

# Private Law and Human Rights: New Realities

*Derecho privado y derechos humanos: nuevas realidades*

*Direito privado e direitos humanos: novas realidades*

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## Abstract

*Point of view:* One of the basic concepts that underlies law as a phenomenon, as well as private law as one of the two areas of law, is the concept of natural law. This concept presupposes that rights and freedoms are an inalienable good of every person, regardless of the will of any external institutions. The ideas of natural law have been expressed in the concept of private law (the fundamental principles of private law are such principles as justice, good faith, reasonableness, dispositiveness, legal certainty, inadmissibility of interference in private affairs, inviolability of property rights, and freedom of contract).

*Object:* The subject of the study is the problems of reforming of private law in modern conditions. The object of research is the social relations that arise in the plane of «person-person» and «state-person» in modern transformation processes.

*Methodology:* The research methodology is formed by methods of analysis, synthesis, and modeling. Additionally, logical-legal, comparative-legal forecasting methods are used. The authors of the article tried to draw a parallel between the concepts of natural law, Roman law and private law.

*Results and discussion:* An analysis of these concepts revealed that each of them is an integral part of the concept of modern Western civilization. At the same time, in modern conditions of pandemic, deglobalization, regionalization, collapse of human rights and the very concept of Western civilization, which is based on the ideas of humanism, liberalism, absolute human rights, inviolability of property rights and respect for privacy, are under threat.

**Key words:** Dispositive method of legal regulation, imperative method of legal regulation, natural law, private law, Roman law.

## Resumen

*Materia y alcance:* Uno de los conceptos básicos que subyace al derecho como fenómeno, así como al derecho privado como una de las dos áreas del derecho, es el concepto de derecho natural. Este concepto presupone que los derechos y las libertades son un bien inalienable de toda persona, independientemente de la voluntad de las instituciones externas. Las ideas del derecho natural se han expresado en el concepto de derecho privado (los principios fundamentales del derecho privado involucran principios como justicia, buena fe, razonabilidad, disposición, certeza jurídica, inadmisibilidad de injerencia en asuntos privados, inviolabilidad de los derechos de propiedad y libertad de contrato).

*Objetivos:* El estudio investiga los problemas de reformar el derecho privado en las condiciones modernas; en particular, las relaciones sociales que surgen en el plano de «persona-persona» y «Estado-persona» en los procesos de transformación modernos.

*Metodología:* La metodología de investigación está formada por métodos de análisis, síntesis y modelado. Además, se utilizan métodos de pronóstico lógico-legal, comparativo-legal. Los autores del artículo intentaron establecer un paralelo entre los conceptos de derecho natural, derecho romano y derecho privado.

*Resultados y discusión:* Un análisis de estos conceptos reveló que cada uno de ellos es parte integral del concepto de civilización occidental moderna. Al mismo tiempo, en las condiciones modernas de pandemia, desglobalización, regionalización y colapso de los derechos humanos, el concepto mismo de civilización occidental, que se basa en las ideas del humanismo, el liberalismo, los derechos humanos absolutos, la inviolabilidad de los derechos de propiedad y el respeto de la privacidad está amenazada.

**Palabras clave:** Método dispositivo de regulación legal, método imperativo de regulación legal, derecho natural, derecho privado, derecho romano.

## Resumo

*Objeto e âmbito:* Um dos conceitos básicos que fundamentam o direito como fenômeno, assim como o direito privado como uma das duas áreas do direito, é o conceito de direito natural. Este conceito pressupõe que os direitos e as liberdades são um bem inalienável de todas as pessoas, independentemente da vontade de quaisquer instituições externas. As ideias de direito natural foram expressas no conceito de direito privado (os princípios fundamentais do direito privado envolvem princípios como justiça, boa fé, razoabilidade, disposição, segurança jurídica, inadmissibilidade de interferência em assuntos privados, inviolabilidade dos direitos de propriedade e liberdade contratual).

*Objetivos:* O estudo investiga os problemas de reforma do direito privado nas condições modernas; em particular, as relações sociais que surgem no plano da «pessoa-pessoa» e do «Estado-pessoa» nos modernos processos de transformação.

*Metodologia:* A metodologia de pesquisa é formada por métodos de análise, síntese e modelagem. Além disso, são usados métodos de previsão lógico-legal e comparativo-legal. Os autores do artigo procuraram traçar um paralelo entre os conceitos de direito natural, direito romano e direito privado.

*Resultados e discussão:* A análise desses conceitos revelou que cada um deles é parte integrante do conceito de civilização ocidental moderna. Ao mesmo tempo, em condições modernas de pandemia, desglobalização, regionalização e colapso dos direitos humanos, o próprio conceito de civilização ocidental, que se baseia nas ideias de humanismo, liberalismo, direitos humanos absolutos, inviolabilidade dos direitos de propriedade e respeito pelos privacidade, está sob ameaça.

**Palavras-chave:** Método dispositivo de regulação legal, método imperativo de regulação legal, direito natural, direito privado, direito romano.

## I. INTRODUCTION

It is known that law, as a system of mandatory rules of conduct introduced or sanctioned by the state, is the most effective regulator of public relations. No other social norms, such as traditions, customs, norms of morality, etc., are able to regulate and ensure the protection of various social relations as the rules of law do.

Law, as a unique social phenomenon, arises with the emergence of the state, because an indispensable attribute of any legal norm is the possibility of using state coercion in case of non-compliance with its instructions. On the other hand, it is with the help of legal norms that states are able to perform their functions properly.

Moreover, law arises together with the first ancient states, and then passes side by side with the state and society all the historical stages of their development. In particular, the law arises in the period of formation of the first states (Ancient Rome, India, China, Egypt, etc.), and develops together with the specified and other state formations during all period of state building, and continues to carry out the functions today.

There are many theories of the origin of law: theological, organic, positivist, natural law, violent, psychological, Marxist, and so on. Probably, each of the above

concepts to a greater or lesser extent found its manifestation in the process of formation of law as a unique social phenomenon.

However, it seems that the natural-legal concept is the foundation on the basis of which modern humanistic ideas about the essence of law were formed. And it is the concept of natural law, together with liberal economic approaches, that should serve as an ideological basis for building a modern democratic, social, legal and humanistic state.

It is on the basis of the ideas of natural law since ancient Rome that the concept of private law was formed.

Among the domestic authors who thoroughly deal with the problems of Roman law and private law in general, it is necessary to name Kharytonov and Kharytonova. Special attention should be paid to their fundamental multi-volume *Private Law as a Concept*<sup>1</sup>. An important factor in the development of the understanding of the concept of private law in Europe was the formation of the European community, reflecting integration tendencies first in Western Europe, and then throughout Europe<sup>2</sup>.

Problems of recodification of Ukrainian civil law, as well as a wide range of other issues of private law in general, are in the sphere of scientific interests of one of the leading domestic civilists: Nataliia S. Kuznetsova. It is necessary to single out her fundamental work *Private Law Doctrine*<sup>3</sup>.

Domestic civilistics is represented by a wide range of scholars who also study different aspects of private law, among which are Shyshka<sup>4</sup>, Plenyuk and Kostruba<sup>5</sup>, Halyantych<sup>6</sup>, Maidanik<sup>7</sup>, and Slipchenko<sup>8</sup>.

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- 1 Evgen Kharytonov & Olena Kharytonova. PRIVATE LAW AS A CONCEPT. VOLUME II. THE SEARCH FOR A PARADIGM. Odesa: Phoenix. (2019).
  - 2 Evgen Kharytonov et al. *Human Rights as the Basic Value of the Concept of Private Law in Modern Europe*. AMAZONIA INVESTIGA 8. May 2019. Pp. 477-485. Available at <https://www.amazoniainvestiga.info/index.php/amazonia/article/view/177>
  - 3 Nataliia S. Kuznetsova & Walter E. Butler. UKRAINIAN LEGAL DOCTRINE. VOLUME 3, PRIVATE LAW DOCTRINE. London: Wildy, Simmonds & Hill Publishing. (2017).
  - 4 Roman B. Shyshka, Maxym Tkalych & Oleksyi Bychkivskiy. *The World in 2020: What Are The Threats To Humanity?* AMAZONIA INVESTIGA 9. February 2020. Pp. 3-5. Available at <https://www.amazoniainvestiga.info/index.php/amazonia/article/view/1132>
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  - 8 Sergey O. Slipchenko. *Development of the Doctrine of Personal Inalienable Rights in European Countries*. INTERNATIONAL CIVILISTICS FORUM. 2018. Pp. 240-245.

## II. METHODOLOGY

In writing this article, the authors used general and special methods of scientific knowledge. Among them are the methods of analysis, synthesis, modeling, forecasting, logical-legal and comparative-legal methods.

Thus, the method of analysis was used by the authors of the article to study the objective state of public relations, which are being developed in the field of private law both in Ukraine and abroad. Moreover, the method of synthesis is used to generalize the positive experience of legal regulation of private relations in foreign countries. Also, the forecasting method was used to identify possible ways of development of domestic and European private law.

Furthermore, the logical-legal method was used by the authors to analyze the useful regulations for the purposes of this study. In addition, the comparative-legal method was used by the authors to study the features of models of private law regulation of public relations in different countries.

## III. RESULTS AND DISCUSSION

Since the time of Hugo Grotius (1583-1645), the classic provision of natural law (lat. «*ius naturalis*») has been the idea that, in contrast to established wills, is a perfect, ideal norm that follows from the natural state of things. According to this concept, law is a perfect and complete system of social norms reflected in the mind, consistent with the objectively existing structure of the universe and human nature.

Hundreds of years after Grotius, his ideological followers, Voltaire, Diderot, Rousseau, Herder, and others, in fact used the idea of natural law to create the concept of the Enlightenment. A characteristic feature of the Enlightenment was the desire of its representatives to restructure all social relations on the basis of the introduction of social progress, the cult of reason, and the principles of justice, solidarity, equality and more.

The French Enlightenment, which was determined, first of all, by its ideological and organizational completeness and consistency, put forward the ideas of bourgeois democracy. Based on the theoretical positions of John Locke – a prominent English materialist philosopher, educator, founder of the ideological and political doctrine of liberalism, who developed an empirical theory of knowledge, educators put forward the idea of personal freedom, freedom of speech, conscience, press, equality, free labor for society, clever selfishness and comprehensive development of the individual, embodied in the *Declaration of the Rights of Man and of the Citizen*<sup>9</sup>.

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9 Declaration of the Rights of Man and of the Citizen. 1789. Available at [https://avalon.law.yale.edu/18th\\_century/rightsof.asp](https://avalon.law.yale.edu/18th_century/rightsof.asp)

Thus, the concept of natural law is an element of the ideological basis of modern Western civilization. In general, according to Professor Evgen Kharytonov and Professor Olena Kharytonova<sup>10</sup>, the Western type of civilizational development is characterized by:

1. The sovereignty of the individual (recognition of the prominent place of the individual, a personality in the system of social relations);
2. Developed institutions of private and corporate property, which plays a crucial role in the economic life of society;
3. Liberalism as a philosophical basis of public life;
4. Socio-political pluralism, which is expressed in the division of functions of different branches of government, giving weight to self-government, etc.; and
5. Worldview doctrine (religion, etc.), which has the character of absolute self-worth or in any case tends to such an understanding.

Thus, humanism, liberalism, the absolute nature of human rights, inviolability of property rights, respect for private life — the values of Western civilization, which were invented, theoretically substantiated and implemented by followers of the concept of natural law.

The ideas of natural law underlie market capitalism and liberalism as optimal socio-economic models of existence of a developed civil society. The basis of civil society is law-conscious citizens and their voluntary associations, the existence of which is regulated not by political power, but by self-government, free expression of citizens and law<sup>11</sup>. Liberalism aims at affirming parliamentary order, free enterprise, and democratic freedoms; upholds the absolute value of the human personality («person is more important than the state») and the equality of all people with regard to individual rights<sup>12</sup>.

Inextricably linked with the idea of natural law is the concept of private law, as one of the forms of implementation of theoretical achievements of iusnaturalists (both in the narrow sense — the followers of the teachings of the 18th century, and in a broad sense — the supporters of civil society values). Private law has absorbed the ideas of natural law, which are manifested in such principles as justice, good faith,

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10 Evgen Kharytonov & Olena Kharytonova, *supra*, note 1.

11 Evgen Kharytonov et al., *supra*, note 2.

12 Shyshka et al., *supra*, note 4.

reasonableness, dispositiveness, legal certainty, inadmissibility of interference in private affairs, inviolability of property rights, and freedom of contract.

The concept of private law is primarily related to Roman law. Moreover, it is thanks to the ancient Roman civilization that mankind has such a phenomenal tool for regulating social relations as law. Roman private law produced a powerful, perhaps even «explosive» intellectual enrichment of law, when the mind «broke» into the field of social regulation, and in connection with the needs of business life and legal practice, showed its strength in creating legal mechanisms, structures and categories of high intellectual order... Therefore, it is almost the completed form entered the human culture. Moreover, it entered not as a system of effective concretized legal prescriptions..., but as intellectual legal values – a perfect system of legal constructions, forms, categories, conceptual and lexical apparatus, summarized in the 6th century in the digests of Justinian's compilations (The Code).<sup>13</sup>

The apologists for natural law, trying to reform all spheres of legal and social life, failed to develop a fundamental concept of private law, which would be radically different from the system of Roman law. In this regard, R. David pointed out:

In the field of private law, natural law did not offer the practice of any system instead of Roman law; it dealt only with details — the coordination of its decisions, and if necessary — their modernization, but not the creation of new foundations of private law. In the field of public law, things are completely different. Here Roman law could not serve as a model. And the school of natural law, in addition to the long-standing activities of universities, proposed models of the constitution, administrative practice, criminal law, deduced «from the mind» [...] The School of Natural Law demanded that, along with private law based on Roman law, Europe should develop the norms of public law that it lacks, expressing natural human rights and guaranteeing the freedom of the human person.<sup>14</sup>

Undoubtedly agreeing with the opinion of R. David, it should be noted that the naturalists did not propose any other model of private law than Roman law because Roman law, in fact, is based on natural law. Accordingly, there was no need to invent anything. On the other hand, public law was not so developed in the ancient Roman

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13 Serhii S. Alekseev. *LINE OF LAW*. Moscow: Statut. (2006). Available at <http://lawlibrary.ru/izdanie60498.html>

14 Rene David & Kamilla Geoffre-Spinozi. *THE MAIN LEGAL SYSTEMS OF OUR TIME*. Moscow: Ministry of Interior and Justice. (2007). Available at <https://www.twirpx.com/file/116177/>

period. In addition, the development of states in the Middle Ages required a new legal concept that would help set and achieve political goals. Such a concept was the concept of public law.

It should be stressed that although public law has been developed significantly under the influence of natural law, at different stages of development of the legal system, private law and public law often competed. At the heart of such competition is the difference in the methods of regulating the relevant social relations. If private law uses the dispositive method, then public law uses the imperative method. Thus, it is often easier for the state to settle some relations by means of coercion than to understand the real interests of the subjects of the respective relations and to delegate to them the right to settle certain relations.

However, at the present stage of development of society, humanity, as never before, needs to expand the scope of private law, taking into account the doctrine of natural law. Instead, unfortunately, in modern conditions, the scope of private law regulation is rather declining. And although this process is not uniform and occurs with varying intensity in different regions of the world, the general trend is disappointing.

The narrowing of the scope of private law regulation is partly due to objective reasons. It is about the need to solve the problems of humanity, which requires the voluntary waiver of some of their rights, for example, during a pandemic. However, on the other hand, modern human problems and related restrictions on individual rights and freedoms can be used by unscrupulous politicians and statesmen as a cover for consolidating power in their hands and establishing authoritarian regimes.

One of the main problems of our time, which can put humanity on the verge of extinction, is the pandemic of the new virus COVID-19. It is associated with an unprecedented narrowing of human rights and freedoms around the world.

At the beginning of 2020, humanity could not even imagine what kind of test awaited in the near future. However, by mid-May, when this material was being prepared, the number of infected people around the world had reached several million. There are already hundreds of thousands of dead. This terrible scenario is still being written, because according to preliminary forecasts, the virus should subside a bit in summer, but may return in autumn and winter. In this case, humanity is actually in danger of extinction, because even those who became ill and survived, according to doctors, are not safe from re-infection. However, there is no vaccine against this virus for now, and it is unknown when it will appear. And even if the vaccine comes out in the near future, no one can guarantee that the virus will not mutate until then and will remain susceptible to it.



Thus, to combat the coronavirus, human civilization must mobilize all available resources and develop a common strategy of action, which should be based on a new ethics of relations in the plane of «man-man» and «man-state». After all, in the near future, almost all the attributes of active social, business, personal life of people will be associated with a high risk of infection. To take control of the situation, states are trying to increase their control over the behavior of individuals. It is at this point that the greatest challenge arises for natural law, as a basic concept of human civilization, and for private law, as a supporting sphere of legal regulation of relations in society. A system of legal norms that gently affect the participants in public relations, giving the latter the right to independently choose the most acceptable option for streamlining the relationship between them.

The point is that, on the one hand, states around the world will increase pressure on human rights by imposing various restrictions and prohibitions, and on the other hand, there will be more and more situations where, due to objective circumstances, private actors will not be able to properly fulfill their obligations. For example, in many countries around the world, the personal data of citizens have ceased to be personal, because states control almost all aspects of human life. Naturally, such measures are considered temporary and involve the need to control the incidence of COVID-19, but it seems that even after the end of the pandemic, it will be very difficult to regain the *status quo*.

Accordingly, modern private law must be transformed and improved in order to be able to meet the challenges of modernity.

Thus, the first and most important task of modern politicians, statesmen, public leaders, and any other people who have the opportunity to influence the life processes of states, local communities, which are related to the regulation of international relations, have any influence on people's opinion in any sphere of human life, should be to inculcate in the mass consciousness the values of natural law. Only such consolidated activities will be able to protect the rights of people around the world, keep the world from escalating processes of «Balkanization», deglobalization, curtailment of humanitarian programs, violation of human rights and freedoms, slipping into a whirlpool of economic, political and military confrontation.

The second important task is the adaptation of private law to the realities of today, namely – expanding the scope of private law, reforming civil law to take into account the emergence of new social relations, development of private law instruments to regulate relations, unification of civil law within intergovernmental associations (for example the European Union), etc. For example, due to the overwhelming commercialization, the relations in the field of sports are increasingly becoming a

commodity-money. Accordingly, these relations have become the subject of legal regulation of civil law. Thus, private law should offer participants in sports relations such instruments of legal regulation that would take into account the specifics of these relations.

One of the forms of improving of civil law is its recodification, which periodically occurs in developed countries. Currently, the process of developing changes to civil legislation is underway in Ukraine. The developers of the draft of the new version of the Civil Code are determined to fundamentally update all Ukrainian civil legislation.

Recodification of civil law, which means a meaningful update of the Civil Code of Ukraine<sup>15</sup> – is an extremely important and responsible stage in the development of not only domestic law but also Ukrainian civil doctrine. All the legal material that provides for the regulation of private law relations, in particular modern scientific research in the field of civil law, formed on the basis of the application of civil law, case law, etc., needs a thorough «inventory». Art. 3 of Regulation «On the working group on recodification (updating) of civil legislation of Ukraine», approved by the Cabinet of Ministers of Ukraine<sup>16</sup> on July 17, 2019 No. 650, establishes that the main tasks of the working group are:

1. Conducting a comprehensive analysis of existing civil legislation of Ukraine and defining areas of private law relations that need to be brought into line with world trends in the development of private law;
2. Study of the experience of European countries on recodification (updating) of the civil legislation of Ukraine;
3. The preparation of proposals for recodification (updating) of the civil legislation of Ukraine.

## IV. CONCLUSIONS

Thus, the basis of modern Western civilization are the concepts of Roman law, natural law and private law. The fundamental ideas of these concepts, which include privacy and private property, good faith, justice, reasonableness, freedom of expression,

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15 Civil Code of Ukraine. Law 435-15 from 2003. January 16, 2003 (Ukraine). Available at <http://zakon4.rada.gov.ua/laws/show/435-15>.

16 Regulation of the Cabinet of Ministers of Ukraine. «About the approval of the working group of recodification (renewal) of the civil legislation of Ukraine». Decision No. 650 from 2019. July 17, 2019. Available at <https://zakon.rada.gov.ua/laws/show/650-2019-%D0%BF>.

freedom of contract, equality of rights and responsibilities, etc., are invaluable assets of modern society and must be preserved and protected.

It is clear that the main task of the moment for humanity is to survive and successfully overcome the global crisis caused by the pandemic. However, in the fight against the virus, the ideological and cultural achievements of Western civilization must not be lost.

Ukrainian society, although in fact part of the European Community, has not yet fully embraced the European values of humanism, liberalism, the absolute nature of human rights, respect for privacy, and must not deviate from its European path.

As for private law, it needs to be updated both nationally and internationally. The main task of private law should be not only the regulation of property and personal non-property relations, ensuring the protection of private interests of individuals and legal entities, but also the establishment of guidelines for civil society.

In any case, in the current conditions of the pandemic, private law must at all costs preserve its sphere of regulation from the influence of public law, as well as try to expand it through new areas of public relations that require legal regulation.

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