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## Theoretical and practical problems of conducting criminal and administrative proceedings in Ukraine under martial law

### Теоретичні та практичні проблеми здійснення кримінальних та адміністративних проваджень в Україні в умовах воєнного стану

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#### Abstract

The purpose of the study was to determine the theoretical and practical problems of conducting criminal and administrative proceedings in Ukraine during martial law. Its achievement became possible thanks to the solution of the main tasks: analysis of judicial and investigative practice, regulatory provisions.

To achieve the goal, a system of general scientific and special methods was used, which made it possible to take into account the peculiarities of the object and subject of research, in particular: methods of formal logic, special legal methods, and comparative legal methods; historical-legal, systemic-structural, sociological methods.

Significant changes in the legal system of Ukraine during martial law are emphasized. Areas of improvement of the current legislation have been determined, with the aim of solving theoretical and practical problems of conducting criminal and administrative proceedings in Ukraine during the martial law. These are: 1) expanding the list of administrative offenses that can be prosecuted in a simplified manner; 2) introduction of administrative responsibility for the commission of certain acts during the period of martial law; 3) establishing the court's

#### Анотація

Метою дослідження стало визначення теоретичних і практичних проблем здійснення кримінальних та адміністративних проваджень в Україні під час воєнного стану. Її досягнення стало можливим завдяки вирішенню основних завдань: аналізу судової та слідчої практик, нормативних положень.

Для досягнення поставленої мети використано систему загальнонаукових і спеціальних методів, які дозволили оптимально врахувати особливості об'єкта і предмета дослідження, зокрема: методи формальної логіки, спеціально-правові методи, передусім порівняльно-правовий; історико-правовий, системно-структурний, соціологічний методи.

Наголошено на суттєвих змінах правової системи України за період дії правового режиму воєнного стану. Визначено напрями вдосконалення чинного законодавства, з метою вирішення теоретичних і практичних проблем здійснення кримінальних та адміністративних проваджень в Україні під час воєнного стану, серед яких: 1) розширення переліку адміністративних правопорушень, провадження у яких може відбуватися у спрощеному порядку; 2) запровадження адміністративної відповідальності за вчинення

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duty to verify the existence of an objective impossibility for the prosecutor to appeal to the court with an indictment, etc.

**Keywords:** criminal proceedings, pretrial investigation, administrative proceedings, legal regime of martial law, investigator, criminal offense, crime.

## Introduction

The military aggression by the Russian Federation on the territory of Ukraine, which began in 2022 and continues to this day, has taken the form of a full-scale invasion. This led to the fact that the President of Ukraine made a decision to introduce a legal regime of martial law on the entire territory of Ukraine on February 24, 2022 (Decree of the President of Ukraine No. 64/2022, 2022). The need to introduce this legal regime was due to threats to the territorial integrity of Ukraine and the independence of our state. The legal consequences of the introduction of martial law were the adoption of a decision to limit the legal status of participants in social relations.

The Constitution of Ukraine defines a detailed list of human and citizen rights and freedoms, as well as rights and legal interests of legal entities that may be limited. The same regulatory provisions have found their consolidation in other legislative acts. At the same time, it should be noted that legislative activity of the parliament of Ukraine was observed in 2022. In particular, it adopted a significant number of laws and resolutions that not only introduced a new order of legal regulation. That is, the introduction of the legal regime of martial law provoked further changes in the legislative system of Ukraine. The system of administrative and criminal legislation did not become an exception. This also led to a reorientation of the directions of scientific research.

Criminal procedural legislation, in particular in the part of regulating social relations related to the commission of criminal offenses and their investigation, develops in accordance with the existing realities of social life. Modern features of the development of its institutions are determined by the legal regime introduced on the territory of Ukraine. Therefore, in the period from 2014 to 2022, it underwent many changes, including:

окремих діянь у період дії воєнного стану; 3) закріплення обов'язку суду щодо перевірки наявності об'єктивної неможливості звернення прокурора до суду з обвинувальним актом та ін.

**Ключові слова:** кримінальне провадження, досудове розслідування, адміністративне провадження, правовий режим воєнного стану, слідчий, кримінальне правопорушення, злочин.

- 1) Addition of Chapter IX-1 of the Criminal Procedure Code of Ukraine (Law of Ukraine No. 1631-VII, 2014). This section was named "Special regime of pre-trial investigation of a military, state of emergency or in the area of an anti-terrorist operation".
- 2) Adoption of the Law of Ukraine "On Amendments to the Criminal Procedure Code of Ukraine regarding the improvement of certain provisions in connection with the implementation of a special pre-trial investigation" (Law of Ukraine No. 1422-IX, 2021).
- 3) The title of Chapter IX-1 of the Criminal Procedure Code of Ukraine was changed to "Special regime of pre-trial investigation of a state of war, state of emergency or in the area of an anti-terrorist operation or measures to ensure national security and defense, repel and deter armed aggression of the Russian Federation on the territory of Ukraine". This name was kept until February 24, 2022, that is, before the beginning of the full-scale invasion of the Russian Federation troops on the territory of Ukraine.

After February 24, 2022, there were several more changes to the analyzed section of the Criminal Procedure Code of Ukraine. It was significantly supplemented with new provisions. Yes, in accordance with the Law of Ukraine "On Amendments to the Criminal Procedure Code of Ukraine Regarding the Procedure for Canceling a Precautionary Measure for Completion of Military Service Upon Conscription During Mobilization, for a Special Period or Its Changes for Other Reasons" dated March 15, (Law of Ukraine No. 2125-IX, 2022). It was named "Special regime of pre-trial investigation, trial in conditions of war, state of emergency or in the area of anti-terrorist operation or measures to ensure national security and defense, repel and deter armed aggression of the Russian Federation and/or other states against Ukraine." Due to the change in the name of the section, a new norm

was formed - Art. 616 of the Criminal Procedure Code of Ukraine. However, it is appropriate to emphasize that later, in April 2022, Art. 615 of the Criminal Procedure Code of Ukraine and added a new norm - Art. 615-1. It was introduced by the Law of Ukraine "On Amendments to the Criminal Procedure Code of Ukraine on Improving the Procedure for Conducting Criminal Proceedings in Martial Law" dated April 14, 2022. The name of the section was also changed - "Special regime of pre-trial investigation, trial under martial law" (Law of Ukraine No. 2201-IX, 2022).

Substantial changes have been made to the norms of material law, in particular, administrative and criminal. The peculiarities of the implementation of these provisions are associated with certain difficulties, which require additional research and resolution. Some changes have also been made to the legislative provisions regulating the procedure for judicial proceedings on the territory of Ukraine, in particular under the conditions of the legal regime of martial law.

Normative and legal changes have already regulated the usual procedure of law enforcement agencies in a new way, introduced the formation of new law enforcement practice and caused the emergence of some difficulties in the implementation of the professional activities of law enforcement agencies. These legislative novelties have a significant impact on the activities related to the investigation of criminal proceedings; they affected the peculiarities of their judicial proceedings, as well as certain aspects of the implementation of administrative proceedings. Therefore, the task of research and definition of theoretical and practical problems of carrying out criminal and administrative proceedings in Ukraine under the legal regime of martial law was updated.

### Methodology

The purpose of the study was to determine the theoretical and practical problems of conducting criminal and administrative proceedings in Ukraine under the legal regime of martial law. Achieving this goal became possible thanks to the solution of the main tasks: analysis of judicial and investigative practice, analysis of regulatory provisions.

To achieve the set goal, the work used a system of general scientific and special methods that allowed to optimally take into account the peculiarities of the object and subject of research, in particular: methods of formal logic (analysis,

synthesis, deduction, induction, analogy, abstraction), special legal methods, primarily comparative legal; historical-legal, systemic-structural, method of systemic analysis, sociological.

### Literature Review

Scientists subject the normative changes that the current legislation of Ukraine has undergone to constant analysis and study. Ukrainian researchers pay detailed attention to the study and analysis of legal mechanisms for limiting the constitutional rights of a person and a citizen under martial law (Panasiuk et al., 2022). Domestic scientists studied the issue of economic and legal regulation of the organization and the implementation of economic activity by economic entities in the conditions of the implementation of the martial law regime (Sieriebriak, 2022). The problems of the environmental and legal component of criminal offenses under martial law were also subject to separate analysis, as the risk of man-made accidents and environmental disasters, because they threaten safety; ecological and human (Anisimova et al., 2023).

Scientists also study the peculiarities of regulating the activities of local self-government bodies under martial law. Based on the results of the research, they note the lack of legal mechanisms for the implementation of the powers of these bodies (Yuvsechko et al., 2023).

The problems of investigation and trial of crimes committed during the war in Ukraine are subject to active study (Ortynska et al., 2022). The representatives of scientific groups consider the peculiarities of legal regulation and practical issues of ensuring the rights of victims under the Criminal Procedure Code of Ukraine. According to the results of such studies, they state that there is no legal regulation of the mandatory participation of the victim's advocate in criminal proceedings (Rakipova et al., 2023).

Considering the increase in the ways of money laundering, illegal use, for the purpose of obtaining profit of humanitarian aid, charitable donations or free aid, committing corruption offenses, these problems also attract the attention of Ukrainian scientists (Utkina, Reznik, Pavlenko, 2022; Lisitsyna et al., 2022).

Some features of legislative novelties that were adopted and implemented during the last year in the criminal and criminal procedural legislation of Ukraine, in connection with the introduction

of the legal regime of martial law, were also analyzed by domestic scientists (Balobanova et al., 2022; Udalova, & Khablo, 2022). Forensic scientists are actively developing and determining the prospects for the construction of separate forensic methods (Husieva, 2021; Stepaniuk, Husieva, & Kikinchuk, 2023).

The prospects of creating military justice in Ukraine were also subject to study and analysis by Ukrainian researchers (Niebytov et al., 2022). In addition, this is understandable, because currently the number of both military administrative offenses and criminal offenses has increased. This proves the need to ensure that competent specialists carry out the investigation. After all, such a guarantee is enshrined not only in the national legislation of Ukraine, but also in international legal acts. Thus, in accordance with Article 8 of the Universal Declaration of Human Rights of 1948, Article 14 of the International Covenant on Civil and Political Rights of 1966, one of the rights of a person is the right to have his case heard by a competent court (Universal Declaration of Human Rights, 1948; The International Covenant on Civil and Political Rights, 1973). The foregoing substantiates the need not only for the need to create a competent judicial system, but also to entrust the pre-trial investigation to competent representatives of the prosecution.

Thus, scientists are currently studying certain aspects of law enforcement activities. However, the analysis of the latest scientific developments also confirms the fact that the specifics of the implementation of criminal and administrative proceedings in Ukraine under the conditions of the legal regime of martial law have not yet been subjected to a comprehensive study. The presented and determined the choice of issues about the theoretical and practical problems of criminal and administrative proceedings in Ukraine under the conditions of the legal regime of martial law, as the subject of this study.

## Results and discussion

The introduction of the legal regime of martial law in Ukraine has defined the peculiarities of consideration and resolution of some procedural cases in a new way. One of these is the proceeding in cases of administrative offenses. There are two types of proceedings in cases of administrative offenses: ordinary and simplified. Ordinary proceedings provide for the drawing up of a protocol, determine preventive measures and the order of their application, regulate the rights and obligations of the participants in the

proceedings, the order of consideration of cases, facts, circumstances that are evidence. It is simplified by implementing a minimum of procedural actions, in particular, a protocol on an administrative offense is not drawn up in cases specified by law (Law of Ukraine No. 8073-X, 1984). Such cases in particular include situations in which: 1) the amount of the fine does not exceed three tax-free minimum incomes of citizens; 2) when, in accordance with the law, a fine is imposed and collected, and a warning is issued at the place of commission of the offense. A summary procedure is used for a small number of offences, but such a procedure also takes place. We believe that under the conditions of martial law, the list of administrative offenses for which an administrative protocol is not drawn up can be expanded. In particular, in the territories classified as those where hostilities are taking place or temporarily occupied. At the same time, such a proposal should be carefully studied by scientists, and the legislator should take a balanced approach to adopting the relevant changes.

Administrative legislation also underwent some changes during the period of martial law. Thus, a number of legislative initiatives have been introduced into the Code of Ukraine on Administrative Offenses. Among those related to the operation of the current legal regime and which have undergone a new edition is the criminal offense provided for in Article 188-51 "Failure to comply with the legal requirements of the Commissioner for the Issues of Persons Missing in Special Circumstances". Also, the Code of Ukraine on Administrative Offenses is supplemented by Article 266-1 "Examination of conscripts and reservists during assembly, as well as servicemen of the Armed Forces of Ukraine for alcohol, drug or other intoxication or being under the influence of drugs that reduce their attention and speed of reaction".

The current legal regime updated the need to revise the sanctions of the articles establishing responsibility for committing military administrative offenses. Thus, responsibility has been increased, in particular, the possibility of arrest at the guardhouse for committing certain types of military administrative offenses has been increased to fifteen days. Sanctions have been increased for the commission of such military administrative offenses as: refusal to comply with the lawful requirements of the commander (chief), voluntary abandonment of a military unit or place of service, careless destruction or damage to military property, abuse of power or official position by a military

official, abuse of authority by a military official or official powers, negligent attitude to military service, inaction of the military authorities, violation of the rules of military duty, violation of the rules of border service, violation of the rules of handling weapons, as well as substances and objects that pose an increased danger to the environment, drinking alcoholic and low-alcohol beverages or use of narcotic drugs, psychotropic substances or their analogues (Law of Ukraine No. 8073-X, 1984).

At the same time, administrative responsibility has not been introduced for some actions. There is no rule that would provide for responsibility for curfew violations. Because of this, the police draw up a report on the person who violated the curfew according to Art. 185 of the Code of Ukraine on administrative offenses. It provides for liability for malicious disobedience to the lawful order or demand of a police officer, a member of a public formation for the protection of public order and the state border, a military serviceman). We believe that this practice is inadmissible, because in fact it contradicts the tasks of proceedings in cases of administrative offenses, in particular, regarding the resolution of each case in exact accordance with the law (Law of Ukraine No. 8073-X, 1984). Also, there is no separate rule that would establish a person's responsibility for violating the special light masking regime and other actions. In this regard, it should be emphasized that there are no provisions in the current legislation that would provide for responsibility for individual actions that may lead to negative consequences and, under certain conditions, even to the death of people. We believe that this practice should be eradicated and requires the introduction of appropriate mechanisms of legal regulation.

As for the changes in criminal procedural legislation, they are more significant. Thus, it is determined that the prosecutor is prohibited from entrusting the implementation of a pre-trial investigation of a criminal offense under the jurisdiction of the National Anti-Corruption Bureau of Ukraine to another pre-trial investigation body. At the same time, this provision was clarified by the wording: "except for the cases of ordering a pre-trial investigation under martial law". Also, the prosecutor is prohibited from entrusting the implementation of a pre-trial investigation of a criminal offense committed by a people's deputy of Ukraine to other pre-trial investigation bodies, except for the National Anti-Corruption Bureau of Ukraine and the central apparatus of the State Bureau of Investigation in accordance with their

jurisdiction, defined by the Criminal Procedure Code of Ukraine (Law of Ukraine No. 4651-VI, 2012).

The next innovation that applies during martial law is the possibility of entering into the Unified Register of Pretrial Investigations decisions on the initiation of criminal proceedings after a certain period of time, in particular, at the first opportunity. This is due to the impossibility of access of the investigator, inquirer, and prosecutor to the Unified Register of Pretrial Investigations, which quite often happens in the territories where active hostilities are taking place.

The list of powers during martial law of the head of the prosecutor's office at the request of the prosecutor or an investigator agreed with the prosecutor has been expanded. Among them, in particular: making a decision on the pretext of a person, temporary access to things and documents, seizure of property, permission to detain for the purpose of pretext, a request to conduct a search in accordance with Part 3 of Art. 233 of the Criminal Procedure Code of Ukraine, search, obtaining samples for examination, conducting secret investigative (search) actions, extending the period of pre-trial investigation, as well as powers to choose preventive measures (Law of Ukraine No. 4651-VI, 2012). This happens in case of impossibility of execution of such powers by the investigating judge.

As for preventive measures, the procedure for selecting them as suspects is provided for in Art. 109-115, 121, 127, 146, 146-1, 147, 152, 153, 185, 186, 187, 189-191, 201, 258-258-5, 260-263-1, 294, 348, 349, 365, 377-379, 402-444 Criminal Code of Ukraine (Law of Ukraine No. 2341-III, 2001). The term of the preventive measure should not exceed 30 days. In addition, in exceptional cases, also in the commission of other serious and especially serious crimes, if the delay in choosing a preventive measure can lead to the loss of traces of a criminal offense or the escape of a person suspected of committing such crimes. These powers are exercised taking into account the requirements of Chapter 37 of the Criminal Procedure Code of Ukraine (Law of Ukraine No. 4651-VI, 2012), that is, the special procedure for criminal proceedings.

The legislator established that in the case of the objective impossibility of filing an indictment with the court, the term of the pre-trial investigation is suspended and subject to renewal, if the grounds for suspension no longer exist. In our opinion, the mechanism of appeal

and verification of the actual existence of the objective impossibility of going to court with an indictment should be enshrined in the current legislation.

Another feature is that the term of validity of the investigative judge's decision on detention or the prosecutor's decision on detention, adopted in accordance with Art. 615 of the Criminal Code of Ukraine, may be extended up to one month by the head of the prosecutor's office at the request of the prosecutor or the investigator, agreed with the prosecutor. The term of detention can be extended several times within the term of the pre-trial investigation.

Decisions made by the prosecutor are immediately notified at the earliest opportunity to the prosecutor of the highest level, as well as to the court determined in accordance with the procedure provided for by law. At the same time, in our opinion, a significant gap is that the current criminal procedural legislation does not establish the court's obligation to further check these decisions by the investigating judge.

It is positive in the aspect of ensuring the possibility of challenging the decisions, actions or inaction of the prosecutor, that the legislator established the possibility of their consideration by the court within the territorial jurisdiction of which the criminal offense was committed, after ensuring its functioning in another area, or by the court closest to it territorially. The subject of such an appeal can be both the existence of grounds for the prosecutor to exercise the powers delegated to him in the conditions of martial law, and the method of their exercise.

A special rule on the recording of criminal proceedings has been introduced. In accordance with it, the course of investigative (search) actions is recorded in relevant procedural documents, as well as with the help of technical means of recording criminal proceedings, except for cases when recording using technical means is impossible for technical reasons. Judging by the wording, priority should be given to double fixation: in the document and by technical means. At the same time, in the context of the effective and legal conduct of procedural actions, we consider it expedient to emphasize that they should not be planned for the period from 10:00 p.m. to 6:00 a.m., and if it is necessary to conduct them immediately, such a course of action should be of an exceptional nature.

During a pre-trial investigation under martial law, it should be emphasized that in order to

participate in procedural actions, in the event that the appearance of a lawyer (defender) is impossible, the investigator, investigator, prosecutor can ensure his remote participation using technical means (video, audio communication). At the same time, under such conditions, the legislator did not pay attention to the fact that in the case of remote participation of the defense counsel, the suspect, the accused do not have the possibility of confidential communication with their defense counsel, and there is no need to talk about lawyer's secrecy in such a situation. The lawyer is also deprived of the opportunity to make sure that no measures of psychological or physical influence were applied to his client, to make sure of the voluntariness of the actions of the client during investigative (search) actions and other procedural actions.

Also, the legislator introduced as a party to the criminal proceedings a person in respect of whom sufficient evidence was collected to report the suspicion of committing a criminal offense, but the suspicion was not reported due to his death. The law defines a certain legal status of the persons against whom the evidence was collected, but the notice of suspicion was not announced because of her death.

Article 208 of the Criminal Procedure Code of Ukraine establishes the possibility of detaining a person by an authorized official and defines the grounds for such detention. A person who is authorized by law to carry out detention makes the decision on these issues. An authorized person has the right to detain a person suspected of committing a crime without a decision of an investigating judge or a court. An authorized official who has detained a person must immediately inform the detainee of the reasons for the detention, search him, draw up a detention report, a copy of which is handed over to the prosecutor, but who is this "mythical" authorized person, there is no definition in the Law, and this makes it possible to abuse the official the position of almost every subject of power. Because of this, it is necessary for the current criminal procedural legislation to establish norms that clearly establish the list of persons authorized to detain a person. This can be done by supplementing Art. 208 of the Criminal Procedure Code of Ukraine with such a list, or amend Art. 3 of the CPC of Ukraine. At the same time, the question arises, if an authorized person without a decision of an investigating judge detains a person, how such a detained person should use his constitutional right to protection and legal assistance of a lawyer.

The introduction of the legal regime of martial law on the territory of Ukraine and the peculiarities of the administration of justice had an impact. It should be emphasized that in accordance with the provisions of the Constitution of Ukraine and the Law of Ukraine "On the Legal Regime of Martial Law", the courts must continue to administer justice in such conditions, because even under this legal regime, the powers of the courts cannot be terminated and the powers of judges limited (Law of Ukraine No. 254k/96-VR, 1996; Law of Ukraine No. 389-VIII, 2015). Because of this, in accordance with part seven of Article 147 of the Law of Ukraine "On the Judiciary and the Status of Judges", taking into account the impossibility of courts to administer justice during martial law, the order of the Supreme Court on changing the territorial jurisdiction of court cases under martial law was adopted.

Changes introduced by the Law of Ukraine "On Amendments to the Law of Ukraine "On the Judiciary and the Status of Judges" regarding additional methods of informing about court cases and conducting meetings of judges in conditions of martial law or state of emergency" were also significant novelties regarding the implementation of judicial proceedings in Ukraine. These changes introduced an additional notification to the participants in the legal process about the consideration of the case using the Unified State Web Portal of electronic services, including using the mobile application of the Diya Portal (Diya), as well as receiving through the relevant application in electronic form a court decision on the case, an executive document, issued in the form of an electronic document, by a person who is a party to the case (Law of Ukraine No. 2461-IX, 2022). Such changes are undoubtedly of a positive nature, but for now, in our opinion, this provision remains debatable in the context of recognition of such a method as proper informing of the party to the case about the time and place of the case hearing.

## Conclusion

The analyzed provisions of the current legislation and the explanations given in relation to them are aimed at ensuring the formation of a coherent national legal system. Such a system should be the basis for the proper functioning of the criminal justice system, as well as the proper performance of their functional duties by employees of state bodies, institutes, and enterprises. Decisions on the implementation of the legal regime of martial law or a state of emergency are no exception to this. It should be

emphasized that in a certain aspect the legal system must be dynamic in nature, because it must correspond to the realities that take place in social life. We mean the conduct of active hostilities in certain territories, their occupation, the impossibility of the functioning of justice bodies, etc.

During the last year, the legal system of Ukraine has undergone numerous changes. Some provisions reformatted the usual order of activity of law enforcement agencies in a positive direction, and some, on the contrary, complicated their activity or created a conflicting situation. That is, the formation of a new law enforcement practice was introduced, however, under certain conditions, this led to the emergence of some difficulties in the implementation of the professional activities of law enforcement agencies.

Based on the results of the research, directions for improving the current legislation have been determined in order to solve the theoretical and practical problems of conducting criminal and administrative proceedings in Ukraine under the conditions of the legal regime of martial law. Among them, in particular, the following:

1. Expansion of the list of administrative offenses that can be prosecuted in a simplified manner. It is a priority to implement such provisions in the territories where hostilities are taking place or temporarily occupied. At the same time, scientists should carefully study such a proposal, and the legislator should take a balanced approach to adopting the relevant changes.
2. Introduction of administrative responsibility for the commission of certain acts during the period of martial law. In particular, for violation of curfew, special light masking regime and other acts. After all, such actions of a person can lead to negative consequences, and under certain conditions - even to the death of people.
3. Implementation and consolidation of the court's duty to verify the existence of an objective impossibility of the prosecutor's appeal to the court with an indictment for groundlessly and illegally stopping the pre-trial investigation. Introduction of the possibility of appealing such decisions by the defense.
4. Introduction of a mechanism for checking the legality of decisions made by the prosecutor by the investigating judge/court during the implementation of a special

- regime of pre-trial investigation, court proceedings under martial law.
5. Ensuring in the case of remote participation of the defense counsel the right of the suspect, the accused to the possibility of confidential communication with his defense counsel, ensuring the preservation of attorney confidentiality in such a situation.
  6. Addition of Article 3 with a definition of the term "a person in respect of whom sufficient evidence has been collected to report suspicion of committing a criminal offense, but suspicion has not been reported due to his death."
  7. Enshrining the possibility of exercising the right to defense by a person detained by an authorized person without a decision of an investigating judge.

We believe that the raised issues are relevant and therefore require further scientific research.

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