

UDC 343.13 + 343.9

Doi: 10.56215/naia-herald/4.2024.61

## Theoretical legal analysis of abuse of power or official authority by a military official in martial law or combat situation: Key aspects

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■ **Abstract.** The relevance of this study is conditioned by the increasing significance of legal mechanisms in ensuring law and order, discipline, and responsibility of military leadership under martial law and combat situation. The purpose of this study was to theoretically investigate the key aspects affecting the qualification and investigation of criminal offences under Article 426-1 of the Criminal Code of Ukraine and to identify the problems and shortcomings related to the application of current legislation in proving the guilt of the perpetrator of such an offence. The methodological toolkit included a set of general scientific and special methods of legal analysis. The legal method was employed to analyse current legislation, the historical legal method – to investigate the evolution of legal provisions, the comparative legal method – to compare various approaches to the application of national legislation in practice, etc. This analysis was aimed at determining the place of the criminal offence under study in the system of forensic classification of military criminal offences. The study identified the elements determining the specifics of their investigation and providing them with a forensic characterisation to develop effective methods for investigating abuse of power or authority by military personnel. Based on the findings, the study provided a theoretical legal characterisation of the subject of the offence under study, which is a military officer. The study analysed such legal categories as special period, martial law, and combat situation. The specifics of abuse of power and official authority in the military sphere were identified. The study described the key aspects of military subordination and clarified the concepts of a military commander and a military superior. The study proposed to supplement the provisions of the Law of Ukraine “On Military Duty and Military Service” in the part relating to the category of “military official” to ensure harmonisation of legislative provisions governing legal relations in the military sphere with criminal law provisions prescribing liability for offences against the established procedure for military service

■ **Keywords:** military criminal offences; military official; military commander; military chief; military discipline; disciplinary authority; criminal liability

### ■ Introduction

The abuse of power or official authority by a military official as a separate criminal offence has appeared in the current legislation relatively recently. It is evident

that with the beginning of the anti-terrorist operation in eastern Ukraine (from April 2014 to April 2018), there was a need to criminalise certain actions of

### ■ Suggested Citation:

Kostiuk, I. (2024). Theoretical legal analysis of abuse of power or official authority by a military official in martial law or combat situation: Key aspects. *Scientific Journal of the National Academy of Internal Affairs*, 29(4), 61-74. doi: 10.56215/naia-herald/4.2024.61.

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■ Received: 04.08.2024; Revised: 28.10.2024; Accepted: 26.11.2024



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military personnel from among the commanding officers. In 2015, the Law of Ukraine No. 290-VIII<sup>1</sup> was adopted at the national level, amending the criminal legislation of Ukraine, the provisions of which were supplemented by Article 426-1. However, in historical terms, this type of criminal offence is not new. In 1995, the Law of Ukraine No. 282/95-BP<sup>2</sup> was adopted, according to which the Criminal Code of Ukraine<sup>3</sup> (CC of Ukraine) of 1960 was amended with respect to official crimes, where Chapter XI was supplemented by Article 254-2, which established liability for abuse of power or official authority by a military official. Comparison of this provision suggests that it is close to Article 426-1 of the CC of Ukraine<sup>4</sup>, the only difference being the status of the subject of the offence and the specificity of some of the ways of committing it. At the same time, Article 426-1 applies exclusively to military officials and is completely blanket in nature, which makes it necessary to refer to legislative and subordinate acts that provide the relevant legal assessment of the actions of the subject of this offence.

The interest in this subject stems from the ambiguity of the provisions of the criminal legislation of Ukraine of the 1960s and 2001s regarding the “abuse” and “exceeding” of power or official authority by military personnel. Comparison of Articles 254 and 254-2 of the CC of Ukraine of 1960<sup>5</sup> (Yatsenko & Shakuna, 1998) with Articles 423 and 424 of the CC of Ukraine of 2001<sup>6</sup> (Melnyk & Havronyuk, 2001) shows that the disposition of Article 254, which established liability for “abuse” of power or official authority, corresponds to Article 424, which defined liability for “exceeding” these powers. At the same time, Article 254-2, which stipulated liability for “abuse” of power or official authority, correlates with Article 423, which prescribed punishment for “abuse” of the said authority.

From a practical standpoint, the interest is also actualised by empirical analysis of court decisions. An illustrative example is the Decision of the Criminal Court of Cassation in case No. 216/1675/22 of 5 July 2023<sup>7</sup>, where the pre-trial investigation and prosecution authorities failed to prove the guilt of the accused military official in the abuse of power and official authority under martial law, which led to the death of a subordinate. The theoretical analysis of the key aspects of the criminal offence under study will

contribute to a more thorough understanding of its legal nature. This will ensure further improvement of the legal framework and doctrinal approaches to the investigation of military unlawful acts related to the violation of the order of performance of official duties.

Prominent studies in this area include a series of modern scientific findings by Ukrainian lawyers on criminal liability and punishment for military criminal offences. M. Komissarov *et al.* (2024) investigated the issues of qualification of military criminal offences committed under martial law at the theoretical and applied level. N. Stefaniv (2023) made a general description of military criminal offences from the perspective of a judge of the Supreme Court of Ukraine. O. Obodovsky (2021) analysed the general aspects of military criminal offences and their characteristics. I. Vartyletska & O. Sharman (2021) examined the specific features of the qualification of criminal offences committed during the special period of martial law. M. Yankovy (2023) highlighted the problematic aspects of investigating criminal offences committed by military personnel during armed conflict.

The interest in the offence under study is enhanced by the statistical data provided by N. Dmytrenko & O. Shkuta (2022), which indicate the latent nature of these acts due to the conservatism of the military system. This paradigm is also confirmed by foreign research. Specifically, analysing the socio-psychological determinants of deviant behaviour among the military, D. Messervey & E. Squires (2021) determine that the illegal activities of the military are influenced by various factors of dispositional (individual), situational (external), and systemic (institutional) origin. The researchers addressed the elevated level of concealment of these offences and the influence of the country’s military and political leadership on this circumstance. The explanation for this is that the military sphere has a specific and strategic nature, where offences are formally directed against the state. As L. Medvid (2020) notes in this regard, crime among the military command effectively undermines the functioning of the country, and its consequences threaten national security and shape public opinion on the level of safety and security of citizens.

The blatant nature of this offence necessitates a comprehensive theoretical legal analysis of the key aspects of abuse of power or authority by military

<sup>1</sup> Law of Ukraine No. 290-VIII “On Amendments to the Criminal Code of Ukraine Regarding Exceeding Authority or Official Powers by a Military Official”. (2015, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/290-19#n5>.

<sup>2</sup> Law of Ukraine No. 282/95-BP “On Amendments and Supplements to Certain Legislative Acts of Ukraine Regarding the Liability of Officials”. (1995, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/282/95-%D0%B2%D1%80#Text>.

<sup>3</sup> Criminal Code of Ukraine. (1960, December). Retrieved from [https://zakononline.com.ua/documents/show/140565\\_\\_529152](https://zakononline.com.ua/documents/show/140565__529152).

<sup>4</sup> Criminal Code of Ukraine. (2001, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/2001-05#Text>.

<sup>5</sup> Criminal Code of Ukraine. (1960, December). Retrieved from [https://zakononline.com.ua/documents/show/140565\\_\\_529152](https://zakononline.com.ua/documents/show/140565__529152).

<sup>6</sup> Criminal Code of Ukraine. (2001, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/2001-05#Text>.

<sup>7</sup> Judgment of the Criminal Court of Cassation as Part of the Supreme Court of Ukraine in Case No. 216/1675/22. (2023, July). Retrieved from <http://iplex.com.ua/doc.php?regnum=112088025&red=100003a60553feaa7cff2f5374c362be92a373&d=5>.

personnel. In this context, it is essential to examine the legal status of a military official, its relationship with power and official authority, disciplinary power, and statutory measures of influence. Particular attention should be paid to the determination of the purpose of the motivation for the unlawful activity, the distinctive differences between the legal regime of martial law and the combat situation, as well as the issues of military subordination and cause and effect relationships that may affect the unlawful activity of military personnel.

The findings of recent legal research do not provide sufficiently clear answers to address these issues. Focusing on the criminal law aspects of this offence, A. Zvenigorodskiy & O. Kizyun (2022) and Sh. Dovlatov *et al.* (2023) formulate an axiomatic statement that the subject of this offence is a person with the official status of a military official, its subjective side is characterised by an intentional form of guilt, while motives and purpose are crucial elements for a fair sentence.

In this context, it was necessary to investigate the established theoretical legal aspects of abuse of power or official authority by a military official in martial law or a combat situation, which affect the specific qualifications and degree of responsibility of the offenders. Proceeding from this, the purpose of this study was to develop theoretical foundations and practical recommendations for improving criminal legislation and law enforcement practice in the investigation of criminal offences related to abuse of power or authority by a military official during martial law or in a combat situation.

## ■ Materials and Methods

The choice of the subject of this study determined its methodology, which forms the method and conceptual framework of analysis depending on the subject matter and the tasks set. To solve the tasks set, the study employed the method of regulatory legal analysis, which involved a systematic examination of regulations to assess their effectiveness, consistency, and possible shortcomings. The method of legal integration was also used, which helped to interpret

the content of the current legislation and substantiate its improvement. The retrospective legal analysis was used to compare the current legislation with the previous ones, to investigate the evolution of legal provisions, the causes and consequences of their changes and amendments, and to analyse possible legal gaps in the new versions.

To evaluate legal categories, clarify definitions, and develop proposals for improving the current legislation, this study employed a multifactor analysis method that enables comparative legal and formal legal analysis of various approaches to the issues under study. The modelling method contributed to the formulation of conclusions and proposals aimed at improving the investigation of military criminal offences related to the abuse of power or official authority by military personnel under martial law or in a combat situation.

The basis of the legal analysis in this study was formed by legislative and subordinate legal acts, the provisions of which regulate certain issues of military legal relations, specifically in the part related to such categories as military official, power and official functions, disciplinary power, statutory measures of influence, military subordination, special period, martial law, combat situation, etc. These regulations included the Constitution of Ukraine<sup>1</sup>, the Criminal Code of Ukraine<sup>2</sup>, the Law of Ukraine “On Military Duty and Military Service”<sup>3</sup>, “On Mobilisation Training and Mobilisation”<sup>4</sup>, “On the Legal Regime of Martial Law”<sup>5</sup>, “On the Disciplinary Statute of the Armed Forces of Ukraine”<sup>6</sup>, “On the Statute of the Internal Service of the Armed Forces of Ukraine”<sup>7</sup>, as well as other legislative acts that served as the basis for the completion of the tasks set according to the subject of this study.

## ■ Results and Discussion

**Analysis of the term “military official”.** To implement the provisions of Article 19 of the UN Convention against Corruption<sup>8</sup>, into the Ukrainian legislation, the Law No. 746-VII<sup>9</sup> was adopted in 2014. According to this act, the criminal legislation of Ukraine was amended to decriminalise the criminal

<sup>1</sup> Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.

<sup>2</sup> Criminal Code of Ukraine. (2001, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/2001-05#Text>.

<sup>3</sup> Law of Ukraine No. 2232-XII. “On Military Duty and Military Service”. (1992, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/2232-12#Text>.

<sup>4</sup> Law of Ukraine No. 3543-XII “On Mobilisation Training and Mobilisation”. (1993, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/3543-12#Text>.

<sup>5</sup> Law of Ukraine No. 389-VIII “On the Legal Regime of Martial Law”. (2015, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/389-19#Text>.

<sup>6</sup> Law of Ukraine No. 551-XIV “On the Disciplinary Statute of the Armed Forces of Ukraine”. (1999, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/551-14#Text>.

<sup>7</sup> Law of Ukraine No. 548-XIV “On the Statute of the Internal Service of the Armed Forces of Ukraine”. (1999, March). Retrieved from <https://zakonrada.gov.ua/laws/show/548-14#Text>.

<sup>8</sup> UN Convention against Corruption. (2003, October). Retrieved from [https://zakon.rada.gov.ua/laws/show/995\\_c16#Text](https://zakon.rada.gov.ua/laws/show/995_c16#Text).

<sup>9</sup> Law of Ukraine No. 746-VII “On Amendments to the Criminal and Criminal Procedural Codes of Ukraine Regarding the Implementation into National Legislation of the Provisions of Article 19 of the UN Convention against Corruption”. (2014, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/746-18#Text>.

offences under Articles 423 and 424. Concurrently, the term “military official” was introduced, by which the legislator referred to military commanders and other military personnel who permanently or temporarily hold positions involving the performance of organisational, administrative, or economic functions, or perform such duties on special instructions of an authorised commander (Article 425)<sup>1</sup>. A comparable definition is contained in the provisions of Article 172-13 of the Code of Ukraine on Administrative Offences<sup>2</sup>, however, the legislation on administrative liability uses the conjunction “or” between the phrases “organisational and managerial” and “administrative and economic” functions.

The ambiguity of the context of the term under study is reinforced by the provisions of the Law of Ukraine No. 2232-XII<sup>3</sup>. In part 12 of Article 6 of this act, the content of this category is formulated analogously to the definition contained in administrative legislation, although the term “military executive” is used. This substantially affects the characterisation of the subject of the offence under study and creates grounds for providing a legal correction of the terms “military executive” and “military official”. Although the terms “executive” and “official” are widely used in Ukrainian legislation, their correlation is not addressed in any regulation. This causes complications in the legal application and legal interpretation of these terms, which, despite certain similarities, have differences.

The Constitution of Ukraine<sup>4</sup> also provides ambiguous definitions of these terms. Thus, according to the Constitution, state authorities and local self-government bodies, their officials are obliged to act only based on the grounds, within the limits, and in the manner prescribed by the Constitution and laws of Ukraine (Article 19); everyone is entitled to appeal to state authorities, local self-government bodies, their officials and employees, who are obliged to provide a reasonable response to the appeal within the time limit specified by law (Article 40); entrepreneurial activity of deputies, officials and employees of state authorities and local self-government bodies is limited by law (Article 42); everyone is guaranteed the right to appeal the decisions, actions, and inaction of the state authorities, local self-government bodies, and their executives and officials (Article 55), etc.

In the Law of Ukraine No. 3475-IV<sup>5</sup> the term “executive” is defined as the head of the civil service in a

state body. The Law of Ukraine No. 2493-III<sup>6</sup>, defines this concept by analogous criteria, where Article 2 states that a local self-government executive is, firstly, a person employed by local self-government bodies, secondly, has the relevant official powers to perform organisational and administrative, advisory and consultative functions, and thirdly, receives a salary from the local budget. In other words, an “executive” is defined as a subject of legal relations who primarily performs organisational, administrative, and advisory functions. In turn, an “official”, apart from organisational and administrative functions, performs administrative and economic functions. This suggests that organisational and managerial, advisory and administrative, and economic functions reflect different aspects of management and organisational functioning. However, these categories are interrelated and complement each other within the overall management process. For example, organisational and managerial functions form the basis of management activities, determining how other functions should be organised and implemented. They provide the structure and order necessary for the effective completion of tasks. Advisory and consultative functions support the organisational and managerial functions by providing expert opinions and recommendations for making informed management decisions. These activities help to clarify the strategies and approaches used in management processes. Meanwhile, administrative and business functions implement the practical aspects of management, providing resources for day-to-day operations. They facilitate the implementation of organisational and managerial functions by providing material and financial resources.

Thus, it is worth supporting the theoretical legal opinion proposed by N. Yarmysh (2015), according to which any executive is by definition an official, but not all officials are executives. An official exercises official powers that cover the rights and duties associated with the performance of functions within the civil service, including the military. These functions relate to the performance of tasks related to the representation of the interests of the state or an organisation, including administrative, managerial, economic, etc.

At the same time, an executive exercises official powers, which are characterised by concrete rights and duties assigned to a particular position in the organisational and staffing structure. These powers

<sup>1</sup> Criminal Code of Ukraine. (2001, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/2001-05#Text>.

<sup>2</sup> Code of Ukraine on Administrative Offences. (1984, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/80731-10#Text>.

<sup>3</sup> Law of Ukraine No. 2232-XII “On Military Duty and Military Service”. (1992, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/2232-12#Text>.

<sup>4</sup> Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.

<sup>5</sup> Law of Ukraine No. 3475-IV “On the State Service of Special Communication and Information Protection of Ukraine”. (2006, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/3475-15#Text>.

<sup>6</sup> Law of Ukraine No. 2493-III “About Service in Local Self-Government Bodies”. (2001, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/2493-14#Text>.

determine the responsibility, rights, and obligations of the person holding the position, which is part of the labour relationship. However, not all officials are executives, as official powers can be broader than executive ones. They may cover persons who perform governmental or other state functions, but do not necessarily hold a concrete position in the hierarchy of the organisational structure. In other words, for executives, their duties are always conditioned by a particular position, which is fixed in the staffing table. Officials, on the other hand, are broader categories that cover entities that have public functions and can act based on the orders or powers without being permanently assigned to a concrete position.

In the context of the military service, this can be illustrated at the level of command. For instance, a platoon commander is an executive officer. This is a person who holds a specific position in the organisational structure of a military unit. Their duties are clearly defined in their job description, which may include managing the platoon, organising military training, monitoring the execution of orders, etc. In this case, the platoon commander exercises the executive powers associated with their concrete position.

Officials can include a military commander or other servicepeople performing official duties that include organisational and managerial, advisory and administrative, and economic functions. For example, a senior officer who temporarily performs administrative support duties for a military unit but does not hold a separate position in the staffing table. They may be temporarily appointed to this function but are responsible as an official. That is, an executive holds a concrete position in the structure of the military unit and performs their duties according to this position. An official, on the other hand, may perform analogous or broader functions, but it is not necessary that they hold a concrete position to perform these functions.

Another example is the executive officer of a military unit's chief of staff. This is an officer who holds a clearly defined position in the command structure of a military unit. Their functions and responsibilities are set out in the staffing table and job description. For example, they are responsible for organising the planning of operations, coordinating actions between units and maintaining official records. In this case, the chief of staff is an executive, as their rights and duties are clearly related to their position.

An officer who performs the duties of a company commander in the absence of the main commander is an official. This officer may not hold this position in the staffing table, but temporarily performs its

functions, for instance, during the leave, illness, or death of the main commander. In such a situation, the officer performs official duties, including supervising company personnel, controlling the execution of orders, and administrative and economic functions, but without being formally appointed to the position. In other words, an executive holds a permanent position with clear responsibilities and powers set out in the staffing table. An official may temporarily perform official duties without being formally appointed to a permanent position, but their duties must be covered by the above-mentioned powers.

An example of an official who permanently performs their duties is the commander of a military unit, who is an official who permanently holds a certain position and performs duties involving organisational, administrative, and economic functions. Their powers include command of personnel, planning and conducting military operations, responsibility for logistical support of the unit, and ensuring the implementation of military discipline. In this case, the commander of a military unit is both an executive, since they hold a certain position in the staffing table, and an official, since their functions cover the performance of duties related to the management of personnel and material resources. This means that the functions and powers of an executive must be assigned to a concrete position in a military unit, while in parallel, they may perform official duties that involve the organisation, control, and management of the activities of a military unit.

Therefore, to clarify the term "military official", it is necessary to supplement part 12 of Article 6 of the Law of Ukraine "On Military Duty and Military Service"<sup>1</sup>, where the term "military executive" is set out in the following wording: "a military executive is a person from among the military personnel who holds a full-time position and performs official (service) powers (rights and duties) related to organisational and managerial, administrative and economic, and advisory functions in the military sphere, or who is specially or temporarily authorised to perform these functions in accordance with the law". These amendments will enable a more precise characterisation of a "military official" as a subject of a criminal offence, since in this case it is a military officer who performs not only official duties but also executive ones.

**Analysis of the terms "special period", "martial law", and "combat situation".** With the development of social relations and changes in the military-political situation, in 2008, the term "special period" was introduced into Ukrainian legislation<sup>2</sup>. This prompted the addition of new qualifying

<sup>1</sup> Law of Ukraine No. 2232-XII. "On Military Duty and Military Service". (1992, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/2232-12#Text>.

<sup>2</sup> Law of Ukraine No. 1932-XII "On the Defence of Ukraine. Law of Ukraine". (1991, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/1932-12#Text>.

features to the criminal offence under study, which distinguished between the abuse of power or authority by a military official in peace, a special period, martial law, or a combat situation. Thus, additional circumstances were introduced into the current criminal legislation that affect the socially dangerous nature of this act and increase the responsibility for their commission.

The special period has a legislative rationale that is closely related to such categories as “mobilisation”, “demobilisation”, and “martial law” (Article 1 of the Law of Ukraine “On Mobilisation Training and Mobilisation”<sup>1</sup>). However, this study did not aim to reproduce the norms already defined by the legislation. Its purpose was to investigate the essence, content, and meaning of this concept using scientific approaches.

When analysing the term “martial law”, which is defined in the legislative act of Ukraine of the same name<sup>2</sup>, it is worth paying attention to such a term as “legal regime”. This term has received considerable attention in the scientific literature. Specifically, when exploring the term “legal regime”, O. Yakovlev (2015), L. Vakaryuk (2016), and N. Kovalenko (2019) considered it as a set of legal provisions and mechanisms regulating the procedure and conditions for the functioning of a certain area of social relations. In the general context, this concept is abstract in nature, establishing rules of conduct, rights and obligations, as well as restrictions for concrete subjects within a particular legal relationship or field of activity.

Legal regimes are classified according to various criteria that depend on the nature of legal relations, as well as the purpose and specifics of the conditions of its application. For instance, they can be divided into constitutional law, civil law, criminal law, administrative law, etc. Depending on the purpose and specifics of legal relations, these regimes can be differentiated into a state of emergency, martial law, etc. In terms of territorial scope, a legal regime may be of national or local significance.

In other words, legal regimes cover multiple spheres of public life and provide legal regulation of various types of social relations proceeding from the concrete conditions of their application. In this context, they can be classified as special and exceptional. In effect, these regimes are legal instruments established by law to ensure effective management, security, and control in particular situations or conditions. They define special or exceptional rules and procedures that apply in particular cases or areas of activity. The key differences between them lie in their purpose, scope of application, and the degree of restrictions imposed. Specifically, special legal regimes

are introduced to regulate concrete areas of activity or certain situations that require an increased level of security and control. Since these regimes are applied to specific situations or activities, their impact may be both local and narrowly targeted.

At the same time, exceptional legal regimes are introduced in extraordinary cases, usually in response to emergency circumstances that threaten security, law and order, public administration, sovereignty, and territorial integrity of the state. These regimes have a wider scope, depending on the nature of the emergency and its consequences. They may cover the entire territory of the country or a significant part of it. Exceptional legal regimes impose stricter limitations that affect the fundamental rights and freedoms of citizens, as well as the activities of enterprises, institutions, and organisations, regardless of their form of ownership. This is explained by the fact that emergencies require urgent, large-scale, and effective measures of influence, response, and control from the state.

Thus, the key criterion for the introduction of an exceptional legal regime is the emergence of extraordinary circumstances that threaten national security, public order, public health, or the environment. In other words, situations when normal conditions of human life are disrupted, caused by accidents, catastrophes, natural disasters, dangerous events of terrorist, and unconstitutional nature or secondary factors of social or military origin. In this interaction, extraordinary circumstances form extraordinary conditions that lead to the introduction of a state of emergency in the country.

The state of emergency is an exclusive measure introduced to eliminate the consequences of extraordinary circumstances caused by certain events, to normalise the situation, restore law and order in the state. Under these conditions, the military and law enforcement agencies must reorganise their activities in such a way as to ensure the fastest possible elimination of the consequences of the emergency, normalise the situation and restore law and order in the country. However, it is extremely challenging to achieve these goals by conventional methods, which is why, depending on the concrete circumstances, exceptional legal regimes of emergency or martial law are temporarily introduced. According to S. Gizimchuk (2021), in specific conditions, these legal regimes allow for the application of exclusive measures aimed at eliminating or minimising the consequences of emergency circumstances and often involve temporary restrictions on the rights and freedoms of citizens, as well as the use of supplementary resources and powers of certain state bodies to respond to a crisis effectively.

<sup>1</sup> Law of Ukraine No. 389-VIII “On the Legal Regime of Martial Law”. (2015, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/389-19#Text>.

<sup>2</sup> Ibidem, 2015.

Depending on their origin, special legal regimes are divided into natural, anthropogenic, social, or military<sup>1</sup>. Military emergencies usually arise as a result of an armed conflict, hostilities, or other military events that lead to significant destruction, human casualties, disruption of the population's living conditions, and major changes in the political, economic, social, and state-building spheres of society. An example of such situations is military aggression and its concomitant consequences, including massive destruction of infrastructure facilities, numerous civilian casualties, destabilisation of the economic system, disruption of social order, and changes in the system of public administration.

Thus, martial law is an exceptional legal regime that is temporarily introduced in a state as a result of military emergency. It involves the introduction of specific measures to ensure national security, including restrictions on the rights and freedoms of citizens, mobilisation of resources, strengthening of control over territories and infrastructure, as well as coordination of activities of the authorities and military structures to effectively respond to military threats. The Law of Ukraine "On the Legal Regime of Martial Law"<sup>2</sup> emphasises this point.

In other words, the introduction of martial law is the result of military aggression and military actions of the enemy state against a sovereign subject of international relations. In this context, the military response authorities are entrusted with the key functions, including coordination of military and civilian efforts, operational management of resources, maintenance of public order and security, implementation of defence and threat neutralisation measures, as well as ensuring an effective response to situations arising under martial law or in a combat situation.

When examining the term "combat situation", it should be noted that its definition is expressed both in the commentary to Article 402 of the CC of Ukraine<sup>3</sup> and in the scientific context by S. Gizimchuk (2021), K. Gurchenko (2023), M. Yankovyi (2023), etc. Having analysed different opinions on this concept, the study concluded that the combat situation referred to in Section XIX of the Criminal Code of Ukraine is a derivative of military operations. It is a direct result and reflection of active military operations that affect the situation on the battlefield. Military actions form the conditions that determine the combat situation, including the location of troops, strategic and tactical changes, the effect on the civilian population and other aspects of the situation. This means that martial law, albeit imposed in connection with

military aggression, can also apply to areas where no hostilities are taking place. In other words, this legal regime can cover both the areas of hostilities and other territories to ensure security and law and order in the context of military aggression. A combat situation may arise in the context of military operations or armed conflict, even if martial law is not formally introduced in the country. In this context, martial law is an exceptional legal regime that is introduced in the state as a whole and particularly in connection with the threat of military aggression or hostilities, but this does not mean that hostilities or a martial law situation are possible only in the presence of martial law.

Apparently, the legislator intended to distinguish between the composition of the criminal offence under study, in cases where unlawful acts are committed under martial law outside the areas of hostilities, and in cases where these acts are committed in other conditions, including martial law within the areas of hostilities or military operations (combat situation). In this regard, as researchers rightly point out, such a distinction is a prerequisite for a more accurate determination of the qualifying circumstances of a criminal offence under which criminal liability may arise, which affects the severity of the consequences caused by the unlawful actions of a military officer (Bondaevsky, 2012; Bayda & Sklez, 2019).

Therefore, when investigating an abuse of power or official authority by a military official committed under martial law or in a combat situation, it is important to establish the time of the criminal offence. Specifically, two important circumstances need to be clarified. Firstly, whether the military officer was on duty at the time of the offence, as this allows assessing the legality of their actions within the scope of their official duties. Determining when a military officer was on duty is also essential to ascertain whether the suspect was acting within their competence when committing the offence. This applies not only to the perpetrator, but also to the victim, if any, as their status at the time of the incident may affect the further legal assessment of the situation and the establishment of liability.

Secondly, it is equally vital to establish the period when the criminal offence was committed, as this may affect the qualification of the act and the determination of the degree of liability. The period of the offence is important for the correct correlation of the perpetrator's actions with the conditions of martial law or combat situation, which may directly affect liability and punishment.

<sup>1</sup> Code of Civil Protection of Ukraine. (2012, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/5403-17#Text>.

<sup>2</sup> Law of Ukraine No. 389-VIII "On the Legal Regime of Martial Law". (2015, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/389-19#Text>.

<sup>3</sup> Criminal Code of Ukraine. (2001, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/2001-05#Text>.

**Analysis of the concepts of abuse of powers of authority and official powers.** Having formed as a separate corpus delicti of a criminal offence, the legislator considers “abuse of power or authority” by a military official to mean intentional actions that, firstly, clearly exceed the limits of the powers of authority or official position granted to that person – rights and duties (part 1), and secondly, involve the use of measures of influence that do not conform to statutory norms or disciplinary authority (part 2), provided that these actions caused substantial damage or grave consequences<sup>1</sup>. These circumstances are the key criteria that distinguish this criminal offence from a military disciplinary offence, which is also confirmed by the findings of V. Shkarpytska (2018), A. Podolyak & Yu. Dyomin (2021).

Unlike abuse of authority or official position, abuse of powers is committed exclusively through active conduct that clearly exceeds the competence of a military official. This means that the perpetrator, being aware of the limits of their powers, deliberately performs actions that clearly violate the scope of their rights and duties. In this context, the intellectual element of intent is the person’s awareness of the socially dangerous nature of their actions and the foresight of the possibility or inevitability of harmful consequences (Review of judicial practice..., 2023). In other words, the person committing this criminal offence is aware of exceeding the limits of their powers and understands that the actions committed are not within their competence.

Depending on the specifics of the activity, according to P. Gorinov & K. Mereniuk (2022), the scope and limits of powers should be carefully detailed in regulations. This is also confirmed by the relevant provisions of the Constitution of Ukraine<sup>2</sup>, according to which the legislative, executive, and judicial branches of government exercise their powers within the limits set by the Constitution and in the manner prescribed by the laws of Ukraine (Article 6). State bodies, local self-government bodies, and their executives are obliged to act exclusively based on and within the limits of the powers prescribed by both direct-action provisions and other legislative acts (Article 19).

The term “powers” does not have a universal definition, but it is widely used in public service and is combined with various categories related to public administration. Among these categories, it is worth highlighting such terms as powers of authority, own (self-governing) powers, delegated powers, state-executive powers, local self-government powers, etc. (Kovbasyuk *et al.*, 2010). Based on the analysis of the above categories, official powers should be

understood as a set of rights and obligations granted to officials to perform their official functions within the established competence. They are regulated by laws and regulations and are aimed at ensuring the effective performance of tasks of public authorities or local self-government bodies, as well as at achieving the goals of state or public activity. Service powers cover both the power and organisational aspects of service activities that regulate the interaction between the subjects of governance. They include all the rights and obligations granted to officials to perform their functions, including administrative, managerial, and powers of authority.

At the same time, “powers of authority” are a specific type of official powers that relate to the ability and opportunity to influence the activities and behaviour of others. In other words, all powers of authority are inherently official, but not all official powers are powers of authority. An example of such authority in the military is the duty to train junior personnel. An instructor or a senior member of the armed forces may be responsible for teaching recruits the basics of military service. These powers are aimed at imparting knowledge and skills, but do not involve direct management or control over the actions of recruits.

Thus, service powers are closely related to such terms as “civil service” and “civil servant” as defined in Article 1 of the Law of Ukraine “On Civil Service”<sup>3</sup>. An analysis of these terms suggests that civil service is performed by civil servants who hold positions in state bodies and their structures, have the relevant official powers necessary to perform the tasks of the state, and receive salaries from public funds. The scope of the civil service is covered by the boundaries of official activity, which means that it operates within the framework of certain rules and regulations that govern the behaviour of employees and their discipline. In this context, according to V. Sokurenko (2015), a civil servant is obliged to perform their official duties in good faith, show respect for citizens, superiors, and colleagues, maintain a high culture of communication, and avoid actions that may harm the interests of the civil service or negatively affect the reputation of civil servants.

An analogous approach applies to military officers whose responsibility is determined by a negative assessment of their behaviour in terms of state interests. Such behaviour is contrary to the requirements of military discipline and may result in the application of measures of influence by authorised officials. Depending on the consequences, according to O. Kizyun (2020), Sh. Dovlatov *et al.* (2023), this

<sup>1</sup> Criminal Code of Ukraine. (2001, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/2001-05#Text>.

<sup>2</sup> Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.

<sup>3</sup> Law of Ukraine No. 889-VII “On Civil Service”. (2015, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/889-19#Text>.

responsibility may entail the application of both disciplinary measures in the form of disciplinary sanctions and criminal law measures in the form of criminal penalties.

According to the Disciplinary Statute of the Armed Forces of Ukraine<sup>1</sup>, military discipline involves strict and absolute compliance by all military officers with the order and rules stipulated by military regulations and applicable legislation. It is based on the military officers' awareness of their military duty, responsibility for the defence of sovereignty, independence, and territorial integrity, as well as loyalty to the military oath (Items 1, 2). In other words, military officers are obliged to faithfully perform the duties of military service, obey lawful orders of commanders, the provisions of the Constitution and laws of Ukraine, and ensure the non-disclosure of military secrets and classified information (Medvid, 2020). In the exercise of their powers under martial law or in a combat situation, military officers must act according to the generally recognised principles of international humanitarian law, the violation of which leads to the application of criminal sanctions not only of a national but also of an international nature (Rubanenko, 2024).

Thus, within the framework of military service, military discipline is closely related to disciplinary power, which serves as a tool for maintaining military law and order. It is exercised through the right of commanders and superiors to impose disciplinary sanctions on subordinate military personnel who have violated the military oath, military regulations, orders, and other legislative and subordinate legal acts regulating the activities of military personnel. Disciplinary measures may include admonitions, reprimands, severe reprimands, deprivation of the military rank, demotion, and other sanctions stipulated by the relevant statutes. The procedure for applying these sanctions, the scope of the commander's powers in this area and other procedural aspects of disciplinary proceedings are regulated by the relevant military regulations, the violation of which may result in criminal liability.

In this context, it is necessary to distinguish between disciplinary authority and statutory measures of influence. The difference between them is that disciplinary authority relates to the exercise by the commander of their powers to impose disciplinary sanctions for violations of military discipline. Statutory measures of influence, on the other hand, cover a wide range of actions, including organisational and managerial decisions that can be taken to ensure the

proper performance of military duties, even without violations. Understanding this distinction allows for effective management in military structures, ensuring a balance between coercion and incentives to perform duties.

Special attention should be paid to the rights of military personnel to use physical force, as well as special means and weapons in the performance of their duties. These actions can be considered as statutory measures of influence, as they are performed within the framework of military regulations and provisions governing the behaviour of military personnel in various circumstances, including ensuring military discipline and performing official tasks. For example, according to Item 21-1 of the Statute of the Internal Service<sup>2</sup>, a commander (chief) in an exceptional period, including martial law or in a combat situation, is entitled to resort to violent measures of physical influence or special means to detain a military person who commits unlawful acts classified as military criminal offences to stop them. This force must be used in a manner that does not cause severe harm to the offender's health. In a combat situation, the commander is entitled to resort to the use of firearms or to order their use if no other methods are effective in stopping the offender's unlawful actions, while avoiding the death of a servicemember. In cases where circumstances permit, the commander is obliged to warn in advance the person against whom statutory measures of influence may be applied by announcing their intentions loudly or by firing a warning shot in the air.

Thus, the scope of official powers of military officials is covered by a wide range of regulations and personnel documentation issued on their basis, including functional duties, job descriptions, regulations, charters, orders, instructions, and laws that regulate the rights and obligations of military personnel. In case of violation of the law, military officers bear legal responsibility, which, depending on the consequences, may include criminal liability for abuse of authority or official powers. Abuse of authority or official powers covers such key aspects as official powers, powers of authority, discipline, legality, disciplinary power, disciplinary measures, and other statutory measures of influence that determine the mechanism of control and responsibility within the military service.

**Analysis of the purpose and motives for abuse of authority or official powers.** Depending on the method of committing the offence under Article 426-1 of the CC of Ukraine<sup>3</sup>, one can distinguish between

<sup>1</sup> Law of Ukraine No. 551-XIV "On the Disciplinary Statute of the Armed Forces of Ukraine". (1999, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/551-14#Text>.

<sup>2</sup> Law of Ukraine No. 548-XIV "On the Statute of the Internal Service of the Armed Forces of Ukraine". (1999, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/548-14#Text>.

<sup>3</sup> Criminal Code of Ukraine. (2001, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/2001-05#Text>.

selfish and violent motives, which are typical for this context. Selfish motives include the actions of a military person that clearly exceed the limits of their powers and are aimed at achieving personal gain. These may include actions aimed at satisfying personal ambitions, needs, or desires for increased control, including to enhance prestige among subordinates, gain advantages in the military team, increase status, or obtain illicit enrichment. Violent motivations involve the use of physical or psychological violence by a servicemember that exceeds the limits of their authority or official powers. Such actions may be used as a means of achieving personal goals, for instance, to control subordinates, to force them to follow orders, to subdue individuals or groups of individuals, or to conceal illegal actions.

The abuse of authority or official powers by a military official should not contain conditional restrictions based on concrete contextual circumstances and should not cause substantial damage or grave consequences to the state, public, or personal interests of citizens. Considering the legal status of the subject of this offence, these actions in the educational and scientific literature include actions that are entrusted to other officials or require collegial decision-making; actions that require separate permission or a relevant situation; and actions that no one is entitled to perform or authorise (Savchenko & Kryshevych, 2012). The qualification of the studied criminal offence is possible only if the actions of a military officer are related to their official powers, but clearly exceed them. That is, actions that have no connection with their powers cannot be qualified as abuse of authority or official powers. Therefore, the criminal acts of a military official must be caused by their official position and be directly related to the rights and duties granted to them. This is also emphasised by the Plenum of the Supreme Court of Ukraine<sup>1</sup> where it is noted that in the absence of such a connection, the perpetrator's actions are subject to qualification under other Articles of the CC of Ukraine<sup>2</sup>, where the subject is a general one.

Thus, from the standpoint of social relations, the abuse of power or official authority by a military official is a form of arbitrariness, which involves the unlawful commission of actions to satisfy one's own (personal) needs (interests) or achieve other personal goals. These actions violate the norms and rules of military service, public order, and military discipline, which are essential for society and law and order overall. In this respect, the only defined subject

of a criminal offence is a military official, who is a military person from among the senior staff who permanently or temporarily holds positions related to the performance of organisational and managerial, administrative and economic functions, or advisory functions, or performs these activities on behalf of an authorised person or governing body.

**Analysis of the military chain of command and military subordination within the scope of official duties.** In the military sphere, senior officers are covered by such concepts as commander and/or chief. An analysis of the Internal Service Statute of the Armed Forces of Ukraine<sup>3</sup> suggests that a commander is a military officer who leads a military unit, subunit, or other military organisational unit and is responsible for its general condition, combat readiness, performance of tasks, as well as for the moral and psychological state of subordinates, their training and discipline. The commander has permanent powers to manage the unit under their command.

A chief is a more general term that covers any official who has the powers to direct other military personnel within the scope of their duties. A chief may supervise subordinates on a permanent or temporary basis, particularly in connection with the performance of certain tasks or during the joint performance of official duties. A chief can be any military member who is senior in rank or position, regardless of whether they are a unit commander. According to the particular structure of military relations, determined by rank, position, and/or the nature of the duties performed, a chief in the hierarchical structure may be subordinate to a commander. This subordination occurs within the scope of official duties since the latter has higher powers and responsibility for managing the unit or the unit as a whole.

Thus, the chief may execute orders of the commander and report to them in the performance of assigned tasks. At the same time, in certain situations, a chief may have autonomy in managing subordinates and not report directly to the commander. This subordination is dynamic and depends on the concrete circumstances and the duties being performed. Thus, the hierarchical relationship between a superior and a commander may change according to the objective needs of the service, which requires flexibility in management and performance of duties.

For instance, in the context of combat operations, a chief may act independently in cases where an urgent response is required, demonstrating the dynamism of hierarchical relations in the military structure.

<sup>1</sup> Decision of the Judicial Panel of the Supreme Court of Ukraine No. n0140700-01. (2001, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/n0140700-01#Text>.

<sup>2</sup> Criminal Code of Ukraine. (2001, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/2001-05#Text>.

<sup>3</sup> Law of Ukraine No. 548-XIV "On the Statute of the Internal Service of the Armed Forces of Ukraine". (1999, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/548-14#Text>.

For example, during an offensive operation in a combat situation, a company commander receives a task from the senior command to capture strategically significant high ground. They order their subordinates – the company's chief of staff and platoon commander – to prepare and carry out the task assigned.

During the operation, the company's chief of staff, who is responsible for planning and coordinating the operation, notices that the enemy has intensified its forces on the flank. In this regard, they decide to redirect part of the forces to hold this flank without waiting for instructions from the company commander, as the situation requires a rapid response. This example is a confirmation of the chief's autonomy in the face of changing battlefield conditions. Although the chief of staff is subordinate to the commander, in this situation the chief's decisions help to avoid possible losses and preserve the combat capability of the unit. Otherwise, if such a decision led to the loss of combat capability of the unit, irreversible damage to military equipment or other military property, or substantial changes in the tactical situation on the battlefield to the benefit of the enemy, in the absence of combat immunity, the person is liable under Article 426-1 of the CC of Ukraine<sup>1</sup>.

In the military sphere, subordination relations are covered by the principle of unity of command. It entitles the commander or chief to make decisions independently, give orders, and ensure their implementation according to the requirements of the legislation. The hierarchical structure includes two principal forms of subordination. The first concerns the relationship between a leader and subordinates by rank, which determines vertical subordination. The other involves horizontal subordination according to the official position of the military member, which regulates the performance of duties within a particular position regardless of rank and determines functional subordination within the scope of official authority.

In other words, according to military ranks and positions, some military officers may be chiefs, while others may be subordinates. Specifically, for enlisted personnel (soldiers and seamen), the superiors are non-commissioned officers and sergeants within the same military unit. For sergeants, petty officers, as well as soldiers and seamen, the superiors are junior officers of the same military unit. Commanding officers for privates, sergeants, non-commissioned officers, and junior officers are senior officers. For all these categories of military personnel, the commanders are generals and admirals of the respective command.

A superior officer is a person to whom a military member is subordinate on a permanent or temporary basis according to their official duties. The chain of command is regulated by orders of the military unit,

statutes, or relevant regulations. In cases where the service relations between military personnel are not clearly defined, the superior in position is determined as the chief during the joint performance of official tasks, and in case of equal positions – the senior in military rank. The chief has the powers to give orders to subordinates and demand their execution, while the subordinate is obliged to obey and execute the received orders without question.

An order may be issued to an individual military member or a group of military members orally, in writing, or by means of technical means of communication. The issuance of orders is permitted only within the scope of official duties and in the interests of the service, as the competence of the chief, as well as the right to issue orders, is limited to the scope of official powers. Requirements that are not related to the performance of official tasks, are caused by the personal interests of the chief or contradict the interests of the service cannot be regarded as an order. Similarly, a requirement from a chief formulated in a non-statutory form that degrades the dignity of a subordinate cannot be considered a lawful order.

## ■ Conclusions

Thus, the subject of the criminal offence under study is a person who must have an official connection with military service, be an authorised representative of a military unit or military command and control body, and hold a military position established by the staff list. This person must be a military officer or have an equivalent status confirmed by law and be subject to the rules of military service. The position must be related to the performance of organisational and managerial or administrative duties that include the powers to lead, organise military activities, or administrative work of the relevant military unit.

The scope of service powers of military personnel is regulated by a considerable number of regulations and personnel documents, including functional duties, job descriptions, regulations, charters, orders, instructions, and laws that define their competence. In case of violation of legal provisions, military members bear legal responsibility, the degree of which depends on the nature and consequences of the actions committed. The abuse of these powers covers such aspects as the exercise of official and authority, compliance with discipline and the rule of law, the use of disciplinary power, the implementation of statutory measures of influence and responsibility within the framework of military service both in peacetime and during a special period, martial law, or a combat situation.

In the context of social relations, the abuse of power or official authority by a military officer can

<sup>1</sup> Criminal Code of Ukraine. (2001, May). Retrieved from <https://zakon.rada.gov.ua/laws/show/2001-05#Text>.

be viewed as a form of arbitrariness, which involves actions motivated by selfish or violent motives. These actions violate the established norms of military service, public order, and military discipline, which are essential for society and law and order. The only correct subject of the criminal offence under study is a military officer of a senior level who performs official duties on a permanent or temporary basis. In the military hierarchy, military officers can be superiors and subordinates. This subordination has two forms – by rank or position. The terms “commander” and “chief” cover commanding officers: a commander has permanent authority to manage a unit and personnel subordinate to them by rank. A chief may exercise leadership on a permanent or temporary basis, particularly in connection with the performance of certain tasks or duties. A superior may be any service member who is senior in rank or position, regardless of whether they have command responsibilities.

When investigating cases of abuse of authority or official powers by a military officer, special attention should be paid to the time and period of the unlawful acts. It is vital to establish whether the military officer was on duty at the time of the act, which

allows assessing the legality of their behaviour within the scope of their official rights and powers. This applies to both the offender and the victim, as their status may affect the legal qualification of the criminal case. Determining the period of the act is crucial for the correct qualification of the offence, especially in the context of peacetime, a special period, martial law, or a combat situation, which affects the level of responsibility and the degree of punishment.

In the future, it is necessary to investigate the theoretical and forensic aspects of classification and characteristics of abuse of authority or official powers by a military official committed under martial law and combat situation in greater detail.

### ■ Acknowledgements

The research was carried out in accordance with the individual plan of the author’s dissertation work at the Department of Criminalistics and Forensic Medicine of the National Academy of Internal Affairs.

### ■ Conflict of Interest

The author of this study declares no conflict of interest.

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## Теоретико-правовий аналіз перевищення влади чи службових повноважень військовою службовою особою в умовах воєнного стану або бойової обстановки: ключові аспекти

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■ **Анотація.** Актуальність дослідження зумовлена посиленням значення правових механізмів у забезпеченні законності, правопорядку, дисципліни й відповідальності військового керівництва в умовах воєнного стану та бойової обстановки. Мета статті полягала в теоретичному дослідженні основних аспектів, що впливають на кваліфікацію та розслідування кримінальних правопорушень, передбачених ст. 426-1 Кримінального кодексу України, а також у виявленні проблем і недоліків, пов'язаних із застосуванням норм чинного законодавства під час доказування вини суб'єкта цього правопорушення. Методологічний інструментарій охоплював комплекс загальнонаукових і спеціальних методів правового аналізу. Використано нормативно-правовий метод для аналізу чинного законодавства, історико-правовий метод для дослідження еволюції правових норм, порівняльно-правовий метод для порівняння різних підходів до застосування норм національного законодавства в практичній діяльності тощо. Цей аналіз було спрямовано на визначення місця досліджуваного складу кримінального правопорушення в системі криміналістичної класифікації військових кримінальних правопорушень. Виокремлено елементи, які детермінують специфіку їх розслідування та надання їм криміналістичної характеристики для розроблення ефективних методик розслідування перевищення військовослужбовцями влади чи службових повноважень. За результатами дослідження було надано теоретико-правову характеристику суб'єкту досліджуваного правопорушення, яким є військова службова особа. Проаналізовано такі правові категорії, як особливий період, воєнний стан і бойова обстановка. Визначено специфіку перевищення влади і службових повноважень у військовій сфері. Надано характеристику основним аспектам військової субординації, уточнено поняття військового командира і військового начальника. Запропоновано доповнити норми Закону України «Про військовий обов'язок і військову службу» у частині, що стосується категорії «військова посадова особа», задля забезпечення узгодження законодавчих норм, які регулюють правовідносини у військовій сфері, з кримінально-правовими нормами, що передбачають відповідальність за правопорушення проти встановленого порядку несення військової служби

■ **Ключові слова:** військові кримінальні правопорушення; військовослужбовець; військовий командир; військовий начальник; військова дисципліна; дисциплінарна влада; кримінальна відповідальність