

## DISCRETION OF PARTICIPANTS IN CIVIL RELATIONS DURING MILITARY CONFLICTS: ANALYSIS OF REGULATORY NORMS AND APPLICATION PRACTICE

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### ABSTRACT

*This research is relevant because of discretion and its related categories, such as freedom of will and freedom of contract. They are widely used in the private law field to regulate a wide range of civil legal relations. The legal categories defined in this article are closely interrelated, but they can exist independently. Much attention is focused on the use of discretion and its related categories by ordinary citizens in the exercise of their rights and legitimate interests. Military conflicts change the usual way of life of citizens, and therefore the issue of the use of discretion requires even more attention and research in such situations. That is why the purpose of this research is to conduct a thorough analysis of the application of such a phenomenon as discretion and its derivative categories during military conflicts to identify the characteristic peculiarities of their interaction with each other in practice. Also, it is important to analyze legal norms in this sphere in order to understand the main features of discretion. In the course of the research, the author used both general methods of scientific cognition: the dialectical method, analysis, synthesis, analogy, and special methods: comparative legal method, systemic and specific sociological methods, etc. All of these methods were used in a comprehensive combination to carry out a detailed analysis of these legal categories. The obtained conclusions will become the basis and contribute to further research in this area.*

**Key words:** *deformalization, discretion, freedom of contract, freedom of will, military conflicts.*

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## 1. INTRODUCTION

Every year, national and international legislation is increasingly moving away from formalizing the legal regulation of certain relations that exist in society. If we speak in existing terms, then deformalization is taking place. This phenomenon is based on the increasing number of legal norms with relatively defined content and the widening scope of the concept of “discretion”. Such actions of both the international community and our state are aimed at a more precise regulation of already existing legal relations, meeting the needs of the population, and observing the rights and legitimate interests of everyone both in war and peacetime.

The definition and function of the term “discretion” are just one of the many contentious and complicated topics covered by Ukrainian civil science. It is important to remember that there is now no consensus in legal practice about whether discretion in private law is necessary. Thus, it should come as no surprise that, in contrast to other significant legal matters, the issue of how discretion should be applied is a hotly debated topic among attorneys and it garners a lot of interest from legal scholars. It is safe to conclude that both are interested in this matter. It is worth noting that, based on a review of existing Ukrainian laws, the author can confidently claim that the idea of “discretion” is more characteristic of private law than public.

The main reason for this is that the existence of dispositive norms at the legislative level of the legal regulation of civil relations has expanded the subjects' opportunities to independently determine their behavior options and the resolution of various situations and legal relations<sup>1</sup>. The aforementioned was a result of the Ukrainian Civil Code's adoption. Furthermore, the presence of dispositive rules necessitates a broad interpretation of the term “discretion” in private law. In the context of this research, it is worth mentioning that private law is expressed in the sphere of civil legal relations, as they are dominated by private law provisions. Someone who wants to exercise their right and legitimate interest may select the legal means and methods from the list that best suit their needs in a given circumstance.

The exercise of such a right by a person may not entail interference by the state and local self-government bodies, interference with such exercise or the establishment of certain restrictions<sup>2</sup>. Regulations and scientific research both state

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<sup>1</sup> Fasii, B. V.: The category of “discretion” in private law: An introduction to the issues, in: *Legal and institutional mechanisms for ensuring the development of Ukraine in the conditions of European integration*, Odesa, 2018, pp. 45-52.

<sup>2</sup> Gorbas, D. V.: Determination of the limits of the exercise of subjective civil law, *Bulletin of the Ministry of Justice of Ukraine*, 2 2006, pp. 111-117.

that when an individual chooses to exercise their right at their own discretion, or independently, and that choice is a manifestation of their will to exercise or not exercise such a right, it is not about discretion but rather freedom of will. In the author's opinion, this is the case. Additionally, a person exercises their freedom of will in private law-related legal relationships when they choose to reject these rights.

A striking example to confirm the above is the process of inheritance, when the heir decides whether to exercise his or her right to inherit. In accordance with the requirements of the applicable law, the heir has six months (during martial law, this period is extended by four months, and therefore makes up ten months in total) to file an application for acceptance of the inheritance with a public or private notary. Submitting such an application is a direct expression of freedom of will. The heir cannot be forced, for example, by a notary to accept the inheritance or vice versa. In particular, the heir cannot be forced to accept the inheritance earlier than the statutory period, for example, within one month. This situation is characterized by the dispositive method of legal regulation. The dispositive method of legal regulation is based on equality, initiative and freedom of will (freedom of will is often identified with discretion) of the parties of legal relations.

Freedom of will is the right to act or not, to enter or not into legal relations. It is also the right to determine one's own behaviour in cases where private law provides for such an opportunity (to enter into unnamed contracts, guided by the general principles of civil law, etc.) Undoubtedly, exercising one's free discretion entails making a decision from the available possibilities. However, one example of the expression of freedom of will is the exercise of free will. It is an example of the civil law dispositivity method. Specifically, non-cash payments can be done with payment orders, letters of credit, settlement checks, collection payments, and other payments allowed by law, banking regulations, and business practices, according to Article 1088 of the Ukrainian Civil Code<sup>3</sup>. Additionally, any kind of non-cash payment may be selected at the discretion of the agreement's parties<sup>4</sup>.

Here are some examples of how the dispositive approach to civil law regulation works. Firstly, in the legal equality of all parties to legal relations. For example, each person is equal before the law and has no privileges of any kind compared to others. Secondly, the presence of initiative, which implies that each person can determine the emergence of certain legal relations. Thirdly,

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<sup>3</sup> Law of Ukraine, (No. 40-44, 2003), Civil Code of Ukraine, Art. 1088.

<sup>4</sup> Kubynets, V. V.: Discretion in civil law, *Actual Problems of the State and Law*, (42) 2008, pp. 207-211.

everyone has the right to choose a particular course of conduct that meets the requirements of the current legislation and the moral requirements established in society. A striking example in support of the above is Article 19 of the Civil Code of Ukraine, which provides for the possibility of self-defense, but does not specify how. The same article states that a person may resort to self-defense by means of countermeasures that are not prohibited by law and do not contradict the moral foundations of society<sup>5</sup>. In this example, the following methods of self-defense can be given as a means of self-defense: guarantee, deposit, advance payment, surety, penalty, etc. to ensure the fulfillment of an obligation.

A clear example of dispositiveness is the principle of freedom of contract. The essence of this principle is that the parties have the right to adjust the content of the contract independently, the process of concluding the contract, make changes to it, and determine the legal grounds for its termination. At the same time, the parties must be guided by the norms of the current legislation and the requirements of justice, good faith, and reasonableness<sup>6</sup>.

Thus, to enter into contractual relations; to choose the form of contract by the parties; the possibility for the parties to enter into contracts provided for by law, as well as those not provided by law but not contradicting it, is a direct manifestation of freedom of contract. It, in turn, is characterized by a person's discretion and will. These concepts are interconnected and interdependent, which is manifested in various spheres of society, but above all in the private legal sphere, both in peacetime and wartime.

## **2. MATERIALS AND METHODS**

The research is based on general methods of scientific knowledge. They include the methods of analysis and synthesis, the dialectical method, and the method of analogy, which contributed to the study in determining the features and characteristics of such phenomena as "discretion", "freedom of will", "freedom of contract" and the scope of their application. The author also investigated the relationship between these categories and found that these categories are independent and autonomous in the legal field, although they are closely related to each other<sup>7</sup>.

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<sup>5</sup> Law of Ukraine, (No. 40-44, 2003), Civil Code of Ukraine, Art. 19.

<sup>6</sup> Shevchenko, Y. M.: *Civil Law of Ukraine: Academic Course*, 2nd ed., In Yure, 2016.

<sup>7</sup> Gorbas, D. V.: Determination of the limits of the exercise of subjective civil law, *Bulletin of the Ministry of Justice of Ukraine*, 2 2006, pp. 111-117.

Among the special methods used in the study, the comparative legal method should be highlighted first of all. It was used to establish the relationship between the concepts of “discretion” and “freedom of will”, “freedom of contract” during military conflicts and peacetime. The concepts of “discretion”, “freedom of will” and “freedom of contract” in the context of civil legal relations were studied<sup>89</sup>.

The study also uses the systematic method, which consists in identifying and analyzing the components of the concept of “discretion” and its derivative categories, and also in determining the expediency and efficiency of using these categories in private law. The application of the specific sociological method facilitated the generalization and analysis of the practice of application of discretion in civil law<sup>10</sup>.

The application of the specific sociological method enabled the generalization and analysis of the practical use of discretion in civil law. The study provides insights into how legal practitioners and participants navigate the complexities of civil relations in times of conflict. It illustrates the adaptability of legal norms in response to pressing societal needs<sup>11</sup>.

Through these methodologies, the study found that discretion plays a crucial role in enabling participants to navigate the uncertainties that arise during military conflicts. The ability allows individuals and entities to better respond to the dynamic conditions of wartime, while legal frameworks may provide a basis for action.

Moreover, the research highlighted that the concept of “freedom of contract” is often constrained in conflict situations, as parties may face coercive circumstances that limit their ability to engage freely in agreements. In contrast, “freedom of will” and discretion may afford a degree of agency, enabling parties to act within their capacities to negotiate and uphold agreements, albeit under duress<sup>12</sup>.

The findings suggest that regulatory norms governing civil relations must account for the realities of military conflicts, and there is a pressing need for legal reforms that enhance clarity and predictability in the exercise of discretion.

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<sup>8</sup> Sokolova, O.: Procurement contracts during the war: why it is important to check the counterparty, *Derzhzakupivli*, April 2022.

<sup>9</sup> Primak, V. D.: Freedom of contract principle in state of war and digitalizations, *Juridical scientific and electronic journal*, 5 2022, pp. 225-229.

<sup>10</sup> Antoniv, R. V.: Insurance during the war, *Economic Truth*, 2022.

<sup>11</sup> Shevchenko, Y. M.: *Civil Law of Ukraine: Academic Course*, 2nd ed., In Yure, 2016.

<sup>12</sup> Kubynets, V. V.: Discretion in civil law, *Actual Problems of the State and Law*, (42) 2008, pp. 207-211.

The rights of participants can be safeguarded by establishing rules to ensure that discretionary powers are applied fairly and equitably. Especially in times of conflict.

Finally, the author highlights how to understand how discretion, free will, and freedom of contract interact in civil relations, especially in times of war. The research contributes to the ongoing discourse on the adaptability of legal systems in the face of extraordinary circumstances and, by shedding light on these relationships, provides a basis for future research and possible legal reforms that can better protect the rights of individuals and entities in such critical times.

### **3. RESULTS AND DISCUSSION**

The concept of “discretion” and other legal categories derived from it is typical not only for Ukraine, but also for many foreign countries. The Swiss Civil Code contains several provisions on freedom of will and discretion, and we will cite a few of them. For example, Article 144 of the Swiss Civil Code states that a creditor has the right, at its discretion, to demand from several debtors at the same time or from each of them separately the fulfillment of an obligation either in full or in part. Article 384 of the Swiss Civil Code states that the publisher is obliged to set the price at his own discretion, but such price must be adequate and not so high as to prevent the sale of the work. Article 163 of the Swiss Civil Code provides that the parties are free to determine the type of liability under the contract<sup>13</sup>. The court may, at its discretion, review the amount of liability if it has doubts about its legitimacy or excessiveness. In addition to discretion and freedom of will, this article also refers to the parties` freedom to determine the terms of the contract<sup>14</sup>.

Section 420 of the Czech Civil Code also contains provisions that are worthy of attention in the context of our study. This section is a general limitation of liability. The general legal capacity is applicable when there is no special provision on compensation for damages. If situations arise to which both general and special provisions of the Code may be applied, the victim is entitled to choose the provision on which to base his or her claim. These provisions apply to compensation for damage to both individuals and legal entities<sup>15</sup>.

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<sup>13</sup> Federal Act, (SR 210, 1907), Swiss Civil Code, 10.12.1907, Art. 144, Art. 163, Art. 384.

<sup>14</sup> <<https://www.admin.ch/opc/en>>, last accessed on 23/01/2024.

<sup>15</sup> <[www.rutlandjezek.com/gb](http://www.rutlandjezek.com/gb)>, last accessed on 23/01/2024.

It is important to note that the term “discretion” is more often used in the sense of “own discretion” in a given situation, as evidenced by the above, as well as our further research. The rights, freedoms, and interests of each individual, as well as someone’s autonomy, are best revealed through the prism of private law. Freedom in private law is interpreted as the sovereign and undisputed independence of a person, which is manifested in the possession and disposal of someone’s rights, including the autonomous and protected status of a subject of law. Independence in making certain decisions and freedom to exercise one’s rights are applicable as long as this freedom does not violate the freedom of others.

It should be noted that the principle of freedom of will has different meanings in different legal orders. If we take a transitional state based on social factors such as Ukraine as a basis, freedom of will is quite common in the legal regulation of various spheres of society. The principle of freedom of will is often correlated with the principle of freedom of contract, as well as with general principles of law, such as good faith, fairness, and reasonableness.

In complying with these principles, a number of factors should be taken into account so that such compliance does not have unjustified consequences for one of the parties to the contract in the social aspect, as in situations with the rich and the poor, the highly educated and the uneducated, etc. If we interpret the freedom of will of the parties to a contract using the metaphysical method, which means that the parties perform certain conscious actions without external influence, then contractual relations, taking into account the above general principles of law such as fairness, reasonableness, and good faith, will be regulated dispositively and take into account the specifics of each individual situation. In such circumstances, equality in contracting will be respected. If one of the parties to the contract is found to be “stronger”, its actions and freedom of will will be closely monitored. This statement covers the following: how the “stronger” party exercises its willpower compared to the “weaker” party, and whether such actions are fair, reasonable, and in good faith.

As the significant historical experience in non-social states shows, such states are characterized by a high level of social injustice and instability. It is accompanied by constant opposition and struggle of the poor against the rich. Although the principles of freedom of will and freedom of contract are introduced in non-social states, unfortunately, these principles are aimed at meeting the needs of a socially unjust society. This is also evident in transitional states, but to a much lesser extent <sup>16</sup>.

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<sup>16</sup> Protsevskiy, V. O., Horban, V. I.: The principle of freedom of will in law: What is wrong with doctrinal interpretations and what are their threats to legal practice, *Collection of Scientific Works of Kharkiv National Pedagogical University named after H.S. Skovoroda. Series: Law*, 31 2020, pp. 7-23.

On its path to European integration, Ukraine is devoting much of its energy and resources to improving its current legislation and bringing it into line with EU law and general principles of international law. In the EU, the principles of freedom of will and freedom of contract are interpreted and implemented differently. They are also characterized by a combination of imperative and dispositive methods of legal regulation of relations, which means that there is no distinction between private and public, civil and administrative, etc. Important changes in EU legislation were made in 2001 when the Law on its reform based on the doctrine of equivalent (fair) contract was adopted. Such changes marked the replacement of the principle of “autonomy of private will”, which is directly manifested in the freedom of contract, with the principle of enhanced protection of the so-called “weak” party. The weak party under such innovations is generally the consumer, who is characterized by the lack of experience of private entrepreneurship as such<sup>17</sup>.

It is quite clear that when performing a particular action, each person takes into account primarily someone’s own interests and wishes. Adherence to the principles of justice, reasonableness, and good faith in the application of legal norms, in turn, seems to oblige a person not to take actions that may have negative consequences for others. In other words, a person’s actions should be carried out in such a way that the negative consequences for another person will be significantly less or absent at all. When performing an action, the interests of both parties should be fairly balanced<sup>18</sup>. An example to support this statement is the provisions of land and civil law, which stipulate that the owner of a land plot may use this land plot in accordance with its intended purpose and at their own discretion.

The owner may, at his or her own discretion, use what is under and above the land plot, provided that such actions do not violate the rights of others (and therefore do not cause negative consequences for them) and unless otherwise provided by applicable law<sup>19</sup> <sup>20</sup>. Taking into account the statements above, we can confidently note the characteristic features of discretion both in Ukraine and in many states of the European Union. These include, first of all, the following:

- prioritizing the interests of an individual;

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<sup>17</sup> Kharytonova, E. O., Kharytonova, O. I., Nekit, K. G.: *Problems of Implementation and Protection of Civil Rights under Martial Law*, Phoenix: National University «Odesa Law Academy», 2023.

<sup>18</sup> Kubynets, V.V.: Discretion in civil law, *Actual Problems of the State and Law*, (42) 2008, pp. 207-211.

<sup>19</sup> Law of Ukraine, (No. 40-44, 2003), Civil Code of Ukraine, January 2003, Art. 373.

<sup>20</sup> Law of Ukraine, (No. 2768-III, 2001), Land Code of Ukraine, October 2001, Art. 90, Art. 91.

- ensuring the interests of the individual, for example, including, but not limited to, economic freedom, equality of market participants, protection of private entrepreneurs from government arbitrariness;
- ensuring the initiative of the parties during the establishment of civil relations;
- ensuring the freedom of will of individuals during the exercise of their rights;
- ensuring the use of a contractual form of regulation of certain civil relations;
- the presence of a prevailing dispositive method of legal regulation of civil relations, which is aimed at taking into account the interests of everyone and the free use of discretion when choosing rules of conduct.

In the author's opinion, the above characteristics make it obvious and quite predictable that the existence of such a phenomenon as discretion is an important component of all legal systems. It is a kind of balance between the interests of individuals and society. Achieving such a balance results in the creation of an environment in which there is respect for a person's own choices, decisions and words, and for the person's autonomy. Civil relations are based on such respect. As other nations' experiences demonstrate, excellent communication between those involved in civil relations is essential to ensuring the concept of discretion exists. Participants must also be informed about all the intricacies and subtleties involved in using discretion. The presence of a robust and stable legislative framework that addresses the management of civil relations under many conditions, including times of peace and military war, is equally significant. It is noteworthy to understand that, in order to streamline the process of adjusting laws to wartime circumstances, a legal framework of this kind may include references to the process for modifying or adding to it in the event of a military conflict.

It can be concluded that the issue of the application of discretion, freedom of will and freedom of contract is quite debatable and requires further study. These concepts are closely related to each other. Freedom of will and freedom of contract are derived from the exercise of discretion, but can also exist as separate independent phenomena with their own characteristics, positive and negative features.

Returning to the problems of limiting the free discretion of participants in civil relations and derivative categories during armed conflicts, we note that most often it concerns the limitation of freedom of contract. The armed conflict in Ukraine, which has turned into a full-scale war, entailed the introduction of martial law. In itself, the introduction of martial law represents the

establishment of certain legal restrictions on human rights, freedoms, and interests. The freedom of contract in the conditions of war have also underwent a number of changes and fell under special restrictions due to the predominance of public interests over private interests. Such public interests are national security, defense, etc. Limitations established for the contract may be derived in their essence from limitations of constitutional human rights and freedoms introduced by legal acts, as well as in turn be introduced by separate special legal acts regarding obligations of a contractual nature<sup>21</sup>.

Free discretion and freedom of will are best manifested through freedom of contract, which in turn is an abstract right to choose permissible behavior within the framework of the law and thus perform actions regarding the conclusion of agreements. At the same time, a person, when choosing the format of their behavior, must understand what legal consequences such behavior can bring.

As the experience of changes in state-private relations shows, the derogation from the principle of “freedom of contract”, even in the years of the First World War, became the starting point for the spread of greater state influence in the sphere of private transactions. The influence of the state in the sphere of contract law during the Second World War only increased. Restrictions on freedom of property and freedom of contract, restrictions on the “freedom of trade” (entrepreneurial activity), were the result of the introduction of the so-called “military regulation of the economy”.

The main methods of military-economic regulation in different states during both the First World War and the Second World War include the following:

- 1) state pricing regardless of the type of product;
- 2) priority consideration of applications from companies for strategic raw materials or vehicles, as well as further conclusion of contracts;
- 3) forcing the conclusion of contracts for the sale of certain types of products;
- 4) the establishment of a card system, which consisted of defining strict norms for the supply of various types of common goods, food, etc.;
- 5) inability to start a new business without first obtaining a number of permits from the state, including a ban on expanding existing businesses and reducing staff;
- 6) the state also actively interfered in the internal activities of enterprises, their organization of work and regime by order of the state authorities; production of a certain product could be suspended or replaced by another; the amount of wages could also be determined by the state;

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<sup>21</sup> Primak, V. D.: Freedom of contract principle in state of war and digitalizations, *Juridical scientific and electronic journal*, 5 2022, pp. 225-229.

- 7) an association of entrepreneurs could exist freely only if one of the participants of such an association was the state in the name of its authorised representatives;
- 8) regulation of imports and exports of goods, which were very often under strict control of the state, accordingly, private enterprises could not freely enter into contracts for the import and export of goods, which directly violated the principle of freedom of contract.

According to Primak, like any other principle of civil law regulation of relations, the principle of freedom of contract has both positive and negative components. The first one implies the counter (interrelated) exercise of civil legal personality (primarily in terms of legal capacity) of at least two subjects of law to perform a specific transaction and to provide certainty of its content. Primak notes that the conditions of martial law may impose new restrictions in this aspect. This concerns, first of all, the composition of the subject, if one of the parties to the contract acquires the status of a person associated with the aggressor state, or the terms of the contract, when certain regulation of prices for goods is introduced or restrictions on the sale of certain goods are imposed. The negative component of the freedom of contract is manifested in the exercise of a person's right to enter into a contract, including the same procedure for entering<sup>22</sup>.

The provisions of the Civil Code of Ukraine (Article 526) contain mandatory requirements that are imposed on the parties in a civil legal obligation. First, all obligations must be fulfilled in accordance with the terms of the contract and the requirements of civil legislation; if there are no such requirements, the customs of business turnover are taken as a basis. Secondly, the fulfillment of an obligation means that the parties perform actions that constitute the content of their rights and obligations. Proper fulfillment of assumed obligations consists in their fulfillment in accordance with the Civil Code of Ukraine, other norms of civil legislation and the terms of the contract and the customs of business turnover. Provisions of Art. 527 of the Civil Code of Ukraine give each party the right to demand confirmation of the fulfilled obligation. Otherwise, there is a possibility of negative consequences from failure to meet such demands<sup>23</sup>.

Military operations and the introduction of martial law primarily entail a substantial change in circumstances. This change in the foundations and existing conditions is characterized by a number of obvious and unobvious features.

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<sup>22</sup> Primak, V. D.: Freedom of contract principle in state of war and digitalizations, *Juridical scientific and electronic journal*, 5 2022, pp. 225-229.

<sup>23</sup> Law of Ukraine, (No. 40-44, 2003), Civil Code of Ukraine, January 2003, Art. 526-527.

First and foremost, it is the prevalence of fear and uncertainty about the future, as well as increased concern for their lives and the lives of their relatives. From a legal perspective, this plays a negative role, as it reduces the ability to adequately assess current situations and solve problems in the civilian sector. Hence the problem of using discretion where it is legalized and permitted.

The next step is to reassess values and priorities. Security and life come first. Therefore, it is obvious that civil cases, such as divorce or inheritance, are postponed. This is primarily due to changes in the current legislation and the ongoing hostilities, but on the other hand, these issues are really not relevant. At this point, the use of discretion is limited. Moreover, the protection of the state from the aggressor encourages society to directly obey the authorities, forgetting about the possibility of discretion in civil relations. In the long run, faith in law, in the rule of law, and even in the judicial system that follows these laws may be lost<sup>24</sup>.

Changes in wartime also affect offline and online communications. For example, there is a ban on taking photos and videos of the armed forces, missiles or drone strikes. On the one hand, this worsens the situation with the public receiving objective and accurate news, but on the other hand, it contributes to national security and defense, as the enemy is also disoriented. Since the introduction of martial law, men have been banned from leaving the country. The feeling of constant control and unfreedom is a direct cause of the lack of discretion. There is no possibility to cross the border at will.

This and other things have the basis for regulation and enshrining in law. For example, in accordance with the provisions of the Civil Code of Ukraine, substantial change in circumstances is the basis for changing the terms of the agreement. In this case, it is worth noting that when we talk about substantial changes in circumstances, we mean the circumstances by which the parties were guided by when concluding the contract. Under such conditions, the terms of the contract may be adjusted or, if changes cannot be made, such contract may be terminated by the agreement of the parties. It is also necessary to correctly interpret the significance of such changes.

Changes in circumstances are substantial if they have changed to such an extent that the parties could not foresee it at the stage of concluding this contract, otherwise they would not have concluded it or concluded it on other substantial terms. As noted by Melnyk, quite risky are situations when a change in circumstances occurs directly during the fulfillment of an obligation, which in turn leads to an imbalance of the obligations assumed by the parties. There are

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<sup>24</sup> Zagnitko, O. O.: Force majeure in contracts during martial law, *Legal Gazette*, 27.04.2022.

many circumstances that the parties cannot foresee or control. Those may be a war, a strike, changes to the current legislation<sup>25</sup>.

It is also worth noting that in the event of a substantial change in circumstances, fulfilling the terms of the contract is possible but rather problematic and complicated. The legal consequences of a substantial change in the circumstances, which were decisive at the time of the conclusion of the contract, are the immediate termination of the contract or the introduction of changes to the contract with the consent of the parties, provided that, in the opposite case, the termination of the contract may have more negative consequences for the parties or be contrary to public interests<sup>26</sup>.

A fairly vivid example to confirm the above is the occurrence of force majeure. According to the letter of the Ukrainian Chamber of Commerce and Industry No. 2024/02.0-7.1 dated 28.02.2022, force majeure circumstances are defined as extraordinary, unavoidable, and objective situations for business entities and/or individuals. These circumstances apply from 24 February 2022 until their official termination. They affect the fulfillment of agreements, certain tax obligations, and other commitments. Specifically, the fulfillment of these obligations become impossible to fulfill within the established time due to the occurrence of such force majeure circumstances<sup>27</sup>.

The above document became the official basis for many participants in civil legal relations to revise their contracts by amending them in the form of supplementary agreements. The most important provisions which required modification were those concerning the extension of the period of performance and the validity of the contracts<sup>28</sup>.

It is worth noting that although the Letter of the Chamber of Commerce and Industry became the basis for the revision of contracts, it cannot be relied upon as the main ground for exemption from liability. First of all, a person must prove how the force majeure affected the relevant obligation and how such

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<sup>25</sup> Melnyk, O. O.: Clause on the immutability of the circumstances of the contract and force majeure in the civil law of Ukraine, *Journal of Civil Studies*, 20 2016, pp. 136-139.

<sup>26</sup> Honcharenko, V.: Martial law as a basis for changing the essential terms of a contract and a basis for exemption from liability for breach of contractual obligations, *Legal Scientific Electronic Journal*, (5) 2022, pp. 100-107.

<sup>27</sup> The Ukrainian Chamber of Commerce and Industry: Letter of the Ukrainian Chamber of Commerce and Industry No. 2024/02.0-7.1 dated February 28, 2022, 28.02.2022.

<sup>28</sup> Malinovska, I. M., Ostroglyad, D. A., Chernyavska, D. S., Tselikovska, O. A.: Change or termination of the contract due to a significant change in circumstances, *Legal Bulletin*, 2 2020, pp. 192-195.

an impact prevented its fulfillment, i.e., to establish a causal link between the unfulfilled obligation and the force majeure event<sup>29</sup>.

This statement is confirmed by the decision of the Commercial Court of Cassation of the Supreme Court of 25 January 2022 in case No. 904/3886/21, which states that force majeure does not have a pre-established meaning. A party must justify the impact of force majeure in its particular case. A person is also obliged to prove the inevitability of force majeure<sup>30</sup>. This position is also confirmed by the decision of the Commercial Court of Cassation of the Supreme Court dated 21.07.2021 in case No. 912/3323/20, which states that it is a mistake to consider the certificate of the Ukrainian Chamber of Commerce and Industry as the only proof of force majeure. When it comes to the breach or non-fulfillment of obligations resulting from the conclusion of the contract, the existence of force majeure circumstances must be demonstrated by particular evidence in the pertinent case<sup>31</sup>.

In the context of our study, it is relevant to note that termination of contracts or amendments to them under martial law may also be carried out in court. However, it requires compliance with a number of conditions:

- when entering into the agreement, the parties did not foresee and could not foresee a substantial change in circumstances;
- the reasons that influenced the substantial change in circumstances could not be eliminated by the stakeholders after they occurred in any way;
- fulfillment of the obligations would directly violate the property interests of the parties or one of the parties;
- it does not follow from the nature of the contract or the customs of business turnover that the risk of a change in circumstances is borne by the party concerned<sup>32</sup>.

Regarding the implementation of contracts, military actions on the territory of Ukraine also made certain corrections. Thus, in particular, the parties to the insurance contract may be released from liability for non-fulfillment of the terms of the contract on the basis of force majeure. As practice shows in insurance contracts, such force majeure circumstances as military actions are often determined by the terms of the contract<sup>33</sup>.

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<sup>29</sup> Nikolov, D. V.: Force majeure during war: judicial practice, *Yur-gazeta.com*, 07.07.2022.

<sup>30</sup> Supreme Court, (No. 904/3886/21, 2022), Resolution dated January 25, 2022, 25.01.2022.

<sup>31</sup> Supreme Court, (No. 912/3323/20, 2021), Resolution dated July 21, 2021, 21.07.2021.

<sup>32</sup> Krasko, Y.: Fulfillment of contractual obligations and force majeure, *Jurliga*, 2022.

<sup>33</sup> Lytvynenko, K.: Contractual force majeure in the conditions of martial law in Ukraine, *Ibuhgalter*, 2022.

It should be noted that the reference to force majeure as a reason for exemption from liability for non-performance or improper performance of the terms of the contract does not exempt a person from the obligation to perform. It is only a legal basis for extending the time for performance or for not imposing a penalty or fine. This provision is effective when force majeure actually prevents the fulfilment of the obligation. If there are no active hostilities in a certain territory and they do not constitute an obstacle to the fulfilment of the contract, then in this case a person is responsible for the non-fulfilment of the terms of the contract<sup>34</sup>.

Under martial law, the conclusion of gift agreements is also subject to restrictions, thereby limiting the principle of freedom of will and freedom of contract, as the range of possible donees is narrowed. They can only be close relatives of the donor. As for force majeure, if a gift agreement was concluded before the war, its execution may be postponed under certain conditions. For example, if the donee is performing military service and cannot accept the gift, or if the donee was deprived of the opportunity to receive the gift.

In connection with the fact that with the beginning of the war many people left their places of residence, the issue of repayment of utility bills or rent arrears also arose. In this case, force majeure does not relieve the need to make payment, but provides a postponement for such payment without charging penalties. However, it is also possible to make changes to the terms of the contract, stating that the person is exempt from paying for the house (apartment) during the time when he did not live there due to military actions (with the consent of the other party)<sup>35</sup>. By agreement of the parties, it is also possible to reduce the amount of rent with justification of the need for such a reduction with reference to force majeure<sup>36</sup>.

Since the protection of national interests takes on special importance in the conditions of martial law, the freedom of choice of the counterparty in the contract is also limited. The party to the contract must comply with sanction decisions issued by state authorities for this purpose, and therefore, even in wartime conditions, it is not possible to conclude a purchase contract with every supplier or executor (for example, we are talking about companies or private entrepreneurs that have a direct relationship with the aggressor country). In particular, customers cannot make purchases from business entities that

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<sup>34</sup> Antoniv, R. V.: Insurance during the war. *Economic Truth*, 2022, <https://pravda.com.ua>, 23/01/2024.

<sup>35</sup> Zagnitko, O. O.: Force majeure in contracts during martial law, *Legal Gazette*, 2.04.2022.

<sup>36</sup> Lozytky, A. A.: Force Majeure: What Businesses Need to Know in Wartime, *Economic Truth*, 24.08.2022.

sell goods, works, and services originating from a foreign country to which sanctions are applied under Law No. 1644<sup>37</sup>. In addition to this prohibition, there is another one in force under martial law, which makes it impossible to conclude purchase contracts with enterprises owned by persons from the Russian Federation.

In order to ensure the protection of national interests in connection with possible future lawsuits due to military aggression of the Russian Federation and until the Law of Ukraine on the regulation of relations involving persons connected with the aggressor state comes into force, the Cabinet of Ministers of Ukraine adopted Resolution No. 187<sup>38</sup>. This resolution establishes a moratorium on the execution, in particular, by compulsory means, of monetary and other obligations by creditors (collectors) owed by the Russian Federation or persons related to it<sup>39</sup>.

Therefore, the autonomy of individuals in civil relations, including the capacity for free will and freedom of contract, is significantly constrained under conditions of martial law. This is due to the prioritization of national and public interests in such circumstances. In light of the aforementioned considerations, the concept of discretion is employed in the context of military conflicts, albeit in a manner that differs from its original form and is subject to certain limitations and modifications.

Nevertheless, the implementation of this concept in civil relations should be endorsed at both the legislative and practical levels. First and foremost, there is a need for an active information campaign on the specifics of contract formation, freedom of contract, inheritance rights, and other benefits that were previously available through the “discretion” category before the onset of military conflicts. Such information campaigns are primarily aimed at reducing the fear of uncertainty. Furthermore, citizens who possess the requisite information tend to be more prudent and active in protecting their rights.

According to the author, a good solution would be to set up mobile human rights clinics to provide legal aid to those who have limited access to it. Primary and secondary legal aid centres already exist in Ukraine, and if we add a little mobility, they will be better adapted to the realities of wartime. In this context, it is also advisable to introduce mechanisms to ensure a rapid response

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<sup>37</sup> Law of Ukraine About Sanctions, (No. 1644-VII, 2014), August 2014, Art. 4.

<sup>38</sup> Resolution of the Cabinet of Ministers of Ukraine, No. 187 “On ensuring the protection of national interests in future lawsuits by the state of Ukraine in connection with the military aggression of the Russian Federation” dated March 3, 2022, 03.03.2022.

<sup>39</sup> Sokolova, O.: Procurement contracts during the war: why it is important to check the counterparty, *Derzhakupivli*, April 2022.

to violations of citizens' rights and effective protection of these rights during martial law. An important step in this direction could be public consultations or the involvement of citizens, civil society organisations or activists in discussing pressing law and order issues. This can increase the level of trust in the authorities, strengthen the legitimacy of decisions and ensure popular support. However, it is important to maintain a line where public hearings remain public hearings and not a place for controversy and quarrels<sup>40</sup>.

The use of artificial intelligence and innovative technologies, such as e-courts, will allow cases to be resolved virtually, thus ensuring access to justice and the right to a fair trial. These areas aim to maintain and apply discretion in civil relations during a military conflict, taking into account the legal restrictions imposed for national security and defence.

#### **4. CONCLUSION**

Based on the above, it is possible to note with certainty that the issues related to the concept of "discretion" and its derivative categories of "freedom of will" and "freedom of contract" are quite controversial and complex. This research topic has been central to the work of many researchers for many years, and during the period of Russia's war against Ukraine, this issue has emerged in a completely new light, primarily for Ukraine itself. The use of the dispositive method of legal regulation, the use of discretion through the prism of freedom of will and freedom of contract has become significantly more complicated and restricted, which has had a number of consequences for ordinary citizens. The restrictions that have been and are being introduced are aimed primarily at ensuring public interests rather than private ones.

It is also important to note that both during active hostilities and in peacetime, discretion occupies a significant place in Ukrainian legislation, influencing the regulation of a large number of legal relations. The exercise of discretion manifests in the choice of behaviour and the formation of contracts, as well as in the decision of with whom to sign such contracts. Although freedom of will and freedom of contract are its derivative categories that exist in a harmonious relationship, they are also independent legal phenomena.

During the research, a number of measures were suggested to guarantee that citizens would use the "discretion" category. These included launching awareness campaigns about the realities of civil relations during a military conflict,

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<sup>40</sup> Kharytonova, E. O., Kharytonova, O. I., Nekit, K. G.: *Problems of Implementation and Protection of Civil Rights under Martial Law*, Phoenix: National University «Odesa Law Academy», 2023.

setting up mobile clinics for human rights and legal aid, holding public consultations and discussions and involving citizens, activists, and public organizations, introducing a mechanism to guarantee prompt response to violations of citizens' rights and efficient protection of those rights during martial law, and utilizing cutting-edge technologies and artificial intelligence.

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