

## **CONSTITUTIONAL AND LEGAL PRINCIPLES OF CIVIL SOCIETY IN THE CONTEXT OF CURRENT CHALLENGES**

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### **INTRODUCTIONS**

Modern civil society as a theoretical concept that reflects the existing social reality faces several trends and problems. First, there is its definition. Despite quite long scientific research in the humanities (philosophy, sociology, political science, history, law) on this issue, the content of the concept of civil society cannot be considered established. Secondly, there are the trends that have prevailed in recent years (decades). This includes, for example, the trend of globalization and the question of the global level of civil society and various international non-governmental organizations, their development, and the question of their effectiveness in the context of preserving state sovereignty. It is also about the challenges to classical democracy, which is a threatening trend of authoritarianization of political regimes, and the emergence of illiberal democracies, which are often called populist, abusive, etc. Thirdly, it is a trend associated with countries that are amid military conflict or terrorist threats and, accordingly, the necessary measures to restrict human rights. Thus, in Ukraine, since 2014, and especially since 2022, this aspect has been extremely relevant due to Russia's armed aggression against Ukraine. The question is: how should civil society develop in times of war, what patterns can be identified and how should law (primarily constitutional law) as a regulator of social relations respond to them? Should the role of civil society increase or decrease in times of war (due to the need to significantly restrict human rights)? These questions are extremely relevant, and legal science, mainly representatives of the science of constitutional law, should try to answer them.

### **1. Modern civil society: threats and prospects**

The definition of civil society and the formation of its characteristics are central to scientific research. One of the most thorough studies was carried out by authoritative scholars Andrew Arato and Jean Cohen. We have already presented our own vision of civil society within the framework of existing approaches in science. We will only mention the most controversial points that exist in science. In addition, we will consider these points

through the prism of threats and prospects of civil society, i.e. not separately from the practical and prognostic aspect, but as close as possible to it. The second and third sections of the article will be devoted to certain challenges that we propose to focus on.

First, it is a question of the shortcomings that may exist in civil society itself (and even the possibility of including criminal organizations in its structure, as is sometimes suggested in academia). Regarding the latter idea, we are categorically opposed to such inclusion, since otherwise its essence is destroyed – activities within the legal framework. The underground activity of civil society institutions, which is not formalized (unrecognized) by the state and formal law, but still exists even in totalitarian countries, is an exception to this rule. But even in this case, we must recognize the exceptionality of this situation and the fact that, as a general rule, we are studying the activities of civil society institutions within a democratic regime.

As for the shortcomings of the institutional structure of civil society, they may indeed exist. Such shortcomings have been systematically analyzed by Alan Fowler. The scientist identified quasi-civic activity, which demonstrates the possibility of abuse of the legal form. That is, we are talking about the creation of certain structures of citizens' associations with a completely different purpose than they declare as the purpose of their activities. Such fake activity only discredits the idea of civil society and creates a syndrome of "acquired helplessness" in people, i.e. when they see only quasi-civil or "bought" activity around them, which has nothing to do with real civil society activity.

Secondly, this is an issue that is closely related to the previous one and usually concerns societies that have experienced totalitarianism and dictatorship. It is a question of trust. The level of development of civil society is characterized by the level of development of trust values. An indicator of trust in society is social capital<sup>1</sup>. Trust is a central concept for civil society, as the research of such authorities in science as Adam Seligman has convincingly proven<sup>2</sup>, Jeffrey Hosking<sup>3</sup> and Francis Fukuyama<sup>4</sup>.

Similar thoughts are voiced in Ukrainian scholarship. According to Mykola Kalinichenko, in terms of culture, the relevant subsystem of society can be called civil society only if it not only has a certain number (network)

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<sup>1</sup> See more: Berchenko G. V. Civil society in Ukraine: constitutional aspects. Kharkiv: Jurait, 2014. P. 64-79.

<sup>2</sup> Seligman, A. The Idea of Civil Society; Translated from English, Kyiv: Dmytro Burago Publishing House, 2000. 248 c.; Seligman A. B. The Problem of Trust. Princeton University Press 2000. 240 p.

<sup>3</sup> Hosking G. Trust: A History. Oxford: Oxford University. Press, 2014. 211 p.

<sup>4</sup> Fukuyama F. The Social Virtues and the Creation of Prosperity. New York: Free Press, 1995. 480 p.

of voluntary associations and public institutions, but also the values of civil culture prevail, in which communication takes place based on trust and tolerance<sup>5</sup>.

Thus, civil society consists not only of material bricks, but also of intangible ones. In particular, Antonina Kolodiy believes that a certain set of institutions can be considered elements of civil society only if the social actors involved in them are free and equal citizens, bearers of civic values, namely they are not alien to social problems and are oriented towards public affairs; they believe in their ability to solve small and large issues in society; – they communicate with each other and with their environment on the basis of trust and tolerance; individualism and competition in their activities are combined with relations of mutual trust and cooperation, ability to compromise<sup>6</sup>.

Thus, it is believed that the development of civil society is determined by the qualitative characteristics, focus and number of its structural elements, the involvement of citizens in them, as well as the intensity (frequency) and effectiveness of their functioning<sup>7</sup>.

So, while 10 years ago, according to various sources, the level of trust in strangers was about 42-43%, this figure has increased significantly. As of July 2022, 63% of Ukrainians say they trust people in general, compared to 45% in October 2021<sup>8</sup>.

This indicator is both impressive and encouraging, as social capital has even increased despite the war. This phenomenon can be explained, among other things, by psychological factors related to the risks and dangers faced by Ukrainian citizens during the Russian invasion. This indicator is clearly positive for the further development of civil society institutions. Nevertheless, it is still insufficient and should have the potential to grow.

Third, there is the issue of mass activism and the concept of mass society. Mass movements are not traditional civil society institutions. Moreover, thanks to the research of scholars such as Gustave Le Bon<sup>9</sup>, Wilhelm Reich<sup>10</sup>, José Ortega y Gasset<sup>11</sup> we can see the psychological roots

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<sup>5</sup> Kalinichenko M. The power of civil society. Sumy: University Book Publishing House, 2006. P. 40.

<sup>6</sup> Fundamentals of Democracy: A textbook for students of higher educational institutions / Edited by A.F. Kolodiy. Third edition, updated and supplemented. Lviv: Astrolabe, 2009. C. 151.

<sup>7</sup> Ibid. P. 168

<sup>8</sup> As of July 2022, 63% of Ukrainians say they trust people in general, compared to 45% in October 2021. URL: <https://texty.org.ua/fragments/107286/ukrayinci-pochaly-bilshedoviryaty-odne-odnomu-pid-chas-vijny-opytuvannya/>

<sup>9</sup> Le Bon G. The Crowd: A Study of the Popular Mind. New-York: Macmillan, 1897. 219 p.

<sup>10</sup> Reich W. The Mass Psychology of Fascism. New-York: Farrar, Straus and Giroux, 1980. 432 p.

of authoritarianism, which emerged and developed precisely because of the masses and their specific characteristics. Thus, José Ortega y Gasset formulates the concept of the "hombre-masa" (mass man) and describes his psychological portrait as a man who strives for conformity. The scientist assesses the rule and rise to power of such masses negatively; in his opinion, there is a decline in morality due to the growth of "mass people." Gustave Le Bon argued that "an individual immersed for some time in a crowd soon finds himself – whether as a result of the magnetic influence exerted by the crowd or for some other reason of which we are unaware – in a special state, very much like the state of fascination in which a hypnotized person finds himself in the hands of a hypnotist." Wilhelm Reich's research is more applied, addressing the peculiarities of the "character structure" of the masses in Germany as of 1933, and he mainly relied on his knowledge of psychoanalysis.

The danger of mass society is that it is often seen as the antithesis of civil society, the result of the development of modernization and at the same time the atomization of society, which has a negative impact on the level of trust and development of institutions. An atomized mass is an easy target for manipulation by populists, a threat we will discuss further below. In any case, the development of civil society should not allow for its atomization and a decrease in the level of trust.

Fourthly, there is the issue of globalization and state sovereignty (and the related challenge of the development of authoritarian forces and the rise of populist regimes). The emergence of global civil society is already being discussed quite actively alongside the concept of globalization as such. The disadvantages of such a global civil society are also obvious. In the absence of a world state, international non-governmental organizations face national governments that retain sovereignty. Depending on the interaction with each individual state, their activities will differ significantly and lead to greater or lesser effectiveness.

In the context of Russia's armed aggression against Ukraine, we can clearly see this in the activities of the International Red Cross Society, which does not work with Ukrainian prisoners of war in Russia due to the position of the Russian authorities.

In addition, activity at the national level remains important, as well as the role of legal regulation rather than informal practices. One of the most striking examples is the legislation on foreign agents. It is usually the result of authoritarian and isolationist forces coming to power and implementing anti-democratic decisions under the slogan of state sovereignty.

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<sup>11</sup> Ortega y Gasset, J. *The Revolt of the Masses* New-York: W. W. Norton & Company, 1994. 192 p.

Thus, on May 14, 2024, the Georgian Parliament adopted the Law on Transparency of Foreign Influence (the Law on Foreign Agents). In its urgent opinion of May 21, 2024, CDL-PI(2024)013-e, at the request of the Parliamentary Assembly of the Council of Europe, the Venice Commission recommended that Georgia repeal this law<sup>12</sup>. Her position is that (para. 96) the restrictions imposed by law on the rights to freedom of expression, association and privacy are incompatible with the strict test set out in Articles 8(2), 10(2), and 11(2) ECHR and Articles 17(2), 19(2) and 22(2) of the ICCPR, as they do not meet the requirements of legality, legitimacy, necessity in a democratic society and proportionality, as well as the established principle of non-discrimination in Article 14 of the ECHR.

The EU High Representative Josep Borrell also stated the need to repeal the law in accordance with the recommendations of the Venice Commission<sup>13</sup>. According to Anthony Blinken, the United States has begun to review its relations with Georgia and is introducing visa restrictions<sup>14</sup>.

## **2. Populism and illiberal democracy as a challenge to civil society**

From the last example in the area of legislation on foreign agents, we have seen the sensitivity of the sphere of constitutional and legal regulation of civil society to populist, anti-democratic, isolationist, and illiberal manifestations. Let us consider this issue in more detail.

In fact, the challenge of populism for civil society is nothing new. The concept of populism is gaining more and more understanding in the science of constitutional law and public law studies around the world<sup>15</sup>. Particular sensitivity in this regard is associated with the impact of populism on civil society. This issue is raised in relation to civil society by authoritative scholars Andrew Arato and Gene Cohen<sup>16</sup>. The study of populism was conducted by a well-known democracy scholar Jan Werner-Müller<sup>17</sup>, by showing that populism is aimed precisely at denying democracy (mainly pluralism) and is associated with the desire to eliminate it.

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<sup>12</sup> CDL-PI(2024)013-e. Georgia – Urgent Opinion on the Law of Georgia on Transparency of Foreign Influence issued on 21 May 2024 pursuant to Article 14a of the Venice Commission's Revised Rules of Procedure URL: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2024\)013-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2024)013-e)

<sup>13</sup> EU: Georgia to withdraw law on "foreign agents" in line with Venice guidelines URL: <https://www.euointegration.com.ua/news/2024/05/23/7186573/>

<sup>14</sup> The law on "foreign agents": US begins review of relations with Georgia and imposes visa restrictions – Blinken URL: <https://suspijne.media/753037-zakon-pro-inoagentiv-ssa-pocinaut-pereglad-vidnosin-iz-gruzieu-i-zaprovadzaut-vizovi-obmezenna-blinken/>

<sup>15</sup> See: Berchenko G.V. Political Populism and the Constituent Power of the People. *Juris Europensis Scientia*. 2020. № 3. C. 7-11.

<sup>16</sup> Arato E., Cohen J. L. Populism and Civil Society: The Challenge to Constitutional Democracy. Oxford: Oxford University Press, 2021. 318 p.

<sup>17</sup> Müller J.-W. What Is Populism? London: Penguin, 2017. 160 p.

Populist regimes are widespread in the world. They are often referred to as illiberal democracies, but in some cases, they turn into full-fledged totalitarianism (modern Russia) or have milder authoritarian forms.

One of the responses that legal regulation can offer to protect civil society in the face of the threat of populism is the tools of "militant democracy" or, in other words, "democracy that can defend itself." This concept emerged after Hitler's rise to power thanks to Karl Löwenstein and became widespread after it was adopted in postwar Germany through the integration of tools for declaring political parties unconstitutional for encroaching on the free democratic system into the German Basic Law of 1949.

Ukraine did not avoid this path either, where the doctrine of "militant democracy" was twice recognized in the practice of the Constitutional Court of Ukraine (Decision No. 9-r/2019 of July 16, 2019, and Decision No. 3-r/2021 of December 21, 2021)<sup>18</sup>.

In the context of armed aggression against our country, the doctrine of militant democracy plays a special role. The issue is to separate genuine institutionalized civic and political activity not only from fake activity (as Alan Fowler has perfectly demonstrated), but also from activity that is disguised as national but acts as an agent of the aggressor state. The ban of political parties and public associations by courts in connection with the support and justification of Russian aggression is quite natural.

### **3. Civil society and human rights under martial law**

Another aspect that is very important and constitutes a separate branch of the study of civil society and the challenges for it in the current environment concerns the issue of human rights restrictions under emergency legal regimes.

Russia's aggression against Ukraine has led to the introduction of a special (emergency) legal regime of martial law twice (first from November 26, 2018, to December 26, 2018, and again from February 24, 2022, to the present). This is quite natural.

However, this raises the logical question of the development of civil society under such a legal regime, the possibility of exercising human

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<sup>18</sup> See more details: Barabash Y., Berchenko H. Freedom of Speech under Militant Democracy: The History of Struggle against Separatism and Communism in Ukraine. *Baltic Journal of European Studies*. 2019. P. 3-24; Barabash Y.G., Berchenko G.V. Is democracy able to defend itself in the conditions of war? (on the experience of state building during the Russian aggression. *Law of Ukraine*. 2023. № 1. P. 54-75; Public Law: Modern Doctrines in Judicial and Law Enforcement Practice: a textbook. For training students of the second (master's) level of higher education in the field of knowledge 08 "Law", specialty 081 "Law" / T.M. Slinko, L.I. Letnyanchyn, H.V. Berchenko; edited by Prof. T.M. Slinko, Associate Professor L.I. Letnyanchyn; Ministry of Education and Science of Ukraine Yaroslav the Wise National Law University. Kharkiv: Pravo, 2023. C. 276-302.

rights, its legitimate restrictions, etc. This issue is quite complex, but we will try to draw attention to the key aspects.

First of all, it should be noted that the Decree of the President of Ukraine No. 64/2022 "On the Introduction of Martial Law in Ukraine" contains clause 3 on the restriction of human rights. It states that "the constitutional rights and freedoms of man and citizen provided for in Articles 30-34, 38, 39, 41-44, 53 of the Constitution of Ukraine may be restricted"<sup>19</sup>. As we can see, Article 36 (the right to association), which is key for civil society institutions, is not mentioned here.

At the same time, Article 8 of the Law "On the Legal Regime of Martial Law" of May 12, 2015, No. 389-VIII (para. 9)<sup>20</sup> gives the military command, together with military administrations (if established), the right to raise the issue of banning the activities of political parties and public associations in several cases following the procedure established by the Constitution and laws of Ukraine (which is essentially a literal reproduction of the provisions of Article 37 of the Constitution of Ukraine). At the same time, in practice, we have seen a rather active position of the Ministry of Justice of Ukraine, which on its own initiative initiated the issue of banning many associations in court.

That is, we are faced with a significant nuance that reflects the functioning of the martial law regime. This is a matter of correlation, so to speak, between ordinary and emergency legislation. After all, nothing prevents, even under martial law, the use of those instruments of human rights restrictions that exist outside its framework, remaining in force (and in some cases even transformed, clarified).

Civil society institutions, in addition to various kinds of citizens' associations, also include the media, which are governed by Article 34 of the Constitution of Ukraine. It is this article that is subject to restrictions, according to the Presidential Decree. We see two trends here. On the one hand, it is the adoption of the Law "On Media" of December 13, 2022, № 2849-IX<sup>21</sup>, which was a step towards European integration. On the other hand, the freedom of speech and information is subject to special restrictions due to the martial law regime. Ensuring the proper functioning of civil society institutions and, at the same time, implementing the necessary restrictions, and finding a fair balance, is one of the most difficult

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<sup>19</sup> Decree of the President of Ukraine dated February 24, 2022 No. 64/2022 "On the introduction of martial law in Ukraine» URL: <https://www.president.gov.ua/documents/642022-41397>

<sup>20</sup> Law of Ukraine "On the Legal Regime of Martial Law" of May 12, 2015, № 389-VIII URL: <https://zakon.rada.gov.ua/laws/show/389-19#Text>

<sup>21</sup> Law of Ukraine "On Media" of December 13, 2022 № 2849-IX URL: <https://zakon.rada.gov.ua/laws/show/2849-20#Text>

issues of legal regulation under martial law. One of the most clear, understandable, and recognized criteria is the principle of proportionality, "necessity in a democratic society" (as well as the three-part test in general). That is, restrictive measures must be dictated by the urgency of the situation and be adequate to the danger.

Civil society institutions in times of war help to preserve the level of democracy that will allow further development in the right direction. Moreover, given the prohibition of elections during martial law, the activities of civil society institutions allow for maintaining social dynamics, public control over the government and its respect for human rights, and participation in mobilizing society to repel Russia's armed aggression with dignity and effectiveness. The increased level of citizens' trust in each other should contribute to the development of civil society, which in turn will contribute to Ukraine's victory.

## **CONCLUSIONS**

Modern civil society is facing challenges that pose both threats and opportunities for it. First, there is the issue of shortcomings that may exist in civil society itself (and even the possibility of including criminal organizations in its structure). We are categorically opposed to the inclusion of illegal activities in the sphere of civil society. Second, there is the issue of trust, which is traditionally low in societies that have experienced totalitarianism and dictatorship. In recent years, despite the war, we have seen an increase in the level of trust (in the sense of social capital), which gives hope for the development and prospects of civil society institutions. Thirdly, there is the issue of mass activism and the concept of mass society. It is closely related to the atomization of individuals and the breakdown of social ties. Such a society is easily manipulated by authoritarian and totalitarian forces. This should not be allowed to happen in Ukraine. Fourth, there is the issue of globalization and state sovereignty. It is quite sensitive, but if abused by populist regimes, the slogan of sovereignty can be used for authoritarian purposes. A striking example is the legislation on foreign agents, which is a kind of marker that demonstrates anti-democratic deviations. The threat of populism in the context of the denial of pluralism (according to Jan Werner-Muller) is no less significant because preserving pluralism is central to democracy and an important factor in the development of civil society. The doctrine of "militant democracy" is one of the directions that, in our deep conviction, allows us to avoid the development and strengthening of populism and to fight it. In the context of armed aggression against Ukraine, the use of the doctrine of "militant democracy" is inevitable. Civil society in times of war faces a paradox: the need to develop and preserve democracy while at the same time restricting



human rights. The key requirement to ensure such a balance is the criteria of proportionality and "necessity in a democratic society" (as well as the three-part test in general).

### **SUMMARY**

Modern civil society faces several trends and challenges. First, there is its definition: it is mainly a question of the shortcomings that may exist in civil society itself (and even the possibility of including criminal organizations in its structure), as well as the role of the level of trust (social capital), the importance of mass activism and the concept of mass society. Secondly, there are the trends that have become prevalent in recent years, for example, the trend of globalization and the question of the global level of civil society and various international non-governmental organizations, their development, and the question of their effectiveness in the context of preserving state sovereignty. Thirdly, it is a trend associated with countries at war (very relevant for Ukraine at this stage). The author provides arguments against including illegal activities in the sphere of civil society. It is established that the preservation of pluralism is central to democracy and an important factor in the development of civil society, and the doctrine of "militant democracy" is one of the ways to avoid the development and strengthening of populism and to fight it. The author concludes that civil society in times of war faces a paradox – the need to develop and preserve democracy and at the same time restrict human rights, and the key requirement for ensuring such a balance is the criteria of proportionality and "necessity in a democratic society" (as well as the three-part test in general). The author concludes that civil society institutions in times of war help to preserve the level of democracy that will allow further development in the right direction.

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становила 45%. URL: <https://texty.org.ua/fragments/107286/ukrayinci-pochaly-bilshe-doviryaty-odne-odnomu-pid-chas-vijny-opytuvannya/>

36. Указ Президента України від 24 лютого 2022 року № 64/2022 «Про введення воєнного стану в Україні» URL: <https://www.president.gov.ua/documents/642022-41397>

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