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# The formation of civil legislation and the peculiarities of its application in Ukraine during the period of martial law

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## Abstract

This study analyzes the peculiarities of the formation of modern civil legislation and peculiarities of its application in Ukraine, during the period of martial law. With the help of philosophical, general scientific and special legal methods and approaches, the legal nature of civil legal relations, the dynamics of their development and the mechanism of regulation under the conditions of a special legal regime were investigated. The expediency of showing a separate section in the Civil Code of Ukraine, which would contain temporary provisions providing legal guarantees for the period of war, for the implementation and protection of civil rights and interests of a person, additional obligations of the state to protect civil rights and interests, is based on social necessity. In the conclusions it is indicated that there is a scientific need to clarify the concept of updating the civil legislation of Ukraine with the key role of an anthropological approach, as a methodological basis for future recoding, and compliance with the principle of legality, proportionality of restrictions, proper definition of prerequisites for establishing restrictions on civil rights and the correct assessment of the degree of danger of occurrence of relevant circumstances.

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**Keywords:** civil legal relations; military regime; formation of civil legislation; limitation of rights; protection of rights and interests of a person.

## La formación de la legislación civil y las peculiaridades de su aplicación en Ucrania durante el período de la ley marcial

### Resumen

Este estudio analiza las peculiaridades de la formación de la legislación civil moderna y las singularidades de su aplicación en Ucrania, durante el período de la ley marcial. Con la ayuda de métodos y enfoques filosóficos, científicos generales y legales especiales, se investigó la naturaleza jurídica de las relaciones legales civiles, la dinámica de su desarrollo y el mecanismo de regulación bajo las condiciones de un régimen legal especial. La conveniencia de mostrar una sección separada en el Código Civil de Ucrania, que contendría disposiciones temporales que brindarían garantías legales para el período de guerra, para la implementación y protección de los derechos e intereses civiles de una persona, obligaciones adicionales del Estado para proteger derechos e intereses civiles, se fundamenta en la necesidad social. En las conclusiones se indica que existe la necesidad científica de aclarar el concepto de actualización de la legislación civil de Ucrania con el papel clave de un enfoque antropológico, como base metodológica para la recodificación futura, y el cumplimiento del principio de legalidad, proporcionalidad de las restricciones, definición adecuada de los requisitos previos para establecer restricciones a los derechos civiles y la evaluación correcta del grado de peligro de ocurrencia de circunstancias relevantes.

**Palabras clave:** relaciones jurídico civiles; régimen militar; formación de la legislación civil; limitación de derechos; protección de los derechos e intereses de una persona.

### Introduction

As you know, civil law is a branch of law that regulates property and private non-property relations, based on legal equality, free expression of will and property independence of participants in civil relations, which include physical and legal entities (Parasyuk, 2023, p. 210). The general concept of private and civil law includes: provisions of civil legislation;

legal status of a private person; civil legal relations; legal facts upon which these relations arise, change or terminate; conditions and procedure for realization of civil rights and obligations; interpretation and practice of application of norms of civil legislation.

Civil-law relations and their regulation under the conditions of martial law declared and operating in connection with the military aggression of the Russian Federation should be included among the peculiarities of the application of civil law norms. Temporary displacement of the population from the occupied territories, departure abroad, created new requirements for the mechanism of legal regulation of civil-law relations. The prerequisite for solving this problem is the determination of the connection between civil relations and civil law, as a tool for their regulation, under the conditions of martial law in Ukraine (Parasyuk, 2023, p. 210).

According to the provisions of Art. 3 of the Decree of the President of Ukraine of February 24, 2022 No. 64/2022 «On the introduction of martial law in Ukraine», approved by the Law of Ukraine of February 24, 2022 No. 2102-IX, in connection with the introduction of martial law in Ukraine temporarily, for the period of validity of the relevant regime, the constitutional rights and freedoms of a person and a citizen, provided for in Articles 30-34, 38, 39, 41-44, 53 of the Constitution of Ukraine, may be limited, as well as temporary restrictions on the rights and legal interests of legal entities may be introduced within the limits and to the extent necessary to ensure the possibility of introducing and carrying out measures of the legal regime of martial law, which are provided for in the first part of Article 8 of the Law of Ukraine «On the Legal Regime of Martial Law» (ON THE IMPLEMENTATION OF MARTIAL LAW IN UKRAINE. LAW OF UKRAINE, 2022).

Limiting the rights of individuals is a forced measure to support the country's defense capability regime and ensure the functioning of the national economy. The restrictions stipulated by the special military legislation concern both the clear functioning of civilian circulation and certain types of activities, in particular, such as public access to certain state registers, certain types of business activities, notarization of legal facts, etc. Under such conditions, in the period of martial law, the question of preserving the normal dynamics of civil legal relations is of particular importance in the context of calls to support entrepreneurial activity and «normally take care of children, play sports, restore normal habits, a normal way of life» (Mernyk and Radchenko, 2023, p. 52), implementation of civil rights and protection of civil interests of private individuals.

The majority of modern scientists and practitioners note the tendency to simplify the procedures for the realization of certain civil rights, and the introduction of changes in the legislative regulation of certain civil legal relations in the existing difficult conditions is characterized as a correct

and expedient decision that corresponds to the principles of a democratic society (Martial law and labor relations: new legislative regulation, 2023). The above, however, does not negate the need to harmonize public and private interests, as an integral task of civil law regulation.

### **1. Methodology of the study**

The methodological basis of the scientific article is philosophical, general scientific and special legal methods and approaches. A dialectical approach is used to study the legal nature of civil legal relations, the dynamics of their development in the conditions of a special legal regime. From the standpoint of the anthropological approach, the role of man as the highest value and active participant in civil legal relations is substantiated. The existential approach made it possible to highlight the personal and spiritual dimension of private law. The use of a philosophical-communicative approach made it possible to define civil-legal relations as a rationally ordered discourse.

The axiological approach made it possible to reveal the humanistic content of civil law and its principles. The hermeneutic method is applied to the interpretation of a number of ideas, provisions, concepts and categories, such as «principles of law», «martial law», «private law», «legal security», «personal non-property rights», «right to entrepreneurial activity», «requisition» etc. General scientific methods of logical modeling, system analysis, systemic structural method and others were also used, thanks to which a scientific analysis of civil legal relations and the peculiarities of their implementation in the conditions of martial law was carried out; special legal methods, in particular the formal-dogmatic and integrative-legal approach, made it possible to determine ways of improving the provisions of civil legislation, bringing it into line with the requirements of international legal standards, as well as to investigate national judicial practice in order to identify individual shortcomings of national legislation and its practice application.

### **2. Analysis of recent research**

The issue of civil-law legal relations, observance of the rights and legitimate interests of their participants was the subject of research by many civilists of the past and present, whose writings emphasized the conformity of legal norms to the principles of law as a prerequisite for the implementation of the rule of law in a democratic legal society, ensuring the effectiveness of law as a social regulator. At the same time, in the conditions of martial law introduced in Ukraine, the harmonization of public and private interests comes to the fore as an integral task of civil law regulation.

That is why the purpose of the publication is to develop mechanisms for achieving a compromise of public and private interests as a basis for the formation of civil legislation during the period of martial law.

### **3. Results and discussion**

At the beginning of the study, we will outline some features of the mechanism of civil law regulation of civil relations, taking into account that the full-scale armed aggression of Russia has become a serious challenge to the entire system of regulation of social relations. After all, it is obvious that the system of regulation of personal non-property and property relations, which is based on legal equality, free expression of will, property independence of their participants (part 1 of article 1 of the Civil Code of Ukraine) (CIVIL CODE OF UKRAINE, 2003), the essence of which consists in ensuring everyday life of a person.

The civil law of Ukraine, which is a manifestation of private law at the level of the national legal system (Rabinovych, 2004, p. 3), determines the status of a private person, the grounds for acquiring and the procedure for the realization of civil rights and obligations by such a person, the principles of protection of his rights and interests. The above requires the adjustment of the general provisions of the concept of the mechanism of legal regulation, taking into account the division of law into private and public.

It should be emphasized that, when the provisions of the general theory of rights are fully suitable for application in the public sphere under the established normativist approach, such an approach cannot be recognized as justified in the field of private law, since private law cannot begin with normative acts, especially when it comes to legislative acts. It is obvious that the law-making process must be preceded by an awareness of the essence of private law and an understanding of how it can be implemented.

At the same time, it should be taken into account that the general trend of the development of the legal system also applies to the scope of civil law. In this regard, N. Onishchenko reasonably emphasizes the growth of the social orientation of the legal system as a means of forming and realizing the interests of legal entities by establishing certain goals, norms, and rules of behavior. At the same time, ensuring an optimal combination of social and legal principles of the development of society becomes especially important (Onishchenko, 2021, p. 11).

In the conditions of martial law, the mechanism of legal regulation in the field of civil relations is adjusted in accordance with the main goal of society - to overcome threats to the existence of society. With this in mind,

the key principles of the concept of the civil-law mechanism of regulation in the conditions of a special legal regime with the mandatory definition of the limits of legal influence and forecasting of expected results should be formed.

We will carry out a general description of the concept and properties of the concepts of natural and positive law in the implementation and protection of the rights and legitimate interests of a person in the conditions of martial law.

As some modern scientists rightly point out, natural law is, in fact, a source of private law, which determines the principles of the legal status of a person and his relationship with other persons - members of society, and the analysis of the limits, principles and expediency of legal regulation gives grounds for the assertion that they are different for the sphere of private and public law. In addition, legal regulation in one and another sphere should be carried out in a different way, using different forms of legal influence, giving legal meaning to various legal facts, etc. (Kharitonov et al., 2023, p. 34).

Taking into account the fact that the formation and adoption of acts of civil legislation in the conditions of martial law somewhat loses the features of private law, in our opinion, under such conditions, natural law cannot unconditionally be the basis of civil legislation, it can be a direct regulator of civil relations in temporarily occupied territories and subsequently to be taken into account when resolving relevant civil legal disputes that arose during the occupation of certain territories of Ukraine.

Characterizing subjective rights and the means of their legal protection, it is necessary, first of all, to determine their nature, that is, whether they are included in the content of the legal relationship of private or public law. Modern jurisprudence is characterized by the idea of the existence of rights and freedoms of citizens in two aspects: subjective rights are the possible behavior of a specific person, the implementation of which is legally guaranteed by the existence of a mechanism of legal regulation; objective rights – legal rights enshrined in legal acts, recognized by the state and ensured by the judiciary (Alekseev, 2010, p. 109). Legal support is the creation by legal means of reliable conditions for the implementation of something, the solution of some tasks that are of interest to society (the state) (Kharitonov et al., 2023, p. 38).

Despite the fact that Chapter One of the Civil Code of Ukraine is entitled «Civil Legislation of Ukraine», its content is not limited to the characteristics of only acts of civil legislation, and the term «civil legislation» serves to denote the totality of all formally expressed norms and rules regulating civil relations, and not only acts of civil legislation (Kharitonov and others, 2023, p. 43). After all, contracts (Article 6 of the Civil Code of Ukraine),

customs (Article 7 of the Civil Code of Ukraine) and other forms of civil law can compete with acts of civil legislation as a type of norms of behavior of participants in civil relations.

In connection with Ukraine's European integration aspirations and the resulting need to adapt Ukrainian legislation to European private law, according to the Resolution of the Cabinet of Ministers of Ukraine «On the formation of a working group on the recodification (updating) of the civil legislation of Ukraine» dated July 17, 2019 No. 650, almost three a year ago, preparations for the implementation of this ambitious project began. The course of the mentioned process was slowed down by the coronavirus pandemic, but still an official concept of updating (recodification) of civil legislation was developed (CONCEPT OF UPDATE OF CIVIL LEGISLATION OF UKRAINE, 2020), according to which work was carried out on projects to introduce changes to individual books of the Civil Code of Ukraine.

In the context of the influence of full-scale military aggression on the functioning of the legal system of Ukraine and the determination of directions for the improvement of civil legislation, it is appropriate to clarify the concept of updating civil legislation. Under such urgent circumstances, the key role should be played by the anthropological approach, the methodological basis of the future recodification.

Its special importance is explained by the fact that the civil rights and interests of a private person in conditions of war, in particular hostilities, occupation, forced displacement from places of permanent residence, etc., are constantly negatively affected. At the same time, the protection of civil rights and interests is significantly complicated by the limited possibilities of applying for jurisdictional protection or the absence of such a possibility at all.

For this purpose, we see the expediency of defining in book II of the Civil Code of Ukraine «A person as a private person» the section «Implementation of civil rights and fulfillment of duties of a person in emergency conditions (terrorism, epidemics, armed conflicts, etc.)», which would contain provisions that would provided legal guarantees for the realization and protection of civil rights and interests of a person, as well as additional obligations of the state to protect such rights and interests.

In order to balance the interests of a private individual with the interests of society and the state, and not with the situational private interests of a single powerful entity, it is extremely important to observe the principles of public law (Omelchuk, 2023, p. 19). In this case, attention should be focused primarily on those factors arising from the content of civil rights. In particular, the legal equality of civil law subjects also presupposes the equality of subjects in the respective limitations of such rights, and law enforcement subjects cannot establish preferences in the scope of powers

or methods of realization of individual civil rights or protection of civil interests. Despite this, in order to support the national economy, the current legislation establishes the priority of the employer's interests in labor relations, which consists in additional rights to change labor contracts and dismiss employees (Cherednichenko, 2022).

One of the important factors in achieving a compromise between the employee and the employer is compliance with the temporal limits of the established restrictions on civil rights and the adequate consequential burden of the cancellation of such restrictions. In this case, we should talk about the «aspiration» to restore the right, compensation and encouragement of the right holder. In particular, the right of ownership in the event of its restriction has the ability to «self-restore.» Other civil rights defined by civil legislation have a similar quality.

In the conditions of special legal regimes, the practical and procedural issues of the application of requisition are actualized (Part 2 of Article 353 of the Civil Code of Ukraine) (CIVIL CODE OF UKRAINE, 2003). In clause 1 of Art. 1 of the Law of Ukraine «On Transfer, Compulsory Expropriation or Expropriation of Property in the Conditions of the Legal Regime of Martial Law or State of Emergency» defines that requisition (compulsory expropriation of property) is the deprivation of the owner of the right of ownership of individually determined property that is in private or communal ownership and that is transferred into the property of the state for use under the conditions of the legal regime of martial law or state of emergency, subject to the previous or subsequent full reimbursement of its value (ON THE TRANSFER, FORCED ALIENATION OR EXTRACTION OF PROPERTY UNDER THE CONDITIONS OF THE LEGAL REGIME OF MARTIAL OR STATE OF EMERGENCY. LAW OF UKRAINE, 2012).

According to the generally accepted approach, requisition is not alienation of property, since it is done without the will of the owner (Sagaidak, 2022), and its characteristic feature as a way to terminate the right of private property is payment. In Art. 12 of the Law of Ukraine «On the transfer, forced alienation or seizure of property under the legal regime of war or state of emergency» states that the owner of property that was forcibly alienated can demand in exchange for providing him with other property, if possible for the value (ON TRANSFER, FORCED ALIENATION OR SEIZURE OF PROPERTY UNDER THE LEGAL REGIME OF MARTIAL OR STATE OF EMERGENCY. LAW OF UKRAINE, 2012).

Similarly, the issue of returning property as a legal consequence of the termination of emergency circumstances must be resolved (ON THE LEGAL REGIME OF MARTIAL STATE. LAW OF UKRAINE, 2015). The right to demand the return of requisitioned property is conditional on the person having the status of «former» owner. The specified status is accompanied by such conditions as termination of extraordinary circumstances;

preservation of property; statement by the owner of a claim for its return to the body that carried out its requisition or to which the relevant property was transferred; establishment of the possibility of return lead to the restoration of the civil right of a person to the extent that it existed before its forced termination.

At the same time, the legal consequence of the return of the thing is the return by the former owner of the amount of money or the thing that was received as payment minus a reasonable fee for the use of this property.

The issue of restoration of other civil rights requires special attention. In particular, the right to engage in entrepreneurial activity, which was significantly restricted under martial law. After all, the conduct of certain types of business activity became impossible during the curfew or during the period of the «Air Alarm» signal.

The freedom of entrepreneurial activity consists in the freedom to dispose of one's abilities to work, in the freedom to choose a type of activity or profession, freedom from unfair competition and monopolistic activity, as well as the general freedom to do everything that is not prohibited by law (Kharitonov and Startsev, 2015, p. 226 ). The forced ban on the sale of alcohol in the conditions of martial law led to losses for representatives of the corresponding type of business. At the same time, state bodies and local self-government bodies did not provide for appropriate compensation, which led to the emergence of a shadow market for the sale of alcoholic beverages.

As for the proportionality of restrictions to the circumstances that lead to their introduction, here, first of all, it is worth pointing out the identification of circumstances that are defined by law as prerequisites for the establishment of restrictions on civil rights, and the correct assessment of the degree of danger or risk of the occurrence of the relevant circumstances. In particular, in order to prevent threats to the life and health of judges and participants in the court process during martial law, access to the Unified State Register of Court Decisions and the «Status of Cases» service was temporarily suspended. It was the threat of negative consequences that led to the limitation of the informational rights of the participants in the civil process.

Taking into account the fact that restrictions have a public-legal essence and the decisions on their introduction are within the procedural limits of the branches of public law, it is extremely important to observe the principles of public law when implementing them. In this case, we can talk not only about the expediency of restrictions introduced on the territory of the state or in a separate region, but also about observing the procedural limits of introducing restrictions on civil rights, as well as about observing the general principles of public law, such as: objectivity; the priority of

human and citizen rights and freedoms; compliance of legislation with international agreements; ensuring legal responsibility for violations of legal norms; minimization of public administration interference in a person's personal life and others.

### **Conclusions**

The mechanism of civil-law regulation of social relations in the conditions of a military conflict requires a significant increase in efficiency, in particular, adequate regulatory support. Despite the fairly prompt reaction of the authorities of Ukraine to today's challenges by adopting a number of laws designed to regulate social relations in the conditions of hostilities, temporary occupation and de-occupation of part of the territory, aimed at protecting property and non-property rights of the state and an individual, etc., it is necessary to supplement Book II of the Civil Code of Ukraine «A person as a private person» by the section «Implementation of civil rights and fulfillment of the duties of a person in emergency conditions (terrorism, epidemics, armed conflicts, etc.)», which would contain temporary provisions that would provide for the period of war legal guarantees for the implementation and protection of civilians rights and interests of a person, additional obligations of the state to protect civil rights and interests.

The nationwide tendency to simplify the procedures for the realization of certain civil rights, as well as the introduction of changes in the legislative regulation of certain civil legal relations under extraordinary circumstances (priority of the interests of the employer in labor relations, requisition, and others) is an urgent and, in the vast majority, correct decision, which corresponds to the principles of democratic society. At the same time, it is expedient to clarify the concept of updating the civil legislation of Ukraine with the key role of the anthropological approach as the methodological basis of the future recodification.

This is caused by the fact that the civil rights and interests of a private person during occupation, hostilities, forced displacement from places of permanent residence, etc., are constantly negatively affected. This approach to the assessment of regulatory changes is aimed at harmonizing public and private interests, which is an integral task of state civil law regulation. At the same time, it is important to observe the principle of legality, proportionality of restrictions, adequate definition of the prerequisites for establishing restrictions on civil rights, the choice of the type of restriction and the range of subjects of civil law to whom it applies, the correct assessment of the degree of danger or the risk of the occurrence of relevant circumstances in the case of relevant restrictions.

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