DOI https://doi.org/10.24144/2663-5399.2023.1.04
UDC 342.4

ARGUMENTATIVE CONSTITUTIONAL TRIALLISM OF NORMS IN REELATIONAL TECHNIQUE

Mariia Blikhar,
Head at the Department of Administrative and Informational Law,
Lviv National University Lviv Polytechnic,
Doctor of Juridical Sciences, Professor,
https://orcid.org/0000-0003-2974-0419
Scopus ID:
https://www.scopus.com/authid/detail.uri?authorId=57826165200
ResearcherID: V-8706-2017
https://www.webofscience.com/wos/author/record/409381
blikharm@ukr.net

Summary

The article under studies deals with the peculiarities of argumentative triallism of norms (the division of the so-called fundamental legal norms into law-justifying and two types of law-negating norms in classical, standard, and derivative relational technique) in the process of functioning of relational technique, within written and oral litigation, as well as within the formation of an expertise style of processing a legal case. The possibility of applying argumentative normotrialism within the framework of constitutional norm-making is indicated. The article assumes that in classical relational technique, argumentative triallism of norms might rely on the action-legal thinking, which suggests the division of legal means into claims and objections, the latter generally being classified as absolute and relative ones. It is important that within standard relational technique (also known as the technique of H. Daubenspeck and his disciples), argumentative triallism of norms could have been related to the formation of pandect law in the XIX century, namely, to the textbook on pandect law by B. Windscheid. The latter may be regarded as the founder of argumentative triallism of norms in the modern sense. In any case, standard relational technique rests on the idea of argumentative triallism of norms from the very beginning and up to this day, especially when it comes to an expertise opinion (votum) or, as it is now commonly said, a working technique. Particular emphasis has been laid on the fact that argumentative triallism of norms is of great importance in derivative relational technique. In the expertise style of processing a legal case, it performs a pure function of a plan for elaborating an expertise opinion, which is a simplified version of an expertise opinion (votum) and is based on standard relational technique. The point is that an expertise opinion in derivative relational technique is consistently drawn up as follows: first, the law-justifying norms are analyzed, then - absolute law-negating rules, and, finally, - relative law-negating norms. Argumentative triallism of norms is one of the keys to the potential adoption of post-classical (standard and derivative) relational technique.

Key words: constitutionalism, the norm of constitutional law, constitutional norm-making, basic and auxilary norms, law-justifying and law-negating norms, theory of norms, juridical methodology, theory of juridical argumentation, H. Daubenspeck, expertise style.

1. Introduction.

Standard relational technique (introduced by H. Daubenspeck in his work "Abstract, Votum and Judgment: a Guide for Practicing Lawyers in the Preparatory Service" (1844–1911) (Daubenspeck, 1844; Daubenspeck 1911), as well as classical and derivative technique are closely associated with the phenomenon that is often referred to as argumentative triallism of norms. This close connection is revealed in the fact that only in terms of relational technique, the phenomenon under studies might be dwelt upon to full extent. Since in Ukraine relational technique is still an insufficiently investigated subject of juridical discussion, it naturally generates the lack of general recognition of the division of basic legal norms into three categories (hereinafter – triallism of norms). Consequently, the study of the link between relational technique and triallism of norms stipulates *the relevance of this theme.*

The division of the so-called basic legal norms into three groups (referred to in the article as triallism of norms) has been studied in the Ukrainian juridical sources in terms of

both relational technique and other respects. The former has been represented in a series of works by O. Stepeniuk. These works may be split into two parts: those directly related to triallism of norms (for example, (Stepeniuk, 2020 and others)), and those dealing with other issues of relational technique. The works that do not directly affect relational technique, but are connected with triallism of norms, were written by V. Truten, A. Pavliuk, O. Nastasiichuk, V. Savchuk, and others. Overall, Ukrainian lawyers tend to ignore the question of what argumentative nature of triallism of norms in relational technique actually relies on. The works by O. Stepeniuk and the above-mentioned authors may serve as a starting point in answering this question. In addition, the works of other domestic and foreign authors are also of great importance, in particular, those by B. Windscheid, R. Alexy, R. Zippelius, J. Schapp, M. Bartoszek, P. Katko, H. Daubenspeck, P. Sattelmacher, W. Sirp, W. Schuschke, R. Maidanyk, N. Huralenko, K.-F. Stuckenberg, F. Ranieri, T. Dudash, S. Rabinovych, and others.

The purpose of the article under discussion is to outline the significance of argumentative triallism of norms in classical, standard and derivative (generalized in classical and post-classical) relational technique. In order to achieve this goal, it is essential to carry out the analysis of the concept and features of argumentative triallism of norms within the three types of the above relational technique.

When establishing the objectivity and validity of scientific provisions and conclusions, a complex of general scientific and special scientific methods was used: historical method, method of legal interpretation, system method, modeling method.

2. Legal triallism of norms

Before attempting to define argumentative triallism of norms in relational technique, i.e., to determine what triallism of norms means *in concreto*, it is necessary to consider what it is *in abctracto* or *per se* (by itself). There are as many ways to explain what legal triallism of norms is as there are concepts of law. If we take into account the division of law into objective and subjective, it will be possible to elaborate an explanation based on either subjective or objective law. In the former case, one should proceed from the fact that if there exists valid subjective law, then there may also exist invalid subjective law. What is more, the logical interrelationship between the two will be of contrasting nature, i.e., there may exist another subjective law. The actual systems of subjective law in Germany or Ukraine are not elementary (simple), since they implicitly include the concept of valid but unenforceable subjective law, whereas explicitly, they include valid and enforceable subjective law. Hence, both the German and Ukrainian systems of subjective law are complex, or qualified. They rest on the issues of occurrence, negation, and inhibition of subjective law. Given there are three types of subjective law (valid, invalid and valid enforceable), each of them should apparently correspond to the three norms of objective law (the law-justifying norm, the absolute law-negating norm, and the relative law-negating norm). Here is the example proving it: in the Civil Code of Ukraine, Art. 655: subject matter of a sale and purchase agreement, Article 599: termination of an obligation by proper performance, and Articles 251–255: limitation period. All these norms perform the respective function of justification or negation, directly or indirectly. Consequently, legal triallism of norms is the ability to justify the validity, invalidity or enforceable validity of subjective law through the application of three types of objective law norms, namely, the law-justifying and two types of the law-negating ones.

It would have been possible to immediately approach the concept of legal triallism of norms by classifying the norms of objective law into basic and auxiliary, and basic norms - into law-justifying and two types of law-negating ones (see, for example, (Zippelius, 2004, p. 46–58)). This is exactly what happens in derivative relational technique (Katko, p. 15, 20–23). This classification results in understanding that the application of three types of legal norms can justify three or four modal characteristics of subjective law, which have just been mentioned. Therefore, in this case, legal triallism of norms might be defined as an opportunity to divide the basic legal norms (within the general division of norms into basic and auxiliary) into three groups - law-justifying norms and two types of law-negating norms (absolute and relative law-negating norms).

The abstract notion of legal triallism of norms can be specified through dividing the history of relational technique into the history of classical relational technique and the history of post-classical relational technique, with latter being a parallel history of standard relational technique and derivative relational technique. Classical relational technique is a real judicial and educational methodology for preparing a relation in the course of a collegial consideration of a legal case with the appointment of a case reporter. The peculiarity of classical relational technique, which existed in Germany from about 1500 to about 1850 (for history, see (Ranieri, 2005)), lies in the fact that it is a technique that functions within the framework of a written trial, i.e. within the framework of operating with documents prepared in a certain way. Such documents include a) documents prepared at the previous stages of the trial (abstract or report), b) an expertise opinion (votum) of the responsible person (speaker), and c) a draft court decision (draft judgment).

Triallism of norms is closely related to the preparation of an expertise opinion (votum). There are two questions that usually arise regarding the use of the opportunities, which may be referred to as triallism of norms. First, did or could the lawyers working from 1500 to 1850 know about the peculiarities of triallism of norms, and second, did triallism of norms objectively take place at that time?

The first question requires an analysis of the relation texts that were prepared at that time. Such an analysis can be the subject of an independent scientific study, which requires profound knowledge not only of German but also of

Latin. Hence, it comes to one of the directions for further research into the history of relational technique. At the same time, we can definitely answer the question of whether these same lawyers could have known about this kind of triallism of norms. The answer is yes, they could have known, and here is why. The relational technique is closely associated with the reception of Roman law. According to M. Bartoszek, in Roman law, along with claims (*actio*), there were exceptions, and they were divided into two types: exception is "essentially a special way of procedural reservation by which the defendant denies the existence of the plaintiff's right at all [defense] or at least his duty to perform at this time [negation]" (Bartoszek, 1989, p. 123).

3. Expert opinion

The action-legal way of thinking of the lawyers of that time consisted in the fact that they asked first of all not about the norm applicable to the case, but about the cause of the action that could support the plaintiff's claims (*quae sit actio*), and only then about the appropriate exception (Ranieri, 2005, p. 1159). It happened as follows: a case to be decided in a panel was prepared by one or two speakers (referents) and offered to others so that they could make a substantiated decision on it. The report (relation) intended for colleagues followed a certain scheme in which the relevant issues had to be presented. In accordance with classical rhetoric, these relations always contained a *species facti*, with a history of the proceedings and an extract from the documents. They also included an expertise opinion that led to a proposal for a decision and was structured in an action-legal manner, asking about the claim demands, conclusiveness (Schlüssigkeit), proofs, and objections (*quae sit actio? an sit fundata? an sit probata? an sit exceptione elisa?*), which is a well-known sequence almost up to this day (Stuckenberg, 2013, p. 169-170). Thereby, an *elisa* meant that if the plaintiff's allegations were proven, it was necessary to elaborate on the defense arguments and evidence. In particular, it was necessary to check whether, despite the successful proof by the plaintiff, the defendant has raised objections that dispelled the plaintiff's allegations (Ranieri, 2005, p. 1159).

If the word "dispel" is understood in an absolute and relative sense, for which, as M. Bartoszek testifies, there is every reason, then we will thereby deal with both relational-technical and substantive-legal triallism in a dual form (procedural- and substantive-legal), albeit implicitly, but objectively, which leads to the answer to the second question. The objective nature of triallism of norms is evidenced by the relevant historical fact.

4. Classical relation technique

To sum it up, classical relational technique objectively and implicitly deals with substantive-legal triallism of norms, and in this case, it is already expedient to dwell upon the argumentative nature of such triallism of norms.

In post-classical relational technique, argumentative triallism of norms reveals itself in different ways. In standard relational technique, it is combined with procedural dualism: law-justification – law-negation. To be more precise, due to the structure of an expertise opinion (Schuschke, 2013, p. 119–165), we deal with the concepts of claim justification and negation, which marks the continuation of the action-legal thinking today in procedural law and in the standard dual relational technique. On the other hand, the fact that legal-substantive triallism of norms functioned in Germany entails that drafting of an expertise opinion (votum) shall rely on this triallism of norms. Therefore, it is not surprising that both the model expertise opinion (votum) provided by H. Daubenspeck a hundred years ago (Daubenspeck, 1905, pp. 235–244) and the model expertise opinion (votum) prepared in the XXI century (Schuschke, 2013, pp. 452–460) are based on the division of norms into three groups. This legal triallism of norms is based on the ideas of its founder B. Windscheid (Windscheid, 1906, p. 182–216).

Thus, post-classical standard relational technique not only can, but actually does rely on the idea of argumentative triallism of norms. The latter is regarded as argumentative because it occurs within justification and negation of a claim as an element of the preparation of a votum and/or as an integral part of the working technique. The main peculiarity of triallism of norms in standard relational technique lies in the fact that argumentative triallism of norms within it is the result of the division of law into substantive and procedural. It occurred in Germany only in the middle of the XIX century precisely due to the efforts of B. Windscheid and was reflected in the German Civil Code.

5. Expert style of judicial proceedings

It is also possible to reveal the essence of argumentative triallism of norms (purely substantive-legal triallism) within the analysis of derivative relational technique, i.e., the expertise style of legal case processing.

In P. Katko's manual on the expertise style (this is the most common name for what we call derivative relational technique) one can find both a list of three types of norms that occur in the German Civil Code (Katko, 2006, pp. 20–23) and the actual concept of the structure of expertise research (Katko, 2006, p. 15). The latter is mostly carried out according to a plan: occurrence, negation (obstruction, termination), and inhibition, where obstruction and termination are the two types of functions of absolute negation.

So, what is the applied significance of argumentative triallism of norms in derivative relational technique, or experise style?

The expertise style (Katko, 2006) and derivative relational technique (Medicus, 1974; Schaller, 2011) are synonyms denoting the civil law methodology for processing a legal case, which (according to P. Katko) unfolds in the following way. The student should articulate the question in compliance with the rule" who wants what from whom on the basis of what?" and provide an answer having analyzed successively the law-justifying and two types of law-negating norms.

This is how it looks on an elementary example that will take into account the formula of argumentative triallism of norms by J. Schapp: *actio an sit fundata, an sit negata, an*

sit exceptione elisa (Schapp, 2006, p. 51). In this formula, the first part refers to the occurrence, the second - to the absolute negation, and the third - to the relative negation of subjective law. Let us consider the problem of paying for the goods transferred by the seller 10 years after the payment period, specified in the sale and purchase agreement.

The solution within the expertise style will run as follows: "Could the seller have launched a claim against the buyer for paying for the transferred goodsin accordance with Article 655 of the Civil Code of Ukraine?" This is how the written solution begins.

Then it continues as if in the opposite direction - from the assumption of the legal consequence that is desirable to the regulatory justification of this consequence. It goes like this: "A prerequisite for this is the conclusion of a sales contract. A sale and purchase agreement is considered concluded if a consensus is reached. Consensus is deemed to have been reached when an offer is accepted. An offer is a proposal to enter into an agreement on the terms of .... Acceptance is an unconditional agreement to enter into a contract on the terms offered". In our case, there was an offer and an acceptance. Therefore, the contract is concluded.

In this way, the law-justifying norms are usually applied. However, here arises a technical problem. It lies in the fact that only the conditions justifying the right of claim are specifically taken into account, i.e., the requirement of the above-mentioned conclusiveness, which initially applies only to relational technique itself, is also fulfilled.

The conditions that prevent the right of claim are analyzed in the second step, within the absolute negation. The circumstances of the case, such as coercion to enter into a contract, have to be taken into consideration as well. If there are no such obstacles, then the conditions that may terminate the right of claim that has arisen should be considered. This includes, for example, proper performance of the obligation, etc.

The expertise opinion is not complete, as it is still necessary to regard the issues of the relative negation, like the claim limitation period, etc.

The foregoing suggests that triallism of norms could be known to lawyers who have dealt with both classical and post-classical (standard and derivative) relational techniques. Triallism of norms is considered to be argumentative precisely because it arose in the process of justifying a claim andnegations, and later became the substantive-legal basis (plan) of legal analysis (justification) within derivative relational technique, i.e., within the expertise style of processing a legal case.

6. Conclusions

1. Argumentative triallism of norms is an opportunity to divide the basic norms into law-justifying and two types of law-negating groups. This opportunity has arisen due to the issues of occurrence, negation and inhibition of subjective law, as well as ensures the formation of standard and derivative relational technique. What is more, the beginnings of argumentative triallism of norms date back to Roman law, namely to the so-called action-legal thinking.

2. In classical relational technique, the hypothetic triallism of norms rests on the division of legal means in Roman law and procedure into claims and negations, as well as on the division of negations into two groups. The reception of Roman law and procedure has linked the accomplishments of Roman lawyers and relational technique.

3. In standard relational technique (introduced by H. Daubenspeck), argumentative substantive-legal triallism of norms is of implicit nature despite being the basis of law. This is due to the prevalence of argumentative procedural-legal triallism (*actio an sit fundata, an sit probata, an sit exceptione elisa*).

4. In derivative relational technique, i.e., in the so-called expertise style of processing a case, substantive-legal argumentative triallism of norms is actually a plan for elaborating an expertise opinion or its explicit basis. It is expressed through the formula *actio an sit fundata, an sit negata, an sit exceptione elisa* (J. Schapp), where the first part of the formula refers to the occurrence, the second - to the absolute negation, and the third - to the relative negation of subjective law.

5. The further investigation of the issue of argumentative triallism of norms in relational technique might regard a detailed and specific consideration of this sort of triallism within the framework of classical relational technique.

Bibliography:

1. **Daubenspeck, H.** (1884) *Referat, Votum und Urtheil: eine Anleitung für praktische Juristen im Vorbereitungsdienst*. Berlin : Vahlen. 146 s.
2. **Daubenspeck, H.** (1911) *Referat, Votum und Urteil: eine Anleitung für praktische Juristen im Vorbereitungsdienst*. Berlin. 320 s.
3. **Gusseck, L.** (2010) *Zu Relation und Rationalität richterlichen Entscheidens. Festschrift für Ulrich Spellenberg*. München. S. 83–98.
4. **Schuschke, W.** (2013) *Zivilrechtliche Arbeitstechnik im Assessorexamen. Bericht, Votum, Urteil, Aktenvortrag. 35., neu bearb. Aufl. auf Grundlage des 1884 von Hermann Daubenspeck begr. und in der Folge von Paul Sattelmacher, Paul Lüttig, Gerhard Beyer und Wilhelm Sirp bearb*. Werkes. München: Vahlen. 492 S.
5. **Schuschke, W.** (2023) *Zivilrechtliche Arbeitstechnik im Assessorexamen. Votum, Urteil, Aktenvortrag, Anwaltsgutachten. 36., neu bearbeitete Auflage*. München: Verlag Franz Vahlen. 484 s.
6. **Stepeniuk, O.** (2022) Hermann Daubenspeck and Relational Technique: Expertise Opinion and Basic Norms. *Recht der Osteuropäischen Staaten (ReOS)*. Issue 1. P. 27–33.
7. **Циппеліус, Р**. (2004). *Юридична методологія.Переклад, адаптація, перекладі з права України і список термінів. Роман Корнута*. К.: Видавництво "Реферат", 2004. 176 с.

8. **Katko, P.** (2006) *Bürgerliches Recht: schnell erfaßt*. Berlin [u.a.]: Springer. 323 s.
9. **Ranieri, F.** (2005) *Relationstechnik. Ueding G. Historisches Wörterbuch der Rhetorik*. Tübingen. S. 1157–1161.
10. **Бартошек, М.** (1989). Римское право. Понятия, термины, определения. Москва: Юридическая литература, 448 с.
11. **Stuckenberg, C.-F.** (2013) Der juristische Gutachtenstil als cartesische Method. *Georg Freund et. al. (Hrsg.): Grundlagen und Dogmatik des gesamten Strafrechtssystems*. FS für W. Frisch. Duncker & Humblot, Berlin. S. 165–186.
12. **Daubenspeck, H**. (1905) *Referat, Votum und Urteil Eine Anleitung f. prakt. Juristen im Vorbereitungsdienst von Hermann Daubenspeck, Reichsger. R. a.D. 9., verm. u. verb. Aufl*. Berlin: F. Vahlen. 316 S.
13. **Windscheid, B.** (1906) *Lehrbuch des Pandektenrechts. Bd. 1. 9. Aufl., unter vergl. Darst. des dt. bürgerlichen Rechts bearb. von Theodor Kipp (der Neubearb. 2., verb. und verm. Aufl.)*. Frankfurt am Main: Rütten & Loenig. 1256 S.
14. **Medicus, D.** (1974) Anspruch und Einrede als Rückgrat einer zivilistischen Lehrmethode. *Archiv für die civilistische Praxis*. Bd. H. 2./3. S. 313–331.
15. **Schaller, J.-M**. (2011) Die Anspruchsmethode. *AJP/PJA*. No. 1. S. 3–17.
16. **Шапп, Я.** (2006). Система германского гражданского права. Учебник. М.: Международные отношения, 2006. 360 с.

References:

1. **Daubenspeck, H.** (1884) *Referat, Votum und Urtheil: eine Anleitung für praktische Juristen im Vorbereitungsdienst [Presentation, vote and verdict: a guide for practical lawyers in their preparatory service]*. Berlin: Vahlen. 146 s. [in German].
2. **Daubenspeck, H.** (1911) *Referat, Votum und Urteil: eine Anleitung für praktische Juristen im Vorbereitungsdienst [Presentation, vote and verdict: instructions for practical lawyers in their preparatory service]*. Berlin. 320 s. [in German].
3. **Gusseck, L.** (2010) *Zu Relation und Rationalität richterlichen Entscheidens. Festschrift für Ulrich Spellenberg [On the relation and rationality of judicial decisions. Festschrift for Ulrich Spellenberg]*. München. S. 83–98. [in German].
4. **Schuschke, W.** (2013) *Zivilrechtliche Arbeitstechnik im Assessorexamen. Bericht, Votum, Urteil, Aktenvortrag. 35., neu bearb. Aufl. auf Grundlage des 1884 von Hermann Daubenspeck begr. und in der Folge von Paul Sattelmacher, Paul Lüttig, Gerhard Beyer und Wilhelm Sirp bearb*. Werkes. München: Vahlen. 492 s. [in German].
5. **Schuschke, W.** (2023) *Zivilrechtliche Arbeitstechnik im Assessorexamen. Votum, Urteil, Aktenvortrag, Anwaltsgutachten. 36., neu bearbeitete Auflage [Civil law working techniques in the assessor exam. Vote, judgment, file presentation, lawyer's report. 36th, revised edition]*. München: Verlag Franz Vahlen. 484 s. [in German].
6. **Stepeniuk, O.** (2022) Hermann Daubenspeck and Relational Technique: Expertise Opinion and Basic Norms. *Recht der Osteuropäischen Staaten (ReOS)*. Issue 1. P. 27–33. [in English].
7. **Tsyppelius, R.** (2004). *Yurydychna metodolohiya. Pereklad, adaptatsiya, pereklady z prava Ukrayiny i spysok terminiv Roman Kornuta* [*Juridical Methodology / translation, adaptation, examples from the law of Ukraine and the list of terms by Roman Kornut*]. K.: Vydavnytstvo "Referat", 2004. 176 p. [in Ukrainian].
8. **Katko, P.** (2006) *Bürgerliches Recht: schnell erfaßt [Civil law: quickly grasped]*. Berlin [u.a.]: Springer. 323 s. [in German].
9. **Ranieri, F.** (2005) *Relationstechnik. Ueding G. Historisches Wörterbuch der Rhetorik [Relations technique. Ueding G. Historical Dictionary of Rhetoric]*. Tübingen. S. 1157–1161. [in German].
10. **Bartoshek, M.** (1989). *Rimskoye pravo. Ponyatiya, terminy, opredeleniya [Roman Law. Concepts, Terms, Definitions.* Moskva: Yuridicheskaya literatura. 448 s. [in Russian].
11. **Stuckenberg, C.-F.** (2013) *Der juristische Gutachtenstil als cartesische Method. Georg Freund et. al. (Hrsg.): Grundlagen und Dogmatik des gesamten Strafrechtssystems [The legal expert opinion style as a Cartesian method. Georg Freund et. al. (Ed.): Basics and dogmatics of the entire criminal justice system]*. FS für W. Frisch. Duncker & Humblot, Berlin. S. 165–186. [in German].
12. **Daubenspeck, H**. (1905) *Referat, Votum und Urteil Eine Anleitung f. prakt. Juristen im Vorbereitungsdienst von Hermann Daubenspeck, Reichsger. R. a.D. 9., verm. u. verb. Aufl [Presentation, vote and judgment A guide for practicing lawyers in the preparatory service by Hermann Daubenspeck, Reichsger. R. a.D. 9th, probably and verb. ed.]*. Berlin: F. Vahlen. 316 s. [in German].
13. **Windscheid, B.** (1906) *Lehrbuch des Pandektenrechts. Bd. 1. 9. Aufl., unter vergl. Darst. des dt. bürgerlichen Rechts bearb. von Theodor Kipp (der Neubearb. 2., verb. und verm. Aufl.) [Textbook of Pandect Law. Vol. 1. 9th ed., under cf. presentation of German civil law. by Theodor Kipp (the new edition 2nd, verb. and probably ed.)]*. Frankfurt am Main: Rütten & Loenig. 1256 s. [in German].

14. **Medicus, D.** (1974) Anspruch und Einrede als Rückgrat einer zivilistischen Lehrmethode [Claim and objection as the backbone of a civil teaching method]. *Archiv für die civilistische Praxis*. Bd. H. 2./3. S. 313-331. [in German].
15. **Schaller, J.-M**. (2011) Die Anspruchsmethode [The claim method]. *AJP/PJA*. No. 1. S. 3–17. [in German].
16. **Schapp, Ya.** (2006). *Sistema germanskogo grazhdanskogo prava. Uchebnik [The System of German Civil Law. textbook*]. M.: Mezhdunarodnyye otnosheniya, 2006. 360 p. [in Russian].

АРГУМЕНТАТИВНИЙ КОНСТИТУЦІЙНИЙ НОРМОТРІАЛІЗМ В РЕЛЯЦІЙНІЙ ТЕХНІЦІ

Марія Бліхар,
доктор юридичних наук, професор,
завідувач кафедри адміністративного та інформаційного права
Національного університету «Львівська політехніка»
https://orcid.org/0000-0003-2974-0419
Scopus ID:
https://www.scopus.com/authid/detail.uri?authorId=57826165200
ResearcherID: V-8706-2017
https://www.webofscience.com/wos/author/record/409381
blikharm@ukr.net

Анотація

В статті йдеться про особливості аргументативного нормотріалізму, тобто поділу так званих основних правових норм на правообґрунтувальні і 2 типи правозаперечних норм в класичній, стандартній і похідній реляційній техніці, тобто в процесі функціонування реляційної техніки в рамках відповідно письмового і усного судового процесів, а також в рамках формування експертного стилю опрацювання правової справи. Вказується на можливість застосування аргументативного нормотріалізму в рамках конституційного нормотворення. Так, гіпотетично показано, що в класичній реляційній техніці аргументативний нормотріалізм міг опиратися на акціонно-правове мислення, яке включає в себе поділ правових засобів на позов і заперечення та поділ заперечень, якщо говорити узагальнено, на абсолютні і відносні. Відмічено, що в стандартній реляційній техніці, тобто в реляційній техніці Г. Даубеншпека і його послідовників, аргументативний нормотріалізм міг мати стосунок до формування пандектного права в XIX столітті, а саме до підручника з пандектного права Б. Віндшайда, якого можна вважати батьком аргументативного нормотріалізму в сучасному розумінні. У будь-якому разі, стандартна реляційна техніка з самого початку і до сьогодні опирається на ідею аргументативного нормотріалізму, особливо в рамках підготовки експертного висновку (вотума) або, як прийнято говорити зараз, робочої техніки. Відмічено, що аргументативний нормотріалізм має особливе значення в похідній реляційній техніці, тобто в експертному стилі опрацювання правової справи, де він виконує чисту функцію плану підготовки експертного висновку, який є спрощеним варіантом експертного висновку (вотума) зі стандартної реляційної техніки. Йдеться про те, що експертний висновок в похідній реляційній техніці складають послідовно так: спочатку аналізуються правообґрунтувальні норми, потім абсолютні правозаперечні норми, а потім відносні правозаперечні норми. Відзначено, що аргументативний нормотріалізм є одним із ключів для потенційного запозичення постклассичної (стандартної і похідної) реляційної техніки.

Ключові слова: конституціоналізм, норма конституційного права, конституційне нормотворення. основні і допоміжні норми, правообґрунтувальні і правозаперечні норми, теорія норм, юридична методологія, теорія юридичної аргументації, Г. Даубеншпек, експертний стиль.