

SECTION 2

CONSTITUTIONALISM AS MODERN SCIENCE

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THE CONSTITUTION OF THE STATE IN THE CONTEXT OF ITS FUNCTIONS

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Summary

Purpose. The scientific publication is devoted to highlighting the peculiarities of the legal nature of the constitution. The authors consider the structure and content of the constitution of the state in the context of its functions. The specificity of the content of the newest constitutions in the history of world constitutionalism is considered.

Methods. The methodological basis of the work is a post-positivist methodology for the study of the problems of the paradigm of contemporary Ukrainian constitutionalism, which is an orderly system of mutually agreed ideological principles and methods that allow to thoroughly and comprehensively investigate the legal properties of the paradigm of constitutionalism and to determine the essence and content of its legal relations.

Results and Conclusions. Consequently, the main and still unresolved issue is the ambiguity of what is proposed to adopt: a new Constitution, a new version of the current Constitution, amendments and additions to the current Constitution. Although paradoxical, but in Presidential speeches, these terms are used repeatedly as synonyms. However, legally they are completely different concepts. This terminological confusion carries a great danger of loss of landmarks and prevents a clear statement of the problem in a purely legal area.

Thus, we believe that the constitutional process is too politicized today. In our opinion, the acutest political struggle is underway for adopting a form of constitution that is convenient for one of the parties. But in fact – for power – everyone wants a maximum of power. Including through their Constitution enforced in some way. However, the Basic Law should be adopted not from the conjuncture considerations of political expediency, but be a complete legal document, taking into account the achievements of the world jurisprudence, with the strict observance of all the prescribed legal procedures. After all, the constitution should be the main document of the state, at least for a decade.

Key words: legal content; constitution; basic law; legal status; legal nature; nature of the constitution.

1. Introduction

Constitutionalism as a politico-legal category and doctrinal learning appears after the emergence and establishment of the constitution of the state in the modern sense of this term. It is inseparable and directly derived from the constitution of the state. Although not always the fact of the existence of a constitution automatically means the emergence of a particular model of constitutionalism. However, without the appearance (availability) of the constitution itself (in the broad sense of this notion), there is no need to talk about constitutionalism. The substantive basis, the very essence of constitutionalism, according to V. Shapoval, is expressed by the formula: «constitutional-legal norm + practice of its implementation» (Shapoval, 1997). Therefore, a bit strange, in our opinion, when in certain writings, including monographs, there are such statements as «ancient», «medieval», «totalitarian» or «Soviet constitutionalism», since at that time the constitution as such (in the modern understanding of this concept) simply did not exist. However, it was precisely in previous times that, in fact, the foundations of the future phenomenon – constitutionalism were laid (Stecuk, 2004).

2. The Constitution of Ukraine is a part of the national legal system

The Constitution of Ukraine is a part of the national legal system, its core, acts as «coordinator of the system of legislation» (Strpanov, 1984). But, as Yu. Tykhomyrov notes, despite the fact that the Constitution, as if is in the middle of the legal array, its influence is not limited to the link «act-act». All elements of the legal system, in turn, also affect the constitution (Tykhomyrov, 1999).

On the one hand, the Constitution is a kind of construction, on which practically all legislation is being built (Onishenko, 2005). It is the Constitution that defines the nature of the current legislation, the process of law-making – determines, which basic acts are adopted by various bodies, their names, legal force, the process and procedure for the adoption of laws (Kozlova, 2003). The development of legislation is possible only within the parameters enshrined in the Constitution, which serves as an important condition for ensuring its unity, internal coherence (Luchin, 2002). As S. Shevchuk notes,

the constitutional norms are formulated in the form of an open text, and, consequently, constitute «empty vessels», which must be filled with a specific content (Shevchuk, 2005). Therefore, the adoption of a new constitution in the state, as a rule, causes significant changes and updates to current legislation. Ukraine is no exception. Although, as V. Opryshko notes, «the current legislation does not yet fit into the legal framework defined by the Constitution of Ukraine» (Opryshko, 2000).

However, the notion of a constitution cannot be disclosed to the full extent without clarifying the question about not only its legal but also socio-political nature.

According to M. Savchyn, the supremacy of the constitution must be supported by certain institutional and procedural guarantees. Only in their totality, they determine the nature of the constitution. Institutional and procedural guarantees define certain criteria for the quality of legislation, administrative and judicial practice. Thus, the nature of the constitution and constitutional order are conditioned by the problem of statics and the dynamics of constitutional matter. The definition of the nature of the constitution is also influenced by the social environment since real constitutional relationships are determined by a certain type of society, civilization in general. The nature of the constitution is influenced by the legal tradition, which is based on the paradigm of constitutionalism, constitutional consciousness and culture, national traditions of government, the system of social values. A diversity of approaches to defining the nature of the constitution determines how these components are combined in the process of drafting the constitution and building a constitutional order (Savchyn, 2009).

The Constitution fulfils the function of legitimizing public order. Therefore, in the form of constitutional principles, democratic access to positions is determined through democratic elections and the fundamental principles of separation of powers, as well as the limitation of power, which are carried out mainly through legal guarantees of human rights and freedoms (Cippelius, 2000). From the institutional point of view, the constitution is embodied in ensuring the consolidation of democracy, representation of the people through free and periodic elec-

tions, parliamentary regime, and judicial constitutional control.

In the normative sense, the constitution includes both the provisions that contain specific regulations, as well as the provisions that determine the general legal principles of intervention in private life. Accordingly, the constitution has both a vertical and a horizontal structure. The vertical structure of the constitution relates to its own requirements, horizontal one defines a set of principles of law (provisions-principles), which operates both in the sphere of public and private law. Thus, the constitution in the normative sense extends to the sphere of public and private law (Savchin, 2005).

In its content, the constitution expresses: a) a public consensus on social values provided by legal protection; b) ways of implementing democratic procedures and control of the people over the public authority; c) legitimation of public authority in the private autonomy of a person; e) legal mechanism of international cooperation of the state. Thus, the constitution in its content is a certain type of social order that is based on the definition of the legitimate framework of government in order to ensure the public good (balance of public and private interests).

3. Constitution properties

In the formally-legal sense, the constitution is understood as the Basic Law, which has a constitutive character and has the rule of law. One should agree with M. Savchyn that, as a normative legal act, the Constitution of Ukraine has the following properties (Savchin, 2005):

a) constitutive nature – the constitution is an act of the constituent power; hence the constitution cannot be considered as a result of the legislative process of the parliament, which is actually established by the constitution and bound by its requirements. The Constitution, therefore, sets the foundations for the organization of society and the state, defines the foundations of the legal status of a person, the content and directions of activities of state authorities and local self-government, foundations of activities of institutes of the political system, and principles of the democratic system in the country.

Since people in a democratic state are recognized as the bearer of sovereignty and the

only source of power, only they possess its highest manifestation – the constituent power. The content of the latter is the right to adopt a constitution and, with the help of it, to create the foundations of a social and state system that chooses one or another people for themselves. Only the constituent government can change, in the most radical way, foundations of the structure of society and the state. The whole history of the constitutional development of both our country and foreign countries serves as a confirmation. Using constitutions, fundamental changes in the entire social system obtained the legitimacy.

It is the recognition of the constitutive nature of the constitution that the special order of its adoption, its supremacy, its role in the entire legal system of the state, the non-contradiction of the constitution for all the powers established by it, including for the legislative, are based.

In the foreign science of constitutional law, the concept, according to which the difference between the constituent power and the authority is established, is quite broadly presented. And in Germany, it received a direct expression in the constitution itself. In its preamble, it is said: «[...] the German people, by virtue of their constituent power, have created the Basic Law».

4. Legal force of Constitution

The constitutive nature of the constitution is manifested also in the fact that its prescriptions act as the first principles are primary. This means that there are no legal restrictions to establish the provisions of the constitution. There can be no such legal provision that could not be included in the constitution on the grounds that it does not correspond to any legal act of the given state. Yes, laws in Ukraine cannot contradict the Constitution. Of course, from this does not follow the conclusion that the content of the constitutional provisions is arbitrarily determined that any provision may be included in the constitution;

b) the main law – the constitution is the core of the legal system, laws and regulations are developed and adopted on its basis, it lays the program, the general direction of law-making work in the state, consolidates the system of sources of national law;

c) the highest legal force – any other normative act can distort the content of the con-

stitution, it creates such an order when justice and law should not diverge. The Constitution of Ukraine has the highest position among rules and regulations, which should not contradict it, but conform to its basic principles and spirit.

In its Decision № 2-В/99 on 02.06.1999, the Constitutional Court interpreted the principle of the supreme legal force of the constitution in the following way: «One of the most important conditions for the definiteness of relations between a citizen and a state, the guarantee of the principle of inviolability of human rights and freedoms enshrined in Article 21 of the Constitution of Ukraine is the stability of the Constitution, which, in addition to other factors, is largely determined by the legal content of the Basic Law. The presence in the Constitution of Ukraine of too detailed provisions, which place is in the current legislation, will give rise to the need for frequent changes to it, which will negatively affect the stability of the Basic Law»;

d) the horizontal effect – the constitution equally is the basis for the rules of public and private law; such a normative influence of the constitution on the legal system of the country is realized through the specification of constitutional principles and human rights and freedoms at the level of current legislation and constitutional jurisprudence;

e) the supremacy of the Constitution regarding international treaties submitted to the parliament for the ratification procedure; this provision also applies to international treaties, duly ratified by the Parliament;

f) direct action of constitutional norms means the duty of state authorities and local self-government bodies, their officials to apply directly provisions of the Constitution in the presence of gaps in law or in the event of a conflict between constitutional provisions and provisions of law; if it is impossible to eliminate such a contradiction during the course of law enforcement, then such a conflict is finally resolved by the Constitutional Court of Ukraine;

g) special procedure for adoption – the constitution in the modern sense of this concept is an act that is usually adopted by the people or on behalf of the people. Characteristically, the emergence in the XVII century of the very idea of the need for such an act as a constitution was associated precisely with this feature.

The demand imposed by the bourgeoisie to restrict the rights of the king and feudal lords to protect their liberties could only be secured through the adoption of an act of supreme authority that embodies the will of the entire nation, of all the people. Thus in an unrealizable in practice «People's Agreement» project of Cromwell in 1653, the condition for signing it by all the people was provided. The same requirement was put forward later by J. Russo. He believed that the constitution requires the consent of all citizens. It should be the result of a unanimous decision, signed by all citizens, and opponents of the constitution should be considered foreigners among citizens.

This essential feature of the constitution is still recognized as dominant in constitutional theory and practice. It is no coincidence that the constitutions of most democratic states of the world begin with the words: «We, the people [...] accept (proclaim, establish, etc.) this constitution».

In Soviet constitutions, this formula was first restored in the Constitution of the USSR in 1977, the Constitution of the RSFSR in 1978. Thus, in the preamble to the Constitution of 1978, it was written: «The people of the Russian Soviet Federative Socialist Republic ... accept and proclaim this Constitution» (Constitutia, 1978).

The idea of the people's involvement in the adoption of the constitution could not be ignored even under a totalitarian regime. Then it was expressed in a nationwide discussion of the draft Constitution of the USSR in 1936, which was held for six months with the widest scope and designed to «sanctify» the Basic Law by the will of the people. The Soviet Union Constitution of 1977 was also subject to a nationwide discussion (Eremenko, 1982).

Consequently, the main and still unresolved issue is the ambiguity of what is proposed to adopt: a new Constitution, a new version of the current Constitution, amendments and additions to the current Constitution. Although paradoxical, but in Presidential speeches, these terms are used repeatedly as synonyms. However, legally they are completely different concepts. This terminological confusion carries a great danger of loss of landmarks and prevents a clear statement of the problem in a purely legal area.

5. Conclusions

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КОНСТИТУЦІЯ ДЕРЖАВИ В КОНТЕКСТІ ЇЇ ФУНКЦІЙ

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