

In accordance with the legal positions of the European Court of Human Rights, as expressed, in particular, by such decisions as Case of Bucur and Tota v. Rornania, “Case of Guja v. Moldova”, if the disclosed information with limited accessibility is of public interest, the right of people to know this information prevails over the right of the state to disclose this information, and respectively the right of the whistleblower to disclose this information is protected by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Consequently, summarizing the above, we can conclude that information of public interest should be understood as information of essential importance for a

significant part of the state's population and the public's right to know this information outweighs the potential harm from its dissemination.

Speaking about the right of access to information, it is important to mention in this context that this right is an important component of human and civil rights and consequently has an international basis, in particular under the Universal Declaration of Human Rights (Article 19), the Convention on Human Rights and Fundamental Freedoms (Article 10), the International Covenant on Civil and Political Rights (Articles 18, 19), and Council of Europe Recommendation No. R (81) 19 on Access to the Information Held by Public Authorities, and the Council of Europe Recommendation No. R (2002) on access to the information held by public authorities, etc.

This right ensures freedom of belief and expression, as well as freedom of expression and freedom of seeking, receiving, and disseminating information, regardless of state borders. Access to information is a subjective and independent right of an individual and a citizen. Legislative regulation of the right of access to information enables determining the scope of this right, its content, and the procedure for exercising it. The global tendency for legal recognition of this right exists nowadays, in fact, many countries of the world have adopted freedom of information laws. It shows a major change in the last ten years, during which more than half of all existing freedom of information laws have been adopted, more than 90 countries in the world now have freedom of information laws [7].

The first countries where citizens received the right to information were the Scandinavian countries: Sweden (where the constitutional Freedom of the Press Act was adopted by the Rikstag in 1766) and then two centuries later Finland (the 1951 Act). In 1966, the U.S. Freedom of Information Act was enacted, introducing new interpretations and new legitimate forms of protection for freedom of information. Similar laws were implemented in Denmark and Norway from 1970, Austria from 1973, France and the Netherlands from 1978, Australia, New Zealand and Canada from 1982, Italy from 1990, Hungary from 1992, Portugal from 1993, Belgium from 1994, Ireland and Thailand from 1997, Korea and Israel from 1998, the Czech Republic and Japan from 1999, Poland from 2000, in the UK from 2001 and Germany from 2005. [8, p. 19].

In Ukraine, the right to information, as noted in part 1 of Article 6 of the Law of Ukraine "On Information" is provided by: "creation of a mechanism for exercising the right to information; providing opportunities for free access to statistical data, archival, library and museum collections, other information banks, databases, and information resources; the responsibility for subjects of power to inform the public and the media about their activities and decisions; the obligation for authorities to designate special units or responsible persons for ensuring access to information requests; the implementation of state and public control over compliance with legislation on information; establishing responsibility for violations of the legislation on information" [3]. In turn, the Law of Ukraine "Access to Public Information" [6] defines the procedure for exercising and ensuring the right of everyone to access the information controlled by the authorities, other disposers of public information defined by this Law, and information of public interest. Furthermore, although the right of

citizens to access information provides for the ability to freely receive, use, disseminate, store and protect information necessary for realising their rights, freedoms and legitimate interests, however, legislation may impose restrictions on the realisation of this right relating to safeguarding the rights of others, national security and public order. In particular, Article 6(2) of the Law of Ukraine “On Information” stipulates that “the right to information may be restricted by law in the interests of national security, territorial integrity or public order, for the prevention of disorders or criminal offences, for the health of the population, for the protection of others’ reputation or rights, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of justice” [3].

Under paragraph 3 of Presidential Decree No 64/2022 on the imposition of martial law in Ukraine (approved by Presidential Decree No 2102-IX of 24.02.2022) in connection with the imposition of martial law in Ukraine, the constitutional human or civil rights and freedoms provided for in Articles 30–34, 38, 39, 41–44, 53 of the Constitution of Ukraine, as well as introducing temporary restrictions on the rights and legitimate interests of legal entities within the limits and in the extent necessary for ensuring the possibility of introducing and implementing the measures of the legal regime of martial law stipulated by Article 8(1) of the Law of Ukraine “The Legal Regime of Martial Law” [9].

Particularly, the restriction of the constitutional right to freely collect, store, use and disseminate information orally, in writing or by other means in the interest of national security, territorial integrity or public order is partially operating. Thus, any filming and photographing of public roads, public facilities, infrastructure, checkpoints, fortifications, and the like is banned in a number of regions.

Meanwhile, with the purpose of providing objective coverage, providing information to the public and international community about war crimes committed by the Russian Federation during its large-scale military aggression against Ukraine launched on 24 February 2022, as well as preventing leakage of information with limited access, preventing dissemination by media representatives (including foreign ones) and public personalities, influencers which the public listens (bloggers, etc.), information, the Order of the Commander-in-Chief of the Armed Forces of Ukraine No 73 of 03 March 2022 “The Organization of Interaction Between the Armed Forces of Ukraine, Other Components of the Defense Forces and Representatives of the Media During the Legal Regime of Martial Law” [10] defines a list of information, divulging of which can lead to the enemy’s awareness concerning military activities of the Armed Forces of Ukraine, other components of the defense forces for negative impact on the fulfilment of tasks during the legal regime of martial law. With that in mind, the order prohibits the independent dissemination, copying or reposting of information concerning, inter alia: the names of military units (subunits) and other military facilities in areas where military (special) missions are being carried out, the geographical coordinates of their locations; the number of military personnel; the number of weapons and military equipment, materiel and supplies, their condition and storage locations. As the details (information) specified in the order constitute restricted information of which is covered by the Code of State Secrets, the dissemination of which is prohibited by the law. Furthermore, we should like to point out that, in

order to properly record and documentation of war crimes and crimes against humanity committed by the Russian army in Ukraine, the Office of the Prosecutor General has created warcimes.gov.ua, the main state platform for collecting evidence, encouraging citizens, if possible, to collect and process data. More concretely, civilians can collect information regarding: the movement and use of the enemy's military equipment within cities, towns, shell debris within a settlement; the enemy's use of civilian infrastructure for military purposes under cover of civilians; property seizures, robbery by the occupying forces, deliberate attacks on personnel, transport, humanitarian aid-related equipment, and so on.

Thus, summing up the above, we can conclude that the state independently establishes the list of information, especially during the legal regime of martial law, which does not apply to the constitutional right to freely collect, store, use and disseminate information.

The right of access to public information is guaranteed under Article 3(1) of the Law of Ukraine “On Access to Public Information” by the duty of the information managers disclosing the information, excluding cases stipulated by law. It should be mentioned that the Law of Ukraine “The Legal Regime of Martial Law” does not provide a direct possibility to establish any prohibitions or restrictions on the execution of the duties of public information managers established by the Law of Ukraine “Access to Public Information” concerning the handling of requests or the disclosure of public information. The general list provided in the Articles 10-1 and 15 of the Law for the disclosure of information is defined as follows: information on the organisational structure, all normative legal acts without exception, the system of recording public information, information on the activities of the authorities, and so on. Attention should be drawn to the fact that publically available information should be promulgated without any delay, at the latest within five working days from the date of approval of the document. Although with the introduction of the legal regime of martial law in Ukraine, the scope of competence and powers of individual decision-makers regarding the disclosure of information and information to citizens has undergone significant changes, bearing in mind the restrictions imposed by the authorised subjects under Article 8 of the Law of Ukraine “The Legal Regime of Martial Law”. However, the mentioned restrictions cannot apply to information on normative legal acts imposing restrictions on constitutional rights and freedoms, as well as information on the state of the environment and the quality of foodstuffs. Based on the existing restrictions under martial law, the implementation of the right of access to public information is actually carried out through citizens' acquaintance with public resources of the Internet.

Regarding requests for the public information, although in some cases public information managers refuse access to citizens on the grounds of “the legal regime of martial law”, they are not always legitimate. Certainly, requests for information already received and logged can be suspended during emergencies that imminently threaten the life or health of workers by informing requests to delay their processing in advance through the manager's website and social media pages, but if requests for the public information focus on life-saving issues such as the availability of medicines in hospitals and pharmacies, beds availability, food and humanitarian requests, as well

as safety and infrastructural questions regarding the provision of water, electricity, heat, etc. for citizens, the rejections are unlawful. Moreover, the holder of information is not deprived of the obligation of substantiating in the request response the legitimacy of the restriction in accessing public information and such a conclusion must be reasoned and reflect a real causal link between the disclosure of the information and the substantial harm which might be caused.

Despite the fact that in accordance with Article 20 of the Law of Ukraine “Access to Public Information” a provider of information should respond to a request for information not later than five working days after receiving the request and if the request contains information necessary for protection a person’s life or freedom, about the state of the environment, of food quality and household items, accidents, disasters, natural hazards and other emergencies that have occurred or may occur and endanger the safety of citizens, the answer should be provided no later than 48 hours from receiving the request [6], in practice most public authorities cannot timely provide public information when the legal regime of martial law is under action. At the same time, according to part 6 of article 22 of the mentioned law, postponement of answering a request for information is allowed in the case when the requested information cannot be provided within the terms specified by the law due to force majeure. Details about the deferral decision comes to the requester in writing with an explanation of the procedure for appealing the decision [6].

With regard to the notion of “circumstances of insuperable force, or force majeure”, its definition is given in Article 14-1 of the Law of Ukraine “On Chambers of Commerce and Industry in Ukraine”, specifying them as the threat of war, armed conflict or a serious threat of such conflict, including but not limited only by hostile attacks, blockades, military embargoes, actions of a foreign enemy, nationwide military mobilization, hostilities, announced and undeclared war, actions of a common enemy, outrage, acts of terrorism, sabotage, piracy, riots, revolution, insurrection, uprising, mass riots, imposition of curfew, expropriation, forced seizure, seizure of enterprises, requisition, public demonstration, blockade, strike, accident, illegal actions of third parties, fire, explosion, long interruption of transport, regulated conditions of decisions and acts of public authorities, etc, as well as caused by exceptional weather conditions and natural disasters, namely: epidemic, severe storm, cyclone, hurricane, tornado, hurricane, flood, snow pile-up, ice, hail, frost, freezing of the sea, strait, ports, passes, earthquake, lightning, fire, drought, subsidence and landslide, other natural disasters, etc. [11].

Consequently, during the legal regime of martial law, citizens may exercise their right of personal familiarization with public information in exceptional cases involving the protection of life, health of citizens, preservation of property, prevention of other negative consequences of war, etc. However, as mentioned previously, exercising this right may be restricted by the disposer of information, and on some occasions it can be delayed due to circumstances of force majeure. Applying the postponement of requests should occur when there is an urgent necessity in reacting and responding sufficiently to circumstances of force majeure. Application of delay in satisfaction of requests must be carried out in acute need as a response and sufficient response to circumstances of insuperable force. At the same time, subjects of authority must

inform the applicant about the time and deadline for exercising the right of access to public information, in particular, if curfew period is set, reschedule it to another day, and in case it is impossible for ensuring the right to personal familiarization with public information, notify on other communication channels specified in the request about alternative ways of exercising their right to access the information. Obviously, in order to ensure the safety of citizens, both requestors and employees of the information provider, while introducing certain measures of legal regime, strengthening security or a special regime of the subject of authority, information providers may limit access to the publically available information, and these circumstances may be grounds for postponing or refusing to satisfy the request.

We can conclude from the foregoing that under the legal regime of martial law in Ukraine implementation of the citizens' right to access information of public interest in accordance with the requirements of the current legislation, in case such information is socially necessary, aimed for ensuring the safety of citizens, preservation of life, health and property, as well as the preventing negative consequences of hostilities, accidents of technogenic nature, as well as the preventing of negative consequences caused by warfare, technogenic emergencies, crimes, etc.

Information can be regarded as socially necessary if its spreading informs citizens on essential matters, in particular: introducing restrictive measures of the legal regime of martial law; safeguarding the rights and interests for internally displaced and other persons affected by the war, providing psychological assistance and rehabilitation; shelters, and the availability of drugs and medical supplies and potable water, food, sanitary facilities; evacuation routes and transport; threats of shelling or bombing by the aggressor and necessity of evacuating population from certain territory; regimes and specifics of functioning of authorities, companies and institutions providing administrative and other services under the legal regime of martial law; ensuring, under martial law, implementation of state guarantees defined by the laws of Ukraine; legal specifications of business activities under martial law, environmental protection, revealing the caused or possible damage to the ecology, public awareness of the real environmental condition and the factors affecting it, as well as ways of protecting against the effects of hazards caused by such emergencies; accountability and controllability in the delivery, distribution of the humanitarian aid; disclosing shortcomings in the activities of public authorities, their employees in taking measures for ensuring the legal regime of martial law, etc.

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**РЕАЛІЗАЦІЯ ПРАВА ГРОМАДЯН НА ДОСТУП ДО ІНФОРМАЦІЇ,
ЩО СТАНОВИТЬ СУСПІЛЬНИЙ ІНТЕРЕС, В УМОВАХ
ПРАВОВОГО РЕЖИМУ ВОЄННОГО СТАНУ В УКРАЇНІ**

У статті висвітлюються особливості реалізації права громадян на доступ до інформації, що становить суспільний інтерес в умовах правового режиму воєнного

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стану в Україні. Наголошується, що в умовах правового режиму воєнного стану в Україні багато державних сервісів призупинили роботу або працюють з обмеженнями як через загрозу національній безпеці, збереження територіальної цілісності, захисту демократичного конституційного ладу та інших національних інтересів України від реальних та потенційних загроз, так і через відсутність реальної можливості належного функціонування, проте доступ громадян до інформації, що становить суспільний інтерес, може врятувати їм життя, оскільки завчасне інформування громадян про загрозу нападу, окупації може сприяти своєчасній евакуації населення, запобігти гуманітарній катастрофі тощо.

Розкривається зміст таких понять, як “інформація”, “суспільно необхідна інформація”, “суспільний інтерес” та “право громадян на доступ до інформації”. Здійснюється аналіз чинного законодавства щодо забезпечення права громадян на доступ до інформації, а також щодо встановлення обмеження в реалізації цього конституційного права громадян у період дії правового режиму воєнного стану в Україні, зважаючи на обставини непереборної сили.

Наголошується, що під інформацією, яка становить суспільний інтерес, слід розуміти інформацію, яка є життєво значущою для значної частини населення держави, і право громадськості знати цю інформацію переважає потенційну шкоду від її поширення.

Зроблено висновок, що в умовах правового режиму воєнного стану в Україні реалізація права громадян на доступ до інформації, яка становить суспільний інтерес, має здійснюватися з урахуванням вимог чинного законодавства, якщо така інформація є суспільно необхідною і спрямована на забезпечення безпеки громадян, збереження життя, здоров'я людей та майна, а також на попередження та запобігання негативним наслідкам бойових дій, аварійним ситуаціям техногенного характеру, вчиненню злочинів тощо.

Ключові слова: права громадян; доступ до інформації; суспільно необхідна інформація; інформація, що становить суспільний інтерес; правовий режим воєнного стану.

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