

CIVIL SOCIETY AND THE ESTABLISHMENT OF CONSTITUTIONAL DEMOCRACY DURING AND AFTER THE WAR (UKRAINIAN CONTEXT)

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INTRODUCTION

Addressing the complex social issues currently facing Ukraine under martial law requires not only the reform of state institutions but also the creation of conditions for establishing and effectively functioning civil society, taking into account contemporary challenges. One of the most pressing issues in Ukraine is the legal regulation of the functioning of civil society institutions, the prospects for their development, and the achievement of a crucial goal: defending statehood and preserving and advancing constitutional democracy.

The study of civil society within the framework of constitutional law is inextricably linked to the question of the state, its regulatory influence, and the relationship between the state and civil society. Therefore, we believe that the analysis of the concept of civil society should be conducted not only from theoretical-legal, philosophical, political, or sociological perspectives but also within a constitutional-legal framework. The concept of civil society is not merely an appealing ideological slogan but a constitutional-legal category with its content and structure. It is essential to clearly understand the legal instruments that the legal system must employ to regulate the activities of civil society institutions, stimulate their development, and, when necessary, impose restrictions. Martial law and the prospects of post-war recovery present yet another challenge to civil society and its institutions. In this context, it is crucial not to lose the potential of civil society institutions due to the war but to choose the right strategy and action plan within the post-war paradigm. This includes the de-occupation of territories and the potential for significant legal system reforms in the future, following the end of the aggressive war of conquest against Ukraine.

1. Constitutional Regulation of Civil Society

On June 19, 1991, the Verkhovna Rada of Ukraine approved the Concept of the new Constitution of Ukraine. This Concept proposed the inclusion of a separate section, «Civil Society and the State,» in the new Constitution of Ukraine, enshrining the concept of civil society at the constitutional level and defining its priority in interaction with the state. In the third section of the Concept, «Civil Society and the State,» it was stated that «the Constitution of the Republic should establish the foundations for the formation, development,

and protection of civil society, as well as define the principles of its relationship with the state. In particular, it should proclaim the priority of civil society over the state, which ensures the conditions for its normal functioning.»

During 1992–1993, a separate section and articles stipulating that the state is subordinate to serving civil society and directing its activities toward ensuring its needs were included in constitutional drafts. As noted by S. M. Tymchenko, in the draft Constitution, the concept of «*civil society*» was understood quite broadly, as evidenced by the inclusion of forty articles in the section, accounting for more than 15% of the total constitutional provisions¹.

In this regard, a logical question arises, as posed by O. V. Skrypniuk: what exactly was the role of this section, and what reasons motivated the drafters of the constitutional projects to include it in the structure of the Constitution?²

As one of the developers of the Constitution, Prof. L.P. Yuzkov stated, «The main legal burden of the civil society institution is the association of free and equal people, which ensures the harmonization of their diverse interests based on self-organization and state-legal regulation. The state exists in such a society to the extent that society itself recognizes the necessity of a certain (specifically democratic and legal) state. And, of course, under such conditions, it is subordinated to civil society, directing its activities towards creating equal opportunities for all as the foundation of social justice»³.

According to S.M. Tymchenko, the inclusion of a section on civil society was a continuation of constitutional tradition: the 1937 Ukrainian SSR Constitution contained a section on the social order, and the 1978 Constitution included provisions on the foundations of the social system⁴.

In the draft approved by the Constitutional Commission on November 15, 1995, the section «Civil Society and the State» was absent. There is no corresponding section or any mention of civil society in the Constitution of Ukraine adopted on June 28, 1996.

P.M. Rabinovich believes that the term «civil society» is not used in the adopted Constitution due to its ambiguity⁵. M.I. Kozyubra, evaluating the situation, states that «the recommendation of the 'State and Civil Society' section of the Constitutional Commission was to remove the section 'Civil Society and the State' from the draft. Most of its provisions were transferred

¹ Тимченко С.М. Громадянське суспільство і правова держава в Україні. Запоріжжя: Юридичний ін.-т МВС України, 2002. С. 46

² Скрипнюк О.В. Конституція України та її функції: проблеми теорії та практики реалізації : до десятої річниці прийняття Конституції України. Київ : Академія правових наук України, 2005. С. 74.

³ Конституція незалежної України: у 3 кн. / Під заг. ред. С.Головатого. Кн.1 : Документи, коментарі, статті. Київ : Право, 1995. С. 18.

⁴ Тимченко С.М. Громадянське суспільство і правова держава в Україні. Запоріжжя: Юридичний ін.-т МВС України, 2002. С. 44.

⁵ Рабінovich П. Громадянське суспільство і правова держава (загальнотеоретичні міркування). *Українське право*. 1996. Число 3. С. 22.

to Section I 'General Provisions' and Section II 'Rights and Freedoms of Man and Citizen.' This allowed avoiding the inevitable duplications that would have arisen if the section had been retained, and made the text of the draft more concise and compact⁶.

P.B. Yevgrafov considers the approach justified according to which the concept of «civil society» is not used in the Constitution of Ukraine, unlike its drafts. In his opinion, the current Constitution of Ukraine adequately enshrines the main principles of organizing and functioning a society that, in terms of its development level, should be referred to as civil. This primarily concerns the economic and political systems, social structure, culture, humanitarian and political-legal values and priorities, and so on⁷. O.V. Skrypniuk also sees quite justified legal grounds for the removal of the corresponding section from the text of the Constitution⁸.

Y.M. Todika cited several reasons why the section dedicated to civil society was not included in the text of the Constitution in its edition of June 28, 1996. However, in his opinion, the main provisions of the corresponding section were incorporated into various sections of the 1996 Constitution of Ukraine, primarily in the section «General Principles»⁹.

As O.V. Skrypniuk notes, many norms and provisions related to civil society were enshrined in the final version of the Constitution of Ukraine. Most of the provisions regulating the activities of political parties and public organizations were included in Articles 36 and 37 of the Constitution of Ukraine¹⁰. Y.M. Todika identified several directions through which the Constitution of Ukraine influences the process of building civil society¹¹.

However, as G.I. Zelenko rightly points out, it is important to understand that by constitutionally establishing the rights and freedoms of citizens and associations (political parties, interest groups, non-governmental organizations), the state has created only a formal framework for granting certain forms to civic activity¹².

⁶ Конституція незалежної України: У 3 кн. / уклад. С.П. Головатий, Л.П.Юзьков. К. : Право, 1995. Кн. 2. ч. 1 : Документи, статті. Київ: Право, 1997. С. 4.

⁷ Євграфов П. Вплив Конституційного Суду України на формування громадянського суспільства і правової держави *Вісник Конституційного Суду України*. 2001. № 5. С. 41.

⁸ Скрипнюк О.В. Конституція України та її функції: проблеми теорії та практики реалізації : до десятої річниці прийняття Конституції України. Київ : Академія правових наук України, 2005. С. 77.

⁹ Тодика Ю.М. Роль Конституції України в становленні громадянського суспільства. *Вісник академії правових наук України*. 1999. № 2. С. 11-12.

¹⁰ Скрипнюк О.В. Шляхи розвитку громадянського суспільства в Україні на зламі тисячоліть: конституційно-правова ретроспектива *Приватне право і підприємництво: Зб. нар. пр. : Голов. ред. О.Д. Крупчан*. К. : НДІ приватного права і підприємництва АПН України. 2009. Вип. 8. С. 24.

¹¹ Тодика Ю.М. Роль Конституції України в становленні громадянського суспільства. *Вісник академії правових наук України*. 1999. № 2. С. 4.

¹² Зеленько Г.І. Політична «матриця» громадянського суспільства: Досвід країн Вишеградської групи та України. К: Знання України, 2007. С. 137.

Thus, even though a special section on civil society was excluded from the current Constitution, practically all the norms and principles contained within it were incorporated into the 1996 Constitution of Ukraine to some extent and continue to be in effect today¹³. K.A. Babenko distinguishes three groups of constitutional norms related to civil society¹⁴, and P.M. Lyubchenko identifies four groups of principles of civil society that arise from the Constitution of Ukraine or are directly stipulated by it¹⁵.

In our opinion, the constitutional principles of civil society can be divided into general and special ones. The general principles of civil society should include constitutional norms dedicated to the foundations of the constitutional order (the principle of a legal, democratic, social state (Article 1), political, economic, and ideological diversity (pluralism), freedom of political activity, prohibition of censorship (Article 15), and the special-permission principle of the activities of state authorities and local government bodies (Part 2 of Article 19 of the Constitution of Ukraine)). Special constitutional principles of civil society can be attributed to constitutional norms related to the activities of civil society institutions and the limits of state interference in their affairs. These are constitutional norms related to citizens' rights to associate in political parties and public organizations (Articles 36, 37 of the Constitution of Ukraine)¹⁶.

According to S.M. Tymchenko, the norms of the current Constitution create an appropriate foundation for the development of civil society¹⁷. Similarly, Y.M. Todika believed that appropriate constitutional and legal foundations have been created for the steady development of civil society. Although there are some imperfect provisions in the Constitution, it serves as a solid foundation for the formation of a viable civil society and the rule of law¹⁸.

However, the idea of creating a special section dedicated to civil society, or at least constitutionally enshrining the relevant term, is still present in academic literature. Thus, according to V.A. Morgun, it would be desirable to

¹³ Бабенко К.А. Становлення громадянського суспільства в Україні: конституційний вимір. *Бюлетень Міністерства юстиції України*. 2006. № 12. С. 7.

¹⁴ Бабенко К.А. Становлення громадянського суспільства в Україні: конституційний вимір. *Бюлетень Міністерства юстиції України*. 2006. № 12. С. 9-11.

¹⁵ Любченко П.М. Конституційні засади становлення та розвитку громадянського суспільства в Україні. *Правове регулювання економіки: Зб. наук. пр. / відп. ред. В.Ф. Опришко*. К.: КНЕУ, 2006. Вип. 6. С. 33-35.

¹⁶ Див.: Берченко Г.В. Громадянське суспільство в Україні: конституційні аспекти. Харків: Юрайт, 2014. С. 127.

¹⁷ Тимченко С.М. Громадянське суспільство і правова держава в Україні. Запоріжжя: Юридичний ін.-т МВС України, 2002. С. 51.

¹⁸ Тодика Ю.М. Конституційні засади формування громадянського суспільства в Україні. *Вісник академії правових наук України*. 2003. № 1. С. 35.

introduce a special section in the Constitution that highlights the theoretical foundations of civil society and the directions for its development¹⁹.

It should be noted that a special section dedicated to civil society is present in the draft Constitution developed by V.V. Rechytsky. The presence of this section in the draft Constitution is explained by V.V. Rechytsky as a reflection of Ukraine's status as a post-totalitarian republic. Therefore, the section on civil society in the draft Constitution is not a mere trend but a conclusion drawn from the country's historical experience. To avoid falling into dictatorship again, society must establish appropriate preventive mechanisms²⁰.

Periodically, there are proposals to include the term «civil society» in the constitutional text. For example, in the draft Law of Ukraine «On Amendments to the Constitution of Ukraine,» submitted to the Verkhovna Rada by President of Ukraine V.A. Yushchenko on March 31, 2009, No. 4290²¹ was proposed to include Article 17, which would enshrine the following provision: «The state promotes the establishment and development of civil society.»

As stated in the explanatory note to this draft, «Considering the need for further establishment and development of civil society institutions, the new edition of the Constitution of Ukraine envisages institutionalizing its relationship with the state, specifying in the relevant article, in particular, that the state promotes the establishment and development of civil society.»

Today, there are different views on whether it is necessary to separately highlight sections or chapters in the constitution specifically dedicated to civil society in terms of its relationship with the state. At the same time, in the vast majority of foreign constitutions, such sections are absent. Instead, they typically contain provisions that enshrine the most important institutions of civil society.

Should we propose including a separate section or special mention of civil society in the updated constitutional text? To answer this, we must first address the question: is the underdevelopment of civil society in Ukraine linked to the absence of such a special mention or section in the Constitution? In our opinion, no. Here's why.

As Y.M. Todika wrote, the formation of civil society largely depends on the quality of constitutional legislation, and primarily the constitution itself,

¹⁹ Моргун В.А. Суспільно-політичні проблеми розбудови громадянського суспільства в незалежній Україні: історичний аспект. Донецьк: Донецький нац. ун-т, 2003. С. 322.

²⁰ Речицький В.В. Проект Конституції України – 2009. Перспектива прав людини. Харків: Права людини, 2009. С. 49.

²¹ Проект Закону «Про внесення змін до Конституції України» № 4290 від 31.03.2009 URL: http://gska2.rada.gov.ua/pls/zweb_n/webproc4_1?pf3511=34882

which should lay the democratic foundations for the functioning of the state and society²².

On the other hand, as G.I. Zelenko points out, concentrating all political, economic, social, and cultural aspirations in a single document leads to the devaluation of norms and transforms the Constitution into a political manifesto²³. I hope that Ukraine does not take a similar path.

That is why we do not overestimate the issue of including a special section or a mention of civil society in the Constitution. The underdevelopment of civil society in Ukraine is, at best, only minimally related to the absence of such a section in the Constitution. Moreover, the formal inclusion of such a section filled with general slogans could harm the development of civil society and discredit its very idea.

It should be acknowledged that there are systemic shortcomings in the current Constitution of Ukraine, which contribute to the imperfect state of civil society in the country. To address these issues, the concept of «militant democracy» should be more consistently implemented when updating the Fundamental Law²⁴.

It is unlikely that the reasons for the current state of civil society should be sought exclusively in the constitutional text. According to Y.H. Barabash, the vast majority of answers lie in the deep foundations of Ukrainians' legal consciousness²⁵. At the same time, the significance of constitutionalizing citizens' rights and freedoms, as well as the limits of state intervention, should not be underestimated, as it plays an undeniable role in the formation of civil society²⁶.

2. The constitutional right to freedom of association as a prerequisite for the development of civil society institutions in Ukraine

Thus, based on the principles of civil society and their constitutional regulation, which we examined in the previous subsection, we should focus on the constitutional status of civil society institutions, which is enshrined in Article 36 of the Constitution of Ukraine (1996). This article establishes the

²² Тодика Ю.М. Конституційні засади формування громадянського суспільства в Україні. *Вісник академії правових наук України*. 2003. № 1. С. 38.

²³ Зеленько Г.І. Політична «матриця» громадянського суспільства: Досвід країн Вишеградської групи та Україна. К: Знання України, 2007. С. 133.

²⁴ 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. Volume 9. Issue. 3 P. 3-24; Барабаш Ю., Берченко Г. Чи здатна захистити себе демократія в умовах війни? (на досвіді державного будівництва під час російської агресії) *Право України*. 2023. № 1. С. 54-75.

²⁵ Барабаш Ю.Г. Двадцять років незалежного поступу: втома від демократії чи утвердження нового конституційного проекту? *Бюлетень Міністерства юстиції України*. 2011. № 1. С. 10.

²⁶ Зеленько Г.І. Політична «матриця» громадянського суспільства: Досвід країн Вишеградської групи та Україна. К: Знання України, 2007. С. 134.

right of citizens to association: *«Citizens of Ukraine have the right to freedom of association in political parties and public organizations for the realization and protection of their rights and freedoms and for the satisfaction of their political, economic, social, cultural, and other interests, except for restrictions established by law in the interests of national security, public order, public health, or the protection of the rights and freedoms of others.»*

In more detail, today the legal and organizational foundations for the realization of the right to freedom of association are regulated by the Law of Ukraine «On Public Associations» dated March 22, 2012, No. 4572-VI. It should be noted that the Law «On Public Associations» entered into force on January 1, 2013, replacing the Law «On Citizens' Associations.» The necessity for the adoption of the new law was related to the fact that the Law «On Citizens' Associations» did not guarantee compliance with European standards in the field of public organizations' activities. As noted by V.L. Fedorenko and Y.O. Kaglyak, the legislation on public organizations «conserved» several serious problems, namely: it complicated the procedure for the state registration of public organizations, restricted the activities of public organizations based on territorial criteria (the broader the area of statutory activity, the more complicated the registration process), limited the types of activities by content (such as in cases of protecting the rights of others, etc.), established state control over the statutory activities of public organizations, and also restricted the scope of their direct economic activities, among other issues²⁷.

It should also be noted that during the practical implementation of the right to associate, Ukrainians encountered numerous legislative obstacles²⁸. As an example, the case «Koretsky and Others v. Ukraine» No. 40269/02 from April 3, 2008, can be cited²⁹. This case was brought before the European Court of Human Rights. The Ukrainian citizens who filed the case against their state had been unable to register their civil society organization, «Public Committee for the Preservation of the Wild (Native) Nature of Bereznyiaky,» since 2000.

In its decision, the Court concluded that the right to freedom of association, as guaranteed by Article 11 of the European Convention on Human Rights, was violated due to the refusal by the Ministry of Justice to register the citizens' association. The refusal was based on the fact that the association's statute did not meet the legislative requirements.

²⁷ Федоренко В.Л., Кагляк Я.О. Інститути громадянського суспільства та інститут громадських організацій в Україні: теоретико-методологічні та нормопроєктні аспекти. *Бюлетень Міністерства юстиції України*. 2009. № 4-5. С. 80-81.

²⁸ Пріоритети розвитку громадянського суспільства України / М. Лациба, О. Вінніков, Л. Сідельнік, Д. Український. Київ, 2008. С. 26.

²⁹ Рішення Європейського суду з прав людини по справі «Корецький та інші проти України» за заявою № 40269/02 від 3 квітня 2008 року URL: https://zakon.rada.gov.ua/laws/show/974_446

According to Article 16 of the Ukrainian Law «On Associations of Citizens,» registration could be denied if the statute or other documents submitted for registration contradicted the requirements of Ukrainian legislation. The law did not specify whether this provision applied only to the substantive non-compliance of the organization's goals and activities with the law's requirements particularly about the grounds for restricting the formation and activities of associations as stated in Article 4 of the same law—or whether it also applied to textual non-compliance of the statute with the relevant provisions of the law.

The European Court concluded that such a provision of the Law allows for a rather broad interpretation and can be understood as prohibiting any deviation from the relevant national norms regulating the activities of associations. The Court believes that the provisions of the Ukrainian Law «On Associations of Citizens» regulating the registration of associations are too vague to be sufficiently «predictable» for interested parties, and grant state authorities too broad a discretion in deciding whether a particular association can be registered.

As a result, the European Court of Human Rights found the state of Ukraine guilty in the case regarding the refusal of the Kyiv City Department of Justice to register the organization «Civic Committee for the Preservation of the Wild (Indigenous) Nature of Berizniaky» (Kyiv), ruling that the state had violated the right guaranteed in Article 11 of the European Convention on Human Rights and Fundamental Freedoms of November 4, 1950³⁰ (the right to freely associate citizens).

To address these issues and based on the objective need to implement the decisions of the European Court of Human Rights, the status legislation on public organizations needed to be updated³¹.

In particular, the Law «On Public Associations» implements the idea of changing the circle of entities that can be founders of public organizations, and this right is also granted to legal entities under private law. However, according to the relevant committee of the Verkhovna Rada of Ukraine, this idea does not align with the Constitution of Ukraine. The committee justifies this thesis by referring to the first part of Article 36 of the Constitution of Ukraine, which stipulates that it is the citizens of Ukraine who have the right to freedom of association in political parties and public organizations for the exercise and protection of their rights and freedoms, as well as to satisfy political, economic, social, cultural, and other interests, except for restrictions established by law in the interests of national security and public order, public health protection, or the protection of the rights and freedoms of others.

³⁰ Конвенція про захист прав людини і основоположних свобод від 4 листопада 1950 р. *Офіційний вісник України*. 2006. № 32. Ст. 2371.

³¹ Федоренко В.Л., Кагляк Я.О. Інститути громадянського суспільства та інститут громадських організацій в Україні: теоретико-методологічні та нормо-проектні аспекти. *Бюлетень Міністерства юстиції України*. 2009. № 4-5. С. 81.

A similar opinion was expressed by the Main Scientific and Expert Department of the Verkhovna Rada of Ukraine. According to experts, the proposed approach is flawed because in the Constitution of Ukraine (Articles 36 and 37), the concept of «the right of citizens of Ukraine to freedom of association in political parties and public organizations» is used in a much narrower sense than in the draft. According to the Main Scientific and Expert Department, the concept of «legal entities» is used in civil and economic law to meet the needs of economic activity and property relations. Therefore, the necessity of granting legal entities legal capacity about the right to freedom of association in public organizations is unclear³².

However, we find the opinion of V.L. Fedorenko and Y.O. Kaglyak more substantiated, who argue that Article 36 of the Constitution of Ukraine should not be interpreted narrowly, meaning only in the sense that citizens can exercise the right to association solely as individuals who join a particular public organization. According to the scholars, the possibility for citizens to realize their constitutional right to association should also be ensured through other mediated means. In particular, the idea that the rights of specific citizens are realized through the activities of legal entities has long been accepted by the European Court of Human Rights³³.

Another argument in favor of granting legal entities the right to establish public organizations and participate in them could be found in the provisions of the Fundamental Principles on the Status of Non-Governmental Organizations in Europe. Paragraph 15 of these principles states that «no person, whether legal or natural, domestic or foreign, or group of such persons, should be restricted from forming non-governmental organizations.» Principles similar to the above are also reflected in the Recommendations of the Committee of Ministers of the Council of Europe to member states regarding the legal status of non-governmental organizations in Europe³⁴.

Similarly, according to experts, the inability of both individuals and legal entities to jointly establish associations does not align with positive international practice. In most countries of Central and Western Europe, associations (membership organizations) can be jointly created by both individuals and legal entities³⁵.

³² Висновок Головного науково-експертного управління Апарату Верховної Ради України на проект Закону України «Про громадські організації» (реєстр. № 2951-VI від 01.11.2010 р.) URL: http://gska2.rada.gov.ua/pls/zweb_n/webproc34?id=&pf3511=38911&pf35401=183204

³³ Федоренко В.Л., Кагляк Я.О. Інститути громадянського суспільства та інститути громадських організацій в Україні: теоретико-методологічні та нормо-проектні аспекти. *Бюлетень Міністерства юстиції України*. 2009. № 4-5. С. 84.

³⁴ Same source.

³⁵ Пріоритети розвитку громадянського суспільства України / М. Лациба, О. Вінніков, Л. Сідельнік, Д. Український. Київ, 2008. С. 27.

In the future, we also support the idea of expanding the circle of subjects who can be founders of public associations and providing this right to legal entities of public law (for example, universities).

V.L. Fedorenko and Y.O. Kaglyak emphasized the appropriateness of introducing such an approach to the activity of public organizations that does not classify them by territorial criteria (without dividing public organizations into local, national, and international ones). This approach allows public organizations to independently determine the territory of their activity and freely carry out their statutory activities throughout Ukraine without re-registration³⁶.

Experts have long emphasized that the practice of establishing the status of a public organization based on territorial criteria follows the traditions of the former USSR. The creation and operation of public organizations within the territory of registration limits their development. After all, expanding the organization's area of activity requires re-registration with state authorities³⁷. Today, according to the Law «On Public Associations,» confirming the all-Ukrainian status of a public association and renouncing such status are voluntary. The activities of a public association can, in any case, be extended across the entire territory of Ukraine.

It is worth noting that an important provision of the Law «On Public Associations» is that public organizations can unite individuals to exercise and protect any rights and freedoms, as well as to satisfy public and other legitimate interests. In other words, a public organization can operate not only to protect the interests of its members but also to protect the interests of individuals who are not its members. This approach aligns with international standards of legal regulation concerning the status of public organizations.

3. Institutions of Civil Society in Ukraine

In the previous section, we explored the constitutional and legal foundations for regulating civil society and its institutions in terms of the right to freedom of association. However, can we approach the relevant issue from a different perspective, specifically from the viewpoint of the institutional structure of civil society?

It is important to agree with P.M. Lyubchenko that civil society is a structured systemic phenomenon³⁸. Thus, to determine the structure of civil society, we must answer the question: can we, alongside non-governmental non-profit organizations (if we use a narrow approach to interpreting civil

³⁶ Федоренко В.Л., Кагляк Я.О. Інститути громадянського суспільства та інститут громадських організацій в Україні: теоретико-методологічні та нормо-проектні аспекти. *Бюлетень Міністерства юстиції України*. 2009. № 4-5. С. 84.

³⁷ Пріоритети розвитку громадянського суспільства України / М. Лациба, О. Вінніков, Л. Сідельнік, Д. Український. Київ, 2008. С. 28.

³⁸ Любченко П. Конституційно-правові проблеми визначення структури громадянського суспільства *Вісник академії правових наук України*. 2004. № 3 (38). С. 52.

society), including manifestations of non-institutionalized civil activism (mass movements or protest actions) in the structure of civil society?

In our opinion, the more reasonable thesis is that equating civil society with radical opposition movements aimed against the government is a significant oversimplification³⁹. It is argued that mass movements are not a manifestation of a developed or stable civil society; they represent another, specific form of interaction, appropriate for crisis periods in the life of individual spheres of public life or even society as a whole⁴⁰.

According to H.I. Zelensko, such activity cannot and should not be prolonged. Therefore, the decline of mass political movements in Central and Eastern European countries is not a sign of the decline or crisis of civil society. The movements were a manifestation of civic consciousness in the political-legal sense of citizenship; they should be followed by stable, organized forms of civic life in the social sense (civil life)⁴¹.

It is stated that the absence of legitimate political and legal institutions as effective mechanisms for resolving socio-political contradictions is one of the most important reasons for their evolution towards authoritarianism or chaos⁴².

Therefore, in our opinion, noninstitutionalized mass activity should not be included in the structure of civil society, as its manifestations are closer to the lifeworld (according to J. Habermas) than to civil society. Civil society is primarily made up of institutions.

Another unresolved issue in the field of study is the possibility of including criminal organizations in the structure of civil society. Currently, there is no consensus on this issue in the academic community.

For example, H.P. Ponomaryova argues that the structure of civil society should not be limited to organizations that operate within the boundaries of the law. According to her, some illegal organizations, according to current law, can be considered elements of civil society. The main criterion is the realization of citizens' rights and freedoms through their activities⁴³.

According to A.V. Nizhelskaya, it is not appropriate to distinguish criminally anti-social manifestations as a separate third force – after the state and civil society. Instead, they should be included under terms like «anti-civil

³⁹ Основи демократії: Підручник для студентів вищих навчальних закладів / За заг. ред. А.Ф. Колодій. Третє видання, оновлене і доповнене. Львів: Астролябія, 2009. С. 153.

⁴⁰ Основи демократії: Навч. посібник для студентів вищ. навч. закладів / М. Бессонова, О. Бірюков, С. Бондарук та ін. К: Вид-во «Ай Бі», 2002. С. 458.

⁴¹ Зеленько Г.І. Політична «матриця» громадянського суспільства: Досвід країн Вишеградської групи та України. Київ: Знання України, 2007. С. 29.

⁴² Політико-правові інститути сучасності: Структура, функції, ефективність / за заг. ред. М. І. Панова, Л. М. Герасіної. К.: Концерн «Видавничий Дім «Ін Юре», 2005. С. 367.

⁴³ Пономарьова Г.П. Незаконні угруповання як елементи громадянського суспільства *Проблеми попередження злочинності в сучасних умовах: Матеріали третьої студентської кримінологічної конференції (м. Харків, 25 лист. 2003 р.)*. Х.: Нац. юрид. акад. України ім. Ярослава Мудрого / За заг. ред. О.Ю.Шостко, 2004. С. 59.

society» or «criminal civil society.» All «positive» and «negative» manifestations should be included within the content of civil society, distinguishing between its official and unofficial parts⁴⁴.

V. Lytvyn also considers it a myth that civil society always pursues noble goals⁴⁵. In contrast to V.M. Lytvyn, E.K. Bystrytsky notes that the mention of the «Luhansk group» as an example of an immoral civil society organization is a complete stretch. A closed, non-public, and extrajudicial group could never be considered what is known as a civil organization, nor can it be classified under the concept of civil society⁴⁶.

According to P.M. Liubchenko, the institutions of civil society operate openly and legally. The absence of appropriate legalization and societal condemnation of the creation and functioning of criminal groups allows us to conclude that their inclusion in the structure of civil society is impossible⁴⁷. M. Kalinichenko also believes that mafia structures or entities of the shadow economy, which strongly oppose both the state and civil society, are components of non-civil society⁴⁸. Thus, civil society consists of voluntary institutions that operate within the framework of the law.

Social institutions, according to institutionalists, reflect «a consciously regulated and organized form of activity of the masses of people, the reproduction of the most stable patterns of behavior, traditions, and habits that are passed down from generation to generation»⁴⁹.

As H. Bortis points out, social or societal institutions arise when several members of a community or the entire society pursue common or shared goals that they cannot achieve individually. In this case, individuals or groups of individuals perform different complementary functions (planning or executive, physical or intellectual) within the framework of the social institution. Cooperation and coordination are essential for the successful functioning of such institutions⁵⁰.

The authors of the collective monograph «*Priorities of the Development of Civil Society in Ukraine*» believe that in a broad sense, the organizations

⁴⁴ Ніжельська А.В. Критерії розвиненості громадянського суспільства *Держава і право. Юридичні і політичні науки*: 36. наук. пр. К. : Ін-т держави і права НАН України, 2002. Вип. 18. С. 377.

⁴⁵ Литвин В. Громадянське суспільство: міфи й реальність URL: https://zn.ua/ukr/internal/gromadyanske_suspilstvo_mifi_y_realnist.htm

⁴⁶ Бистрицький Є. Передчуття громадянського суспільства URL: <http://www.dt.ua/1000/1550/61107/2007>

⁴⁷ Любченко П. М. Конституційно-правові основи розвитку місцевого самоврядування як інституту громадянського суспільства. Харків: Одиссей, 2006. С. 70.

⁴⁸ Калініченко М. Влада громадянського суспільства. Суми: ВТД «Університетська книга», 2006. С. 44.

⁴⁹ Політико-правові інститути сучасності: Структура, функції, ефективність / за заг. ред. М. І. Панова, Л. М. Герасіної. К. : Концерн «Видавничий Дім «Ін Юре», 2005. С. 7.

⁵⁰ Бортіс Г. Інституції, поведінка та економічна теорія: Внесок до класико-кейнсіанської політичної економії /; пер. з англ.: Т. Барбадим ; наук. ред.: М. Винницький. К. : Києво – Могилянська акад., 2007. С. 62.

that can be considered as part of civil society include non-governmental organizations, charitable foundations, business associations, bodies of self-organization of the population, media, trade unions, employers' organizations, religious organizations, and citizen initiative groups⁵¹.

V. Lytvyn believes that the structure of civil society, in addition to non-governmental organizations with a social-political orientation, includes trade unions, chambers of commerce, and professional associations and syndicates (such as those for lawyers, doctors, etc.), ethnic associations, and political parties. Furthermore, it encompasses the broadest range of associations that do not have a social-political agenda, such as religious, student, sports, and cultural societies (ranging from amateur choir singing clubs to sports fan clubs and voluntary firefighters)⁵².

D. Stuedemann includes trade unions, churches, free voter groups, consumer protection associations, as well as tenant rights associations, environmental groups, neighborhood mutual aid organizations, sports associations, voluntary fire services, women's organizations, and self-help organizations for alcoholics and drug addicts in the structure of civil society⁵³.

In the literature, based on the analysis of the legislation of Ukraine and the EU, the following list of civil society organizations is included as institutions of civil society: 1) Public organization; 2) Union of public organizations; 3) Religious organization; 4) Charitable organization; 5) Employers' organization; 6) Trade union association; 7) Creative union (other professional organization); 8) Self-organization body of the population; 9) Private institution; 10) Institution of a public union or religious organization or trade union; 11) Enterprise of a public organization of people with disabilities⁵⁴.

It is worth noting that the category «civil society institution» has already been defined in current legislation. According to the second paragraph of item 2 of the Procedure for Promoting the Public Expert Review of the Activities of Executive Authorities, approved by the Resolution of the Cabinet of Ministers of Ukraine on November 5, 2008, No. 976, the following are considered civil society institutions: public associations, trade unions and their associations, creative unions, employers' organizations and their associations, charitable and religious organizations, bodies of self-organization of citizens, non-governmental media, and other non-commercial societies and institutions legalized according to the law.

As noted by V.L. Fedorenko and Y.O. Kaglyak, «for the first time in the history of state-building and law-making in independent Ukraine, civil society

⁵¹ Лаціба М., Вінніков О., Сідельнік Л., Український Д. Пріоритети розвитку громадянського суспільства України. Київ, 2008. С. 10.

⁵² Литвин В. Громадянське суспільство: міфи й реальність URL: http://zn.ua/ukr/internal/gromadyanske_susplstvo_mifi_y_realnist.htm

⁵³ Штюдеманн Д. Громадянське суспільство в Німеччині URL: <http://dt.ua/articles/2725>

⁵⁴ Хто є організаціями громадянського суспільства в Україні *Громадянське суспільство*. 2009. № 2. С. 16-19.

institutions have ceased to be an exclusively philosophical, sociological, or political science category and have been regulated as a system of subjects endowed with rights and obligations to defend their legitimate interests in the process of further building civil society in Ukraine and participating in the management of state affairs, including the formation and implementation of state legal policy.» Furthermore, in their view, today civil society institutions have overcome the established stereotype of their amorphousness and are transforming into full-fledged subjects of constitutional law in Ukraine⁵⁵.

V.L. Fedorenko, comparing the category of «civil society institution» with the category of «constitutional law institution,» concluded that the institutional model of civil society in Ukraine can find its embodiment in the institutions of constitutional law of Ukraine. As examples of such institutions that already exist, the scholar cites the institution of political parties, the institution of public organizations, the institution of organs of self-organization of the population, and others⁵⁶.

It should also be noted the Article 5 of the Law of Ukraine «On the Principles of Domestic and Foreign Policy» dated July 1, 2010, No. 2411-VI, where the principles of domestic policy in the field of civil society institution formation are listed. A rather broad definition is contained in paragraph 9 of part 1 of article 1 of the Law of Ukraine «On the Basic Principles of State Policy in the Field of Strengthening Ukrainian National and Civil Identity» dated December 13, 2022, No. 2834-IX, according to which civil society institutions are non-profit organizations operating by the legislation of Ukraine.

4. Features of the Functioning and Legal Regulation of Civil Society Institutions During the War and in the Context of Post-War Reconstruction Prospects.

The roles of civil society institutions during martial law are related to two aspects. On one hand, we are talking about the imposition of restrictions on human rights, which became possible starting from February 24, 2022, when martial law was officially introduced (it is worth noting that on February 23, the state of emergency was introduced). Such restrictions could well apply to (and in practice have applied to) various types of associations, i.e., civil society institutions. These types of restrictions have already been analyzed in sufficient detail in the literature⁵⁷.

⁵⁵ Федоренко В.Л., Кагляк Я.О. Інститути громадянського суспільства та інститут громадських організацій в Україні: теоретико-методологічні та нормо-проектні аспекти *Бюлетень Міністерства юстиції України*. 2009. № 4-5. С. 76.

⁵⁶ Федоренко В.Л. Система конституційного права України: теоретико-методологічні аспекти. К.: Ліра-К, 2009. С. 399.

⁵⁷ Барабаш Ю.Г., Берченко Г.В. Чи здатна захистити себе демократія в умовах війни? (на досвіді державного будівництва під час російської агресії). *Право України*. 2023. № 1. С. 54-75; Коцюруба О. Вплив держави на політичні партії: погляд крізь призму агресії

At the same time, formally, according to the Decree of the President of Ukraine No. 64/2022 of February 24, 2022, «On the Introduction of Martial Law in Ukraine»⁵⁸(Paragraphs 3) of Articles 36 and 37, which regulate the issue of freedom of association, are not mentioned in the context of potential temporary restrictions. This does not mean that the relevant restrictions were not somehow correlated with the conditions of martial law. It is worth noting that by the Law of May 3, 2022, No. 2243-IX «On Amendments to Certain Legislative Acts of Ukraine Regarding the Prohibition of Political Parties,» amendments were made to the Law «On Political Parties in Ukraine» by expanding the grounds for the prohibition of political parties in connection with Russia's armed aggression⁵⁹. In other words, the legislator accepted the conditions in which Ukraine found itself as a basis for imposing additional restrictions.

Before this, the National Security and Defense Council, in its decision of March 18, 2022 (implemented by the Decree of the President of Ukraine of March 19, 2022, No. 153/2022), «On the Suspension of the Activity of Certain Political Parties,» took into account the requirements of the Ukrainian laws «On the Legal Regime of Martial Law» and «On Political Parties.» The Council adopted the decision to suspend the activity of several political parties⁶⁰.

On the other hand, civil society institutions, in addition to posing risks, can also bring significant benefits. We have already demonstrated this aspect in the previous publication (along with highlighting the risks that civil society institutions face)⁶¹. Such benefits may be associated with the activities of numerous human rights organizations, charitable foundations, and other similar institutions⁶². The functioning of political parties as a key element of

Російської Федерації проти України. *Український часопис конституційного права*. 2022. № 2. С. 23-42.

⁵⁸ Указ Президента України №64/2022 від 24 лютого 2022 року «Про введення воєнного стану в Україні» URL: <https://www.president.gov.ua/documents/642022-41397>

⁵⁹ Закон від 3 травня 2022 року № 2243-IX «Про внесення змін до деяких законодавчих актів України щодо заборони політичних партій» URL: <https://zakon.rada.gov.ua/laws/show/2243-20#n40>

⁶⁰ Рішення РНБО від 18 березня 2022 року (Введено в дію Указом Президента України від 19 березня 2022 року № 153/2022) «Щодо призупинення діяльності окремих політичних партій» URL: <https://zakon.rada.gov.ua/laws/show/n0005525-22#Text>

⁶¹ Slinko T.M., Berchenko H.V. Constitutional and Legal Principles of Civil Society in the Context of Current Challenges. In: *Transformation of the legal system and human rights protection under the influence of martial law*. Riga: Publishing House “Baltija Publishing”, 2024. pp. 258-269

⁶² Детальніше див.: Демиденко А. Л. Неурядові (громадські) правозахисні організації як інститут громадянського суспільства: конституційно-правовий аспект: дис. ... д-ра філософії в галузі знань 08 «Право»: спец.: 081; Нац. юрид. ун-т ім. Ярослава Мудрого, М-во освіти і науки України. Харків, 2023. 220 с; Щербанюк О.В., Сінкевич О.В. Деокупація та реінтеграція Криму: вплив правозахисних неурядових організацій. *Науковий вісник Ужгородського національного університету*. Серія ПРАВО. 2023. Випуск 79: частина 2. С. 375-380; Щербанюк О.В., Сінкевич О.В. Роль неурядових правозахисних організацій у забезпеченні збору доказів для

constitutional democracy, a strong coalition (or the existence of a parliamentary majority), and opposition is also crucial. In other words, the institutions of civil society hold significant restorative potential, as these institutions can be beneficial for maintaining social capital. They also have a substantial influence on the material aspects of society's existence, playing a significant supporting role in both the implementation of state policies and, most importantly, creating conditions for the protection and development of constitutional democracy.

In our opinion, it is essential to actively implement strategies for the development of civil society institutions in the post-war period. These strategies should be based on the two trends mentioned above. On the one hand, post-war recovery must not allow the restoration of anti-democratic forces. In this regard, the doctrine of militant democracy plays a significant role⁶³. On the other hand, civil society institutions should receive a new impetus for their activities.

It is worth recalling that a draft law «On the Principles of State Policy for the Transitional Period» No. 5844, dated 09.08.2021⁶⁴, was developed some time ago⁶⁵. Although this draft law was later withdrawn, it remains almost the only benchmark for the legal aspects on which the reintegration of occupied territories can be built.

On the one hand, this project provided for several human rights restrictions, but on the other hand, it included many key principles of transitional period state policy (Article 7), which are fundamentally important for human rights. As for the restrictions, they concerned limitations on the right to be elected in local elections and to hold positions (Article 10), and an entire Section III was titled «Elections, Referendums, and the Formation of Local Self-Government Bodies in De-occupied Territories,» establishing the relevant limitations (Articles 15-17).

At the same time, it should be acknowledged that alongside the restrictive measures, which are indeed necessary, the aspect of stimulating the development of civil society institutions in the post-war paradigm has not been adequately reflected in the aforementioned draft law, which should have been addressed as well. Therefore, it is proposed to create a strategy (or concept) for the development of civil society institutions, taking into account the issues of post-war recovery and de-occupation of territories. We should already have

міжнародного кримінального суду в контексті війни в Україні *Наше право*. 2022. № 2. С. 236-242 ; Щербанюк О.В., Сінкевич О.В. Взаємодія неурядових правозахисних організацій із органами місцевого самоврядування. *Аналітично-порівняльне правознавство: Електронне наукове видання*. 2023. № 5. С. 202-206.

⁶³ 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. Volume 9. Issue. 3 P. 3-24.

⁶⁴ Проект Закону про засади державної політики перехідного періоду № 5844 від 09.08.2021 URL: https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=72625

some kind of plan and direction for legislative work on this matter. Civil society institutions are still a source of informal freedom and self-organization. However, under the current conditions in which Ukraine finds itself, state policy must take into account the characteristics, development challenges, and importance of civil society institutions. It is reasonable to limit certain rights with a legitimate purpose and by the principle of proportionality (the doctrine of militant democracy), but it is also essential to stimulate their development.

CONCLUSIONS

The constitutional regulation of the principles of organization and functioning of public associations is of fundamental importance for the development of civil society in Ukraine. It is worth supporting the idea that public organizations can unite individuals to exercise and protect any rights and freedoms, as well as satisfy public and other legitimate interests. In other words, a public organization can act both to defend the interests of its members and to protect the interests of individuals who are not its members. This is of particular significance for non-governmental human rights organizations that carry out the right to defense. In the future, the idea of expanding the circle of entities that can be founders of public associations can be discussed, including granting such a right to legal entities of public law (e.g., universities).

The structure of civil society should not include manifestations of non-institutionalized civil activity (mass movements or protests) alongside non-governmental non-profit organizations. The components of civil society are voluntary institutions, and only those operating within the framework of the law should be considered. It is worth adopting the list of civil society institutions provided in the second paragraph of point 2 of the Procedure for promoting public expertise of the activities of executive authorities, approved by the Cabinet of Ministers of Ukraine on November 5, 2008, No. 976. Additionally, it makes sense to provide more precise definitions of terms in the legislation. However, the list of civil society institutions should be carefully framed to avoid narrowing it. The most important (central) element of the list of civil society institutions is considered to be public associations (non-governmental organizations) of various directions. Non-governmental human rights organizations often play the most active role in this context. In general, active and effective civil society institutions create appropriate conditions for the development of democracy and the protection of human rights.

Although the concept of «civil society» is not explicitly mentioned in the Constitution of Ukraine, this does not mean that the Constitution does not regulate the relationships between civil society and the state. The constitutional foundations of civil society can be divided into general and special ones. General principles of civil society include constitutional norms dedicated to the foundations of the constitutional order. Special constitutional principles of civil society can be found in constitutional provisions related to the activities of civil society institutions and the limits of state interference in

their affairs. When updating the constitutional text, it is not advisable to propose the inclusion of a separate chapter or special mention of civil society. The underdevelopment of civil society in Ukraine is least related to the absence of a relevant section in the Constitution of Ukraine. At the same time, it should be acknowledged that there are systemic shortcomings in the Constitution of Ukraine, which are one of the reasons for the current imperfection of civil society in the country. To address these issues, the concept of «militant democracy» should be more consistently implemented when updating the Fundamental Law.

Alongside the necessary restrictive measures, the aspect of stimulating the development of civil society institutions in the post-war paradigm has not been properly reflected, and this should also be addressed. That is why it is proposed to create a strategy (or concept) for the development of civil society institutions, taking into account the issues of post-war recovery and the de-occupation of territories. We should already have a plan and understand the directions of legislative work on this issue. It is clear that civil society institutions still have their source in the idea of informal freedom and self-organization. However, given the current circumstances in Ukraine, state policy must take into account the peculiarities, developmental challenges, and the importance of civil society institutions. It is reasonable to restrict certain rights with a legitimate purpose, while adhering to the principle of proportionality (the doctrine of militant democracy), but also to stimulate their development. Such stimulating and enabling measures are crucial for the further development of Ukrainian civil society.

ABSTRACT

Constitutional and legal regulation of the organization and functioning of public associations is crucial for the formation of civil society in Ukraine. We believe it is inappropriate to include manifestations of non-institutionalized civil activism (such as mass movements or protests) in the structure of civil society alongside non-governmental non-profit organizations. Civil society consists of voluntary institutions, but only those that operate within the framework of the law. It is advisable to use the list of civil society institutions provided in paragraph two of section 2 of the Procedure for Promoting Public Expertise of the Activities of Executive Authorities, approved by the Resolution of the Cabinet of Ministers of Ukraine No. 976 of November 5, 2008, as a basis. Furthermore, it makes sense to provide more precise definitions of concepts in legislation. At the same time, the list of civil society institutions should be defined carefully to avoid narrowing it down. The most important (central) element in the list of civil society institutions is public associations (non-governmental organizations) of various orientations. In general, active and effective civil society institutions create the necessary conditions for the development of democracy and the protection of human rights.

Alongside the restrictive measures that are indeed necessary, the aspect of stimulating the development of civil society institutions in the post-war paradigm has not yet been adequately reflected, both in terms of ideas and in

legislative drafts or other regulatory acts, and this should also be addressed. Therefore, it is proposed to develop a strategy (or concept) for the development of civil society institutions, taking into account the issues of post-war recovery and the de-occupation of territories.

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