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ЗМІСТ

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SECTION 1

CURRENT ISSUES OF CONSTITUTIONAL AND LEGAL STATUS OF HUMAN AND CITIZEN

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CONSTITUTIONAL SYSTEM OF PROTECTION OF HUMAN AND CIVIL RIGHTS AND FREEDOMS: THEORETICAL AND LEGAL PRINCIPLES AND THE ROLE OF THE BAR

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Summary

The article is devoted to the study of the constitutional system of protection of human and civil rights and freedoms in Ukraine with a special emphasis on the role of the bar in this system. The author analyzes the current state of human rights mechanisms and reveals a significant gap between constitutional declarations on the rule of law and their practical implementation.

The study substantiates the need for a conceptual rethinking of the structure of state obligations in the field of human rights. It is proposed to move away from the traditional understanding of the triune obligation of "recognition-observance-protection" and consider protection as an independent state obligation. Such differentiation is due to the specifics of the subjects of implementation, the peculiarities of functioning and various mechanisms for ensuring each of these obligations.

Special attention is paid to the role of the bar as an independent institution of civil society. It is proved that the activities of a lawyer do not have a dual nature, but are unique in their essence: by protecting the rights of an individual, a lawyer simultaneously contributes to the strengthening of legality in society. A direct connection has been established between the effectiveness of advocacy and the general level of democratic development of the state.

The author critically assesses the current state of the rule of law in Ukraine, stating that the proclamation of the rule of law in the Constitution does not correspond to the real state of affairs. The main problems that hinder the effective functioning of human rights protection mechanisms have been identified: citizens' distrust of state institutions, violation of rights by government structures, weakness of civil society institutions.

The study is based on a comprehensive analysis of domestic and foreign scientific literature, international documents in the field of human rights, constitutional provisions and law enforcement practice. The results of the study can be used to improve national legislation in the field of human rights protection and the development of civil society institutions.

Key words: constitutional system of protection, human rights, advocacy, state duties, rule of law.

1. Introduction

In the current conditions of the development of Ukrainian statehood, the problem of the effective functioning of the constitutional system for the protection of human and citizen rights and freedoms is of particular relevance. Despite the constitutional proclamation of Ukraine as a state governed by the rule of law and the consolidation of the state's obligation to recognize, observe and protect human rights, an analysis of law enforcement practice shows significant gaps between the declared principles and their real implementation. This problem is directly related to the important scientific tasks of developing effective human rights protection mechanisms and the practical needs of ensuring the rule of law in Ukrainian society.

The relevance of the study is due to the need to rethink traditional approaches to understanding state responsibilities in the field of human rights and to find new conceptual solutions to overcome the gap between constitutional declarations and public practice. Of particular importance is the study of the role of the legal profession as an independent institution of civil society in the system of human rights protection.

The novelty of the study lies in the justification of the need to consider the protection of human rights as an independent state duty, separate from recognition and observance, as well as in the comprehensive analysis of institutional mechanisms for the implementation of this duty with a special emphasis on the role of the legal profession.

The purpose of the study is to develop theoretical and legal principles for the functioning of the constitutional system for the protection of human and civil rights and freedoms and to determine the place of the legal profession in this system.

The objectives of the study:

to analyze modern approaches to understanding state duties regarding human rights;

to substantiate the concept of protection as an independent state duty;

to investigate the role and functions of the legal profession in the system of protection of constitutional rights;

to identify problems of the practical implementation of human rights protection mechanisms in Ukrainian realities.

The research methodology is based on the comprehensive application of general scientific and special legal methods, including system-structural analysis, comparative law method, formal-dogmatic approach and methods of legal hermeneutics.

Analysis of recent scientific research shows that the issues of human rights and mechanisms for their protection are actively studied in both domestic and foreign scientific literature.

In the context of the theoretical foundations of human rights, fundamental research was carried out by P. Rabinovich (Rabinovych, P.M., 1992), who developed a general theory of human rights and their legal support, V. Bukach (Bukach, V., 2001), who studied the content of constitutional rights and freedoms of citizens, and V. Tymoshenko (Tymoshenko, V.I., 2006), who analyzed the problems of the relationship between legal and factual equality. A significant contribution to the development of the classification and guarantees of the implementation of human rights was made by M. Antonovich (Antonovych, M., 2000), I. Borodin (Borodin, I., 2001), V. Pohorilko, V. Golovchenko, M. Siry (Pohorilko, V.F., Holovchenko, V.V. & Sirshi, M.I., 1997).

The issues of institutional aspects of human rights protection were studied by D. Byelov and O. Turyanitsa (Byelov, D.M. & Turyanytsya, O.O., 2015), who analyzed the reform of the institutional system in Ukraine, S. Rossokha (Rossokha, S.V., 2015), who studied the role of law enforcement agencies in the mechanism of human rights protection. Of particular importance are the studies of D. Belov and K.-S. Gefner (Byelov, D.M. & Hefner, K.-S.L.) on the institution of the bar as a key element in the development of a state governed by the rule of law, as well as the works of M. Gromovchuk and D. Byelov (Hromovchuk, M.V. & Byelov, D.M., 2022) on humanism as a philosophical and legal category. In the international scientific literature, the works of C. Gearty (Gearty, C., 2020), who proposed a new approach to human rights law, D. Shelton (Shelton, D., 2021), who studied regional systems of human rights protection and their institutional mechanisms, are of considerable interest. O. De Schutter (De Schutter, O., 2019) analyzed the implementation of human rights through international cooperation, while S. Friedman (Friedman, S., 2021) studied the prospects and limitations of national human rights institutions. A comprehensive analysis of the effectiveness of regional systems for the protection of human rights in the 21st century was carried out by C. Heyns and D. Padilla (Heyns, C. & Padilla, D., 2022).

The problems of implementing the principles of the rule of law in Ukraine and ways to solve them were studied by S. Agafonov (Ahafonov, S., 2006), which is

especially relevant in the context of analyzing the gap between constitutional declarations and the practical implementation of human rights.

2. Theoretical principles of the constitutional status of man and mechanisms for the protection of rights and freedoms

In a democratic legal state, a person is the highest social value and acts as a central figure in all spheres of public life - economic, political, social and spiritual and cultural. Each person is characterized by individuality, originality and uniqueness of his qualities. The degree of his involvement in the functioning of the legal state is determined by the available material and spiritual resources for the implementation of subjective rights and conscious fulfillment of legal obligations. The legal status of a person is formed through the consolidation in the legislation of his rights, freedoms and obligations, which create legal opportunities that acquire real meaning through their practical implementation in life.

The opportunities for rights and freedoms are transformed into reality not only through their use by citizens, but also, as noted by D. Byelov - due to the provision by the state of all necessary material, social, spiritual means, protection and defense of these rights and freedoms by the relevant bodies (Byelov, D.M. & Turyanytsya, O.O., 2015, p. 104).

The stability of the concept of protecting the rights and freedoms of man and citizen is ensured by relying on a system of principles that have been tested by scientific thought and social practice. The strength and progressive nature of this concept is formed through the integration of legal, moral, traditional and other socio-regulatory norms. The use of such a comprehensive approach allows us to prevent the dominance of negative legal phenomena in the legal system and to resist the spread of legal nihilism and indifference to law (Gearty, C., 2020, p. 294).

It is worth emphasizing that the constitutional consolidation of the state's duty to protect the rights and freedoms of man and citizen serves as an indicator of the democratic nature of state formation. This duty acquires functional expression through the work of government institutions of all branches of government. State protection of constitutional rights and freedoms of man and citizen from unlawful encroachments and direct violations is a separate stage of the process of their implementation, which arises as a result of the occurrence of certain legal facts. Scientists consider such protection as a specific form of state activity, this activity can achieve significant development and expected effectiveness in resolving human rights claims of citizens only if it is independently systemically and functionally designed (Shelton, D., 2021, p. 124).

Political and economic transformations in our country have led to a reassessment of former social ideas and attitudes. The steps taken to significantly reduce the social burdens of society and the state are perceived by the population far from unambiguously and entail negative consequences. This situation indicates that social problems have deep institutional roots and separate recipes for neutralizing conflicts in society cannot be dispensed with here (De Schutter, O., 2019, p. 588). At the same time, human rights are designed to contribute to the solution of one of the most important tasks - ensuring the sustainable development of the modern world (Friedman, S., 2021, p. 848), and the real scope of individual rights and freedoms is always some kind of compromise that can be achieved in a given society (Heyns, C. & Padilla, D., 2022, p. 240).

In the legal doctrine, there are contradictory approaches to the implementation of established standards in the field of human rights. Some scholars hold the position that the reality of their implementation depends mainly on the degree of socio-economic development of the state (this is confirmed by the works of V. Bukach (Bukach, V., 2001, p. 28), P. Rabinovich (Rabinovych, P.M., 1992, p. 84) and other researchers). Others express the opinion that human rights and freedoms enshrined in generally recognized principles and norms should be guaranteed to everyone, guaranteed by the constitution of the country and its national legislation (in particular, V. Tymoshenko (Tymoshenko, V.I., 2006, p. 2) and others). Of course, emphasizing the importance of constitutional rights of the individual implies not only their proclamation, but also the ability of the state to actually ensure and guarantee them. This is a key point that determines the real weight of fundamental rights and indicates the level of development of a social and legal state. To ensure the constitutional rights of an individual, the state creates appropriate bodies, organizations and institutions: a law enforcement system, judicial institutions, etc.

In the course of the development of the concepts of the legal status of an individual, which were recorded in the US Declaration of Independence and the French Declaration of the Rights of Man and of the Citizen (18th century), the institution of rights and freedoms has become a fundamental component of constitutional law and the core of the constitutional system. Nowadays, the question is often asked: why deal with human rights when democracy has already won? (Rossokha, S.V., 2015, p. 45), identifying democracy with majority rule. However, as history shows, majority rule can be very cruel towards individuals or various minorities (it was the majority that sentenced Socrates to death, and it can hardly be said that this is a good testimony to the political system of Athens).

Researching diverse aspects of human rights and freedoms is not an easy task. Protagoras' maxim «man is the measure of all things» in a step-by-step history. The concept of human rights has acquired a modern meaning in the course of its development - the «human

dimension», as the participants of the CSCE (OSCE) called a set of issues in the sphere of relations related to human rights (Dokument Kopenhahens′koyi narady Konferentsiyi shchodo lyuds′koho vymiru NBSE (OBSE), 1990).

Thus, the recognition of a person as the «measure of all things» involves the identification of system-forming elements that ensure the effectiveness of the mechanism for protecting this status. A comprehensive solution to the outlined problem, in our opinion, requires consideration of the constitutional system for protecting the rights and freedoms of a person and a citizen as an independent phenomenon. It should be noted that in constitutional and legal science the theory of human rights and freedoms has been developed quite thoroughly and systematically (Bukach, V., 2001; Rabinovych, P.M., 1992; Antonovych, M., 2000; Borodin, I., 2001; Pohorilko, V.F., Holovchenko, V.V. & Sirshi, M.I., 1997). The conclusions obtained by scientists in this field, the systematization of scientific knowledge about the nature and essence of human rights, about the principles of forming a legal status, the classification of human rights – all this stimulates the improvement of human rights mechanisms for the implementation of such rights, the search for appropriate and accessible procedures. By applying these procedures, a person can truly feel like they are, according to the constitutional definition, «the highest social value».

3. The structure of state obligations to protect human rights and the role of the legal profession

According to Part 2 of Article 3 of the Constitution of Ukraine, «human rights and freedoms and their guarantees determine the content and direction of the state's activities. The state is responsible to man for its activities. The affirmation and provision of human rights and freedoms is the main duty of the state» (Konstytutsiya Ukrayiny, 1996). At the same time, the constitutional use of the word «duty» in the singular with the actual extension of this concept to recognition, observance and protection directs to their comprehensive perception and research. This approach prevailed in the study of the issues reflecting the relationship between the state and the individual regarding the implementation of the latter's rights and freedoms (Hromovchuk, M.V. & Byelov, D.M., 2022, p. 302).

An analysis of domestic law enforcement practice allows us to state that the long experience of studying and practical use of Article 3 of the Constitution of Ukraine in the traditional sense has shown the absence of significant positive developments in the field of human and citizen rights and freedoms. They continue to be violated by the authorities, which generates citizens' distrust of the state and rejection of the initiatives of its bodies, including law enforcement agencies. Such a development of the situation increasingly distances our state from the standards of the rule of law and weakens it; prevents citizens from realizing themselves as full-fledged participants in civil society and protecting their rights and legitimate interests; creates the danger of a serious, even dramatic, confrontation between Ukraine and its citizens. That is why, in our opinion, in order to prevent this in the future, additional justifications are urgently needed, based on which it is possible to strengthen the coherence of the interests of man (society) and the state, to strengthen constitutional human rights protection mechanisms that create insurmountable legal obstacles to the arbitrariness of power. The most weighty justifications on the studied issues can be identified through scientific understanding of the complex of issues, which can be defined as the constitutional system of protection of human and citizen rights and freedoms and the role of the institute of advocacy in this system.

When a lawyer ensures the protection of human and citizen rights, he does a useful and necessary thing, which is important for both the person and society, since thereby he helps to observe the law, eliminate its violations. Conviction of an innocent person or rejection of a justified claim harms not only the convicted person or the party that lost the civil case. The harm is caused to the entire society, interested in law and order, and not in erroneous court decisions (Byelov, D.M. & Hefner, K.-S.L., p. 108).

The protection of human and civil rights has no grounds for opposing the interests and tasks of the state and its bodies. The activities of a lawyer are not dual in nature. It is unique in its essence: defending the rights and legally protected interests of a person, a lawyer simultaneously acts in the interests of society and the state, contributing to the strengthening of legality. The lawyer, by providing assistance to the defendant in the exercise of his procedural rights, thereby contributes to the correct and comprehensive consideration of the case and the adoption of a lawful, reasoned and fair decision.

Within the framework of the professional duty to protect the rights and interests of their clients, lawyers must play a significant role in the fair administration of justice. Being an active participant in the law enforcement mechanism, occupying an independent place in the justice mechanism, the bar performs (must perform) an important function of public control in this area. This thesis is also confirmed by international documents regulating the scope of activity of the bar. Thus, the Charter of Fundamental Principles of the Activities of European Lawyers of the CCBE defines the role of a lawyer as an indispensable participant in a fair trial, who not only sincerely serves the interests and protects the rights of his client, but also performs such functions in society as the prevention and resolution of conflicts, the resolution of conflicts «... in the further development of the law, as well as

the protection of freedom, justice and the rule of law» (Khartiya osnovopolozhnykh pryntsypiv diyal′nosti yevropeys′kykh advokativ, 2006).

4. The rule of law as a prerequisite for effective protection of human rights and freedoms

It is clear that a lawyer promotes legality and justice when providing any legal assistance. Public legal principles determine the attitude of the legal profession to detected offenses, regulate the interaction of lawyers with clients, and the resolution of a number of other procedural issues. At the same time, the prerequisite for successful legal practice is democracy, legality, respect for human rights, respect for individual freedom, honor and dignity of the person. The prestige of a lawyer and the effectiveness of his activities directly depend on the position of a person in society and the state, on the attitude to the fundamental principles of democracy and legality.

It must be admitted that the proclamation in the Constitution of Ukraine of the presence of a rule of law in our country does not fully correspond to the real state of affairs. According to S. Agafonov, at the current stage of development of our society, the term «rule of law» is widely used. At the same time, some authors proceed from the desire to emphasize that, having declared itself sovereign and independent, Ukraine has simultaneously become a legal state, while others seek to prove that the formation of such a state is a task of a more distant future. According to Art. 1 of the Constitution of our state, Ukraine is a sovereign and independent, democratic, social, legal state. However, modern realities do not always convincingly testify to this (Ahafonov, S., 2006, p. 12).

At the same time, a legal state is a sovereign state that functions in the conditions of civil society and in which the protection of the fundamental rights and freedoms of man and citizen is actually ensured by legal means. It is based on certain principles, the most important of which are the rule of law, the separation of powers, the reality of the rights and freedoms of man and citizen, legality, and the presence of a high legal culture among citizens.

Thus, as already noted, the recognition, observance and protection of the rights and freedoms of man and citizen are the duty of the state. The constitutional principles of building a legal and democratic state have a clearly defined goal - to prevent arbitrariness and lawlessness in relation to a person and a citizen, in particular on the part of the state itself. All these principles stem from the main function of law - to be the bearer and guarantor of human freedom in optimal and reasonable forms. It is just law, based on strict compliance with laws, that is able to maximally express, consolidate, guarantee and thereby ensure, in accordance with the high requirements of civilization, the reality of individual freedom and rights of each person in public life.

5. Conclusions

The study made it possible to establish that the modern constitutional system of protecting the rights and freedoms of a person and a citizen in Ukraine is characterized by a significant gap between the declared principles and their practical implementation. The analysis showed the need for a conceptual rethinking of the structure of state responsibilities in the field of human rights, in particular, the isolation of protection as an independent duty of the state, distinct from recognition and observance. Such differentiation is due to the specifics of the subjects of implementation, the peculiarities of functioning and various mechanisms for ensuring each of these duties, which is confirmed by both theoretical analysis and law enforcement practice.

The study revealed the key role of the bar as an independent institution of civil society in the system of protection of constitutional human rights. It is proven that the activities of a lawyer do not have a dual nature, but are unique in their essence: by protecting the rights of an individual, a lawyer simultaneously contributes to strengthening the rule of law and law and order in society. It has been established that the effectiveness of legal activity directly correlates with the general level of democratic development of the state, adherence to the principles of the rule of law and respect for human dignity, which is confirmed by both domestic experience and international standards.

The results of the study indicate that building an effective system for protecting human rights requires not only constitutional consolidation of the relevant principles, but also the creation of real institutional mechanisms for their implementation. It has been established that the formation of a legal state in Ukraine remains an incomplete process, which requires further improvement of human rights protection mechanisms, raising the level of legal culture of citizens and strengthening the independence of civil society institutions. Prospects for further research are related to the development of specific mechanisms for improving interaction between state bodies and civil society institutions in the field of human rights protection.

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КОНСТИТУЦІЙНА СИСТЕМА ЗАХИСТУ ПРАВ І СВОБОД ЛЮДИНИ ТА ГРОМАДЯНИНА: ТЕОРЕТИКО-ПРАВОВІ ЗАСАДИ ТА РОЛЬ АДВОКАТУРИ

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Анотація

Стаття присвячена дослідженню конституційної системи захисту прав і свобод людини та громадянина в Україні з особливим акцентом на ролі адвокатури в цій системі. Автор аналізує сучасний стан правозахисних механізмів та виявляє значний розрив між конституційними деклараціями про правову державу та їх практичною реалізацією.

Дослідження обґрунтовує необхідність концептуального переосмислення структури державних обов'язків у сфері прав людини. Запропоновано відійти від традиційного розуміння триєдиного обов'язку «визнання-дотримання-захист» і розглядати захист як самостійний державний обов'язок. Така диференціація обумовлена специфікою суб'єктів реалізації, особливостями функціонування та різними механізмами забезпечення кожного з цих обов'язків.

Особливу увагу приділено ролі адвокатури як незалежного інституту громадянського суспільства. Доведено, що діяльність адвоката не має подвійного характеру, а є єдиною за своєю суттю: захищаючи права

окремої особи, адвокат одночасно сприяє зміцненню законності в суспільстві. Встановлено прямий зв'язок між ефективністю адвокатської діяльності та загальним рівнем демократичного розвитку держави.

Автор критично оцінює сучасний стан правової державності в Україні, констатуючи, що проголошення правової держави в Конституції не відповідає реальному стану речей. Виявлено основні проблеми, що перешкоджають ефективному функціонуванню правозахисних механізмів: недовіру громадян до державних інститутів, порушення прав з боку владних структур, слабкість інститутів громадянського суспільства.

Дослідження базується на комплексному аналізі вітчизняної та зарубіжної наукової літератури, міжнародних документів у сфері прав людини, конституційних положень та правозастосовної практики. Результати дослідження можуть бути використані для вдосконалення національного законодавства у сфері захисту прав людини та розвитку інститутів громадянського суспільства.

Ключові слова: конституційна система захисту, права людини, адвокатура, державні обов'язки, правова держава.

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MAIN DIRECTIONS OF DIGITAL TRANSFORMATION OF THE LEGAL MECHANISM FOR THE IMPLEMENTATION OF CONSTITUTIONAL LAND RIGHTS

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Summary

The purpose of this article is to examine the current state and prospects for the development of the legal mechanism for the implementation of constitutional rights to land plots using digital technologies.

When examining the legal mechanisms for exercising land rights, in particular the digitization of administrative procedures in the field of land relations, the article concludes that the digital transformation of land relations contributes to the depersonalization of the processes of exercising land rights and improves the efficiency of land assessment.

The issue of legal support for the digitization of natural resources and environmental protection is becoming a subject of particular scientific interest and research. However, the current situation in Ukraine requires additional in-depth scientific research into the prospects for legal regulation of the use of digital technologies in the implementation of constitutional land rights.

Scientific approaches to distinguishing between the concepts of "digital transformation" and "digitalization" are revealed. It is argued that the starting points for digital transformation are constitutional norms that guarantee the right to land ownership and its inviolability, the right to use land, the right to access information about the state of land as an element of the environment and to public information, the right to protect information, and the right to judicial protection.

The study conducted on the consequences of land contamination in Ukraine as a result of armed aggression by the Russian Federation highlights the need for a legally defined mechanism for exercising property rights to land plots that have been contaminated by mines.

In summary, the main areas of digital transformation of land relations should include: improving and further filling the State Land Cadastre with reliable information; developing the national geospatial data infrastructure and updating the cartographic base; further simplification and automation of state registration of land plots and property rights to them, creation of conditions for the effective functioning of the land market; completion of the inventory of state-owned land and implementation of new software for interaction between the State Land Cadastre systems and other registries; digitization of services, automation of processes, and ensuring transparency of land relations.

Keywords: digitalization, land relations, land ownership rights, state land cadastre, land monitoring, land management.

1. Introduction

Digital transformation is identified as a key factor in Ukraine's pursuit of a green, digital, and inclusive economy in the Plan for Ukraine Facility 2024-2027, approved by the EU Council on May 14, 2024. Sustainable development, economic growth, and equal access to digital opportunities are expected to accelerate through the integration of digital solutions in various sectors, in line with EU standards.

The systematic introduction of digital technologies into various spheres of public life in Ukraine has led to the designation of digital transformation as a priority of Ukraine's national policy, including in the field of land use and protection. The necessary measures include the development of updated scientific and methodological approaches to land use and protection, land monitoring, and improvement of the regulatory framework, as outlined in the Concept of the National Target Program for Land Use and Protection, approved by the Cabinet of Ministers of Ukraine Order № 70-r of January 19, 2022. These measures must be planned taking into account the current dynamics of socio-economic and environmental conditions in the country, in particular the accelerated development of digital technologies. The digitalization of land relations in Ukraine directly affects the content of the mechanism for the implementation of land rights.

The significant potential of digitization of land relations is emphasized in scientific literature. Through the development and implementation of modern information systems such as geographic information systems, integrated databases, and remote sensing systems, it is now possible to track land use, identify violations of land legislation, plan land use, and facilitate access to information. They contribute to the efficient administration of land resources at the national level by improving data for decision-making, significantly increasing transparency and control over land use. Digital land registries, which are maintained using blockchain technologies, ensure reliable and immutable storage of information on land relations, reducing the possibility of abuse and corruption. (Naumchuk, 2024, p. 121)

An analysis of constitutional provisions allows us to conclude that although the Constitution of Ukraine does not explicitly mention the digitization of land relations, as well as any other relations, its principles and foundations create a legal basis for the introduction of electronic tools that ensure transparency, efficiency, and protection of land rights.

The purpose of this article is to examine the current state and prospects for the development of a legal mechanism for the implementation of constitutional rights to land plots using digital technologies.

The issue of legal support for the digitization of the use and protection of natural resources is receiving increasing attention in scientific literature. It has been developed in the works of O. Vinnik, M. Dolynska, O. Kalugin, M. Kinakh, P. Kulinich, N. Malysheva, K. Markevich, S. Romanko, M. Rudenko, A. Strizhkova, and others. However, the current situation in Ukraine, with the war and the resulting restrictions on land and other natural resources, as well as changes in the legal system, calls for more in-depth research into the prospects for legal regulation of the use of digital technologies in the implementation of constitutional land rights.

2. General principles of legal regulation of digital transformation of land relations

The state recognizes the important role of digital transformation for sustainable development, economic growth, and the protection of subjective rights. This necessitates an active search for ways to develop its regulatory framework. The main goal of digitalization is to achieve the digital transformation of existing industries and create new ones, as well as to transform areas of life into new, more efficient, and modern ones, including the land sector. (Concept for the Development of the Digital Economy and Society of Ukraine for 2018-2020, 2018)

To study the mechanism for implementing constitutional land rights, it is appropriate to refer to the distinction between the concepts of «digital transformation» and «digitization». These concepts are often defined through each other. As O. Vinnik notes, «digitization» should be understood as the use of digital technologies and digitized data in activities, which is a process that goes beyond the implementation of technologies and involves more profound changes in the entire business model and the evolution of work, while «digital transformation» involves a much broader use of digital technologies, the implementation of appropriate organizational measures and related cultural changes, and therefore concerns more people than technologies. (Vinnyk, 2021, p. 259).

O. Miroshnychenko's conclusion regarding the definition of the goal of digital infrastructure development as ensuring that all citizens of Ukraine have the opportunity to use digital opportunities without restrictions and difficulties of a technical, organizational, and financial nature, regardless of their location and without being in the «digital divide» segment, is reasonable. (Miroshnychenko, 2023, p.214)

Noting the absence in Ukraine of a separate regulatory act that would contain provisions comprehensively regulating relations concerning the digital transformation of land rights, it should be noted that, to a certain extent, this gap is compensated for, albeit not always effectively, by a significant body of regulatory acts, which can be divided into several groups.

The first group includes acts aimed at regulating modern information relations and informatization of key areas of public life (the Laws of Ukraine «On

Information», «On Access to Public Information», «On the National Informatization Program», «On Electronic Documents and Electronic Document Management», «On Telecommunications», etc.). The second group includes acts relating to various aspects of the functioning of the information society (the Laws of Ukraine «On the Licensing System in the Sphere of Economic Activity», «On Public Electronic Registers», «On State Registration of Real Rights to Immovable Property and Their Encumbrances», «On Electronic Identification and Electronic Trust Services», etc.). The third group includes regulatory and legal acts of land legislation that are not directly devoted to the digital transformation of land rights, but some of their provisions regulate certain aspects of digital transformation. These include the Land Code of Ukraine, the Laws of Ukraine «On Environmental Protection», «On the State Land Cadastre», «On the National Geospatial Data Infrastructure», «On Environmental Impact Assessment», resolutions of the Cabinet of Ministers of Ukraine «Procedure for Monitoring Land and Soil», «On Public Monitoring of Land Relations», «Procedure for Maintaining, Administering, and Using Information from the Register of Territories Contaminated/ Potentially Contaminated with Explosive Objects», etc.

3. Constitutional foundations of digital transformation of land rights

A. Yezorov's opinion on the phenomenon of the Constitution is reasonable, which mainly consists in the fact that it constitutes a system of basic values designed to limit any manifestations of arbitrariness of public authorities in order to guarantee human rights (Yezerov, 2021). Despite the absence of any mention in the Constitution of the digitization of land relations, as well as any other relations, it can be convincingly argued that the starting conditions for digital transformation are constitutional norms that guarantee the right to land ownership and its inviolability, the right to use land, the right to access information about the state of land as an element of the environment and to public information, the right to protect information, and the right to judicial protection. Its principles and foundations create the legal basis for the introduction of electronic tools that ensure transparency, efficiency, and protection of land rights.

Provisions guaranteeing land ownership rights, according to which such rights are recognized as inviolable, are enshrined in Articles 13, 14, and 41 of the Constitution of Ukraine. Digital transformation is aimed at strengthening these guarantees. Electronic registries ensure the reliability and accuracy of information, making manipulation and illegal alienation impossible. This increases trust in the land system and the effectiveness of protecting the rights of owners.

Ownership of land is acquired and exercised exclusively in accordance with the law, as stated in Article 14 of the Constitution of Ukraine. One of the legally established methods is the acquisition of rights to land plots through auction. Land auctions have become an effective mechanism for the digital transformation of land rights. They are conducted in the form of real-time electronic auctions on the Internet. This makes the process of acquiring land rights more accessible, efficient, and transparent. All participants have equal access to them.

Fundamental to ensuring data openness, which is one of the main goals of digital transformation, is Article 50 of the Constitution of Ukraine, which guarantees everyone the right to free access to information about the state of the environment. Digital transformation enables citizens to obtain complete, reliable, and up-to-date information about land plots, their owners, intended use, and restrictions through the State Land Cadastre and other open electronic registries. In order to provide administrative and other public services in the field of ecology, a nationwide automated environmental information and analytical system for decision-making and access to environmental information, as well as its network, EcoSystem, have been created and are functioning successfully and are constantly being improved.

At the same time, the Constitution of Ukraine has established safeguards against the use and dissemination of confidential information about individuals without their consent, except in cases specified by law and only in the interests of national security, economic well-being, and human rights. The constitutional provision (Art. 32) on the protection of personal data obliges the state to create digital systems with a high level of cybersecurity and restricted access to confidential information about land owners.

Mechanisms that should guarantee environmental safety and create real conditions for the implementation of the state's commitments in this area are also regulated by the Constitution of Ukraine (Art. 16). These provisions include the right to freedom of association in public organizations to exercise and protect one's rights and freedoms and to satisfy, among other things, environmental interests (Art. 36) and to participate in the management of public affairs (Art. 38). An important guarantee of these rights and a form of their implementation is the development of digital platforms for public engagement. They provide access to up-to-date information and participation in discussions on land use plans, which enhances the transparency and openness of land relations, in particular through citizen participation in environmental impact assessments and strategic environmental assessments through the Unified Register of Strategic Environmental Assessments and the Unified Register of Environmental Impact Assessments.

The right to an environment that is safe for life and health and to compensation for damage caused by violation of this right is enshrined in Article 50

of the Constitution of Ukraine. During the full-scale russian invasion, a service was introduced to record damage to the environment caused by emergencies, events, and armed aggression by the russian federation (hereinafter referred to as the RF) called «Eco-Threat», as a functional module of «Eco-System». Its purpose is to record facts of environmental damage to the natural environment for rapid response, forecasting, management decision-making, reporting, and planning regarding recorded facts of damage to the natural environment. It is designed to enable citizens to exercise their rights to free access to up-to-date information on recorded facts of damage to the natural environment as a result of emergencies, events, and armed aggression by the Russian Federation. EcoThreat also. It provides for the submission of electronic appeals regarding identified cases of damage to the environment as a result of emergencies, events, and armed aggression by the russian federation.

An analysis of these provisions gives grounds to assert that the provisions of the Constitution are the direct legal basis for the creation and functioning of digital systems in the field of land rights.

4. Problems of exercising land ownership rights in areas contaminated by mines

As a result of Russia's armed aggression, a significant part of Ukraine's land fund is contaminated with explosive objects. In the National Mine Action Strategy for the period up to 2033 (National Mine Action Strategy for the period until 2033, 2024), states that, as a result of Russia's armed aggression, Ukraine has become one of the most contaminated countries in the world in terms of explosive ordnance. This creates legal and environmental risks for their further use and has led to significant restrictions on the exercise of property rights to land plots. The issue of land ownership rights is of critical importance in the context of mine contamination, where restrictions on access to land plots can last for decades, significantly affecting the socio-economic stability of the region. Any decision to survey or clear areas of explosive objects is directly related to the issue of land ownership, as interference in the processes of access, use, or disposal of land plots requires legal justification and a balance between property rights guarantees and the need to eliminate threats to public safety. (Ilkiv, Aftanasiv, 2025, p.23)

Within the framework of mine action, the principle of the inadmissibility of harm to individuals and society, enshrined in Part 3 of Art. 13 of the Constitution of Ukraine, acquires legal significance. It determines the need for active intervention by the relevant authorities in the mechanism for reducing the risks associated with mine contamination of territories.

The legal basis for the reclamation of land plots affected by man-made pollution, including explosive damage to soils, is defined by the Land Code of Ukraine. T.G. Popovich correctly notes that, given the imperative nature of land legislation, the activities of entities responsible for demining cannot remain within the bounds of absolute neutrality, since their operational decisions directly affect the level of public safety and the environmental condition of mine-contaminated areas. In this context, interference with land ownership rights within the framework of mine action measures acquires doctrinal justification and should be defined as a component of the mechanism for implementing constitutional security guarantees (Popovych, 2024, p. 111).

The Law of Ukraine «On Mine Action in Ukraine» (On mine action in Ukraine, 2018) which regulates the organizational and legal basis for humanitarian demining, establishes the competence of state authorities in this area and provides state guarantees for the protection of the rights of persons whose land plots have been affected by hostilities. However, this regulation is incomplete. Given the need to ensure legal certainty and restore land relations in the post-war period, it is crucial to develop a clear mechanism for the implementation of property rights to land plots that have been mined.

Experts rightly emphasize the incompleteness of existing regulatory and legal acts and the importance of developing new legal mechanisms that will ensure the procedure for transferring contaminated land to state ownership for its long-term restoration with appropriate compensation to landowners for the period during which the contaminated land remains in state ownership; mechanisms for regulating land relations regarding compensation to owners or tenants of land plots due to restrictions on their use; the procedure for providing investments and loans to landowners and measures for land restoration (reclamation, conservation); mechanisms for guaranteeing the rights of landowners if their land is expropriated or temporarily mothballed; mechanisms for ensuring the financing of a complete independent ecological and geochemical assessment of soils, to be initiated by the Ukrainian government. (Balandina, 2023)

Thus, the absence of a legally defined mechanism for exercising property rights to land plots that have been mined complicates law enforcement practice and creates obstacles to the effective protection of land rights.

5. Digital transformation of guarantees for the implementation of constitutional land rights

National legislation enshrines a wide range of land rights guarantees. However, as experts rightly point out, their implementation has become difficult since the start of military aggression, accompanied by military environmental crimes. This has a negative impact on environmental and economic security, exacerbating existing threats and creating new challenges. (Yarmol, Baik, Bernaziuk, Stetsyuk, Ilkiv, 2024, p. 106)

The implementation of constitutional land rights is intended to promote the legislative consolidation of the principles of digitization of certain functions that are part of the legal mechanism. Since the priority direction of land reform is to create a system of land rights while ensuring a balance between administrative and market regulation of land relations, this primarily necessitated the digital identification of the legal characteristics of land and rights to it, as well as the creation of conditions for universal access to information about the state of land. A major achievement for Ukraine was the creation and filling of the State Land Cadastre.

A sophisticated mechanism for monitoring land and soil is designed to facilitate the timely detection of changes in land condition, pollution, and soil properties, as well as the assessment of measures taken to protect land, preserve and restore soil fertility, prevent the impact of negative processes, and eliminate the consequences of such impact. The concept of the State Targeted Environmental Monitoring Program was approved by Order of the Cabinet of Ministers of Ukraine No. 610-r of July 7, 2023. It defines the main objective of the program as the development of a comprehensive environmental monitoring system, improving its effectiveness in order to maintain ecological balance in Ukraine and ensuring the constitutional right of individuals to a safe environment.

As P.F. Kulinich rightly points out, the digitization of land relations significantly changes the scope of land law, determining its further development through the creation of new social needs for the use of land resources, which generate new land interests among its members. (Kulynych, 2022, p.411) Given the introduction of various forms of land ownership and, accordingly, the rights derived from it, which led to an expansion of the circle of land rights holders, an important area of digitalization was the introduction of state registration of property rights in the State Register of Property Rights to Real Estate and Encumbrances Thereon.

he digitization of administrative procedures in the field of land relations should be considered one of the effective tools of the legal mechanism for the implementation of land rights. This is ensured by the provisions of the Law of Ukraine «On Administrative Procedure» (On administrative procedure, 2023). In particular, Part 2, Section 3 of Article 62 of this law imposes on the administrative body the obligation to take measures to consider cases in automatic mode, i.e., using software tools, without human intervention, and responsibility for administrative acts adopted in this mode. This supports the thesis that the digitization of land relations has a positive impact on reducing the dependence of the realization of land rights on personal (subjective) factors, as well as on improving the efficiency of land assessment..

The study concludes that the digital transformation of the legal mechanism for the implementation of constitutional land rights is a complex process aimed at improving the efficiency of land management, transparency, and accessibility of information for all interested parties. It introduces digital technologies, uses various digital tools, artificial intelligence to monitor and collect data on land plots, perform analysis and forecasting to process large amounts of information, create electronic systems for effective management and monitoring of land and soil, and use electronic tools to interact and exchange information about environmental objects.

The main areas of digital transformation of land relations include: improving and further filling the State Land Cadastre with reliable information; developing the national geospatial data infrastructure and updating the cartographic base; further simplifying and automating the state registration of land plots and property rights to them, creating conditions for the effective functioning of the land market; completion of the inventory of state-owned land and introduction of new software for interaction between the State Land Cadastre systems and other registries; digitization of services, automation of processes, and ensuring transparency of land relations.

6. Conclusions

The goal of the digital transformation of the legal mechanism for the implementation of constitutional land rights should be to create equal conditions of access to the land market for all land users, to increase the productivity of land use through its rational and sustainable use, to establish transparent, clear, and, most importantly, effective land management by increasing transparency in land use and access to information, to improve the existing information support system and control over the state of land resources, and to widely introduce new information technologies. Legal regulation of this process is extremely important, as it defines the limits and possibilities of using digital technologies in land relations.

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ОСНОВНІ НАПРЯМИ ЦИФРОВОЇ ТРАНСФОРМАЦІЇ ПРАВОВОГО МЕХАНІЗМУ РЕАЛІЗАЦІЇ КОНСТИТУЦІЙНИХ ЗЕМЕЛЬНИХ ПРАВ

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Анотація

Метою статті є дослідження сучасного стану та перспектив розвитку правового механізму реалізації конституційних прав на земельні ділянки із застосуванням цифрових технологій. Закріплення на конституційному рівні вихідних засад правового регулювання земельних відносин виступає гарантією реалізації конституційних земельних прав та спонукає до активного пошуку дієвих засобів їх забезпечення.

Досліджуючи інструменти правового механізму реалізації земельних прав, зокрема цифровізацію адміністративної процедури у сфері земельних відносин, у статті висновується, що цифрова трансформація земельних відносин сприяє деперсоналізації процесів реалізації земельних прав та покращує ефективність оцінки стану земель.

Проблематика правового забезпечення цифровізації природоресурсної та природоохоронної сфери стає об’єктом особливого наукового інтересу та наукових розвідок. Проте сучасні українські реалії, пов’язані з воєнними діями, та як наслідок обмеженням земельних та інших природних ресурсів, змінами у правовій системі, вимагають додаткового ґрунтовного наукового дослідження перспективи правового регулювання застосування цифрових технологій у реалізацій конституційних земельних прав.

Розкриваються наукові підходи до розмежування змісту понять «цифрова трансформація» та «цифровізація». Стверджується, що вихідними умовами для цифрової трансформації є конституційні норми, які гарантують право власності на землю та його непорушність, право користування землями, право на доступ до інформації про стан земель як елементу довкілля та на публічну інформацію, право на захист інформації, право на судовий захист. Аналіз цих положень дає підстави стверджувати, що норми Конституції є безпосередньою правовою основою, що актуалізує створення та функціонування цифрових систем у сфері

земельних прав. Принципи та засади Конституції України створюють правову основу для впровадження електронних інструментів, що забезпечують прозорість, ефективність та захист земельних прав.

Проведене дослідження наслідків мінного забруднення земельного фонду України внаслідок збройної агресії російської федерації, актуалізує необхідність законодавчо визначеного механізму реалізації прав власності на земельні ділянки, що зазнали мінування, оскільки його відсутність ускладнює правозастосовну практику та створює перешкоди для ефективного захисту земельних прав.

Підсумовано, що до основних напрямів цифрової трансформації земельних відносин слід віднести: вдосконалення та подальше наповнення Державного земельного кадастру достовірною інформацією; розвиток національної інфраструктури геопросторових даних та оновлення картографічної основи; подальше спрощення та автоматизація державної реєстрації земельних ділянок та речових прав на них, створення умов для ефективного функціонування ринку земель; завершення інвентаризації земель державної власності та впровадження нового програмного забезпечення для взаємодії між системами Державного земельного кадастру та з іншими реєстрами; цифровізація послуг, автоматизація процесів та забезпечення прозорості земельних відносин.

Ключові слова: цифровізація, земельні відносини, право власності на земельну ділянку, державний земельний кадастр, моніторинг земель, управління землями.

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INTERNATIONAL HUMAN RIGHTS STANDARDS AS A TOOL FOR HARMONIZING GLOBAL AND LOCAL LEGAL ORDER

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Summary

The study is devoted to a comprehensive analysis of the conceptual foundations, main features and practical aspects of the functioning of international human rights standards in the modern globalized world. The relevance of the work is due to the need to form a holistic theoretical approach to understanding the nature of international standards in the context of the dynamic development of international law and the adoption of over 300 international documents in the field of human rights.

The work analyzes the evolution of conceptual approaches to defining international human rights standards, starting from the 2012 Declaration on the Rule of Law and UN General Assembly Resolution No. 41/120. Particular attention is paid to the study of the main characteristics of the standards: establishing the content and scope of human rights, their minimal nature as the "least acceptable compromise", the obligation of compliance and model for national legal systems.

A significant part of the study is devoted to the analysis of the paradox of the universality of international standards, which consists in combining their global nature with the possibility of various culturally specific interpretations. The practice of the European Court of Human Rights on the application of the doctrine of "margin of appreciation" and the approaches of different civilizations to the interpretation of fundamental rights and freedoms is considered. The need for a dialogue of civilizations to form a "consensus" language in the field of human rights is substantiated.

Special attention is paid to practical aspects of the implementation of international standards, in particular the problem of establishing a fair balance between individual and collective interests. The process of standardization of the social significance of formally distinct legal phenomena and the dialectics of essence and form in the application of international standards are analyzed. The specifics of the maximum abstractness of the terminology of international standards and the features of their official interpretation in specific historical conditions are considered.

The study demonstrates the complex and multidimensional nature of international human rights standards, their dynamic nature and ability to adapt to changing social needs, while maintaining the fundamental focus on protecting human dignity and ensuring justice on a global scale.

Key words: international human rights standards; human and civil rights and freedoms; human rights protection mechanism; constitutional law; international law.

1. Introduction

Statement of the problem in general terms and its connection with important scientific or practical tasks. In modern conditions of globalization and integration processes, the issue of international human rights standards is of particular relevance both for the theory of international law and for the practice of state-building. The formation of a single conceptual basis for understanding the nature, content and mechanisms for implementing international human rights standards is a key task for ensuring effective protection of fundamental rights and freedoms at the global level. This issue is of particular importance in the context of the need to harmonize national legislation with international requirements and standards.

The relevance of scientific solutions. The relevance of the study is due to several factors. First, the dynamic development of international human rights law and the adoption of about 300 international documents in this area, which requires systematization and conceptual understanding. Second, the presence of various, often contradictory approaches to interpreting the concept

of "international human rights standards" in scientific literature. Thirdly, the practical necessity of developing effective mechanisms for implementing international standards into national legal systems, taking into account the cultural and historical characteristics of different states.

Analysis of recent research and publications. The issue of international human rights standards has been studied in the works of both domestic and foreign scholars. A significant contribution to the development of theoretical foundations has been made by studies devoted to the analysis of the nature of international standards, their classification and implementation mechanisms. At the same time, despite the presence of numerous publications, the issues of the dialectical combination of the universal nature of standards with their culturally specific interpretation, as well as the problem of standardizing the social significance of legal phenomena, remain insufficiently studied.

The purpose of the study is to comprehensively analyze the conceptual foundations, main features and practical aspects of the implementation of international human rights standards in order to form a holistic theoretical approach to understanding their nature and functional purpose.

Research tasks:

to analyze the conceptual principles of the formation of international human rights standards and their regulatory and legal basis;

to determine the main features and properties of international human rights standards, including their universal nature and features of cultural adaptation;

to investigate practical aspects of the implementation of international standards, in particular the problems of balancing individual and collective interests;

to substantiate theoretical approaches to understanding the dialectics of the universal and the particular in the system of international human rights standards.

Research methodology. The work uses a complex of general scientific and special research methods. The dialectical method is used to analyze the contradictions between the universal nature of standards and their culturally specific interpretation. The systemic approach allows us to consider international standards as a holistic system of interconnected norms and principles. The comparative legal method is used to analyze different approaches to the interpretation of standards in different legal systems. The formal-logical method is used to systematize and classify the main features of international standards.

Logic of presentation of the researched material. The structure of the study reflects a logical sequence from general theoretical principles to specific practical aspects. First, the conceptual foundations and nature of international standards are revealed, then their main features and properties are analyzed, including the issue of universality, and the study concludes with a consideration of practical aspects of the implementation of standards in various socio-cultural contexts. This approach provides a comprehensive understanding of the phenomenon under study, from theoretical justification to practical application.

2. Conceptual principles and nature of international human rights standards

Fundamental (key) principles of law that define, establish the norms of ensuring, as well as guaranteeing, the minimum necessary (under specific historical conditions) principles of human existence in a certain society. Such principles must be provided to every participant in the relevant society, in particular to every person, regardless of their place of residence. Therefore, the uniformity, equality of such basic principles - at least in their minimum life-supporting dimension - is one of the most convincing manifestations of the principles of humanity, humanity, justice in the activities of any modern society (M. Freeman, 2017, p. 45).

In the modern world, the protection and provision of fundamental rights and freedoms of man and citizen have ceased to be the exclusive competence of an individual country, but have become a matter of the entire international community, since for a long time it has been a priority task of many states of the world community. Due to the increased interest and attention of the international community to these issues, at different times authoritative international organizations have adopted about 300 declarations, conventions, charters. International legal acts in the field of human rights are usually considered as international standards, since they are created on the basis of customary norms that have formed as a result of the recognition by states of the legal force of norms of conduct that were proclaimed by the UN General Assembly in the form of declarations or recommendations (J. Kluchka, 2019, p. 415).

On September 19, 2012, at its 67th session, the UN General Assembly adopted the Declaration on the Rule of Law at the National and International Levels. The document emphasizes the important role of the General Assembly as the key consultative and representative body of the United Nations in promoting the rule of law in all areas through the formation of political decisions and the creation of relevant standards (paragraph 27). Therefore, it is quite natural that today in almost all works devoted to human rights and freedoms - scientific research, educational literature, journalistic and educational materials - the authors address the issue of human rights standards. However, this terminological concept is used by researchers mainly in different, often contradictory meanings.

It should be noted that for understanding the nature and features of international human rights standards, the UN General Assembly Resolution No. 41/120

"Establishment of International Standards in the Field of Human Rights" adopted on December 4, 1966, is of great methodological importance (Establishing International Standards in the Field of Human Rights UN General Assembly Resolution No. 41/120 of 4 December 1986). This document identified the main guidelines that should be taken into account when creating international instruments in this area. In particular, such instruments should: a) be consistent with the existing system of international human rights law; b) be fundamental and based on the inherent dignity and worth of the human person; c) be sufficiently specific or constitute a basis for rights and obligations that can be clearly defined and implemented; d) contain, where necessary, a practical and effective implementation mechanism, including reporting systems; e) have significant international support.

The main characteristic of the standards under study is usually considered to be the establishment of a) specific content or b) a defined scope, or c) both the content and scope of human rights. Such standards are human rights criteria enshrined in international agreements and other international instruments, which States undertake to observe or to which they are encouraged to strive (H. Steiner, P. Alston & R. Goodman, 2020, p. 5).

Some researchers rightly emphasize that international human rights standards actually define the "minimum standard", constitute the "least acceptable compromise"; they not only fix the catalog of generally accepted rights, but also establish their certain basic scope, the lowest level at which these rights should be implemented. In addition, specific requirements for mechanisms for ensuring human rights (for example, positive obligations of the state to guarantee, protect and defend these rights) may also be subject to standardization.

Despite the existence of various alternative formulations and views, today it is still possible to determine what exactly is covered by the concept of international human rights standards. Due to the fact that legal, social, economic conditions in the world are diverse, not all standards can be applied everywhere and simultaneously. Undoubtedly, states must overcome discrepancies between domestic legislation and achieve international standards, an international level, and in view of this, international human rights standards are norms that provide for general democratic requirements and obligations of states, which must, taking into account the peculiarities of their social structure and national development, be implemented in their systems. The provisions of the Constitutions of states on the fundamental rights and freedoms of man and citizen must be consistent with international standards, since the protection of these rights ensures the existence of a sovereign, democratic and independent state (J. Mazák, 2020, p. 45).

The binding nature (or at least the expediency of compliance by states) of international standards in the field of human rights is also one of their essential characteristics. Thus, depending on their deontic status, they can be both legally binding and recommendatory prescriptions that should be taken into account in the formation and creation of all other legal norms on human rights. That is why some scholars characterize this property of standards as model nature.

3. Main features and properties of international standards

It is also necessary to note the peculiarities of sanctions for non-compliance with the specified standards. Such sanctions are mainly either of a political-legal (regarding mandatory norms) or exclusively political (regarding recommendatory norms) nature. One way or another, the obligation or recommendation regarding their implementation and a certain responsibility for evading this falls precisely on the states.

Some scholars note that (along with the legal norms themselves) the standards under study also include principles. They are even proposed to be considered as a separate source of law in the field of human rights.

In particular, the position was expressed that international human rights standards are formed from a set of principles and norms that define: human rights and freedoms in various spheres of life; the obligation of the state to ensure and observe human rights without any discrimination both in peacetime and during armed conflicts; the basic principles of natural law; responsibility for criminal violations of human rights; ways of developing and expanding the sphere of human rights; directions for strengthening the control mechanism over the implementation by states of their human rights commitments (M. Nowak & K. Januszewski, 2017, p. 54).

Standards in international law are generally recognized norms that are both the smallest possible agreement of positions and guidelines for implementation. This dual function of international standards determines their variability (in the field of human rights - towards the continuous enrichment of the content of declared rights). In addition, the process of creating international standards as a whole is in a rather close connection with natural human rights and the positivist approach to understanding the essence of the relevant norms, which guarantees the presence of legal content and form of prescriptions that can function as standards, samples, models and benchmarks. It is worth emphasizing that one of the characteristics of international human rights standards is also their universality – global or regional.

This was again stated in the above-mentioned Declaration of the UN General Assembly "The Rule of Law at the National and International Levels". It states, in particular, the following: "We reaffirm the solemn commitment of our States to fulfill their responsibilities

to promote universal respect for, observance of and protection of all human rights and fundamental freedoms for all. The universal nature of these rights and freedoms is beyond doubt. We emphasize the obligation of all States, in accordance with the Charter, to respect human rights and fundamental freedoms for all, without distinction of any kind" (paragraph 6) (D. Shelton, 2020, p. 112).

However, this characteristic, in our opinion, requires additional clarifications and refinements. What is meant is that the universality of such standards should be dialectically combined with, at first glance, a contradictory feature – the possibility of non-universal (ambiguous, multidimensional) interpretation of their more or less specific content and/or scope in different cultural environments. For example, the UN Human Rights Committee, established in accordance with the International Covenant on Civil and Political Rights and the Optional Protocol thereto, directly noted that the right to family life may vary depending on socio-economic and cultural circumstances. And the European Court of Human Rights (hereinafter referred to as the ECHR) has developed the doctrine of the "margin of appreciation", which provides, in particular, for the interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the ECHR) taking into account the traditions of the relevant state, so that certain national, historical, and cultural characteristics of the state are taken into account in the process of its national implementation.

Indeed, researchers of this issue cite numerous examples of different interpretations of human rights standards depending on the traditions and values not only of different civilizations, but even of individual states. For example, the concept of freedom, which is basic to European human rights standards, is interpreted quite differently in the Islamic world, Chinese, Indian, and African civilizations. It is also difficult to reach an understanding when it comes to different religions. However, in any case, human rights standards are a problem that unites all of humanity; therefore, in this situation, it is important to strive for and achieve, through a dialogue of civilizations, a common, "consensus" language on these issues (N. Rodley & M. Pollard, 2021, p. 39).

4. Practical aspects of the implementation of international standards

The characteristics of international standards are: universality, i.e. international standards of law enforcement are of a general nature and these standards touch on key aspects of law enforcement; practical orientation, i.e. international standards are the result of practical experience, which is reflected in international norms or the result of proven achievements of modern legal science; optimality, i.e. international standards are the result of a compromise between countries that have different levels of legal regulation of law enforcement and establish minimum rules, models, samples and standards for their implementation for all; duality – for some countries that are distinguished by a high level of organization and activity of law enforcement agencies, the model of functioning of such agencies proposed by international standards constitutes minimum requirements, and for others - the goal that they seek to achieve as a result of the implementation of such standards; orientation towards implementation in the internal legal system of countries, which implies the readiness of the latter to integrate international standards of law enforcement into national legislation.

Along with the problem of different interpretations of the content of human rights standards in different cultural contexts, there is also the problem of establishing the optimal ratio of individual and collective interests, taking into account the needs and characteristics of each individual, which can often create difficulties in the implementation of the standards under study. After all, it is necessary to establish a "fair" balance of the various interests of different subjects of society. And it involves a certain standardization of ontically (actually, empirically, externally) different, but functionally similar phenomena. In particular, the ECHR succeeds in this in its practice through, so to speak, "universalization of individualization", since the very requirement to achieve such a balance is not a one-time, not individualized, but extremely general, all-encompassing, that is, normative (H. Steiner, P. Alston & R. Goodman, 2020, p. 8).

In other words, it is about the standardization of the social significance of outwardly (formally) different facts, relations, situations. In this way, the dialectic of the essence and form of the phenomenon is embodied: any essence is always formalized, and any form is always essential.

A specific characteristic of international human rights standards, which already concerns the linguistic-terminological and logical-conceptual form of their structure and presentation, is the maximum abstractness of the terms-concepts used in them (among which terms-concepts of a purely evaluative nature often dominate). The literature has rightly drawn attention to the fact that standards established at the global level should be as general, abstract as possible, not defining a specific scope of rights and freedoms. Universal standards should be based on universal human values, and not on the ideas of individual civilizations. However, the official interpretation of such standards for practical purposes will still often be carried out taking into account the specific historical conditions and circumstances of their application.

Conclusions

The analysis of international human rights standards indicates their complex and multidimensional nature.

These standards act both as a minimally acceptable consensus of the world community and as guidelines for the further development of national legal systems. Their key characteristic is to establish the basic content and scope of human rights, which must be ensured by all states regardless of their cultural, economic or political characteristics.

At the same time, a feature of international standards is their universality, which is paradoxically combined with the possibility of different interpretations in different cultural contexts. This creates a certain tension between the desire for unification of approaches to human rights and the need to take into account national specifics. Resolving this contradiction requires a constant dialogue of civilizations and the search for a common "consensus" language in the field of human rights.

The practical significance of international standards is manifested in their modeling - the ability to serve as models for the formation of national legislation and law enforcement practice. At the same time, the mechanisms for ensuring compliance with these standards are predominantly political and legal in nature, which emphasizes the special role of the international community in their promotion and protection.

The dynamism of international human rights standards is due to their dual function as minimum requirements and maximum aspirations, which ensures the constant expansion of the content of the proclaimed rights. This property allows the standards to adapt to changing social needs and challenges, while maintaining their fundamental focus on protecting human dignity and ensuring justice on a global scale.

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МІЖНАРОДНІ СТАНДАРТИ ПРАВ ЛЮДИНИ ЯК ІНСТРУМЕНТ ГАРМОНІЗАЦІЇ ГЛОБАЛЬНОГО ТА ЛОКАЛЬНОГО ПРАВОПОРЯДКУ

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Анотація

Дослідження присвячене комплексному аналізу концептуальних засад, основних ознак та практичних аспектів функціонування міжнародних стандартів прав людини у сучасному глобалізованому світі. Актуальність роботи зумовлена необхідністю формування цілісного теоретичного підходу до розуміння природи міжнародних стандартів в умовах динамічного розвитку міжнародного права та прийняття понад 300 міжнародних документів у сфері прав людини.

У роботі проаналізовано еволюцію концептуальних підходів до визначення міжнародних стандартів прав людини, починаючи від Декларації про верховенство права 2012 року та Резолюції Генеральної Асамблеї ООН № 41/120. Особливу увагу приділено дослідженню головних характеристик стандартів: встановленню змісту та обсягу прав людини, їх мінімальному характеру як «найменшого прийнятного компромісу», обов'язковості дотримання та модельності для національних правових систем.

Значну частину дослідження присвячено аналізу парадоксу універсальності міжнародних стандартів, який полягає у поєднанні їх глобального характеру з можливістю різного культурно-специфічного тлумачення. Розглянуто практику Європейського суду з прав людини щодо застосування доктрини «межі розсуду» та підходи різних цивілізацій до інтерпретації основоположних прав і свобод. Обґрунтовано необхідність діалогу цивілізацій для формування «консенсусної» мови у сфері прав людини.

Окрему увагу приділено практичним аспектам реалізації міжнародних стандартів, зокрема проблемі встановлення справедливого балансу між індивідуальними та колективними інтересами. Проаналізовано процес стандартизації соціальної значущості формально відмінних правових явищ та діалектику сутності й форми у застосуванні міжнародних стандартів. Розглянуто специфіку максимальної абстрактності термінології міжнародних стандартів та особливості їх офіційного тлумачення в конкретно-історичних умовах.

Дослідження демонструє складну та багатовимірну природу міжнародних стандартів прав людини, їх динамічний характер та здатність адаптуватися до змінних суспільних потреб, зберігаючи при цьому фундаментальну спрямованість на захист людської гідності та забезпечення справедливості у глобальному масштабі.

Ключові слова: міжнародні стандарти прав людини, права та свободу людини і громадянина, механізм захисту прав людини, конституційне право, міжнародне право.

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THE FOURTH GENERATION OF HUMAN RIGHTS: MEANINGFUL CONTENT IN THE DIGITAL SOCIETY

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Summary

The article is devoted to a study of the concept of the fourth generation of human rights in the context of modern challenges of the digital society. The relevance of the study is due to the need to rethink the traditional generational classification of human rights, developed by K. Vasak, in connection with the emergence of fundamentally new forms of legal relations, where the object is data and information in digital format. The purpose of the study is to conduct a theoretical and legal analysis of the concept of the fourth generation of human rights in the context of determining its content in the digital society. The study uses a systematic approach, comparative law, structural-functional and prognostic methods. The limitations of the traditional three-generational classification are analyzed, in particular its Eurocentric nature and disregard for the cultural diversity of legal traditions. The dual nature of the impact of digitalization on the human rights system is revealed: modification of traditional rights and emergence of fundamentally new challenges. The structure of the fourth generation of human rights, which includes digital and somatic rights, is studied. Specific characteristics of digital human rights that distinguish them from previous generations are identified: a specific object of legal relations - information and data in digital format; implementation through digital technologies. The article draws attention to the ethical dilemmas associated with the expansion of the catalog of human rights, in particular the potential conflict with traditional religious and moral norms. It is stated that the formation of the fourth generation of human rights reflects fundamental changes in the nature of social relations under the influence of digital technologies. This transformation requires not just a supplement to the existing system of rights, but its qualitative reconfiguration, taking into account new forms of social interaction and the likely challenges and threats caused by the nature of the digital space. The conclusion is made about the need for a balanced approach to the development of the fourth generation of rights, combining legal, ethical, technological and social aspects to ensure the protection of human dignity in conditions of rapid civilizational changes.

Key words: human rights; fourth generation of human rights; digital rights; somatic rights; digital society.

1. Introduction

The issue of human rights and their classification remains one of the most debatable topics in modern law, especially in the context of rapid technological development and digital transformation of society. The traditional generational concept of human rights, developed in the second half of the twentieth century, today requires critical rethinking and supplementation due to the emergence of fundamentally new challenges for the protection of human dignity.

The relevance of the study is due to several factors. First, the intensive digitalization of all spheres of public life gives rise to new forms of legal relations, where the object is data and information in digital format. Second, the development of biotechnology and medicine actualizes the issue of somatic human rights related to the disposal of one's own body. Third, the existing system of classification of human rights demonstrates its inability to adequately respond to the challenges of the digital era, which requires the development of new conceptual approaches.

Analysis of recent research and publications indicates the growing interest of scholars in the issues of the fourth generation of human rights. Fundamental studies by L. Hunt (2007) and M. Ishay (2004) reveal the historical evolution of the concept of human rights. Modern studies by T. Flew (2021), M. Mann and T. Matzner (2019) analyze the digital aspects of human rights. Domestic scholars S. Nesynova, Y. Knyazeva (2015), O. Suprun (2013) investigate the problems of classifying new rights. At the same time, there is a lack of comprehensive research into the structure and content of the fourth generation of human rights in the scientific literature.

The purpose of the study is to conduct a theoretical and legal analysis of the concept of the fourth generation of human rights in the context of determining its content in the digital society.

Research objectives: 1) to analyze the general characteristics of development of the concept of human rights; 2) to investigate the generational classification of human rights and its limitations; 3) to determine the structure and content of digital and somatic rights as components of the fourth generation.

The research methodology is based on a systemic approach, which allows us to consider human rights as a holistic phenomenon in its historical dynamics. The comparative legal method was used to analyze different approaches to the classification of human rights, the structural-functional method to determine the place of the fourth generation in the system of human rights, as well as the prognostic method to identify trends in the development of this legal category.

2. The general characteristics of development of the concept of human rights

The evolutionary development of the concept of human rights, their institutionalization in national legislation and international legal documents have demonstrated the existence of a historically conditioned sequence of the formation of rights and freedoms. Over the past two centuries, the spectrum of rights recognized as natural and inalienable has expanded significantly. Forming in historical retrospect, the institution of human rights includes various normative "layers" that reflect the transformation of ideas about the essence of the corresponding legal concept. The institution of human rights demonstrates one of the most striking examples of the implementation of legal concepts into the practice of normative regulation. All key aspects of social development have directly affected the evolution of human rights (L. Hunt, 2007, p. 43).

Human rights constitute a unique phenomenon of legal reality: initially they arise as a theoretical idea, later receive normative consolidation in legal acts and constitutions, and in the second half of the twentieth century they are transformed into fundamental principles of international law. Each historical era of social transformations has generated its own "generation" of human rights, designed to overcome social instability and ensure sustainable development. Such generational dynamics of human rights reflects the progressive nature of legal progress and the adaptation of legal institutions to changing social needs (M. Ishay, 2004, p. 41).

The integrity and internal logic of the system of human rights and freedoms does not contradict the possibility of their systematization into certain groups based on one or more criteria. Systematization is of extremely important theoretical significance, the main goal of scientific systematization of human rights is to highlight their social role, identify key characteristics and conduct an in-depth study of their essence. It is systematization that contributes to the structuring of scientific knowledge about human rights as a holistic phenomenon and about the specifics of individual rights accumulated by humanity at the current stage of development. At the same time, the complexity of the classification of human rights is due to the heterogeneity of their specific content and dispersion across different articles of constitutional texts. The methodological function of systematization is to create a conceptual framework for the analysis of legal institutions and identify the patterns of their evolution: such structuring allows not only to organize existing theoretical knowledge, but also to identify gaps in legal regulation and promising directions for the development of the institution of human rights (J. Nickel, 2019, p. 990).

To construct a structural model of the human rights system and identify categories and types of rights, it is necessary to establish criteria (characteristics, bases of differentiation) for their systematization. In this regard, the question arises: what criteria for classifying rights should be recognized as essential and what is their optimal number? Legal science has not yet offered an exhaustive answer to this question. The structural components of the system of human and citizen rights, including the categories of rights, have not received a proper monographic study either in the general theory of law or in constitutional law. This situation is explained by the extraordinary diversity of human rights and their subjects, as well as the multiplicity of possible criteria for dividing rights as a holistic phenomenon into separate components. The methodological complexity lies in the fact that each of the possible classification criteria highlights only a certain aspect of human rights, leaving out of consideration other important characteristics. This creates the need for a multi-criteria approach to systematization, which, however, complicates the creation of a single consistent classification scheme. The lack of established theoretical approaches to the structuring of human rights leaves this issue open for further scientific research.

3. Generational classification of human rights

The systematization of fundamental rights and freedoms corresponds to the concept of "generations" of rights and freedoms developed by legal theorists. Today, this concept is generally recognized and established both in the general theory of law and in the science of constitutional law. Each "generation" of human rights is based on a certain legal doctrine of rights and freedoms – natural law or positivist (S. Nesynova & Y. Knyazeva, 2015, p. 37).

The theory of dividing human rights into "generations" was developed by the French jurist K. Vasak. The basis of this concept is the generational approach, namely the division of rights into three generations (O. Suprun, 2013, p. 37). The theory of three generations of human rights appeared as a result of the scientific systematization of human rights in a historical perspective.

The first generation of civil and political rights dates back to the 17th–18th centuries, namely in the period after the English, American, and French revolutions. They are guaranteed by Articles 2-21 of the Universal Declaration of Human Rights, and they are united by the idea of the freedom of the individual, alone or together with others, from abuses of state power (M. Antonovich, 2005, p. 14). The first generation of human rights includes traditional liberal rights and freedoms, from which, in fact, human rights in their modern sense begin: the right to life, freedom from torture, treatment or punishment degrading human dignity, the right to liberty, the right to property, freedom of thought and conscience, speech, etc. (T. Okolit, 2002, p. 10). In this case, we are talking about the demands of freedom of speech, religion, etc., put forward in relation to the state. The second generation of rights, the idea of which appears at the beginning of the 19th century and is formed after the socialist revolutions, write S. Nesynova and Yu. Knyazeva, includes social, economic, cultural rights, or in short – socio-economic rights, related to human well-being, the level and quality of his life (S. Nesynova & Y. Knyazeva, 2015, p. 36). They were reflected in the Universal Declaration of Human Rights and were developed and set out in more detail in the International Covenant on Economic, Social and Cultural Rights of 1966: the right to work, including the right to choose the field of work, the right to rest, to paid leave, to education, medical and social security, social insurance, protection of motherhood and childhood, etc. The third generation of human rights is primarily collective rights. At the same time, T. Okolit notes, the formation of the concept of the third generation of human rights is chronologically attributed to the second half of the 20th century. These, according to the scientist, include: the right of the people to self-determination, to peace, to identity, to a dignified existence, to national and international security, to development, the right of the people to freely dispose of their natural resources, etc. (T. Okolit, 2002, p. 10). At the same time, there are many theories regarding the third generation of rights. The idea of such rights began to take shape due to the aggravation of global world problems after World War II. The peculiarity of these rights is that they are collective and can be implemented by a community (association). This point of view is held by most scientists, for example, only collective rights based on solidarity should be included in the third generation of rights: the right to development, to peace, independence, self-determination, territorial integrity, sovereignty, freedom from colonial oppression, the right to a decent life, to a healthy natural environment, to the common heritage of humanity, to communication (S. Nesynova & Y. Knyazeva, 2015, p. 37).

It should be noted that K. Vasak considered the change of three generations of human rights as a consistent embodiment of the ideals of "freedom, equality and fraternity" of the French Revolution. Intergenerational concept human rights, despite its debatability, remains one of the most common forms of categorization of human rights, however, this concept was formed under the influence of European history and is characterized by a Eurocentric approach. The theory of three generations of human rights overemphasizes the role of the European Enlightenment in the formation of modern human rights standards, ignoring the historical context of the emergence of legal requirements in different countries of the world. The evolution of human rights in different states took place according to different scenarios, therefore the application of the European trajectory of the historical development of human rights as a universal model for non-Western countries is problematic. This conceptual model, unfortunately, does not take into account the cultural, religious and socio-economic characteristics of non-Western civilizations, where the formation of ideas about human rights could occur according to different principles and in other chronological periods. Thus, despite its heuristic value, the generational classification requires critical rethinking, taking into account the global diversity of legal traditions (K. Vasak, 1977, p. 30).

4. The fourth generation of human rights: digital and somatic rights in modern society

The need to form the fourth generation of human rights is due to the fact that the basic knowledge of the industrial-commercial era, which embodied the three previous generations of human rights (civil and political rights, economic, social and cultural rights, as well as solidarity rights), has undergone radical transformations in the context of the digital society. The transition from the industrial-commercial to the digital stage of development requires the reconstruction of the human rights system in accordance with the laws of the functioning and life of the digital society.

The evolution of human rights must occur according to the logic of the digital society, since the lack of adequate human rights protection instruments makes it impossible to effectively protect individual rights. The specific characteristics of the digital society require appropriate specialized rights to guarantee them. The modern concept of human rights, based on educational values, faces new challenges in the digital age. The traditional model of ensuring human rights demonstrates its inability, which actualizes the need to restructure the axiological foundations of human rights in accordance with the laws of the functioning of the digital society and the establishment of digital human rights as a new legal reality. In fact, this transformation involves not just supplementing the existing system, but its qualitative reconfiguration taking into account technological realities and new forms of social relations (T. Flew, 2021, p. 315).

One of the characteristic features of digital human rights is a specific object of legal relations – information (data), presented in a special digital format. Digital human rights are implemented through digital technologies (digital implementation of rights) and belong exclusively to "digital people" (persons with digital attributes). Obligations in the field of digital human rights cover both positive and negative obligations of states and private entities. Thus, it is appropriate to attribute digital human rights to a new separate generation (or system) of rights - this solves the problem when "without new rights there is no new generation of human rights". At the same time, fourth-generation human rights as a general legal framework can solve the problem that in the digital age "new rights appear, but they are not necessarily human rights" (for example, some countries grant robots the corresponding rights, but it is difficult to argue that these are human rights, so they cannot be attributed to the category of fourth-generation human rights). Therefore, the main characteristics of fourth-generation human rights are the necessity of digital rights in the context of a digital society and their digital implementation. This concept emphasizes the anthropocentric nature of digital rights, distinguishing them from the rights of artificial intelligence or robotic systems, and emphasizes the technologically mediated nature of their implementation (M. Mann & T. Matzner, 2019, p. 8).

Since the three previous generations of human rights were mainly concerned with social participation, living standards and equitable development in the physical world, where people, property, things and behavior in a material sense were concerned, the concepts of data and information were practically absent from them. Today, in the conditions of the onset of the digital age, everything – from personal privacy to public life, from everyday needs to public safety - is in an accelerated process of informatization and digitalization (D. Byelov & M. Bielova, 2023, p. 317).

Completely offline activities are becoming increasingly rare, the distinction between the virtual and real worlds is losing its former meaning, and the digital life of each person is becoming increasingly detailed. This transformation is radically changing the nature of social interactions and the forms of realization of human rights. In such a context, traditional legal categories that were formed to regulate relations in physical space are insufficient to protect the individual in the digital environment. Digital traces, algorithmic solutions, personal data processing and virtual identity are becoming new objects of legal regulation, requiring specialized legal instruments and appropriate protection guarantees. This necessitates the development of new conceptual approaches to human rights adapted to the realities of the digital society (D. Byelov & M. Bielova, 2024, p. 7).

Thus, human rights, including the right to life and property, participation in political life, work and employment, social security, culture and education, are either deconstructed and reconstructed through the processes of informatization and digitalization (e.g., privacy and identity, smart governance and public participation, protection of virtual property, freedom of speech in cyberspace, etc.), or face fundamentally new challenges (in particular, the digital divide, algorithmic discrimination, algorithmic dominance, social monitoring, etc.) (J. Nickel, 2019, p. 991).

This transformation, in our opinion, demonstrates the dual nature of the impact of digitalization on the human rights system: on the one hand, traditional rights are being modified under the influence of technological capabilities – privacy is taking on new dimensions in the context of digital traces, political participation is being transformed through e-democracy, and property is expanding to virtual assets, on the other hand, completely new threats to human rights arise, associated with algorithmic decision-making, mass data collection, and digital inequality. This process requires not just the adaptation of existing legal norms, but the creation of a holistic system of digital rights capable of ensuring the protection of human dignity in the conditions of total digitalization of social relations. There is a need to develop new legal instruments that would take into account the specifics of the digital environment and its impact on the implementation of fundamental human rights. At the same time, data and information are becoming not only irreplaceable valuable resources for people's digital lives, but also carriers of a new type and expression of value, for which human rights in the new era are becoming increasingly important. Whether it is about the characteristics of human rights, their elements, content or form, they are all moving from the physical relations of human rights of the three previous generations to the digital relations of modern human rights, which is the driving force and basis for the development of human rights of the fourth generation. Today, digital human rights can become more effective

only if they are reinforced by digital technologies that contribute to the observance of human rights in accordance with the objective needs of a smart society. This transformation reflects a fundamental paradigm shift: from material objects and physical actions as the basis of legal relations to information flows and digital interactions (R. Radu, 2021, p. 180).

Therefore, in such a context, data is transformed from a simple tool into an independent object of legal protection, and digital technologies become not only a means of realizing rights, but also a condition for their existence, which, in turn, creates a new legal reality where the effectiveness of human rights protection directly depends on the level of technological development and digital literacy of society. There is a need to integrate technological capabilities with legal guarantees to ensure comprehensive protection of the individual in the digital space.

The fourth generation of human rights is the independence and alternativeness of the individual in choosing lawful behavior, which is based on human autonomy, within a single legal field, norms of morality and religion. At the same time, the list of new human rights includes: euthanasia, sex change, organ transplantation, cloning, same-sex marriage, artificial insemination, a child-free family, independent of state interference in life according to religious and moral views. The catalog of human rights of the fourth generation consists of two subgroups: somatic rights and information rights. As we can see, new human rights concern a wide variety of spheres of social relations. Therefore, the problem of regulating such rights is acute in many countries of the modern world, in particular in Ukraine.

The key factors (determinants) of the emergence and evolution of a new generation of human rights, which are due to the progress of medicine and biotechnology and concern the right of an individual to dispose of his own body and organs, are the following:

1) Scientific and technological progress – the globalization of the educational environment, the spread of technical knowledge and the informatization of all spheres of life have accelerated the circulation of information, which has become a key driver of the development of science and society;

2) Interdisciplinarity of scientific exploration - scientific development is not limited to the framework of individual branches of knowledge; the synthesis of various scientific directions contributes to the acceleration of obtaining new results and increases their effectiveness. This applies to both humanitarian and technical disciplines, and such interdisciplinarity is productive for the accumulation of additional knowledge. Somatic rights are the result of such a comprehensive scientific approach;

3) Transformation of social mentality – first of all, there is a change in the social attitude towards individuality; man is no longer considered as a collective being. The concepts of equality and freedom have caused a fundamental restructuring of the ideology of social and state processes;

4) Evolution of moral and ethical standards - an essential characteristic of respect for the individual is the recognition of the moral autonomy of the individual. With the development of a post-romantic understanding of individual differences, this principle extends to the requirement to ensure that people are free to develop their personality at their own discretion, even if their views seem unacceptable to us or incompatible with our moral ideas (Y. Turyansky, 2020, p. 24).

We agree with the scientists who not only focused on somatic rights, but also substantiated the need for a preliminary philosophical and legal understanding of this issue before its constitutional and legal solution, as well as achieving a principled consensus between legal science, religion and philosophy. This approach seems reasonable, since the human body should be considered inextricably linked to spirituality.

Researchers also see the danger that the greatest loss for humanity will occur in the process of evolution of somatic rights - the loss of the very essence of man. For these reasons, we also do not share the optimism of some authors that thanks to this, man supposedly has a real opportunity not only to improve the world around him, but also to "transform the entire human race." Is it worth interfering in human nature to the extent of changing the entire human race? Absolutely not!

We advocate for reasonable restrictions on somatic rights (based on constitutional principles and norms), aware of possible resistance along the way.

Scientists argue that the problem of legal registration of the specified possibilities of the person is complicated by the fact that for the first time in the history of mankind, a potential conflict with established religious and moral norms can be observed. Lawyers, philosophers, doctors and theologians are conducting intensive discussions on the fourth generation of human rights. Science is unable to predict how the implementation of these possibilities will affect future generations, which naturally raises the question: is this not a hidden medical experimentation on human nature in the context of globalization processes? Obviously, such a situation is unacceptable and requires a separate scientific study in the legal sphere, since ignoring this issue can have serious consequences for human civilization (O. Bunchuk).

We do not entirely agree with such a categorical statement. It is worth noting that the formulation of "actual denial of the norms of religion and morality" and "catastrophic consequences for the existence of humanity" contains rather categorical statements that require a more balanced approach. The fourth generation of human rights (digital rights) does not necessarily contradict religious or moral principles -

rather, it requires their rethinking in the context of new technological realities. It would be more constructive to talk about the need for an ethical understanding of new technologies, rather than about their a priori negation of traditional values.

5. Conclusions.

The analysis conducted demonstrates the evolutionary nature of the development of the concept of human rights, which has gone from theoretical ideas to normative consolidation and international recognition. The generational classification of human rights proposed by K. Vasak demonstrates the historical logic of their formation in accordance with the social needs of each era. At the same time, this concept has significant limitations, in particular, a Eurocentric approach that does not take into account the cultural diversity of legal traditions of different civilizations.

The formation of the fourth generation of human rights reflects cardinal changes in the nature of social relations under the influence of digital technologies. Digital rights fundamentally differ from previous generations in the specificity of the object of legal relations – information and data, as well as in the methods of implementation through technological platforms. This transformation requires not just a supplement to the existing system of rights, but its qualitative reconfiguration, taking into account new forms of social interactions and threats to human dignity in the digital space.

The inclusion of somatic rights alongside digital rights in the fourth generation raises reasonable debates about the ethical limits of expanding the catalogue of human rights. Although some of these rights do indeed question traditional moral and religious norms, this does not mean their a priori denial, but rather highlights the need for a balanced ethical understanding of the technological possibilities of modernity. The development of the fourth generation of rights requires an interdisciplinary approach that combines legal, ethical, technological and social aspects to ensure the protection of human dignity in the face of rapid civilizational change.

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ЧЕТВЕРТЕ ПОКОЛІННЯ ПРАВ ЛЮДИНИ: ЗМІСТОВНЕ НАПОВНЕННЯ В УМОВАХ ЦИФРОВОГО СУСПІЛЬСТВА

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Анотація

Стаття присвячена дослідженню концепції четвертого покоління прав людини в контексті сучасних викликів цифрового суспільства. Актуальність дослідження зумовлена необхідністю переосмислення традиційної генераційної класифікації прав людини, розробленої К. Васаком, у зв'язку з появою принципово нових форм правовідносин, де об'єктом виступають дані та інформація в цифровому форматі. Метою дослідження є проведення теоретико-правового аналізу концепції четвертого покоління прав людини у контексті визначення її змістовного наповнення в умовах цифрового суспільства. У статті використано системний підхід, порівняльно-правовий, структурно-функціональний та прогностичний методи. Проаналізовано обмеження традиційної тригенераційної класифікації, зокрема її євроцентристський характер та неврахування культурного різноманіття правових традицій. Розкрито дуальний характер впливу цифровізації на систему прав людини: модифікацію традиційних прав та виникнення принципово нових викликів. Досліджено структуру четвертого покоління прав людини, що включає цифрові та соматичні права. Визначено специфічні характеристики цифрових прав людини, що відрізняють їх від попередніх поколінь: специфічний об'єкт правовідносин - інформація та дані у цифровому форматі; реалізація через цифрові технології. У статті звернено увагу на етичні дилеми, пов'язані з розширенням каталогу прав людини, зокрема потенційний конфлікт з традиційними релігійними та моральними нормами. Констатовано, що формування четвертого покоління прав людини відображає кардинальні зміни в характері суспільних відносин під впливом цифрових технологій. Ця трансформація вимагає не просто доповнення існуючої системи прав, а її якісної переконфігурації з урахуванням нових форм соціальної взаємодії та ймовірних викликів і загроз, обумовлених природою цифрового простору. Зроблено висновок про необхідність збалансованого підходу до розвитку четвертого покоління прав, що поєднує правові, етичні, технологічні та соціальні аспекти для забезпечення захисту людської гідності в умовах стрімких цивілізаційних змін.

Ключові слова: права людини, четверте покоління прав людини, цифрові права, соматичні права, цифрове суспільство.

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LEGAL ENSUREMENT OF FREEDOM OF EXPRESSION IN UKRAINE

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Summary

The article examines the general theoretical and constitutional dimensions of the legal safeguards for the protection of freedom of expression in Ukraine.

The purpose of the study is to provide a comprehensive theoretical characterization of the legal mechanisms ensuring the realization and protection of freedom of expression in Ukraine.

The methodological framework of the research is grounded in a system of conceptual approaches (anthropological, systemic, dialectical), general scientific methods (analytical, formal-dogmatic, structural), and specialized legal methods (interpretation of legal norms, comparative legal analysis, and structural-legal methodology).

Findings and conclusions. Based on the analysis of the structure of the freedom of expression of a person as a subjective legal right, the concept of this right is defined as the ability of a person, enshrined in legal norms and provided by the state, to freely express views, collect, search, receive, record, store, distribute, transmit, and to use information and ideas orally, in writing or in any other form and in any way, except for cases specified by law.

The legal mechanism for ensuring freedom of expression in Ukraine is a system of effective legal means of implementing, protecting, and safeguarding freedom of expression in general, as well as its individual elements (possibilities), enshrined in national legal acts and other sources of law.

I would like to emphasize that a number of positive trends in the field of legal support for the implementation of freedom of expression are manifested in Ukraine, namely:

– formation of Ukrainian legislation (in particular, recognition of binding international documents) on issues of freedom of expression and information rights as its component;

– increased criminal liability for crimes against journalists and their family members;

– the possibility for citizens and other subjects to apply to the Parliamentary Ombudsman of Ukraine, the Constitutional Court of Ukraine, the European Court of Human Rights on issues of protection of freedom of expression, etc.

Despite positive trends in the field of legal protection of freedom of expression in Ukraine, there are still a number of problems in this field. The biggest problem is the full-scale invasion of the Russian Federation against Ukraine, which caused massive violations of the rights of journalists and mass media.

Key words: human rights, freedom of expression, information rights, violations of the right to freedom of expression in Ukraine, Ukrainian legislation.

1.Introduction

Freedom of expression is the foundation of civil society. Its real and maximum provision is a criterion of the state's democracy, and its effective implementation is an important indicator of the level of provision of other human opportunities.

Freedom of expression as a fundamental human right is reflected in the main international human rights documents of global and regional significance. In Ukraine, the basis of the legal mechanism for ensuring freedom of expression is national legislation, primarily the Constitution of Ukraine dated June 28, 1996, which "guarantees everyone the right to freedom of thought and speech, and to the free expression of his or her views and beliefs" (Part 1, Article 34), the Law of Ukraine "On Information" dated October 2, 1992 (as amended by the Law of Ukraine dated January 13, 2011), as well as other normative legal acts.

An analysis of Ukrainian legislation on freedom of expression and legal guarantees for its provision provides grounds for asserting that it needs improvement and coordination with the norms of international legal documents on human rights.

In Ukraine, human rights are massively violated, in particular, freedom of expression, as a result of the full-scale military invasion of the Russian Federation on the territory of Ukraine.

All these arguments confirm the relevance of the research topic and its scientific, theoretical, and practical significance.

The aim of this study is to provide a general theoretical overview of the legal framework for safeguarding freedom of expression in Ukraine.

To achieve this aim, the following objectives must be addressed:

– to define the concept and structure of the subjective legal right to freedom of expression in Ukraine;

– to describe the legal mechanisms for ensuring freedom of expression in Ukraine;

– to outline violations of freedom of expression in Ukraine under wartime conditions;

– to formulate and substantiate proposals, based on the research findings, for improving the legal mechanisms that guarantee the exercise of the right to freedom of expression in Ukraine.

The methodological basis of the study comprises a system of conceptual approaches, general scientific and specialized legal methods, as well as techniques of scientific inquiry. The anthropological approach made it possible to reveal the value and essence of freedom of expression as a subjective legal right. The systemic approach enabled an analysis of freedom of expression as a complex construct encompassing a range of opportunities, including information rights. The use of the formal-dogmatic method allowed for the formulation of definitions of the key concepts under study, as well as proposals for improving the current legislation of Ukraine regarding freedom of expression. Through the structural-legal method, the structural elements of freedom of expression as a subjective legal right were identified. The study also employed such methods as dialectical analysis, comparative analysis, and interpretation of legal norms.

Analysis of Recent Research and Publications. Theoretical-legal, international, and branch aspects of freedom of expression, its individual elements (possibilities) and the relationship with other human rights are investigated by the following famous domestic and foreign scientists: V. Bed, S. Gilbert, M. Harrison, M. Verpo, J. Wilcke, E. Zakharov, O. Kokhanovska, N. Kushakova-Kostytska, O. Nesterenko, V. Pavlykivskyi, S. Shevchuk and others.

2. The concept, structure of the subjective legal right to freedom of expression in Ukraine

Scientific sources from the theory of state and law, international law, constitutional law of Ukraine, and other legal sciences contain different interpretations of the content and structure of freedom of expression as a subjective legal right.

According to modern scientific research, international documents on human rights, and normative legal acts of Ukraine and other states, freedom of expression is not considered a political right of a citizen but a personal right inherent to everyone. In this context, S. Shevchuk's researches on constitutional theories of understanding the content and meaning of freedom of expression are important. In particular, the researcher considers the following theories:

– *the theory of four values* (developed by the American professor T. Emerson), according to which constitutional guarantees of freedom of expression are aimed at ensuring the development of the individual; their acquisition of knowledge and establishment of the truth; participation of all subjects of society in the process of state decision-making;

– *the theory of the political process* (it is represented by Professor A. Michaeljohn, American judge R. Bork). According to it, the only purpose of the constitutional guarantee of freedom of expression is to support the democratic political process;

– *the theory of the free market of ideas* (it originated in the works of the English philosophers D. Milton and J.S. Mill). It assumes that open debate, in the absence of state intervention, leads to the discovery of the truth, or at least to the determination of the best prospects, or to the solution of social problems;

– *the theory of individual self-realization* (developed by the American professor M. Radish), according to which the constitutional guarantee of freedom of expression serves to ensure the only fundamental social value – the self-realization of the individual. (Shevchuk S., 2005).

S. Shevchuk emphasized that these theories, which are mostly inherent in the American constitutional doctrine, determine the constitutional practice of the US Supreme Court, although they are no less relevant for other countries, for the practice of the ECtHR (Shevchuk S., 2005). In this context, it is appropriate to emphasize the publication of "Freedom of Speech. Decisions of the Supreme Court of the United States", which highlights thirteen court cases of the Supreme Court of the United States related to freedom of speech – they vividly illustrate the legal duel between the right of citizens to speak freely and the powers of the state to intervene and punish (Maureen Harrison, Steve Gilbert, 2004).

In our opinion, the meaning of the freedom of expression is most fully revealed by the theory of individual self-realization, which covers various aspects of the manifestation of a person's views in the political, economic, spiritual, and aesthetic spheres, and not only in one of them. In our opinion, freedom of expression is a type of personal human rights.

Philosopher J.S. Mill stressed that for the mental well-being of mankind (on which all other types of well-being depend), freedom of thought and freedom of expression are necessary (Mill J.S, 2001).

At this stage of society's development, freedom of expression as a natural possibility of a person is most fully reflected in the main international documents on human rights, which embody the achievements of humanity during the entire period of its existence. These documents record the possibilities of the external manifestation of specific elements of human consciousness (views, faith, beliefs, etc.), for example:

– the right to freedom of thought, conscience, and religion (Article 18 of the Universal Declaration of Human Rights (UN, 1948) (hereinafter - UDHR); Article 18 of the International Covenant on Civil and Political Rights (UN, 1966) (hereinafter - the ICCPR)); Article 10 of the Charter of Fundamental Rights of the EU);

– the right to freedom of thought, conscience, religion, and belief (Paris Charter for a new Europe);

the right to freedom of beliefs and to their free expression (Article 19 of the UDHR);

– the right to freely adhere to one's views (Part 1, Article 19 of the ICCPR) and the right to freely express one's views (Part 2, Article 19 of the ICCPR);

– the right to freedom of expression (Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe, 1950) (hereinafter - the Euroconvention));

– the right to freedom of expression (Article 11 of the Charter of Fundamental Rights of the EU).

ICCPR and Euroconvention are also components of the national legislation of Ukraine.

The ICCPR declares that «everyone shall have the right to hold opinions without interference» (Part 1, Article 19); «everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice» (Part 2, Article 19).

The structural elements of freedom of expression, according to the European Convention (Article 10), are the following possibilities of a person: to hold opinions and to receive and impart information and ideas.

The content and structure of freedom of expression as a subjective legal right, the principles on which it is based are primarily reflected in the Constitution of Ukraine, the Law of Ukraine «On Information». In a number of other legal acts, the legal means of realization, protection, and safeguarding of this freedom in general, as well as its individual elements (possibilities), are defined: Law of Ukraine «On Media» of 13 December 2022; Law of Ukraine «On State Support for Media, Guarantees of Professional Activity, and Social Protection of Journalists» of 23 September 1997; Law of Ukraine "On Access to Public Information" of 13 January 2011; Law of Ukraine «On the Basic Principles of Ensuring Cybersecurity of Ukraine» of 5 October 2017.

The Constitution of Ukraine enunciates a number of important principles on which freedom of expression is based: 1) social life in Ukraine is based on the principles of political, economic, and ideological diversity (Part 1, Article 15); 2) No ideology shall be recognised by the State as mandatory (Part 2 of Article 15); 3) censorship is prohibited (Part 3 of Article 15); 4) provision of information security, along with the protection of sovereignty and territorial integrity of Ukraine, provision of economic security, are the most important functions of the State, and a matter of concern for all the Ukrainian people (Part 1, Article 17); 5) ensuring the free and comprehensive development of the individual in society (Article 23).

The Constitution of Ukraine guarantees everyone «the right to freedom of thought and speech, and to the free expression of his or her views and beliefs» (Part 1, Article 34); «everyone has the right to freely collect, store, use and disseminate information by oral, written or other means of his or her choice» (Part 2 of Article 34). So, the Constitution of Ukraine declares individual opportunities for everyone, that are:

– freedom of thought and speech;

– the right to freely express one's views and beliefs;

– the right to freely collect, store, use and impart information (so-called information rights).

According to the Constitution of Ukraine, the so-called information rights are not a component of freedom of expression, as it is enshrined in the main international human rights documents. Freedom of speech is declared in the Basic Law of Ukraine separately from freedom of expression.

The Law of Ukraine «On Information» (Article 2) also singles out the guarantee of the right to information among the main principles of information relations; freedom of expression of views and beliefs. The mentioned law of Ukraine enshrines: "Everyone has the right to information, which provides for the possibility of freely obtaining, using, distributing, storing and protecting information necessary for the realization of their rights, freedoms and legitimate interests" (Part 1, Article 5); «the state guarantees all subjects of information relations equal rights and opportunities to access information» (Part 1, Article 7).

Therefore, according to the Law of Ukraine «On Information»:

– the right to information includes separate opportunities for receiving, using, distributing, storing, and protecting information;

– the right to information is not included in the freedom of expression, as it is declared in the main international human rights documents.

In the Civil Code of Ukraine (in the second book, «Personal non-property rights of a natural person»), the

freedom of expression is, unfortunately, not declared. However, the document contains a caveat that the list of personal non-property rights established in it is not exhaustive (Part 3 of Article 270). The Civil Code of Ukraine declares the right of an individual to information as one of the personal non-property rights that ensures his social existence. In particular, it is established that a natural person has the right to freely collect, store, use and disseminate information (Part 1 of Article 302). In our opinion, a person's freedom of expression is an inalienable personal non-property right; therefore, it should be reflected in the Civil Code of Ukraine.

Analysis of the content and structure of the freedom of expression of a person, based on the Constitution of Ukraine, the Law of Ukraine «On Information», international documents (ICCPR and the European Convention), gives grounds for drawing a number of important conclusions.

1. The interpretation of the considered human freedom in the main international human rights documents and in the Constitution of Ukraine is not the same, so it is necessary to eliminate this discrepancy, namely, to declare in the Constitution of Ukraine that everyone has the right to freedom of expression. In addition, it is expedient to declare not only the freedom of expression but also the freedom of their formation in the main international acts on human rights and in the Constitution of Ukraine.

2. Freedom of expression, according to the ICCPR and the European Convention, which are part of the national legislation of Ukraine, includes such possibilities (elements) as to adhere to one's views and to freely express views (this right includes the following freedoms: to seek, receive, impart, disseminate any information and ideas).

In Article 34 of the Constitution of Ukraine, in contrast to international acts on human rights, the components (possibilities) of freedom of expression are not specified. The Law of Ukraine "On Information" does not declare the right to information as a component of freedom of expression but considers it as a separate possibility of subjects.

Therefore, the structurally subjective legal right to freedom of expression consists of the following elements (possibilities):

– adherence to one's views;

– free expression of views (this right covers the following freedoms: to collect, search, receive, record, store, distribute, impart, and use information and ideas, except for cases defined by law).

In our opinion, the structure of freedom of expression of views reflected in the legislation of Ukraine needs some clarification. First, the right to adhere to one's views is not subject to legal law, as it concerns the internal sphere of the individual. Secondly, the informational rights of a person have a double subordination; they belong both to the right to form their views (these are the possibilities of searching, accessing, receiving, and storing information and ideas) and to the right to their expression (these are the possibilities of distribution, transmission, and use of information and ideas). In view of this, it is proposed, as already mentioned, to declare in the Constitution of Ukraine not only the freedom of expression but also the freedom of their formation.

3. The results of a comparison of the elements of freedom of expression as a natural right and as a subjective legal right in Ukraine allow us to state that the elements (possibilities) of freedom of expression as a natural right are generally reflected in the legislation of Ukraine. However, some elements of freedom of expression, such as the ability to change one's views, refuse them, and not express them, also need to be legally enshrined in the Constitution of Ukraine.

In the Constitution of Ukraine, it is also necessary to enshrine the following normative provision: no one can be forced to express views or refuse them. In order for such a normative legal provision not to be declarative, it is necessary to provide administrative responsibility for coercion to express views and coercion to renounce them.

4. Based on the analysis of the structure of the freedom of expression of a person as a subjective legal right, the concept of this right is defined as the ability of a person, enshrined in legal norms and provided by the state, to freely express views, collect, search, receive, record, store, distribute, transmit, and to use information and ideas orally, in writing or in any other form and in any way, except for cases specified by law.

3. The mechanism of the legal protection of freedom of expression in Ukraine

Freedom of expression, like any other right of a person or other subjects, in addition to its consolidation and proclamation, requires the establishment of legal means of implementation, protection, and safeguarding, which together constitute a legal mechanism for its provision. In general, legal protection of freedom of expression does not require high financial costs of the state; it is necessary to create an effective system of legal guarantees of the right in question and its elements, which would correspond to international norms.

I believe that the main purpose of the state in the field of the legal protection of freedom of expression is its (the state's) non-interference in the exercise of freedom of expression, not creating obstacles to its implementation. The state's activities to ensure freedom of expression should be carried out in the following areas:

– legislative declaration of freedom of expression and its individual possibilities;

– delineation of clear boundaries of freedom of expression;

– assistance in the realization of freedom of expression in necessary cases (for example, during peaceful assemblies, when expressing views by children, journalists, or when accessing information, etc.);

– creation of mechanisms for promoting the formation of people's views (in the educational process, in the mass media, etc.);

– protection of freedom of expression from possible encroachments on it;

– protection of freedom of expression in cases of encroachment on it or obstruction in its implementation.

The legal mechanism for ensuring freedom of expression in Ukraine is a system of effective legal means of implementing, protecting, and safeguarding freedom of expression in general, as well as its individual elements (possibilities), enshrined in national legal acts and other sources of law.

I would like to emphasize that a number of positive trends in the field of legal support for the implementation of freedom of expression are manifested in Ukraine, namely:

– formation of Ukrainian legislation (in particular, recognition of binding international documents) on issues of freedom of expression and information rights as its component;

– increased criminal liability for crimes against journalists and their family members;

– the possibility for citizens and other subjects to apply to the Parliamentary Ombudsman of Ukraine, the Constitutional Court of Ukraine, the European Court of Human Rights on issues of protection of freedom of expression;

– support and development of the national audiovisual product;

– reduction of the number of state television and radio organizations and subjects of information activity, etc.

Despite positive trends in the field of legal protection of freedom of expression in Ukraine, there are still a number of problems in this field. The biggest problem is the full-scale invasion of the Russian Federation against Ukraine, which caused massive violations of the rights of journalists and mass media.

4. Violation of freedom of expression in the conditions of war in Ukraine

With its full-scale military invasion of Ukraine, the Russian Federation caused violations of both natural human rights and subjective legal rights enshrined in Ukrainian legislation.

In the three years and four months since the start of Russia's full-scale war, the Russian Federation has committed 839 crimes against journalists and media in Ukraine, according to monitoring by the Institute of Mass Information (hereinafter -IMI).

As of June 24, 2025, Russian forces have killed a total of 107 journalists in Ukraine. Of these, 12 journalists were killed while performing their professional duties (839 crimes committed by the Russian Federation against journalists and media in Ukraine, 2025).

On March 1, 2022, LIVE TV channel operator E. Sakun died as a result of Russian shelling of a TV tower in Kyiv.

On March 13, 2022, Russian occupiers shot dead The New York Times correspondent Brent Renaud in Irpen near Kyiv. Another American journalist, Juan Diego Herrera Arredondo, was wounded.

On March 14, 2022, Ukrainian journalist O. Kuvshynova was killed during artillery shelling by Russian troops in the village of Gorenka, Kyiv region. Irish citizen Pierre Zakrzewski, the operator of the Fox News TV channel, was killed the same day.

On April 3, 2022, in the city of Mariupol, the Russian military killed the Lithuanian director and documentary maker Mantas Kvedaravičius. The director died while trying to leave the city.

On May 30, 2022, a journalist of the French channel BFMTV, Frédéric Leclerc-Imhoff, was killed in Luhansk Oblast as a result of Russian shelling.

On September 8, 2022, O. Yurchenko, operator of the "Pryamiy" TV channel, who served in the Armed Forces of Ukraine, died in the battles for the liberation of the city of Balaklia (Kharkiv Region) (Russia committed 454 crimes against journalists and media in Ukraine in seven months, 2022).

In June 2025, V. Voloboyev, a mobilized journalist from the Kryvyi Rih city newspaper *Pulse*, was killed. He died as a result of a Russian attack on a military training ground. At the time of his death, he had only been in military training for five weeks. At the *Pulse* city newspaper, the journalist has worked for five years. Other illegal offenses against journalists and media were also committed during the war in Ukraine, namely: kidnapping of journalists – 29; injuries to journalists – 42; attacks on journalists – 46; harassment of journalists, threats, intimidation – 130; shelling of TV towers – 21; raids and attacks on media editorial offices – 30; cybercrimes – 106; turning off Ukrainian broadcasting and broadcasting Russian propaganda – 35 (839 crimes committed by the Russian Federation against journalists and media in Ukraine, 2025).

Among the problems of the legal protection of freedom of expression in Ukraine, we can also single out the following:

– ineffective information policy in the field of countering the information war waged by the Russian Federation against Ukraine;

– imperfection, inconsistency with international human rights documents of certain provisions of Ukrainian legislation on freedom of expression;

– an inadequate level of ensuring the professional activity of journalists and especially their safety; ineffective investigation of crimes against them and their family members;

– insufficient provision of access to the Internet for citizens.

5. Conclusions

The structure of the subjective legal right to freedom of expression, enshrined in the legislation of Ukraine, includes the following elements (possibility) of a person: 1) to adhere to one's views; 2) to freely express views (this right includes the freedom to seek, receive, impart, transmit any information and ideas - except for cases specified by law). It was emphasized that the right to adhere to one's views does not fall under the scope of legal law, as it concerns the internal sphere of a person. The structure of freedom of expression as a subjective legal human right needs to be supplemented with the following possibilities: to change one's views, not to express them, to renounce them.

The mechanism of the legal protection of freedom of expression in Ukraine consists of the following elements: national legislation (in particular, ratified international treaties as part of it), which declares freedom of expression, as well as its individual possibilities (elements); legal means of realizing freedom of expression; legal means of its protection; legal means of its safeguarding.

Taking into account the provisions of international human rights documents, it is proposed:

a) to amend Part 1, Article 34 of the Constitution of Ukraine as follows:

"Everyone has the right to freedom of formation and expression of views. This right includes the ability to freely collect, seek, receive, record, store, disseminate, transmit, and use information and ideas, to change one's views, to renounce them and not to express them in any form and by any means."

b) to supplement the Constitution of Ukraine with a regulatory provision: "No one can be forced to express views or to renounce them."

The main problem in the field of legal protection of human rights, in particular, and freedom of expression in Ukraine, is a significant, massive violation of these rights by the Russian Federation as a result of its full-scale military invasion of Ukraine.

In the 21st century, in the center of Europe, the totalitarian state of the Russian Federation committed terrible crimes against the Ukrainian people, in particular, encroachment on freedom of expression. This is a period of trials both for Ukraine and for other countries of the world and for each of us personally. In my opinion, strengthening the faith of the Ukrainian people, and forming a strong Christian state in Ukraine will help to overcome the enemy and win the final victory! Ukraine is a shield for Europe and other countries of the world! The countries of the world should take an example from Ukraine in its fight against evil and injustice! The struggle takes place not only on the material level but also on the spiritual level! Strong faith in God is the key to Ukraine's final victory!

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ЮРИДИЧНЕ ЗАБЕЗПЕЧЕННЯ СВОБОДИ ВИРАЖЕННЯ ПОГЛЯДІВ В УКРАЇНІ

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Анотація

У статті проаналізовано загальнотеоретичні та конституційні аспекти юридичного забезпечення свободи вираження поглядів в Україні.

Метою дослідження є загальнотеоретична характеристика юридичного забезпечення свободи вираження поглядів в Україні.

Методологічну основу дослідження становить система концептуальних підходів (антропологічний, системний, діалектичний), загальнонаукових (аналіз, формально-догматичний, структурний) методів і спеціально-юридичних методів (тлумачення юридичних норм, порівняльно-правовий, структурно-правовий).

На підставі аналізу структури свободи вираження поглядів людини як суб'єктивного юридичного права поняття цього права визначено як можливість людини, закріплена в юридичних нормах та забезпечувана державою, вільно виражати погляди, збирати, шукати, одержувати, фіксувати, зберігати, поширювати, передавати і використовувати інформацію та ідеї усно, письмово або в будь-якій іншій формі та в будь-який спосіб, крім випадків, визначених законом.

Юридичним механізмом забезпечення свободи вираження поглядів в Україні є система ефективних юридичних засобів реалізації, охорони та захисту свободи вираження поглядів загалом, а також окремих її елементів (можливостей), закріплених у національних нормативно-правових актах та в інших джерелах права.

Наголошено, що в Україні проявляється ряд позитивних тенденцій у сфері правового забезпечення реалізації свободи вираження поглядів, а саме:

– формування законодавства України (зокрема, визнання обов'язковими для себе міжнародних документів) з питань свободи вираження поглядів та інформаційних прав як її складової;

– посилення кримінальної відповідальності за злочини проти журналістів та членів їхніх сімей;

– можливість громадян та інших суб'єктів звертатися до парламентського омбудсмена України, Конституційного Суду України, Європейського суду з прав людини з питань захисту свободи вираження поглядів та ін.

Попри позитивні тенденції у сфері правового забезпечення свободи вираження поглядів в Україні, залишається все ж таки ще низка проблем у цій сфері. Найбільшою проблемою є повномасштабне вторгнення Російської Федерації проти України, яке спричинило масові порушення прав журналістів та медіа.

Ключові слова: права людини, свобода вираження поглядів, інформаційні права, порушення свободи вираження поглядів в Україні, законодавство України.

SECTION 2
CONSTITUTIONALISM AS MODERN SCIENCE

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THE RULE OF LAW IN THE PARADIGM OF MODERN CONSTITUTIONALISM: PRINCIPLES, MECHANISMS AND CHALLENGES OF IMPLEMENTATION

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Summary

The article is devoted to a comprehensive study of the theoretical and conceptual foundations of the rule of law and the problems of practical implementation of its principles in modern conditions. The relevance of the study is due to the presence of a significant gap between the theoretical concepts of the rule of law and their practical implementation in democratic societies. The purpose of the work is to analyze the basic principles of the rule of law, identify factors that hinder their effective implementation, and study the mechanisms of the formation of the rule of law.

The study uses a systematic approach, methods of comparative legal analysis, structural-functional and historical-legal methods. The evolution of the concept of the rule of law from ancient times to the present day is analyzed, the conceptual differences between the concepts of "rule of law" and "rule of law" in the context of various legal traditions are revealed.

Special attention is paid to the study of the triune structure of the principle of the rule of law, which includes ideological-conceptual, normative-legal and practical-implementation components. It was found that the key problem of modern state-building is not the absence of relevant legislation in the field of human rights, but the lack of effective mechanisms for transforming legal norms into real instruments for protecting civil rights.

It is proven that the rule of law is not a static construct, but a dynamic process that requires constant interaction between theoretical understanding, normative consolidation and practical implementation of legal principles. The results of the study indicate the need to develop more effective mechanisms for implementing the principles of legal statehood and the formation of an appropriate legal culture in society. Prospects for further research include studying the impact of digitalization and globalization processes on the transformation of traditional models of legal statehood.

Key words: rule of law, rule of law, constitutionalism, human rights, legal culture

1. Introduction

The issue of the rule of law remains one of the central themes of modern constitutional law and state theory, which is due to the need to rethink traditional approaches to the organization of state power in the context of globalization and democratization of social relations. The relevance of studying the principles and mechanisms of the functioning of the rule of law is due to the presence of a significant gap between the theoretical concepts of rule of law and their practical implementation in modern democratic societies.

Despite the broad constitutional consolidation of the principles of the rule of law in the basic laws of most countries of the world, the problem of creating effective

mechanisms for transforming regulatory provisions into real instruments for protecting citizens' rights and limiting state power remains unresolved. This issue becomes particularly acute in the context of the need to ensure a balance between the formal consolidation of democratic principles and their actual implementation in socio-political practice.

The theoretical foundations of the rule of law have been studied in the works of leading foreign scholars, in particular J. Waldron (2016), B.Z. Tamanaha (2004) analyzes the history, political and theoretical aspects of the rule of law. Modern approaches to understanding the rule of law are presented in the works of C.R. Sunstein (2024), who examines the principles of the rule of law in the American Journal of Law and Equality, and G. Lamond (2014), who studies legal sources and customary law in the context of the rule of law. The European perspective of the rule of law is revealed in the studies of U. Haltern (2018), who analyzes the ways of conceptualizing the European rule of law, and T. Endicott (2020), who explores the relationship between access to justice and the rule of law. Domestic aspects of constitutionalism and human rights are highlighted in the works of D. Byelov, M. Hromovchuk, D. Berlinger (2021), who consider the modern doctrine of constitutionalism and the classification of human rights.

The purpose of the study is to conduct a comprehensive analysis of the theoretical and conceptual foundations of the rule of law, identify problems in the practical implementation of its principles, and study the mechanisms for the formation of effective rule of law in modern conditions.

The objectives of the study are: 1) to analyze the theoretical and conceptual foundations of the rule of law and reveal its essential characteristics; 2) to investigate the problems of the practical implementation of the principles of rule of law and factors that hinder their effective implementation; 3) to determine the structural components and mechanisms for the formation of the principles of rule of law in modern conditions.

The research methodology is based on the use of a systemic approach, which allows us to consider the rule of law as a holistic phenomenon in the interconnection of all its elements. Methods of comparative legal analysis were used to study various concepts of rule of law, the structural-functional method to determine the mechanisms for implementing the principles of rule of law, and the historical-legal method to study the evolution of the concept of rule of law.

The scientific novelty of the study lies in the comprehensive analysis of the triune structure of the principle of the rule of law, which includes the ideological-conceptual, normative-legal and practical-implementation components, as well as in identifying the patterns of interaction between the theoretical understanding, normative consolidation and practical implementation of the principles of the rule of law.

2. Theoretical and conceptual foundations of the rule of law

The construction of a rule of law is a multifaceted process that involves not only the creation of state institutions capable of guaranteeing the rule of law and the protection of civil rights, but also the existence of various political forces, social groups and social strata with their unique needs and characteristics of legal, political, social and economic activity (Waldron, J., 2016).

The scientific consensus in legal doctrine indicates that the construction of a rule of law is a promising task that involves a comprehensive renewal of the economic, political and legal system of society. The main challenge in implementing the rule of law principle is not legislative shortcomings in the field of human rights and freedoms, but the lack of functional mechanisms for their practical implementation. Constitutional guarantees of free medical care, the right to work, free education and other social rights are formally enshrined, but their implementation in a number of democratic states remains problematic (Byelov D., Hromovchuk M. & Berlinger D., 2021, p. 35).

At the current stage of socio-political development, the concept of a "rule of law" has become widely used in scientific discourse and political practice, but its interpretation remains ambiguous. Researchers demonstrate diametrically opposed approaches to understanding this phenomenon: one group of scientists tries to substantiate the thesis that the proclamation of state sovereignty and independence automatically transformed the state into a rule of law, while another group of researchers consistently proves that the formation of a true rule of law is a long-term project, the implementation of which requires significant time resources and systemic transformations.

At the same time, an objective analysis of modern state-legal reality convincingly demonstrates a significant gap between regulatory requirements and their practical implementation. Empirical data and sociological research demonstrate that many constitutional principles and legislative guarantees remain declarative, not receiving proper implementation in the everyday practice of public administration and law enforcement. Therefore, this situation actualizes the need for a critical rethinking of existing approaches to building a legal state and developing more effective mechanisms for implementing legal norms. Special attention needs to be paid to studying the factors that hinder the transformation of formal legal requirements into real instruments for protecting citizens' rights and limiting state power, since this issue is a key challenge for modern state-building (Byelov D., Hromovchuk M. & Berlinger D., 2021, p. 36).

It is undeniable that the rule of law is a sovereign state entity that functions in the conditions of a developed civil society and provides effective legal

protection of fundamental rights and freedoms of the individual with the help of legal instruments. The conceptual basis of such a state is a system of fundamental principles, among which the leading place is occupied by: the principle of the rule of law as the basis of the constitutional system, the doctrine of the division of state power into independent branches, guaranteeing the real provision and protection of human and citizen rights and freedoms, compliance with the principle of legality in the activities of all subjects of legal relations, as well as the formation of a high level of legal culture in society. It is worth emphasizing that the effectiveness of the functioning of the rule of law is determined not only by the formal consolidation of these principles in regulatory legal acts, but also by their practical implementation through a system of state and non-state institutions. Of particular importance is the interaction between state structures and civil society institutions, which ensures the democratic nature of public administration and creates the prerequisites for the real implementation of the principles of legal statehood in socio-political practice (Tamanaha, B.Z., 2004, p. 16).

The concept of a legal state, which has its historical roots in the ancient political and legal tradition and has received powerful development in the period of Modern times, in modern conditions is moving from theoretical constructions to practical implementation. The constitutional consolidation of the principle of legal statehood in the basic laws of many modern states actualizes the problem of filling the category of "legal state" with specific legal content and developing mechanisms for its practical implementation. The conceptual essence of a legal state is revealed through a system of its fundamental principles, and the process of state and legal construction can be successfully carried out only under the condition of effective implementation of certain legal standards and the creation of effective mechanisms for the implementation of the fundamental principles of legal statehood (Sunstein, C.R., 2024, p. 500).

The conceptual approach that provides for a clear distinction between the concepts of "legal state" and "rule of law" on the basis of their genetic affiliation to different legal traditions deserves special theoretical attention. According to this doctrinal position, the concept of "rule of law" is an organic product of the Romano-Germanic (continental) legal family, while the concept of "rule of law" was formed within the framework of the Anglo-Saxon (common law) legal tradition (Lamond, G., 2014, p. 27). Such methodological differentiation, in our opinion, justifies the inadmissibility of the mechanistic identification of the above categories, their subordination of one concept to another or the interpretation of one concept as a component of another. It should be noted that this theoretical position has found wide recognition in modern European legal science and has received support in the practice of European legal institutions.

The conceptual differences between these concepts correlate with the fundamental features of the respective legal systems: if the Romano-Germanic tradition emphasizes the systematization of legal norms, codification and the primacy of written law, then the Anglo-Saxon model gives preference to judicial precedent and the evolutionary development of legal principles through judicial practice. In fact, such a comparative perspective allows for a deeper understanding of the specifics of each of the concepts and avoids terminological confusion, which often arises when legal categories are uncritically borrowed from different legal traditions without taking into account their historical and cultural context.

3. Problems of practical implementation of the principles of the rule of law

Ensuring the effective implementation of fundamental human rights for all persons under the jurisdiction of a certain state is the prerogative, first of all, of the state authorities, since it is state institutions that have the exclusive competence to provide formal and legal general obligation to those regulatory conditions that are necessary for the full enjoyment of the fundamental rights of each person. In the case when the state uses its potential in this area as effectively as possible and positions the provision of human rights as its priority function, such a state can be qualified as a legal one (Byelov D., 2021, p. 36).

Therefore, in our opinion, a legal state is a state formation characterized by real, rather than declarative, provision of human rights. It is this conceptual formula that emphasizes the fundamental difference between the formal constitutional enshrining of rights and freedoms and their practical implementation in social and legal reality.

The essential characteristic of the rule of law is the transformation of abstract legal guarantees into specific mechanisms for the protection and implementation of individual rights. This involves not only the creation of an appropriate regulatory framework, but also the formation of an effective system of legal institutions, procedures and mechanisms capable of ensuring the practical implementation of constitutional principles in the everyday lives of citizens. This interpretation of the rule of law focuses on the effectiveness of state activity in the field of human rights, which makes the criterion for assessing the legal nature of the state not so much the presence of relevant regulatory provisions as their actual effectiveness and ability to ensure real protection of human dignity in all spheres of public life.

The issue of conceptualization and substantive content of the category "rule of law" became the subject of in-depth scientific research at the beginning of the twentieth century, when a number of fundamental

works devoted to this topic appeared. The rule of law was considered by leading theorists of that time as the most advanced form of state organization, a kind of scientific and practical laboratory in which the conceptual foundations of the future social order are formed. At the same time, a characteristic feature of scientific approaches at the beginning of the last century was the interpretation of the rule of law not as an empirically achievable reality, but as a normative ideal to which humanity should strive. This methodological approach reflected the awareness of the complexity and multifaceted nature of the task of building a true rule of law. The pessimistic assessment of the prospects for the practical implementation of the ideal of the rule of law was based on a deep understanding of the anthropological limitations of human nature. According to this concept, the creation of an authentic rule of law is possible only under the condition of the moral improvement of all humanity to the level of "holiness", which, obviously, does not correspond to the real possibilities of neither the current nor the nearest future period of the development of civilization (Haltern, U., 2018, p. 677).

Such a theoretical position, in our opinion, actualizes the question of the ratio of the ideal and the real in the process of state formation, as well as the need to develop pragmatic approaches to the gradual implementation of the principles of legal statehood in conditions of objective anthropological and social limitations. And this, in turn, encourages a rethinking of strategies for building a legal state, taking into account the real possibilities and limitations of human nature.

4. Mechanisms of formation and structure of principles of a democratic state based on law

It should be emphasized that the actualization of the issues of a state based on law at the present stage of social development is a natural phenomenon that reflects the objective needs of state and legal construction. It is possible to state the formation in modern legal doctrine of a relatively stable scientific consensus on the substantive characteristics and essential features of this phenomenon. At the same time, the conceptual understanding of a state based on law as a specific form of organization and functioning of state power, characterized by a democratic regime of constitutional governance and legality, the principle of the rule of law, a system of separation of state power with mechanisms of mutual control between its branches, mutual responsibility of the state and the individual, as well as the recognition, guarantee and provision of fundamental rights and freedoms of man and citizen, has acquired the status of a fundamental theoretical position in modern jurisprudence (Endicott, T., 2020, p. 380).

At the same time, as the evolution of doctrinal concepts of classical legal positivism (K. Gerber, D. Dicey, R. Iering, P. Laband, A. Yesmen) and neo-positivist theories (G. Kelsen) convincingly demonstrated, all attempts to terminologically replace the concept of "rule of law" with the categories of "state of laws" or "state of legality" give rise to extremely complex methodological problems that remain theoretically unsolved, and ultimately lead to a conceptual distortion of the understanding of the role of law in society and the essence of the legal order as such (Lamond, G., 2014, p. 27).

In view of the above, a completely justified practical explication of the definition of the rule of law as a special form of legal organization and the exercise of public and political power in its relations with individuals as subjects of law and bearers of constitutionally recognized and normatively enshrined rights and freedoms of man and citizen is systematic state-building activity aimed at the practical implementation of the fundamental principles of rule of law.

The issue of the formation of the rule of law is characterized by double significance, combining both scientific and theoretical and practical and applied components. On the one hand, the research focus is directed at an empirical assessment of the real level of implementation of the law-regulatory function of state and public institutions, on the other - at a comprehensive analysis of the current state and prospects for the development of rule of law, including the identification of mechanisms, processes and trends that determine and optimize the trajectories of its further development.

It is worth emphasizing that a number of countries did not limit themselves to a declarative declaration of intentions to build a legal state, but carried out a constitutional consolidation of their legal status in the form of a fundamental constitutional norm. The principle of a legal state as a fundamental principle of the constitutional system finds its embodiment primarily in the implementation of the rule of law, the functioning of state power on the basis of its institutional division into legislative, executive and judicial branches, ensuring mutual responsibility of the state and the individual, constitutional guaranteeing and protection of human and citizen rights and freedoms (Tamanaha, B. Z., 2004, p. 130). In our opinion, it is these constitutional provisions that form the regulatory and legal matrix that has determined, determines and will continue to determine the conceptual parameters of the general development of the state system. These principles form the basis for the gradual transformation of formal legal regulations into real mechanisms for the legal regulation of social relations and ensuring the effective functioning of the rule of law in Ukrainian realities.

The conceptual basis of the rule of law is inextricably linked with the establishment of the principle of popular sovereignty and the subordination of state power to the interests of society. The rule of law is an institutional system of bodies and institutions that ensure and protect

the optimal functioning of civil society in conditions of democratic governance. The essential characteristic of such a state is the rule of law, to which power structures at all levels, political parties and public organizations, civil servants and private individuals are equally subordinate. The historical process of the formation of the rule of law statehood is characterized by a common pattern – the progressive movement of humanity towards freedom, which is manifested in conscious efforts to limit state power, force it to strictly comply with legal regulations and protect the honor and dignity of man as the highest social value.

The principle of the rule of law in society is a fundamental principle of the rule of law, which determines all its other principles, in particular the subordination of the state itself and its institutional structures to the law. According to scientific concepts, the rule of law is characterized by qualities inherent in law itself, namely: justice, humanity, and must constitutionally enshrine the inalienable natural rights of each individual. Ensuring the inviolability of human rights, protecting their honor and legitimate interests, creating effective mechanisms for their protection and guaranteeing are one of the cardinal principles of the rule of law, which determines its social legitimacy and moral and ethical justification (Byelova M., Farcash I.-M. & Byelov D., 2022, p. 32).

According to the position of some researchers, the conceptual scope of the principle of the rule of law significantly exceeds the limits of its regulatory and legislative implementation, which necessitates the need for a multi-faceted analysis of this phenomenon. In the structure of the content of the principle of the rule of law, three interrelated components are distinguished:

firstly, the ideological and conceptual component, which includes the formation of certain theoretical ideas and doctrinal positions in the field of legal consciousness, which create a worldview basis for understanding the essence and meaning of the rule of law;

secondly, the normative and legal component, which provides for the institutional consolidation of relevant provisions in current legislation, their formalization through a system of constitutional norms, laws and by-laws, which creates a legal basis for the functioning of the rule of law;

thirdly, the practical and implementation component, which covers the real implementation of the principles of the rule of law in specific areas of social relations through the activities of state institutions, law enforcement practice and social behavior (Haltern, U., 2018, p. 681).

Such a triune structure of the principle of the rule of law, in our opinion, emphasizes its complex nature and the need to ensure harmonious interaction between the theoretical-conceptual, normative-legal and practical-applied levels of its functioning in order to achieve effective legal statehood.

As we can see, this concept, in particular, contains a scheme: the principle of the rule of law arises as a certain idea in the theory of constitutionalism, is fixed in the system of constitutional and legal norms and through them is transformed into social relations. Or vice versa: social relations are concentrated and fixed in the norms of constitutional law, on the basis of which the principles of the rule of law are formulated.

Thus, the scheme of implementation, transformation into life of the principles of the rule of law fully coincides with the mechanism of the emergence and implementation of constitutional and legal norms. In this case, the resolution of the issue of the moment of emergence of the principle of the rule of law is of great importance. There are two main scientific positions on this issue, in particular: constitutional consolidation of the principle of the rule of law (ideas that are not enshrined in the basic law cannot be considered principles of the rule of law); regulatory influence on law enforcement practice can also be exercised by such legal ideas-principles of the rule of law that are not enshrined in the constitution.

It seems appropriate to emphasize that the conceptual basis of the principle of the rule of law is objective public interests and needs that are formed and transformed regardless of the subjective will of the legislator. The key role in identifying and articulating such public needs belongs to legal practice, which by its immanent nature is designed to quickly adapt to dynamic changes occurring in the legal sphere.

Undoubtedly, the process of emergence and formation of a principle as a scientific concept or guiding principle of legal practice is characterized by duration and multifacetedness, legislative consolidation is only the culminating stage of this complex evolutionary process. It is worth noting that scientific discussions and practical verification of the adequacy of the principle of the rule of law to real social relations do not stop even after its incorporation into the text of the basic law, and often receive an additional incentive for further development. Thus, the fact of normative consolidation of the idea in an act of higher legal force is an indicator of the existence of a specific principle of the rule of law, it is this constitutionally consolidated principle that further serves as a starting point and methodological guideline for the further development of both legal science and law enforcement practice. Such dialectical interaction between theoretical understanding, practical testing and normative consolidation ensures the dynamic development of the principles of the rule of law in accordance with the evolution of social relations and the legal needs of society.

5. Conclusions

The analysis shows that the rule of law is a complex multifaceted phenomenon that combines theoretical concepts, regulatory and legal foundations and practical

implementation mechanisms. The key characteristic of the rule of law is not just the formal consolidation of democratic principles in constitutional legislation, but their real implementation through an effective system of human rights protection, ensuring the rule of law and the functioning of mechanisms for mutual control of the branches of power.

The fundamental problem of modern state-building remains a significant gap between the declarative provisions of constitutions and their practical implementation. Empirical studies convincingly demonstrate that many legal guarantees are formal in nature, not providing real protection of citizens' rights. This situation highlights the need to develop more effective mechanisms for transforming legal norms into effective instruments of social regulation.

Understanding the rule of law as a dynamic process, not a static construct, is of particular importance. The triune structure of the principle of legal statehood, which includes ideological-conceptual, normative-legal and practical-implementation components, emphasizes the need to ensure harmonious interaction between theoretical understanding, legislative consolidation and practical implementation of legal principles.

The prospects for building a legal state are determined by the ability of society and state institutions to ensure effective interaction between formal legal regulations and the real needs of citizens, creating conditions for the gradual transformation of normative ideals into the everyday practice of democratic governance. This requires a comprehensive approach that combines constitutional reforms, institutional building and the formation of an appropriate legal culture in society.

Prospects for further research in this area include an in-depth study of the mechanisms for the effective implementation of the principles of the rule of law in different national contexts, the development of innovative methodological approaches to assessing the quality of legal protection for citizens, as well as a comparative analysis of successful practices in building a rule of law in different legal traditions. Special attention should be paid to the study of the impact of digitalization and globalization processes on the transformation of traditional models of the rule of law, as well as the development of new indicators and criteria for assessing the effectiveness of the functioning of legal institutions in modern conditions.

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ПРАВОВА ДЕРЖАВА В ПАРАДИГМІ СУЧАСНОГО КОНСТИТУЦІОНАЛІЗМУ: ПРИНЦИПИ, МЕХАНІЗМИ ТА ВИКЛИКИ ІМПЛЕМЕНТАЦІЇ

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Анотація

Стаття присвячена комплексному дослідженню теоретико-концептуальних засад правової держави та проблем практичної реалізації її принципів у сучасних умовах. Актуальність дослідження обумовлена наявністю значного розриву між теоретичними концепціями правової державності та їх практичною імплементацією в демократичних суспільствах. Метою роботи є аналіз основних принципів правової держави, виявлення факторів, що перешкоджають їх ефективному втіленню, та дослідження механізмів формування правової державності.

У дослідженні використано системний підхід, методи порівняльно-правового аналізу, структурно-функціональний та історико-правовий методи. Проаналізовано еволюцію поняття правової держави від античних часів до сучасності, розкрито концептуальні відмінності між поняттями «правова держава» та «верховенство права» в контексті різних правових традицій.

Особливу увагу приділено дослідженню триєдиної структури принципу правової держави, що включає ідеологічно-концептуальну, нормативно-правову та практично-імплементаційну складові. Виявлено, що ключовою проблемою сучасного державотворення є не відсутність відповідного законодавства у сфері прав людини, а брак ефективних механізмів трансформації правових норм у реальні інструменти захисту громадянських прав.

Доведено, що правова держава являє собою не статичну конструкцію, а динамічний процес, який вимагає постійної взаємодії між теоретичним осмисленням, нормативним закріпленням та практичною реалізацією правових принципів. Результати дослідження засвідчують необхідність розробки більш ефективних механізмів імплементації принципів правової державності та формування відповідної правової культури в суспільстві. Перспективи подальших досліджень включають вивчення впливу цифровізації та глобалізаційних процесів на трансформацію традиційних моделей правової державності.

Ключові слова: правова держава, верховенство права, конституціоналізм, права людини, правова культура.

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CONSTITUTIONAL JUDICIAL DIALOGUE: INTERNATIONAL STANDARDS AND JUDICIAL PRACTICE

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Summary

Dialogue between courts is a mechanism for improving modern constitutional jurisdiction. The growth of information in this century has led to complex conflicts, making it difficult to provide a constitutional response solely based on the internal context of the country. Thus, there is a tendency among constitutional judges to look for other experiences to summarize their impasses, dialogical activities, and exchange of legal reasoning between courts, an expression capable of contributing to reducing the discretion of the constitutional interpreter and the protection of fundamental rights.

After the thematic detailing, the methodological aspects applicable to these vocalizations are evaluated, explaining in general their conditions, characteristics, modalities, object, hypotheses and objectives, to address in the following topic the assumptions and legitimizing bases of judicial dialogue, to prove how constitutional theory serves as a support for the construction of this network of legal interaction, highlighting, in particular, the perspective of constitutionalism as a dynamic process, the contribution of constitutional hermeneutics, countermajoritarian the position of the Court and the improbability of building a Global Constitution in the world.

Finally, we try to systematize judicial dialogues between Constitutional Courts, offering a procedural interpretation of how a foreign judgment can be internalized in the national reality of the Supreme Court, emphasizing the possibility of a step-by-step approach to contextualize constitutional orders inserted in different contexts, mainly using comparison as an interpretive method. In this context, the work is the result of the reflexive organization of the exchange of influences between constitutional judges, who play an essential role in the collaboration of the rationalization and control of power with the exchange of horizontal experiences, given that the dissemination of jurisprudential agreements between constitutional courts are tools capable of reducing the limits of the interpreter's discretion and protecting fundamental rights that are vulnerable due to the level of rooting of paradoxes and their global projection in constitutional jurisdiction.

Key words: judicial dialogue, constitutional courts, European Court of Human Rights, court decisions, validity.

1. Introduction

Judicial dialogue is a human rights communication tool that, in its best expression, contributes to the optimization of transnational protection of human rights. Judicial dialogue is, without a pipe, one of the most fashionable concepts in the right-wing world. How the courts interact with each other to resolve those complex issues that concern more than one ordination is of obvious interest. And if this is true in general terms, then the judicial dialogue has found the most fruitful field for activity in the field of international law. In Europe, the legal space consists of different levels, each with its constitutional Court. The constitutional courts of the Member States, the Court of Justice of the European Union, and the European Court of Human Rights must ensure the effectiveness of certain freedoms, the material content of which is homogeneous. But if everyone has a say in this already somewhat crowded house, no one can impose themselves on others. In this context, only through dialogue can possible differences be smoothed out. However, this phenomenon does not only occur on the European continent.

The functional definition of judicial dialogue focuses on the advantage that, as a tool of legal communication, it could play, first of all, in the protection of human rights and, in general, in the qualitative development of the right person as such. From this point of view, dialogue would be fruitless. He interprets from cognitive activity at the judge's expense, striving to form legal knowledge within the framework of the verdict, judicial, and case management.

2. The Legal Nature of Constitutional Dialogue

The metaphor of dialogue between constitutional courts and legislatures was born in Canada to describe the role of the Supreme Court after the adoption of the Charter of Rights and Freedoms in 1982. It was then considered again in the Anglo-American academic space of comparative constitutional law, and then in Latin America, to describe or call for a new concept of constitutional justice, whose deliberative rationality would enhance or even exceed political representation. These formulations illustrate a certain circulation of constitutional ideas simultaneously with doctrinal work to legitimize the power of judges in very different contexts. Already in Canada, this metaphor caused heated debate. The connection of constitutional justice with the advisory paradigm raises questions, since it is difficult to imagine how the control function of a judge and his powers to abolish or amend legislative texts could be anything other than a transfer within the separation of powers.

Constitutional justice was first developed a century later, particularly at the end of the Second World War, and the theory that accompanied it (Ginsburg T., Versteeg M., 2014). This refers to the one proposed in the context of continental Europe by the Austrian legal theorist Hans Kelsen, who participated in its formation in Austria in 1920. Schematically, the legal order is a system of norms built hierarchically, and each norm operates when the norm is developed of the highest rank, up to the Constitution (Kelsen H., 1962). The judge checks the validity of the norms within the system; A constitutional judge, whether he is a court specializing in this review or an ordinary judge under the supervision of a general supreme court, verifies the compliance of all or part of the norms with the constitutional norm, thus performing an essential function in structuring the legal order (Kelsen H., 1928).

Constitutionalism and constitutional justice underwent a new transformation in the last two decades of the twentieth century, when neo-constitutionalism redefined legal systems. In addition to the increasingly frequent appeal to higher norms, called constitutionalization or fundamentalization, there was a substantialization of the legal justification based on texts related to these laws. Higher standards are a balancing act embodied by proportionality control (Barberis M., 2015). Then the legitimacy of the legal order passes from the law and representatives to the rights, principles, and values that the constitutional order will strive to achieve in the "process of axiologizing legal orders" (Champeil-Desplats V., 2012). Constitutional justice is no longer a procedural tool for verifying the validity of a norm in the system of positive law that Kelsen imagined; it becomes, in the words of Georges Vedel, the guardian of a certain transcendence specific to the rights and principles that pass through the legal system (Vedel G., 1988).

This evolution, which is less linear than its general presentation might suggest, has been accompanied by numerous and more or less subtle criticisms. The most famous was formulated in the 1960s, when the American constitutionalist Alexander Bickel proposed the "objection to the counter-majority" (Bickel A., 1986) against the argument in the case of Marbury v. Madison. The judge, who checks the conformity of a rule with the Constitution, is opposed to democratically elected representatives - this is especially true in cases where the judge reviews a law passed by Parliament. Alexander Bickel agrees with Justice Marshall's argument that the primacy of the Constitution must be effective, but denies, in the absence of legal provisions on this point, that the judge is the body authorized to do so; she even considers, from the point of view of moral and democratic legitimacy, that she is the least qualified body to do so, since she is not elected. The specter of an illegitimate "government of judges" has flourished (Lambert E., 2005). This criticism is similar to that initiated by Hans Kelsen, regarding the "intolerable" transfer of power from Parliament to the constitutional judge, when the reference standard of its review is based on rights and not only on procedural norms (Kelsen H.). An ideological dimension is added for those who believe that constitutional courts establish neoliberal values that would simultaneously subjugate political, legal, and sociocultural elites (Hirschl, R., 2004). In essence, the problem lies in the supremacy of the decisions of the constitutional judge in the legal order compared to the decisions of elected representatives, as US Supreme Court Justice Robert Jackson said: "We are not final because we are infallible, but we are infallible only because we are final." This evolution, apparently less linear than its summary might seem, was accompanied by numerous and more or less sophisticated criticisms. The most famous was formulated in the 1960s, when the American constitutionalist Alexander Bickel proposed a "counter-majority objection" (Bickel A., 1986) to the argument in the case of Marbury v. Madison. A judge who checks the compliance of a norm with the Constitution is opposed to democratically elected representatives – this is especially true when the judge controls a law adopted by the Parliament. Alexander Bickel agrees with Justice Marshall's argument that the primacy of the Constitution must be effective, but denies, in the absence of legal provisions in this regard, that a judge is an authority authorized to do so; It even considers, in terms of moral and democratic legitimacy, that it is the least qualified body to do so, since it is not elected. The specter of an illegitimate "government of judges" has blossomed (Lambert E., 2005). This criticism is similar to the one initiated by Hans Kelsen himself, regarding the "unbearable" transfer of power from Parliament to the constitutional judge, when the reference standard for its revision is based on rights, not only procedural norms (Kelsen H.).

An ideological dimension is added for those who consider that constitutional courts establish neoliberal values that would simultaneously subjugate political, legal, and sociocultural elites (Hirschl, R., 2004). The problem lies in the supremacy of the decisions of the constitutional judge in the legal order compared to the decisions of elected representatives, as Justice Robert Jackson of the US Supreme Court said: "We are not final because we are infallible, but we are infallible only because we are final" (Cour suprême des États-Unis, Brown v. Allen, 1953).

Several theoretical answers have been provided, demonstrating that the constitutional judge does not exercise such supremacy. There are two series.

These rather formal answers prove that various power relations in the political and legal system limit the powers of a judge. These limitations refer to the institutions that are courts, that is, their composition, organization, or status (Tusseau G., 2012). They also refer to the norms in question. Since the constitutional judge is only a negative legislator who has the possibility of repealing the norm adopted by the positive legislator, the latter may instead adopt an equivalent norm (Kelsen H.), which can create different problems depending on the modalities of constitutional justice specific to each legal system. The constituent bodies can revise the reference standard for the control exercised (Vedel G., 1992). The judge is then only a "switch" for Louis Favoret, whose function would be to indicate to the representatives whether the provision in question should fall within the scope of the law – then this provision corresponds – or to the Constitution – this provision should be elevated to the constitutional rank, to be valid. Then, the judge does not have the "last word" (Favoreu L., 1994); he only has the first word on which the electoral composition should depend. Other, more substantial answers consider that the constitutional judge only applies normative principles characteristic of the legal community and which are binding on him, as proposed by Ronald Dworkin, or that he formulates values necessary for the legal order, which voting (Dworkin R., 1995) cannot constitute a mere vote, as Alexander Bickel himself wrote, or that he participates through his deliberative capacity in a form of democratic representation (Bickel A.). Another, more critical approach assumes that the judge is introduced into the environment of dominant opinion, socio-economic relations, or strictly legal constraints that weigh on his reasoning (Rousseau D., 1995). Conversely, some studies in the United States are interested in the interpretation of the Constitution by political bodies, or even reduce each department to its function, returning the judge to his function of resolving disputes (Troper M., Champeil-Desplats V., Grzegorczyk C., 2005), which is tantamount to both a reminder of the limitations that weigh on the judge and a departure from the distorted vision of constitutionalists who would expect too much from the courts. To move away from this variant of the so-called political constitutionalism (as opposed to "legal constitutionalism"), which considers that it is the executive and legislative branches as representatives, and not the judge, who should ensure compliance with the Constitution (Bellamy R., 2007).

In this context, the idea of constitutional dialogue emerged in the late 1990s, which was at once a theoretical response to the argument of the opposing majority, a middle ground in these debates, and a description of a new practice of constitutional justice in specific legal systems. It takes the form of a metaphor for a dialogue that would take place between the constitutional judge, on the one hand, and the executive and legislative branches, on the other. This dialogical judicial control would consist of an interaction through which the political authorities would have the opportunity to confirm their interpretation of the Constitution and respond to what the judge had proposed (Tushnet, M., 2009).

While neo-constitutionalism asserted itself at the end of the 20th century, this dialogical concept corresponded to a broader political thought. To preserve the axioms of liberal democracy while noting its aporias, despite the expectations raised by its arrival in 1989, many political theorists look beyond elections and propose a more deliberative approach. This new political procedurality brings together an unparalleled plurality of views and even makes their communication an active principle of democratic action (Habermas J., 1997). Often drawing on this work, proponents of constitutional dialogue argue that the judge is no longer content with monitoring the validity of norms and imposing his decisions on elected representatives, just as these representatives are no longer the sole depositories of political legitimacy. They all continuously exchange opinions, where no decision is ever final but is constantly open to discussion. The proposed reversal is total: the constitutional judge becomes an essential actor in democracy, since he produces arguments within the framework of public debates.

In this respect, the metaphor of dialogue would have enormous explanatory and transformative potential; It would allow both to abolish the postulates of constitutional theory in terms of constitutional justice and the separation of powers, and to explain as well as to relieve their tension; It would embody a new democratic moment of constitutionalism in the broader context of the crisis of liberal democracies and representation. In a sense, it is about preserving the idea of the constitutional judge and the fundamental axiologized norm that he would defend, without freezing the content of the constitutional order or assuming a higher legitimacy of any voice in the institutional game.

The metaphor has become classic in English-language works on comparative constitutional law, based on the observation of the Commonwealth

countries, where this dialogical alternative would appear, and in constant connection with the US tradition. The first thing to do here is to present the conditions of a particularly lively and stimulating debate. They are not entirely related to the French context, in which, as we have seen, the question of the relationship of the constitutional judge with other states has already given rise to similar questions. The debate on constitutional dialogue as such has also given rise to two studies in France (Carpentier M., 2019): particularly in-depth, they have attempted to place this concept within a model of constitutional justice and to logically break down its elements as possible criteria, which makes it possible to reassess the French tradition in this area usefully. This is not our aim here; rather, it is a matter of stepping aside and questioning the construction of doctrinal discourses concerning constitutional dialogue based on the context of this metaphor.

It is also difficult not to mention the dialogue between judges, which is often invoked in France to describe the exchanges that take place between national and European courts (Young A., 2017) through previous decisions, the influence that case law has on each other, and all the everyday moments of socialization that mark, in a broader sense, the "global community of judges" (Slaughter A.-M., 2003). Although the content of the constitutional dialogue (Dawson M., 2013) considered here is different, since it concerns legislative bodies, the two concepts nevertheless share the idea that courts are advisory bodies that facilitate debate in the public space. In both cases, dialogue places supreme judges as close as possible to values and far from the simple normative control envisaged by Kelsen, or even the traditional hierarchy of norms, as the theses of legal pluralism in Europe suggest (Auby J.-B., 2010). The dialogue of judges is like the dialogue studied here. This expression is so meaningless because it is used in a general sense to refer to the relations of systems, legitimizing the central place of the judge in modern societies (Magnon X., 2016). Suppose the metaphor of constitutional dialogue can tell us so much from a comparative perspective. In that case, it is because it is a compelling example of the circulation of legal concepts and instruments. In this regard, many of the difficulties experienced by legal science in general arise, namely the relevance of the scientific qualification of the so-called legal situation; the role of such qualification about the legitimacy of institutions and the interpretations of constitutional texts; the essential link between description and prescription, that is, between the restitution of a phenomenon and the formation of reality. This metaphor offers a privileged position to observe the link between the creation of law and its study. Dialogue is not a reality that can be accessed outside its doctrinal qualification. On the contrary, legal discourses here show their capacity to explain and justify one or another state of affairs in the game of power.

This is because the circulation of legal concepts and instruments, which has intensified in the process of globalization, tends to make us forget about the problems specific to the different contexts from which legal concepts and instruments emerge. Or even to conceal the fact that they are constructed, stemming from conflicting interests and academic spaces involved in games of influence, constitutionalism remains primarily a political phenomenon, and the search for the legitimacy of constitutional courts remains a matter of power. Although legal concepts do not circulate identically from one context to another or even take on very different meanings, their circulation ultimately provides an opportunity to shed more light on each context. We therefore propose to situate discourses on the dialogue between constitutional judges and legislatures in the context of the realities they faced.

We will first examine the emergence of the dialogue metaphor in Canada, which was used to describe the new State of positive law in the late 1990s. Adopting the Charter of Rights and Freedoms in 1982, the Supreme Court found itself in a completely new situation, compensated by original textual provisions intended to spare the legislator and the so-called dialogical practice of the Court. However, from the very beginning, this metaphor was the subject of sharp criticism, in particular because it lacked relevance to describe the reality of power relations in Canada, where the Supreme Court finally had the last word, breaking with the tradition of parliamentary sovereignty, and at a time when conflicts between the English-speaking majority and the French-speaking minority threatened the federal project. Similar developments affected New Zealand and the United Kingdom. The idea of constitutional dialogue was widely taken up during the 2000s in the English-speaking academic space of comparative constitutional law to form a new concept of constitutional justice, in contrast to the model embodied by the US Supreme Court. More recently, as it was becoming well-known in the English-speaking world, it was taken up again in Latin America, in favor of a completely different, much more radical theoretical approach, which is about the fight against the presidential form that freezes the game of power and inhibits the realization of social rights. These two formulations reflect an inevitable increase in the abstraction of the concept developed in Canada and a very different use.

3. The American Model of Constitutional Judicial Dialogue

This study analyzes the concept of judicial dialogue in multilevel protection of fundamental rights in the United States, Canada, and Latin America.

In particular, this phenomenon's different typologies, characteristics, and fundamental elements will be examined based on the most relevant doctrine and case law on the subject. Subsequently, the relationship

between the Constitutional Chamber and the Inter-American Court of Human Rights (hereinafter referred to as the ICCHR), that is, between the "Courts of San José" (Ferrer Mac G.E., Herrera García A., 2013), will be analyzed, in particular, through the hierarchy of the American Convention on Human Rights in domestic law, the use of the Inter-American Convention jurisprudence by the Constitutional Chamber and the reverse phenomenon, as well as the conflict that arose between both jurisdictions as a result of the decision in the Artavia Murillo case, to determine the presence or absence of judicial dialogue.

Since the mid-1990s, the first studies of "global constitutional law" have emphasized the growing role of constitutional judges as protagonists of legal circulation, using "extra-systemic" arguments or increasingly referring in their decisions to international law and the decisions of other constitutional courts (L'Heureux–Dube C., 2001). This phenomenon has been confirmed at the international level in the decisions of regional protection bodies such as the Inter-American Court of Human Rights and its counterpart, the European Court of Human Rights. The gradual increase in the recognition of foreign law and legal comparisons by domestic, international, and supranational case law highlights the so-called "judicial dialogue" (Bonilla Haideer M., 2016). In this regard, a distinction should be made between "horizontal dialogue" and "vertical dialogue". The first occurs between bodies of the same level, particularly Constitutional Courts, Chambers or Tribunals, or at the international level between the Inter-American Court of Human Rights and its counterparts, the European Court of Human Rights or the African Court of Human Rights. In this respect, there are legal systems that demonstrate openness in the use of comparative law and the jurisprudence of international tribunals, such as the Constitutional Court of South Africa, and, conversely, there are cases of legal systems where this openness is very limited, such as the Supreme Court of the United States. The second phenomenon, the so-called vertical dialogue, occurs in relations between national, international, or supranational jurisdictions and can be carried out from the top down or vice versa. In this field, the relations between the Constitutional Courts and the Inter-American Court of Human Rights are studied within the Inter-American System of Protection framework. In the field of multilevel protection in Europe, the relationship between constitutional jurisdictions and the European Court of Human Rights is analyzed, as well as at the supranational level, with the Court of Justice of the European Union (EU).

In the field of fundamental rights, it is possible to establish a common cultural space that allows the creation of the preconditions for establishing judicial dialogue. In this sense, the success of judicial dialogue is due to several factors: 1) the globalization of normative sources; 2) the internationalization of human rights and guarantees of their protection, which are no longer the exclusive jurisdiction of States, which is why there is a multilevel constitutionalism; 3) the existence of common problems. Regarding the latter, we can mention the protection of the environment, same-sex marriage, issues related to bioethics such as euthanasia, the beginning and end of life, religious symbols, international terrorism, the rights of immigrants, as well as the emergence of new rights related to new technologies, such as the right to access the Internet. These rights are present at all latitudes, and to them, national and international jurisdictions have had to give responses that are not the same at all latitudes. In this sense, the jurisprudence of a specific constitutional, convention, or supra-constitutional Court can stimulate a reaction in other legal systems that can propose an identical, similar, or different solution to the same problem, demonstrating the influence that can exist between jurisdictions and the weight that comparative law currently has (Vergottini G., 2013). Strictly speaking, the term "judicial dialogue" is used whenever a decision contains references to decisions that come from a system different from that in which a particular judge works and, therefore, external to the system in which the decision must explain its effectiveness. The distinction between "influence" and "interaction" is beneficial. The former is unidirectional, while the latter implies plausible reciprocity resulting in "mutual enrichment." So, only if we observe interaction does it seem reasonable to engage in the topic of dialogue.

In this sense, dialogue is a process of interaction and mutual relations. On the other hand, there can be a dialogue between legislators, that is, between different parliaments (Scaffardi L., 2011), as well as between doctrines, as reflected in recent studies (Pegoraro L.), but the object of our research will be the circulation of law through the interpretative activity of judges. The metaphor of dialogue between the Canadian constitutional judge and the provincial and federal legislatures has been the subject of much criticism, primarily for its relation to the reality of constitutional justice: here it is not so much a dialogue as a monologue of the Supreme Court of Canada, to which the legislator almost always responds approvingly (Morton F.L., 1999). Indeed, in 2003, Andrew Petter argued that behind this "dubious dialogue" lies the supremacy of the judge (Petter A., 2003), while "not all legislative responses are evidence of genuine dialogue, and many are better described as echoes, rather than responses, to standards set by the judge" (Petter A., 2003). Responding to a 2007 review of his first study by Peter Hogg, Andrew Petter argued that the notion of dialogue retains too much of a quantitative dimension, since the accumulation of a large sample of legislative and legal data does not allow us to demonstrate anything about the nature of the interaction between the judge and the

legislator. Let alone the democratic legitimacy of the constitutional judge (Petter A., 2007). Is any legislative action that affects Charter law a "legislative extension"?

Both authors acknowledged as early as 1997 that there were situations in which the judge reserved the final word. They argue that this is the case when the judge decides that section 1 of the Charter does not apply because the law is a denial rather than a limitation of a right, or when the unconstitutionality concerns the very purpose of the law, which is the first step in the review introduced by the Oakes decision, or, finally, when the issue is particularly controversial. The legislature refrains from acting; the judge must take a firm decision to provoke a reaction (Hogg P.W., Bushell A.).

There is still the possibility of applying this clause in Article 33, but we have seen that it has minimal reality. There are not so many possibilities left for an honest dialogue. It is not excluded that the use of metaphor partly creates the fact it should convey. Andrew Petter's criticism goes further, questioning, beyond the reality of the dialogue, its function. It is possible that "dialogue theory () came to the rescue" of Canadian judges as they "broke their teeth" on several complex political and social issues, when their position, before the adoption of the Charter, was much more procedural, often in the shadow of public debate (Petter A., 2003). The Charter appeared in the context of "liberal legalism", dating back to the nineteenth century, which saw the judge as a neutral and impartial arbiter, excluding any political assessments and reasoning solely based on legal texts, in a formalistic way (Petter A., 2003). Such an approach could not justify the position of the judge, who guaranteed legal statements proclaiming fundamental rights, and no longer simply a technique for organizing power and the distribution of powers. Thus, "Charter scholars have worked on alternative theories" to legalism that no longer works. The metaphor of dialogue has offered a theory for these new jurisdictional practices, such as the "creative" rewriting of legislation by judges or the proportionality review that supports the "apparently neutral way of making judicial decisions" characteristic of legalism. Although the proportionality test has a rational dimension similar to the mathematical objectivity described by Robert Alexi, it is, above all, an in-depth assessment of legislative acts that brings the judge dangerously close to the role of legislator or, at the very least, an evaluation of a political nature. The paradox is that to enter into this apparent logic of dialogue, the Supreme Court has not simply softened the sharpness of its provisions in place of a brutal censorship of the law; it has developed tools which, while allowing interaction with the legislator, place the Court in a privileged position in the legislative process. The metaphor of dialogue would not only help to create the reality it is supposed to describe and make it understandable, but it would also disguise a function that is difficult to accept: the legislator only responds to the norms that the judge establishes, interpreting the Constitution and assessing the content that opposes it. Thus, the use of the metaphor of dialogue, in Andrew Petter's view, besides being rather nondescript, misses its mark:

Used as a justification for constitutional review as it relates to the Charter, the theory of dialogue minimizes rather than legitimizes. By acknowledging the subjective nature of Charter decisions, the theory of dialogue undermines the legitimacy of constitutional review. At the same time, it seeks to explain why legislatures should be allowed to prevail over judicial decisions.

This analysis of the turning point in the Canadian political and constitutional order in the 1980s is similar to that of the Canadian political scientist Ran Hirschl. According to him, the establishment of constitutional justice would aim to preserve the threatening hegemony of the sociological group that holds the power of the legislative majority and constitutes, in the context of parliamentary sovereignty, by safeguarding its rights and participation in the political system in the event of the loss of such power, all under the impartial guarantee of the supreme judge (Hirschl R., 2004). In Canada, Prime Minister (and also a lawyer and law professor) Pierre Trudeau sought and then achieved the adoption of the Charter in the name of his unequivocal commitment to rights and freedoms. At the same time, he fulfilled another of his desires – federal unity – by imposing the same rule on the provinces. According to Ran Hirschl, this is a way to preserve English-speaking power over the federation by conceding rights within its borders to the French-speaking minority (Morton F.L., 1987) and entrusting the Supreme Court, a symbol of impartiality, to resolve sensitive issues concerning languages (Cour suprême du Canada, P.G. (Qué.) v. Quebec Protestant School Boards, 1984) and the desire for independence, which the famous decision of 1998 decisively limited (Cour suprême du Canada, Renvoi relatif à la sécession du Québec, 1998), making the Court the main forum for resolving these delicate political conflicts (Hirschl R., 2004). Where, on the other hand, we understand the interest of defending the office of the Supreme Court and its role in the constitutional dialogue: it is about ensuring that a third party, especially if it is not the result of an election, can confront a majority or a minority (as in Quebec) that would deviate from good federal legislation: in this sense, a judge is appointed, first of all, against separatist legislatures, or populism, as Kent Roach writes.

Elements of the Canadian debate primarily concern constitutional justice, which has been established since the end of the last century in many legal systems, in countries where liberal democracy was first established, as well as in certain countries of the South, where it takes on particularly innovative forms (Bonilla Maldonado D., 2013). Constitutional courts

then find themselves at the epicenter of public debate and democratic uncertainty. How they respond to this, especially when the law forces them to influence all aspects of politics, including economic, social, and cultural, is always marked by the "judge's fear of becoming a 'super-legislator'" (Roman D., 2012) and provokes reproaches or support from their privileged observers. This is because fundamental principles and rights, understood as structuring the legal order, require the judiciary to examine the positive obligations of States. This function is more essential than the simple guarantee of the hierarchical structure of norms in a liberal regime. At the end of these transformations, very schematically, parliamentary legitimacy was partially replaced by the legitimacy of constitutional justice. In this context, the metaphor of dialogue between courts and legislatures has life outside Canada and the Commonwealth, where Parliament has never known such sovereignty. In 2014, the Constitutional Court of Chile issued two rulings declaring the inapplicability of military justice on the grounds of unconstitutionality in cases involving civilian casualties or where the circumstances indicate that they constitute a widespread criminal offense. In both cases, the Court based its arguments on numerous references to both traditional international human rights law and the jurisprudence of the Inter-American Court of Human Rights (IACHR Court). The following questions arise from these examples: Can these cases be considered demonstrations of the judge's leading role under the prism of a new legal paradigm? Can these cases be demonstrations of the potential growth of the role of the constitutional judge in the context of the emergence of a new public law? Is there a dialogue between judges in these cases? Our position is that the recent decisions of the Constitutional Court of Chile, concerning the competence of military justice, are an example of what can be called a change in the legal paradigm, especially in the constitutional sphere. Such a paradigm shift would have, against the background of the slow emergence of a new public law, and as a characteristic feature, a leading role of the judge and a multilevel inter-judicial dialogue.

Different modalities of dialogue are presented under the auspices of human rights interpretation. This is why various types of dialogue translate into other varieties of interpretation.

4. Conclusions

Thus, "dialogue between judges" refers to the exchange of arguments, interpretations, and legal decisions between judges, particularly during debates, through case law or cooperation between courts. This dialogue is an essential feature of judicial work, since it most often determines the relationship between the judge and the legislator and between the judge and the magistrates who preceded him. The dialogue thus symbolizes the relationship that judges from different jurisdictions, sometimes from various countries, can have, particularly the fact that judges cite each other in their decisions. Institutional mechanisms can provide for this dialogue or even be made mandatory. These examples show that dialogue between judges increasingly occurs outside institutional channels and, above all, independently of the judicial hierarchy. We are witnessing a kind of "circularity of case law", since the dialogue can be horizontal and vertical, institutional or informal, national or international, international or transnational, in short, it is multidimensional.

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КОНСТИТУЦІЙНО-СУДОВИЙ ДІАЛОГ: МІЖНАРОДНІ СТАНДАРТИ ТА СУДОВА ПРАКТИКА

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Анотація

Діалог між судами є механізмом удосконалення сучасної конституційної юрисдикції. Зростання інформації в цьому столітті призвело до складних конфліктів, що ускладнює надання конституційної відповіді виключно на основі внутрішнього контексту країни. Таким чином, серед конституційних суддів існує тенденція шукати інший досвід для узагальнення своїх глухих кутів, діалогічної діяльності та обміну юридичними міркуваннями між судами, виразу, здатного сприяти зменшенню дискреційних повноважень конституційного тлумача та захисту фундаментальних прав.

Після тематичної деталізації оцінюються методологічні аспекти, застосовні до цих аргументів, пояснюються в загальному вигляді їх умови, характеристики, модальності, об'єкт, гіпотези та цілі, щоб розглянути в наступній темі припущення та легітимізуючі засади судового діалогу, довести, яким чином конституційна теорія служить опорою для побудови цієї мережі правової взаємодії, висвітлення, зокрема, перспективи конституціоналізму як динамічного процесу, внеску конституційної герменевтики, контрмажоритарної позиції Суду та неймовірності побудови глобальної Конституції у світі.

Насамкінець, намагаємось систематизувати судові діалоги між конституційними судами, пропонуючи процесуальне тлумачення того, як іноземне судове рішення може бути інтерналізоване в національній реальності Верховного Суду, наголошуючи на можливості покрокового підходу до контекстуалізації конституційних приписів, вставлених у різні контексти, переважно з використанням порівняння як інтерпретаційного методу. У цьому контексті робота є результатом рефлексивної організації обміну впливами між конституційними суддями, які відіграють важливу роль у співпраці раціоналізації та контролю влади з обміном горизонтальним досвідом, враховуючи, що поширення юридичних угод між конституційними судами є інструментами, здатними зменшити межі дискреційних повноважень перекладача та захистити фундаментальні права, які є вразливими через рівень вкорінення парадоксів та їх глобальної проекції в конституційній юрисдикції.

Ключові слова: судовий діалог, конституційні суди, Європейський суд з прав людини, судові рішення, аргументація.

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«TREATY ON THE CONSTITUTIONAL RIGHTS AND FREEDOMS OF THE ZAPOROZHIAN ARMY» AS THE CONSTITUTIONAL PRINCIPLES OF STATE LIFE OF THE UKRAINIAN COSSACK STATE OF THE SECOND HALF OF THE XVII-XVIII CENTURIES

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Summary

The article examines the legal foundations of the state life of the Ukrainian Cossack state in the second half of the XVII-XVIII centuries through the prism of the «Treaty on the Constitutional Rights and Freedoms of the Zaporozhian Army». The content of the Ukrainian-Muscovite articles is analyzed as an example of early modern constitutionalism in Eastern Europe. The political and legal significance of these documents for the formation of the idea of limited power, representative government and social protection is revealed. The efforts of the Cossack elite to preserve autonomous rights are highlighted. It is proved that Cossack law is a unique form of constitutional tradition in the history of Ukrainian state formation.

To analyze the content and meaning of the «Treaty on the Constitutional Rights and Freedoms of the Zaporozhian Army» as the fundamental constitutional principles of the Ukrainian Cossack state; to determine their influence on the formation of the political and legal system and mechanisms of state administration.

The methodological basis of the scientific article: the historical-legal method for the reconstruction of the legal bases and traditions of the Cossack statehood; a systemic-structural approach to identify the institutional elements of the state system established in Cossack law; source method for analysis of normative acts.

The concept of the «Treaty on the Constitutional Rights and Freedoms of the Zaporozhian Army» not only reflected customary law, but also acquired a normative design that corresponded to the principles of constitutionalism in early modern Europe.

It is shown that despite the formal dependence on the Moscow protectorate, the Ukrainian Cossack elite defended autonomous «rights and freedoms» as the political and legal foundation of their statehood.

The Document formed a unique model of state and legal thinking, which combined democratic principles, military organization and customary law. The study allows us to assert that the Cossack state of the second half of the XVII-XVIII centuries had developed features of early modern constitutionalism. Legal codification of «freedoms» was not only a means of preserving identity, but also a political mechanism for resisting external pressure by the Moscow state.

Key words: rights and freedoms; Constitution of Pylyp Orlyk; Zaporozhian Army; Cossack law; constitutionalism; autonomy; hetman state; early modern era.

1. Introduction

In the context of Ukraine's modern struggle to preserve its independence, democratic order, and European values, turning to its own historical and legal traditions is of particular importance. Studying the «Treaty on the Constitutional Rights and Freedoms of the Zaporozhian Army» allows us to more deeply understand the origins of Ukrainian constitutionalism, legal culture, and democratic governance.

First, in the era of decentralization, self-government reforms, and strengthening of civil society, turning to the Cossack experience of self-organization, representative democracy, and separation of powers helps to form modern legal institutions based on their own historical soil.

Secondly, the contractual articles of the Ukrainian hetmans record the limitations of power, the rights of communities, and the mechanisms of control over officials. This allows us to talk about the continuity of the Ukrainian legal tradition with the best examples of Western constitutionalism, which is an important component of national identity in the era of military aggression and political turbulence.

Thirdly, at a time when Russia is trying to rewrite history and deny the existence of Ukrainian statehood, appealing to documents that record the tradition of autonomous, and later sovereign, legal thinking serves as a historical and legal argument in the struggle for truth, memory, and statehood continuity.

Thus, the study of the rights and freedoms of the Cossacks is not only an academic matter, but also an important tool for modern state-building, the formation of national legal consciousness, and the protection of Ukrainian legal tradition in the face of the challenges of the XXI century.

Modern historiography increasingly recognizes «Treaty on the Constitutional Rights and Freedoms of the Zaporozhian Army» not just as a historical phenomenon, but as a legal and political code of the Ukrainian tradition of self-government, which was formed long before the emergence of modern national law. There is growing interest in codifications of Cossack law, elements of parliamentarism in the Hetmanate, as well as legal protection of the individual in the Cossack environment. The study of the political and legal culture of the Cossack elders in the 17th–18th centuries has attracted the attention of many Ukrainian historians. Among them, it is worth noting the works of such scholars as V. Smolii, V. Stepankov, V. Horobets, T. Chukhlib, V. Matyakh, and V. Kononenko, who examined the political and legal aspects of the functioning of the Cossack foremen, their role in state-building processes, and their impact on social development. O. Ohloblyn and Z. Kohut emphasized that the political and legal acts of the Hetmanate sought to secure the sovereignty of Cossack autonomy and to protect it from the constant pressure of Russian autocracy, which was characteristic of European political thought during the Enlightenment era.

2. «Treaty on the Constitutional Rights and Freedoms of the Zaporozhian Army» as the basis of the existence of Ukrainian society.

Historical documents attest to the active use by the political elite of the Hetmanate of such notions as «liberties», «ancient liberties», «liberties gained in blood», «rights and liberties» as well as their extended variants: «rights, liberties and privileges», «rights, privileges, advantages, liberties and freedoms», and so forth (Matyah, 2000, p. 420).

This concept, in all its semantic interpretations, acted as a symbol so widespread that it seemed to have acquired an independent status and was actively used not only in relation to the realities of political life, but was also combined with the physical existence of the people and society. Bohdan Khmelnytsky drew an equation between these values in his letter of June 2, 1648, to the Grand Crown Marshal A. Kazanowski: «…so that, in accordance with our ancient rights and privileges, under the present liberties, we might remain alive and in good health» (Smolii V., Stepankov V., 2014, pp. 42–43). In the same manner, Ivan Vyhovsky compared rights and liberties. This is evident from his letter of October 17, 1658, to the Putyvl voivode Prince Dolgorukov: «We testify before Almighty God that we shall strive for our health and for our liberties, so that they may not fall away from us and not come into the hands of the enemies who encroach upon our well-being» (Oghloblin, 2001, p. 249). «The enemy is advancing upon us and our liberties», wrote Colonel K. Andriievych on August 6, 1661, to other colonels concerning the Tatar offensive. The ideal of socio-political life, as can be inferred from Ivan Mazepa's letter to the vizier of the Crimean Khan, was a state in which «the entire Little Russian people» «enjoy their rights, liberties, and freedoms peacefully and without disturbance» (Oghloblin, 2001, p. 301).

Considering the above, it is not surprising that liberties appear in a variety of figurative constructions – epithets, comparisons, metaphors, allegories − in which they are once again presented as a condition of the existence of society and the people: «And just as a man, wishing to cultivate a field for his kin, first puts in labor and clears it of thorns, so too did our ancestors diligently devote their efforts to this, sparing not their own health, but sacrificing even more where it was necessary, casting the thorns out of their fatherland so that it might bear us liberties, which we regard as the most precious thing; for, as we see, to fish, to birds, as well as to beasts and every creature, it is equally dear» − thus, on the one hand figuratively, and on the other within the framework of the natural law concept, perceived liberties the Koshovyi O. Vasiutenko in his letter of May 21, 1667, to I. Briukhovetsky (Oghloblin, 2001, p. 306).

This attribution of independent existence to abstractions, characteristic of Baroque culture, rested on a broad politico-cultural foundation. Above all, by «liberties» was understood the political distinctiveness of the Hetmanate society and its union with the Moscow tsar solely on the basis of a treaty. It was in this way that Demian Mnohohrishny, in his letter to L. Baranovych of September 26, 1668, perceived the essence of rights and liberties: «Then I, having consulted with the colonels from the other side of the Dnipro, inform you under which liberties we wish to remain: …under the ancient liberties of the late, glorious Bohdan Khmelnytsky, Hetman of the Zaporozhian Army, confirmed for the entire Zaporozhian Army by the articles established at Pereiaslav and by privileges…» (Horobets, 2023, p. 26). The Hetman envisioned no other option (and by this he meant «the violence of the voivodes and the restriction of the liberties of the Zaporozhian Army» which he explained as the reason for the Bruikhovetsky episode): «And if His Tsarist Majesty should disdain our service, we are ready to die with our liberties…» (Horobets, 2023, p. 27).

Through the prism of liberties, the political courses of the russian governments toward Ukraine were interpreted and assessed. Thus, P. Doroshenko and L. Buskevych perceived a «violation of liberties» in the fact that Moscow played a double game with the contenders for the hetman's insignia. At first, «they give hope, by the sovereign's favor, to one and to the entire Army, proclaiming him hetman, and thereafter secretly choose another for the hetmancy, and bestow upon him the charter, the mace, and the banner» (Stepankov, 1993, p. 30). The Cossack officers insisted that this could only have occurred as a result of granting «the arbitrariness of the pretenders to seniority» «contrary to their ancient rights and liberties» (Stepankov, 1993, p. 31).

Rights and freedoms were perceived as a symbol of territorial integrity and the inviolability of borders. Thus, when the Muscovite voivodes O. Trubetskoy, V. Sheremetev, and H. Romodanovsky, in Pereiaslav, declared to Yurii Khmelnytsky and his delegation the appointment of tsarist voivodes to Novhorod-Siverskyi, Chernihiv, Starodub, and Pochep, and, more generally, the ancient belonging of those towns «to the Muscovite state and not to Little Russia», the Ukrainian participants in the negotiations immediately pointed out that in this way their rights and liberties would be violated, which was impossible, since «the great sovereign had granted to their entire Zaporozhian Army… their former rights and liberties» (Stepankov, 2006, p. 252).

Rights and freedoms were also regarded as a symbol of non-interference in the internal state affairs of the Hetmanate. Defending «our military affairs» from the encroachments of the Pereiaslav voivode F. Volkonsky, Ivan Samoilovych, in a petition to the tsar of 12 October 1676, emphasized that the voivode was acting «against our military rights and liberties» (Smolii, Stepankov, 1994, p. 51). In the same role, rights and freedoms appear in the petition of Pavlo Polubotok together with the general officers to Peter I on 30 April 1723: «that His Imperial Majesty might graciously order in the future, concerning such and similar matters related to the Little Russian government, to send separate sovereign decrees directly to the Little Russian rulers, and not from the Little Russian Collegium, since at present, all affairs and orders in Little Russia, after the death of the late Hetman Skoropadsky, have been entrusted by His Majesty's own high decree to them to administer in accordance with the rights of the Little Russian people» (Oghloblin, 2001, p. 413).

The recognition of monarchical protection, as well as the Ukrainian side's obligation to fulfill the duties of a subject, was conditioned upon the guarantee of rights and freedoms. This was precisely how a Muscovite envoy understood the position of Petro Doroshenko regarding allegiance to the tsar, reporting to Moscow on 15 December 1667: «The hetman does not seek boyar rank or anything else from the great sovereign, but desires only His sovereign's grace − that the Cossack freedoms and rights may remain free» (Oghloblin, 2001, p. 425).

We encounter numerous assurances expressed by Ukrainian officers to russian officials that guaranteeing the liberties of the Zaporozhian Army on the tsar's part would secure their faithful service to him «And if the Zaporozhian Army is to have its liberties, it will never be subject to betrayal and will remain steadfast and unwavering, as long as the Army may have its liberty» − thus concluded Pavlo Zabila and his companions in their petitionary articles to the tsar of 1 January 1669, revealing their understanding of relations with representatives of Russian society (Stepankov, 2006, p. 250).

Rights and freedoms were also perceived as a symbol of the personal dignity of the Ukrainian officers. This is evident from Ivan Samoilovych's letter of complaint to the tsar dated 12 October 1676 against the Pereiaslav voivode F. Volkonsky, ending with the demand «that he should no longer, contrary to our military rights and freedoms, presume to dishonor the Pereiaslav colonel and the local company with indecent words» (Kogut, 1994, p. 127).

Rights and freedoms, in the perception of the Cossack officers, also served as a symbol of the distinctiveness of the Hetmanate's judicial system. This is evident from the case of Colonel P. Roslavets of Starodub. The tsar's decision to send him from Moscow to Baturyn in order to have his actions examined by the General Military Court was interpreted by I. Samoylovych as the monarch's desire «to preserve us, the Zaporizhian Army and the Little Russian people, steadfastly in our military rights and liberties» (Kogut, 1994, p. 128). A similar orientation can be traced in the petition of D. Mnohohrishny, submitted to the tsar on January 1, 1669. In it, among other things, the officers pointed

out the inadmissibility of interference in judicial affairs, as had been the practice of the voivodes under Briukhovetsky: «...They encroached upon Cossack rights and liberties and judged the Cossacks, which had never occurred in the Zaporizhian Army» (Kogut, 1994, p. 130).

The concept of «rights and freedoms» also extended to the perception of the economic life of the Hetmanate. The realization of this concept in this sphere, as evidenced by the universal of I. Mazepa of September 11, 1687, addressed to the Kyiv magistracy, was associated with the creation of favorable socio-economic conditions for the functioning of a given estate, formulated there as the possibility «to acquire prosperity». Any, even seemingly minor restriction or abuse in this sphere − for example, the introduction of the «bee tithe» not to mention taxes on estates, mills, or taverns − was regarded as «contrary to freedoms». A violation of «military freedoms», as I. Mazepa informed the tsar in January 1691, was likewise perceived in the Hetmanate in the arbitrariness of russian couriers, who «inflicted insults and imposed burdens» by seizing horses and carts and punishing those who sought to defend their property (Oghloblin, 2001, pp. 235, 241).

The Ukrainian officers associated rights and freedoms, as well as their violation, with the entire set of issues that became the cause of misunderstandings, military clashes, and wars between Ukraine and russia in the period from 1657 to 1668. In the articles submitted by the General Quartermaster P. Zabila together with his associates to the russian envoy Ya. Khitrovo on January 1, 1669 − specifically in Article 3 − it is indicated that the reason for the disregard of freedoms lay with the hetmans, who cared only «for their own honor and the increase of their estates». Yet already in the following Article 4 it is explicitly specified that the cause of the latest war with Briukhovetsky was the indulgence shown by the voivodes to the Muscovite troops, who engaged in theft, murder, torture, and arson, while remaining unpunished, since the voivodes with their «sacred authority» always «delayed and failed to act» (Horobets, 2001, p. 140). «For this reason, and for no other, could this present war begin and grow, only because of that...». It is worth noting that in this article the officers clearly distinguished between a «war for freedoms» and the war that the «traitor Briukhovetsky» had «begun at the same time». Moreover, it was specifically emphasized: «...And besides, they were not accustomed to our nature and customs» (Okinshevich, 1926, p. 72). Thus, rights and freedoms were quite openly linked to national peculiarities as they were perceived at that time.

Within the framework of the concept of «rights and freedoms» were also considered such components of national life as religious affiliation and faith. Let us recall here, for example, only the first article of Pylyp Orlyk's Constitution: «...The Hetman Bohdan Khmelnytsky, of glorious memory, together with the Zaporizhian Army, undertook and righteously waged war against the Polish Commonwealth for nothing else but military rights and freedoms, and above all, for the Holy Orthodox faith...» (Smoliy, Stepankov, 1997, p. 177).

Through the notion of «rights and freedoms», individual persons and their private economic life were likewise protected. Thus, on April 29, 1654, I. Vyhovsky, in a letter to V. Buturlin regarding a petition to the tsar for the confirmation of Kyiv's rights, referred to the establishment by a tsarist charter of «all freedoms, according to ancient custom, for each to live in his own settlement» (Smolii, Stepankov, 2014, p. 59]. On January 12, 1676, P. Yanenko and S. Tykhy, during negotiations over the conditions of P. Doroshenko's submission to the tsar, considered it expedient and necessary to insist that «the great sovereign show favor to Doroshenko, to all his relatives, and to all the community with him... allowing them to enjoy their property and freedoms without violation» (Smoliy, Stepankov, 1997, p. 103).

The active use of this symbol by the Ukrainian side led to its incorporation into the diplomatic lexicon and conceptual apparatus of the russian side as well. This is evidenced, for example, in the «Detailed Extract of the Articles Sent for Review to the Little Russian Prikaz by Hetman Briukhovetsky». When Muscovite officials encountered the petition of the Kyiv clergy and a colonel «to reestablish Latin schools in Kyiv», the resolution − prepared, of course, by those most competent in Ukrainian affairs − employed precisely the term «freedoms»: «To tell the Hetman: if this will not be offensive to their freedoms, such schools should not be established for them; but if it will be offensive to their freedoms, then the great sovereign, showing favor, has ordered schools to be established in Kyiv and the Kyiv inhabitants to be educated therein» (Strukevich, 1997, p. 136].

In the broadest sense, the concept of «rights and freedoms» continued to be used throughout the second half of the eighteenth century, up to the very abolition of the institution of the hetmancy and the elections to Catherine II's Legislative Commission. This is convincingly demonstrated by the «Petition of the Little Russian Nobility...» of 1763. Already in the preamble and the first article of the document «On the Little Russian Freedoms in General», the issue of «rights and freedoms», alongside the issue of «contractual articles», was posed as a matter of two interrelated components of the mechanism ensuring both the normal functioning of society as a whole and, in the broadest sense of the term, the safe life of each individual citizen (Chukhlib, 2009, pp.108–109).

Thus, the preamble emphasizes that «the granted rights, customs, privileges, freedoms, and even the contractual articles have become the protection of the weak Little Russian people». The very first article further underscores that the purpose of all former rights

and freedoms – «established by the Polish kings and the Grand Dukes of Lithuania, and by the ancestors of the All-Russian sovereigns, and especially by His Majesty Tsar and Grand Duke Alexei Mikhailovich, and confirmed by Catherine II» − was to create a situation for Ukraine-Hetmanate, and within it as well, in which «both collectively and individually, everyone could enjoy their rights, customs, freedoms, and advantages, employ them in all circumstances, and thereby protect themselves» (Chukhlib, 2009, p.112).

Under the slogan of securing rights and freedoms, the document also laid out all the specific articles, regardless of which spheres of social life they concerned. Finally, the document concluded with an appeal to the Empress, in which all the societal issues and needs of the Hetmanate were reduced to the theme of realizing the freedoms of a «free people, yet deprived of the opportunity to make use of their freedoms» (Chukhlib, 2009, p. 114).

We consider the examples and reflections cited above sufficient to agree with Zenon Kohut's assertion: «Little Russian rights and freedoms constituted the political autonomy of the Hetmanate, its institutions of self-government, social order, and administrative practice» (Kogut, 1994, p. 127).

3. «Rights and Freedoms» as the Foundations of State Sovereignty.

Alongside the concept of «rights and freedoms», in the context of the senior officers (starshyna) fulfilling their social functions as a political elite, synonymous notions such as «integrity», «peace», and «sacred peace» were often employed, indicating the ultimate goal of their activity. An example can be found in P. Doroshenko's letter to the Poltava regiment of 1665: «...We, having zealous care for the integrity of the Zaporozhian Army, direct all our efforts solely toward establishing without disruption and firmly securing peace in our lamented fatherland and strengthening military freedoms» (Serdiuk, 2020, p. 23).

As we see, here the concept of «integrity» is used both as a synonym and as a broader notion in relation to «peace» and «freedoms». Doroshenko used it similarly on November 30, 1669, in his letter to D. Mnohohrishnyi. There he employed the term «integrity» to signify the process of territorial unification of both banks of the Dnipro, viewing it as the guarantee of realizing rights and freedoms: «...On which foundation the freedoms, rights, and liberties both of the Zaporozhian Army and of our Mother the Church are to be laid and secured» (Oghloblin, 2001, p. 54). Doroshenko also used the notion of «integrity» to denote the ultimate goal of his socio-political activity toward the end of his hetmancy, when in public statements he attempted to summarize his political career. In his letter to I. Sirko in March 1676, he wrote in particular: «Yet wherever good may occur, even if only in Starodub, it is good, as long as the integrity of Ukraine is preserved». A few days later, when nearly everyone had abandoned him, the Right-Bank Hetman in a letter to the colonels declared that from his youth he had followed the principle: «Only that military honor and the integrity of the common good should not suffer violation» (Smoliy, Stepankov, 1997, p. 269).

I. Samoilovych, in his letter to I. Sirko of December 19, 1675, defined the aim of his hetmancy and of the contractual articles established upon his election with the formula: «Fearing for the integrity of military freedoms» (Chukhlib, 2009, p. 321).

P. Ivanenko (Petryk), on April 11, 1692, when concluding an agreement and taking an oath to the Crimean nobility, expressed the ultimate purpose of his activity as follows: «...Striving, with God's almighty help, to preserve the integrity of Ukraine» (Smoliy, Stepankov, 1997, p. 129).

Integrity was also regarded as the very meaning of life and service for a particular Cossack officer. This can be seen in the universal of I. Skoropadsky of November 9, 1712, addressed to the General Ensign I. Sulima concerning the villages of Stare and Kalne: «In respect of the faithful and steadfast service, labors, and merits, rendered since his youth in the Zaporizhian Army of His Tsarist Majesty, untiringly devoted to the integrity of the Little Russian fatherland» (Kononenko, 2017, p. 238).

«Integrity» was likewise conceived as an object of struggle against external enemies, which allows us to view it as a concept of general significance. Such an understanding of the term is encountered in Ya. Somko, in his letter to the tsar of June 24, 1662: «...Fighting against the enemies of the tsar and for the integrity of Little Russia»; (Smoliy, Stepankov, 1997, p. 279). I. Samoylovych, who, in greeting the serdiuks on March 2, 1676, declared: «...You have preserved integrity against the enemy's invasion...» (Strukevich, 1997, p. 137); and again I. Samoylovych, who in his letter to the tsar of December 9, 1677, regarding the defense of Chyhyryn, interpreted the notion of «integrity» in the context of territorial wholeness and protection from hostile attack: «...That the integrity of this region near Chyhyryn might be preserved from the enemy's assaul» (Strukevich, 1997, p. 138).

At the same time, we have sufficient examples in which the concept of «integrity» was used in narrower senses, or its semantic meaning was reduced to describing the condition of an individual person. Thus, on May 7, 1669, P. Doroshenko proposed to D. Mnohohrishny to correspond «concerning the integrity of the land and the people» (Stepankov, 2006, p. 251). Later, at the end of 1676, when Prince Volkonsky demanded that the Right-Bank ex-hetman P. Doroshenko be sent to Moscow, I. Samoylovych replied that he and the General Staff had promised Doroshenko «to preserve him in integrity» that is, not to trouble him in his capacity as a

private person, which he had become (Stepankov, 2006, p. 252).

In a similar context, if we are to believe the denunciation of V. Kochubei, I. Mazepa used this term in reference to his personal situation: «I live never having full confidence in my own integrity, always in danger, expecting the axe like an ox awaits the slaughterer's blow!» (Smolii, Stepankov, 1994, p. 121). From the denunciation of the General Judge it is also evident that the hetman employed the term together with freedoms: «And we would wish to secure our further integrity and military freedom» (Smolii, Stepankov, 1994, p. 54).

The notion of «peace» was also employed quite actively. For instance, in his letter to I. Sirko of April 5, 1677, Yu. Khmelnytsky used «integrity» in the same context as «peace»: «Likewise, I, following this path and earnestly caring for the holy peace, for the integrity of our beloved motherland» (Oghloblin, 2001, p.306). This concept, too, was actively invoked to designate the ultimate aim of the activity of a leading political actor, regarded as one of his highest merits before society. This is evident, for example, in Yu. Khmelnytsky's exhortatory letter, addressed in 1677 to the inhabitants of Kaniv: «Our father of glorious memory... together with your grace, waged war for nothing else but privileges and freedoms, so that your grace might live in peace, which your grace experienced during our rule» (Oghloblin, 2001, p. 306).

In his universal of December 8, 1708, I. Skoropadsky employed the notion of «integrity» as a contextual antonym to «devastation». And in his universal of February 16, 1709, he placed it alongside «peace», assuring the officials of Starodub that he, as commander, desired that under his rule «not only the city of Starodub, but also our entire Little Russian fatherland should remain in peace, inviolate integrity, and complete security...» (Smolii, Stepankov, 2014, pp. 42–43).

«Peace», as a political and cultural value, carried such weight that disregard for it was considered one of the gravest accusations against a representative of authority. It was precisely by emphasizing Doroshenko's alleged unwillingness to ensure socio-political stability and security in the land that I. Samoylovych, in his universal of July 31, 1676, sought to discredit his opponent in the eyes of the officer elite: «...He strove for nothing else but always to harm innocent people in their peaceful dwelling» (Stepankov, 1993, p.29).

As can be seen from the above examples, there existed no clearly defined hierarchy of subordination among the concepts of «integrity», «peace», and «freedoms». Depending on the specific context, their semantic coordination and interrelation assumed diverse shades and connections. All of this ultimately points to the use of these notions by the officers as contextual synonyms and as symbols of the self-sufficient functioning of Ukrainian society in the full variety of its manifestations.

Ultimately, if we accept the legitimate assumption that each historical epoch possesses characteristic «concepts which may serve as a key to understanding its culture», then for the period of the Ukrainian Cossack state of the late seventeenth to eighteenth centuries, such a key concept was embodied in the notion of «rights and freedoms».

4. Conclusions.

In general, while agreeing with Z. Kohut's interpretation of the essence of the «Little Russian rights and freedoms», it is important to emphasize that the concept of «rights and freedoms» encompassed the entire spectrum of social life and the functioning of Ukrainian society as a whole, including its political dimensions. These rights and liberties reflected both the actual status of political actors and the envisioned ideal state of maximum political subjectivity. Thus, they functioned as a symbolic construct that consistently oriented society toward the broadest possible expansion of political agency and distinctiveness.

Accordingly, the rights and liberties of the Zaporizhian Army can be regarded as a corporate code of rights and obligations of the Ukrainian Cossack state in the late seventeenth to eighteenth centuries − one that established the foundations of self-regulation and political autonomy. In this sense, the rights and liberties of the Hetmanate constituted an essential component in the development of Ukrainian statehood in the early modern period. Their study allows for a more comprehensive and profound understanding of Ukraine's early modern history.

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«ПРАВА І ВОЛЬНОСТІ ВІЙСЬКА ЗАПОРОЗЬКОГО» ЯК КОНСТИТУЦІЙНІ ЗАСАДИ ДЕРЖАВНОГО ЖИТТЯ УКРАЇНСЬКОЇ КОЗАЦЬКОЇ ДЕРЖАВИ ДРУГОЇ ПОЛОВИНИ XVII–XVIII СТ.

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Анотація

У статті досліджено правові основи державного життя Української козацької держави у другій половині XVII–XVIII ст. через призму «прав і вольностей» Війська Запорозького. Проаналізовано зміст українo-московських статей як приклад ранньомодерного конституціоналізму в Східній Європі. Розкрито політико-правове значення цих документів для формування ідеї обмеженої влади, представницького управління та соціального захисту. Висвітлено зусилля козацької еліти щодо збереження автономних прав у контексті зовнішнього тиску Московської держави. Доведено, що козацьке право становить самобутню форму конституційної традиції в історії українського державотворення.

Проаналізувати зміст і значення «прав і вольностей» Війська Запорозького як засадничих конституційних принципів Української козацької держави; визначити їхній вплив на формування політико-правової системи та механізмів державного управління у другій половині XVII–XVIII ст.

Методологічною основою наукової статті є комплекс загальних та спеціально-наукових методів пізнання. Авторами були використані: історико-правовий метод для реконструкції правових засад і традицій козацької державності; системно-структурний підхід для виявлення інституційних елементів державного устрою, закріплених у козацькому праві; джерелознавчий метод для аналізу нормативних актів.

Уточнено, що поняття «права і вольності» козацтва не лише відображало звичаєве право, а й набувало нормативного оформлення, яке відповідало принципам конституціоналізму ранньомодерної Європи.

Показано, що попри формальну залежність від московського протекторату, українська козацька еліта послідовно відстоювала автономні «права і вольності» як політико-правовий фундамент своєї державності. «Права і вольності» Війська Запорозького сформували унікальну модель державно-правового мислення, яка поєднувала демократичні принципи, військову організацію та звичаєве право. Дослідження дозволяє стверджувати, що козацька держава другої половини XVII–XVIII ст. мала сформовані риси ранньомодерного конституціоналізму, що випереджали багато європейських аналогів. Збереження і правове кодифікування «вольностей» було не лише засобом збереження самобутності, а й політичним механізмом протистояння зовнішньому тиску та централізації з боку Московської держави.

Ключові слова: права і вольності; Конституція Пилипа Орлика; Військо Запорозьке; козацьке право; конституціоналізм; автономія; гетьманська держава; ранньомодерна епоха.

SECTION 3

CONSTITUTIONAL AND LEGAL PRINCIPLES OF ORGANIZATION OF ACTIVITY OF STATE AUTHORITIES AND LOCAL GOVERNMENT

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THEORETICAL FOUNDATIONS OF THE EXERCISE OF DEMOCRACY UNDER SPECIAL LEGAL REGIMES

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Summary

The institution of representation gives rise to a key problem for the modern concept of democracy – between nominal holders of power and absolute rulers, because power, in the end, cannot be anything other than the exercise of power. Accordingly, the holding of free elections in itself cannot be a reliable criterion of true democracy, since the next no less critical and challenging problem arises on the way of its practical implementation – by what means and means it is necessary to increase the influence of the people on the exercise of power formed on behalf of the people and exercised about the people.

The inalienability of popular sovereignty excludes the understanding of the people's constituent power as a one-time act, after which the people allegedly lose their sovereignty, as the concept of "people's democracy" prevailing in the countries of the former socialist camp actually allowed. Therefore, no one, including the state, can usurp popular sovereignty. The latter provision of the Constitution of Ukraine is one of the general principles of the constitutional system of Ukraine, which are subject to increased constitutional protection. It is not legitimate to limit democracy because it is supposedly only capable of giving the people the opportunity to change their rulers through general elections periodically.

The formation of the structure of the legal regime, as well as the technology of introducing legal regimes, should be based on the principles of the rule of law, legality, expediency, and reasonableness, since otherwise the introduction of restrictions and obligations may cause rejection in society and cause socio-political cataclysms. In general, the advantage of legal regimes over other means of legal policy is the comprehensive solution of important constitutional and legal policy tasks.

Keywords: democracy, elections, people's legislative initiative, referendum, legal regime, special legal regime, martial law, state of emergency, human rights

1. Intriduction

The Constitution of Ukraine declared the people to be the bearer of sovereignty and the sole source of power, which it exercises directly and through state and local government bodies. The most direct expression of the people's power is a referendum and free elections. The forms of direct popular power, enshrined in Section 3 of the Constitution, play a decisive role in modern domestic constitutionalism, determining the directions of development of civil society and the state, and providing an opportunity to ensure the free expression of the will of a citizen on the broadest range of issues.

In constitutional doctrine, two fundamental approaches to the concept of emergency regimes can be distinguished: monism and dualism. Representatives of the first approach believe there is no significant difference between a constitutional order functioning under normal conditions and governance under extreme conditions. The rule of law requires the introduction of such mechanisms in the event of extreme conditions that would, on the one hand, ensure the protection of the constitutional order, and on the other, an adequate return to normality.

Representatives of the second group proceed because the constitutional order under normal conditions is based on the unconditional guarantee of individual rights and freedoms and a polyarchic government structure by the principle of separation of powers. Under extreme conditions, there is a temporary suspension of the constitutional order, in particular, individual rights and freedoms, and the polyarchy of the republican system of government is replaced by monocracy. In other words, under extreme conditions, there is a suspension of the ordinary constitutional order, which is replaced, albeit temporarily, by an extraordinary legal order.

2. Special legal regimes as an institution of constitutional law

Special legal regimes ensure public order, national security, and healthcare. They are an essential legal system component, allowing states to promptly respond to emerging challenges and threats. At the same time, the application of such regimes requires a careful balance between the protection of state interests and the observance of human rights and freedoms. The analysis of historical and modern examples of the introduction of special legal regimes shows that their consequences are often complex because, on the one hand, these regimes contribute to stabilizing the situation. On the other hand, they can lead to the restriction of the fundamental rights of citizens, causing a public outcry.

The legal regime is an essential component of the national legal system of any state, since a well-coordinated mechanism of norms, principles, and procedures determines the content and direction of legal regulation of social relations. The foundations of forming legal regimes based on the relationship of trust between the individual and the state have a thousand-year history, which is closely intertwined with the complex global political, economic, social, and cultural transformations of humanity, establishing law and order. Therefore, there is a need for the temporary introduction of special legal regimes, which are characterized by a combination of special legal means: prohibitions, permits, and obligations *(Demyanchenko A.S.)*.

The purpose of the legal regime is to provide a specific procedure for regulating a particular area of social relations. Considering the social content of law, the legal regime aims to solve specific legal policy tasks. The choice of certain legal means that should form a particular legal regime is determined by the subject of legal regulation, the object and circle of persons to whom it will apply, the time and territorial framework, and the goal set by the subject of law-creative policy. Such a specific state of regulation of social relations about a tangible or intangible object, process, activity or other object of influence consists, according to V. Tchaikovska, in a special combination of methods of legal regulation, forms of law and the procedure for implementing the relevant norms, a special set of rights and obligations of subjects of law about these objects, measures of responsibility for offenses related to their use, and other components of legal influence *(Chaikovska V.V., 2014)*.

The classification of legal regimes causes specific discussions in scientific circles. Thus, O. Yakovlev distinguishes the following types of legal regimes: according to the specifics of the combination of methods, methods and types of legal regulation, sectoral, subsectoral and institutional legal regimes are distinguished; according to the object of legal regulation, we can talk about material and procedural regimes; According to the scope of action, legal regimes can be divided into private law and public law; From the point of view of functional purpose, regimes are classified into regulatory and protective. At the same time, according to the jurist, such regimes should not be opposed to each other, since the same regimes may fall under certain types of different classifications. For example, the protective regime is procedural and public law, and the substantive law regime is regulatory (*Yakovlev O. A., 2015*).

I. Haydamaka gives the following classification of legal regimes: primary and secondary legal regimes; general and special permitting regimes; general and special legal regimes. At the same time, the researcher notes that the general legal regime covers both general and permissive regimes in general (*Haydamaka I., 2008*).

The doctrine distinguishes the following historical varieties of legal regimes:

1. Classical model of a special legal regime.

Some of the first mentions of the change in the legal regime at that time take us back to the era of Ancient Greece and Rome, when, from time to time, the population of these influential states experienced wars, state rebellions, and natural disasters. The ancient Greek philosopher Aristotle warned that the legislator should strive to have a solid foundation by the principles of the preservation and decline of states already stated; he must beware of destructive factors and pass laws, written or unwritten, that will contain all the preservatives of statehood (*Aristotle*).

At the same time, the well-known Latin expression of Cicero, contained in the treatise “On Laws”, underlines one of the basic principles of the legal

regime: "Salus populi suprema lex esto (lat. " the health (well-being, goodness, salvation, happiness) of people should be the highest law (right)" (*Ciceronis. M. Tvli, 1928*). In ancient Rome, to stabilize emergencies (for example, suppressing state rebellions, waging wars, overcoming the consequences of natural disasters, etc.), the senate, as a legislative body, could appoint a dictator to embody a significant range of powers for a specific period, so that the latter would govern the state.

The classical Roman model of special legal regimes evolved significantly during the Modern Age. The philosophy of changing the foundations of public affairs management and the transformation of the relationship between man and the state was actively promoted by pro-enlighteners: D. Diderot, Voltaire, C.L. Montesquieu, and J.J. Rousseau. Their achievements are made up of the well-known concept of separation of powers and the principle of "checks and balances". The most famous reformers of the idea of human rights of their time were F. Bacon with the work "The Great Revival of the Sciences" (supplemented in 1620 with the treatise "New Organon"), G. Grotius – "Three Books on the Law of War and Peace" (1623), T. Hobbes – "Leviathan" (1651), T. Paine – "The Rights of Man" (1791). It should be noted that J. J. Rousseau also supported the idea of powers-prerogatives and was convinced of the need to establish special legal regimes during extraordinary events. The philosopher argued that the inflexibility of laws, which does not allow them to be adapted to emergencies, can in some instances make them disastrous, and thereby cause the destruction of the state during a crisis... There may be a thousand cases for which legislation is not provided, and the awareness that everything cannot be predicted is necessary for foresight (*Rousseau J., 1950*). Thus, the classical model of special legal regimes demonstrates the philosophical and legal foundations of how relations of trust between a person and the state were born in extraordinary situations since ancient times. Significantly, fiduciary ties were based on the primitive ideas of that time about justice, equality, freedom, and humanism. This model evolved during the Modern Age and was filled with additional outlines about the strict observance of legislative bases, boundaries, and procedures for implementing temporary measures of the authorities aimed at returning to the standard social order. These restrictions constituted the content of legal guarantees – "red lines" aimed at protecting a person from the arbitrariness of the authorities.

2. The French model of the "state of siege".

Derived from the Roman model of dictatorship is the French model of 'état de siège réel' (from French 'état de siège'), which was formed during the Great French Revolution (1789-1799). This unique model was the first to include a special set of measures to overcome crises. The basis of the legal regime of the 'state of siege' was the suspension of the Constitution ('supremacy of the constitution') in the event of extraordinary situations, as special temporary measures were put in place.

The initial idea of the institution of the "state of siege" is that emergencies can be prevented and countermeasures can be introduced by promulgating comprehensive legal norms in advance. A carefully developed legal framework establishes the outlined and prescribed measures that must be taken to control or stop a particular emergency *(Reinach T., 1885)*. Thus, the primary source regulating the functioning of the "state of siege" is the normative legal act, which defines the norms and procedures of measures taken by state institutions to prevent or overcome the consequences of threats to the ordinary legal regime. The military's various functions during a siege, the administration of justice, and the protection of civil liberties are paramount (*Gross O., Fionnuala Ní Aolá, 1996*).

The significance of the model of the state of siege lies in the clear legislative consolidation and delimitation of the boundaries of the powers of the authorities, as well as the definition of their spheres of influence for the settlement of extraordinary situations. It should be noted that the introduction of the "state of siege" does lead to radical changes in the state's legal structure and sometimes affects the redistribution of jurisdiction between civil and military authorities. This is done to ensure the stability of the state in the face of the threat of external aggression or internal conflict. However, such measures should be limited in time and scope and should be consistent with international norms and human rights standards. The state of siege presupposes the presence of a fixed number of "legal guarantees", which again ensure citizens' trust in the authorities. In the context of responding to extraordinary situations, the national legal system of Ukraine primarily gravitates towards the model of the "state of siege" of the Romano-Germanic legal family, which is determined by the endowment of the authorities with normatively and procedurally recognized extraordinary powers.

3. Anglo-American model of "martial law".

In contrast to the French model, the "martial law" model was formed in the countries of Anglo-Saxon law. This concept was historically intended to regulate the relations of royal power (military, police) with subjects who committed a rebellion or otherwise expressed disobedience to the monarchical system. Unlike the concept of a state of siege, martial law is the result of judicial lawmaking, since its provisions are determined, for the most part, by precedent. This key feature emphasizes the difference in historical traditions that formed the "martial law" model. The prerequisites for creating an extraordinary administrative and legal regime, which took place in England in the first half of the 17th century, were some court decisions that ratified extraordinary powers of authority. The famous jurist Albert Venn Dicey defines martial law as undoubtedly

a part of the law of England, since it gives the right to maintain public order, at whatever cost to blood or property it is necessary *(Radin M., 1942)*. The term "martial law" actually meant a summary form of criminal justice, carried out under direct or delegated royal authority by the military or police forces of the Crown, which is independent of the established processes of the ordinary law courts, ecclesiastical courts, and courts applying civil law in England. Martial law is not a set of substantive law norms but a summary of powers that apply when the ordinary rule of law is suspended *(Reinach T., 1885)*. According to the provisions of the "martial law" model, emergency powers are an integral part of the "common law", although the "user manual" for their application specifies the preliminary factual conditions that must exist before such powers can be applied in a particular case. Emergency situations are resolved by using the powers within the ordinary legal system, without needing new or additional powers from the government *(Gross O., Fionnuala Ní Aolá, 1996)*.

As for the national legislation of Ukraine, it should be noted that the concept of "legal regime" is used in many regulatory legal acts. In particular, only in the Constitution of Ukraine is the legal regime used about the concepts of "state border", "property", "war and state of emergency, and " zones of emergency ecological situation". It should be noted that the Constitution of Ukraine and other regulatory acts do not disclose the concept of "legal regime" (*Tsytsyura V.I., 2024)*.

O. Petryshyn and V. Tkachenko consider the legal regime as a special order of legal regulation applied to a particular type of social relations, which is ensured by legal means and methods and types of legal regulation (*Tsvik M.V., Tkachenko V.D., Petryshyn O.V., 2002*).

In turn, V. Nastyuk, V. Believtseva, the legal regime is considered as a set of legal norms that determine rights and obligations, including responsibility, which are necessarily fixed at the level of legislation and with the help of which relations are regulated by applying legal means (methods, techniques) based on the principles of law (*Nastyuk V.Ya., Believtseva V.V., 2009*).

D. Kosse, studying special legal regimes, notes that they are an administrative form of activity of state authorities in non-standard conditions, which allows applying extraordinary measures and guaranteeing their compliance with the constitutional status (*Kosse D.D., 2013*).

Analysis of different approaches to the concept of "special legal regimes" allows us to determine their main characteristics:

Temporary nature, which can be established for a specific period (martial law, state of emergency, special economic zone regime);

Territorial limitation is because they are introduced in a particular territory (state, region, oblast, city, etc.), in a certain industry, or about specific subjects.

To achieve the goal for which a special legal regime is introduced, citizens' constitutional rights and freedoms may be temporarily limited, but only within the limits specified by legislation.

Expanding the powers of state and local authorities to ensure the effective functioning of the special legal regime; the introduction of a special legal regime must be provided for by law and carried out by the established procedure.

Sokolova, having analyzed the category of legal regime, concluded that the legal regime is a set of legal means that are interconnected, which provide normative regulation of a separate sphere of relations in society, which express the degree of legal regulation and are intended to satisfy the interests of legal subjects (*Sokolova I.O., 2011*).

Today, it is no longer possible to apply legal forms of ensuring the country's national security that do not meet world standards in the field of ensuring human rights and freedoms. Characterizing the establishment and development of forms of exercising power by the people in independent Ukraine, we can state disparities both in their legislative support and in practical application. Thus, the exercise of power by the people through state authorities and local self-government bodies has received a fairly thorough study in domestic legal science. At the same time, the situation with the direct exercise of power by the people is significantly different: Ukraine has not yet gained significant experience in the exercise of power directly by the people, the relevant legislative framework is outdated or imperfect, the legal regulation of the direct exercise of power by the people is aimed at regulating its forms, while ignoring the types of such activity. Special attention should be paid to exercising popular power precisely in the conditions of the influence of global risk factors on society, that is, during the introduction of emergency legal regimes. The transformation of modern Ukrainian society requires new approaches to solving issues in the scientific provision of national security (*Kuznichenko S.O., 2020*).

3. Possibilities and features of holding elections during the introduction of special legal regimes

As is known, Ukrainian legislation does not allow elections to be held during the legal regime of martial law. At the same time, the Constitution of Ukraine regulates the holding of different types of elections under martial law in various ways. Thus, Part 4 of Article 83 makes it impossible to hold elections for the people's deputies of Ukraine during a state of emergency or martial law. According to this article, the Verkhovna Rada, whose powers are ending, remains in full force until the first meeting of a new council elected after the abolition of the state of emergency or martial law. Amendments to the Constitution under a state of emergency or martial law are prohibited under Part 2 of Article 157.

As for other types of elections, the Fundamental Law does not establish such a prohibition. The corresponding restrictions are provided by the Law "On the Legal Regime of Martial Law" and the Election Code. Thus, to hold elections of the President of Ukraine or local elections under martial law, it is sufficient to amend the rules.

At the same time, the constitutionality of the norms of the aforementioned laws concerning the postponement of the next elections of the President of Ukraine may be questioned. On the one hand, Article 64 of the Constitution of Ukraine does not list the electoral rights of citizens among those that cannot be restricted during a state of war or emergency. On the other hand, the norms of the Constitution directly establish the date of the next elections of the President of Ukraine and people's deputies of Ukraine (unlike local elections) - the last Sunday of March and October, respectively, of the fifth year of office. Postponing voting in connection with the operation of the legal regime of a state of emergency or martial law is not conditioned by the circumstances for the elections of the President of Ukraine. None of the subjects of the submission has applied for clarification to the Constitutional Court of Ukraine. However, it is not excluded that such submissions will appear in the event of a protracted war closer to the date of the elections established by the Constitution.

The principal risks of holding elections during hostilities (Makarov G., 2023)

So, in 2024, under the legal regime of martial law, it is possible to hold regular elections of the President of Ukraine. To remove the relevant restrictions, it is necessary to amend the Law "On the Legal Regime of Martial Law" and the Electoral Code. However, assuming the elections will still have to be held during martial law, they pose a very high risk to the country's political development. Let us consider in more detail what risks elections during hostilities have.

It is impossible to comply with OSCE (Organization for Security and Cooperation in Europe) standards due to the temporary restriction of political rights and freedoms of citizens. In particular, peaceful assemblies have practically ceased, citizens' freedom of movement has been restricted, and most audiovisual media operate in the Unified Information Marathon mode.

It is problematic to ensure voting security. This is especially true for areas close to hostilities. However, the danger of missile strikes remains throughout the country.

The complexity of financing elections. For example, in 2019, almost 2 billion UAH was spent from the State Budget on the polls of people's deputies, and 2.3 billion UAH on the elections of the President of Ukraine. Considering inflation, the cost of elections will only increase in the future. Therefore, holding elections will require reducing expenses for social services and support, state authorities, local self-government bodies, defense, and the army.

Problems of organizing the electoral process, particularly, are related to implementing the electoral rights of specific categories of citizens. Let us note in more detail which ones.

- ✓ Identification of the place of residence of temporarily displaced persons. A significant proportion of displaced persons is not registered at their actual residence. As for citizens of Ukraine who have left abroad, according to the Ministry of Foreign Affairs, fewer than 5% of them are registered with the consular authorities. As a result, it is not easy to enter relevant information into the Voter Register.
- ✓ The difficulty of ensuring the voting rights of voters who remain abroad. According to data from the Ministry of Foreign Affairs of Ukraine, provided at the request of the OPORA network, as of June 21, 2023, more than 8 million Ukrainian citizens were abroad. This is about 20% of the population as of the beginning of the full-scale Russian invasion on February 24, 2022. The existing network of foreign polling stations cannot ensure the voting rights of internally displaced persons. For example, in Poland alone, each of the four polling stations will have more than 300 thousand voters. Organizing elections under such conditions is impossible without introducing new voting methods - postal or electronic.

Voting by military personnel directly in combat zones is practically impossible to organize.

The possibility of mobilizing members of election commissions during the election campaign is not excluded, which could lead to the disorganization of their work. The same applies to official observers and candidates for elected positions.

The danger of intensifying internal political conflicts and adopting populist administrative decisions in wartime.

If holding elections in conditions of hostilities becomes critically necessary (for example, to fill vacant positions of people's deputies of Ukraine), it is possible through the temporary abolition or suspension of the legal regime of martial law. In this case, it is also possible to make amendments to the Constitution of Ukraine that would allow holding elections in conditions of martial law. However, the suspension or temporary abolition of the legal regime of martial law will not mean the cessation of Russian armed aggression. Therefore, it will not solve the problem of the security of the electoral process at all stages, the deficit of budget funds, the organization of elections abroad, or the aggravation of internal conflicts.

All the reasons why democracies refuse to hold elections during wartime can be classified into the following groups: economic (the need to spend money and other resources on elections), electoral (unstable psychological state of the population, the possibility of influencing elections by the enemy state, the lack of an

opportunity for the population in the occupied territories to vote in elections), political (the presence of a period of political instability during elections) and security. Whether elections during wartime are possible depends on how these problems are resolved. If most issues can be resolved without causing significant harm to society, then elections during wartime are theoretically possible (Novak D.E., Moryak-Protopopova H.M., 2023). It is worth considering them in more detail in the context of the Ukrainian situation.

1) Economic reasons. The most obvious reason is the priority of state budget expenditures. The 2019 Presidential elections in Ukraine cost the State Budget 2.4 billion hryvnias. Taking into account inflation, as well as new challenges (updating the destroyed electoral infrastructure, compiling voter lists in the conditions of a long "freeze" of the State Register, a more complex than usual organization of voting outside polling stations, perhaps even the need to hold voting for longer than 1 day due to shelling, prolonged air raids, etc.), the cost of the elections will only increase. According to the data provided by the Ministry of Finance based on calculations received from the CEC, the estimated expenditures of the State Budget and the conditions for 2024 for the holding of the Presidential elections in Ukraine will amount to 5,418.3 million hryvnias (the Ministry of Finance explained why it asked the CEC for the cost of the elections for the next year).

2) Electoral problems – this group is the most numerous.

3) Political problems. The danger of intensifying internal political conflicts and adopting populist administrative decisions in wartime.

4) Security risks. It is problematic to ensure the security of the vote. This is especially true in areas close to hostilities. However, the danger of missile strikes remains throughout the country.

It is worth emphasizing that formally we are not talking about all elections, but only about regular elections (for some reason, various experts do not specify this), because according to Part 2 of Article 135 of the Electoral Code, "in connection with the expiration of the constitutional term of office of the Verkhovna Rada of Ukraine," regular elections of people's deputies are held. It should also be understood that "expiration of the constitutional term of office" and "termination of office" differ. According to Part 1 of Article 90 of the Constitution of Ukraine, "the powers of the Verkhovna Rada of Ukraine shall terminate on the day of the opening of the first session of the Verkhovna Rada of Ukraine of the new convocation." However, the President may terminate the powers of the Parliament early by Part 2 of the same Article. And if the provisions regarding the prohibition of early termination of the powers of the Verkhovna Rada of Ukraine in the last six months of its term of office or the powers of the President of Ukraine are spelled out, then the impossibility of "dissolving" the Parliament during martial law is not mentioned. At the moment, this point is irrelevant, because the constitutional terms of office of both these bodies have reached/are coming to an end, but for the future, the provisions of the Basic Law should be clarified. Also, the Constitution of Ukraine does not contain a direct prohibition on holding by-elections of people's deputies (for now, this is relevant, because the current Verkhovna Rada of Ukraine was elected under a mixed electoral system even before the Electoral Code came into force). Filling vacant seats in Parliament in the event of early termination of the powers of deputies elected in single-mandate constituencies does not affect either the expiration of the term or the termination of the powers of the Verkhovna Rada of Ukraine as a whole; therefore, it does not fall under constitutional prohibitions (*Hrynyuk R.F., Gutsulyak O.I., 2023*). Thus, formally, the Constitution of Ukraine excludes the possibility of holding only regular elections for the people's deputies of Ukraine. As for other types of elections (in particular, by subject, presidential, and local), the Constitution does not establish such a prohibition. The corresponding restrictions are provided for by the Law "On the Legal Regime of Martial Law" and the Electoral Code. Therefore, changes to the legislation can unblock certain types of elections during martial law.

In conclusion, the teleological interpretation of the Constitution of Ukraine indicates that it is in favor of the impossibility of discussing regular elections of people's deputies during martial law. As for other types of elections, despite the absence of a direct constitutional ban on their holding during martial law (against the background of the legislative ban, which can be eliminated), it seems impossible to organize them in compliance with all essential principles and foundations, and therefore democratic elections are currently not available to us, and undemocratic ones are not needed.

It should be noted that in the countries of the European Union, at the level of constitutions, restrictions on elections during a state of emergency or martial law are mainly not stipulated. The Constitution of Italy allows (but does not oblige) the postponement of elections to the chambers of Parliament and the extension of the powers of their current composition during a period of martial law. In general, most EU countries have not had the opportunity to use the legal regime of martial law since there were no hostilities in their territories after World War II. In Croatia, where an armed conflict continued in 1991–1995, direct parliamentary and presidential elections were held in August 1992, during a decrease in the intensity of hostilities. However, the international community criticized these elections and recognized them as undemocratic.

In Bosnia and Herzegovina, no elections were held during the armed conflict. It is worth considering the experience of Israel, which is cited by supporters of holding elections in wartime. Even though this state is constantly threatened by external aggression, it has minimal understanding of long-term, full-scale wars. The only exception is the Israeli War of Independence of 1947–1949. Other full-scale wars were short-lived (from 6 days to 3 months). Some wars were not constant hostilities, but strings of armed incidents between army units of different states (for example, the so-called "war of attrition" of 1967–1970 between Israel and Egypt) or long series of terrorist attacks (the so-called "Intifadas"). Such conflicts did not require significant restrictions on the rights and freedoms of citizens and could not disrupt the electoral process. That is why the ban on holding elections was used extremely rarely: yes, elections were not held during the War of Independence; in 1973, during the Yom Kippur War, parliamentary elections were postponed for 2 months.

In contrast, elections under the legal regime of martial law were actively held in some of Israel's neighboring authoritarian Arab states, since such a regime had lasted for years. For example, in Egypt, martial law, which was declared in 1981 after the assassination of then-President A. Sadat, lasted 30 years and was only lifted after the overthrow of the regime of H. Mubarak in 2011.

The UK does not have a single codified act in the form of a Constitution, so the possibility of postponing elections depends on legislation passed by Parliament *(Case Studies, 2024)*. Generally, the UK legal order does not contain classic legislation on a state of emergency. Part 2 of the Civil Contingencies Act 2004 (the Civil Contingencies Act, "CCA") is the most relevant part. Other provisions allow the government to act urgently in response to crises in specific areas (for example, the Public Health (Control of Disease) Act 1984 (PH(CoD)A), but the CCA contains general provisions for responding to emergencies. The powers granted by section 2 of the CCA are of a broad regulatory nature, under which the monarch can make "emergency regulations" by order in Council. In practice, this power will only be exercised with the consent of the government, primarily the Home Secretary. The most recent examples of postponement of elections in the UK are 2001 and 2020.

In 2001, the first election since the Second World War was postponed due to the foot-and-mouth disease epidemic. It was expected that the General Election was due to be held on May 3 to coincide with the local elections, but on April 2, 2001, both the general and local elections were postponed to June 7 due to rural movement restrictions imposed in response to the foot-and-mouth disease outbreak that began in February. This was achieved by the Elections Act 2001, which postponed the 2001 local elections in England and Wales from May 3 2001 to June 7 2001, and Northern Ireland from May 16 2001 to June 7 2001. In 2020, the Coronavirus Act 2020 (CA) was passed, which provided that neither general nor presidential elections would be held during the coronavirus pandemic. Some local elections were postponed for a year. This decision was made by Parliament, having passed an Act providing the legal basis for the postponement. About local council elections, s. 60 provides that "an ordinary election of councillors of any local authority in England which would otherwise be held on the ordinary election day in 2020 shall be held instead on the ordinary election day in 2021". By s. 60(2). The election of the Mayor of London has been postponed. 60(6), as have the elections of mayors of local and combined authorities. 60(8) and (10). The election of police and crime commissioners has been postponed. 60(12). S. 64 amends the provisions governing the timing of elections in Northern Ireland. S. 61 CA provides for the power of the Secretary of State to postpone an election due to be held from March 16, 2021, until May 5, 2021, but only until May 6, 2021.

Like the United States, Canada is an interesting example of a democratic state located far from the theater of hostilities of the First and Second World Wars, but it took an active part in them *(Case Studies, 2024)*. The war never took place on their territory, allowing them to hold regular parliamentary elections on schedule. However, in another respect, Canada's military experience differs significantly from the experience of the United States: the country experienced a social and internal political split associated with the decision to mobilize Canadians to participate in the war. As a British dominion, Canada depended on Great Britain's foreign policy. The declaration of war on Germany in 1917 and 1939 automatically meant Canada's involvement in the war on the Allies' side. The Canadian government could only determine the degree of the participation, but could not remain neutral. It was for this purpose that the independent Canadian Expeditionary Force was created, which was under the command of the armed forces of Great Britain. However, this decision immediately created a split in society and among political parties regarding the need for a general mobilization of Canadians to fight in the interests of Great Britain and France, countries that many Canadians did not perceive as their homeland. This problem was a key topic of political debate during the First and Second World Wars. Its basis was mainly ethno-linguistic differences between Canadians from Great Britain and those from France and other French-speaking countries. The confrontation between Anglo-Canadians and Franco-Canadians had a substantial impact on the political process, the struggle for power between political

parties, and the policies of governments. At the same time, this domestic political crisis and the search for a solution each time increased Canada's independence and sovereignty.

Regarding respecting and exercising the right to choose, Judith S. Trent and Robert W. Frydenberg state that the right to choose is essential because it gives us the freedom to participate actively in selecting our leaders. It is the core of democracy. There is no other country in the world where citizens exercise their right to choose more vigorously and responsibly than in the United States. Whether the election results determine the winners of two seats on the city council or the presidential seat in the White House, the exercise of the right to choose continues to be an essential element of democratic government. The right to choose allows us to determine how our fundamental interests can best be served.

Conclusion

Summarizing the views of scientists on the concept of democracy, it can be concluded that it certainly implies a democratic nature of governance, where society has the opportunity to influence decision-making both through elected representatives in state and local government bodies, and directly through elections, referendums, as well as other forms of citizen participation in political decision-making. However, its content should not be limited only to the right of the people (society, communities, citizens) to express their will in its purely constitutional forms (doctrinal approach), which is too narrow an understanding, but also includes the ability, opportunity and will of citizens to take an active part in the political life of the country in the broadest sense, expressing their own opinions and support for decisions important to society.

A special legal regime can be defined as an extraordinary administrative and legal regime that is temporarily introduced by state or local authorities on the entire or a specific territory of the state by special legislation, as an extreme measure of the state about the elimination of an extreme (extraordinary) situation that cannot be resolved in the general order and the introduction of which, as a rule, provides for the expansion of the powers of state and local authorities and is associated with the restriction of the rights and freedoms of a person, citizen and the interests of legal entities.

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ТЕОРЕТИЧНІ ЗАСАДИ ЗДІЙСНЕННЯ НАРОДОВЛАДДЯ В УМОВАХ ОСОБЛИВИХ ПРАВОВИХ РЕЖИМІВ

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Анотація

Інститут представництва породжує ключову проблему для сучасної концепції демократії – між номінальними носіями влади та абсолютними правителями, адже влада, врешті-решт, не може бути нічим іншим, як здійсненням влади. Відповідно, проведення вільних виборів саме по собі не може бути надійним критерієм справжньої демократії, оскільки на шляху її практичної реалізації постає наступна не менш критична і складна проблема – якими засобами і засобами необхідно посилити вплив народу на здійснення влади, що формується від імені народу і здійснюється щодо народу.

Невідчужуваність народного суверенітету виключає розуміння народної установчої влади як одноразового акту, після якого народ нібито втрачає свій суверенітет, як фактично дозволяла пануюча в країнах колишнього соціалістичного табору концепція «народної демократії». Тому ніхто, в тому числі і держава, не може узурпувати народний суверенітет. Останнє положення Конституції України є одним із загальних принципів конституційного ладу України, які підлягають посиленню конституційного захисту. Обмежувати демократію нелегітимно, тому що вона нібито здатна лише дати народу можливість періодично змінювати своїх правителів шляхом загальних виборів.

Формування структури правового режиму, як і технологія введення правових режимів, має ґрунтуватися на принципах верховенства права, законності, доцільності та обґрунтованості, оскільки в протилежному випадку введення обмежень та обов'язків може викликати неприйняття в суспільстві та стати причиною соціально-політичних катаклізмів. В цілому перевагою правових режимів перед іншими засобами правової політики є комплексне вирішення важливих завдань конституційно-правової політики.

Ключові слова: демократія, вибори, народна законодавча ініціатива, референдум, правовий режим, спеціальний правовий режим, воєнний стан, надзвичайний стан, права людини.

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COMPLIANCE OF THE REGULATION OF SUPERVISION OVER LOCAL GOVERNMENT IN THE POLISH CONSTITUTION AND IN LEGAL ACTS

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Summary

The aim of the article will be to analyze the regulation of supervision over local government in the Polish Constitution and in the legal system regulating the supervision of local government. The implementation of this objective will allow to demonstrate to what extent supervision has constitutional authority and whether the constitutional regulation is complied with in legislation. Therefore, this study will omit those issues related to supervision that do not directly arise from the Constitution. In particular, this applies to the supervisory procedure. The content of this study includes an analysis of the concept of supervision itself, supervisory criteria and supervisory authorities.

The basic research method will be the dogmatic method focusing on the interpretation of constitutional norms and the presentation of the positions and views of representatives of science. The research method used will also include an analysis of selected and representative court case law and the presentation of practical examples of supervision and their assessment by administrative courts.

The Polish Constitution uses the concept of supervision without defining it. It is interpreted in the same way in Polish doctrine as well as in judicial jurisprudence, emphasizing its most important element, i.e. the authoritative and unilateral interference in the activities of local government bodies by the supervisory authority. This is how it differs from control, which does not include this form of influence.

The Polish Constitution defines the criterion of supervision for supervision too narrowly, as well as incompletely defines supervisory bodies. It ignores the criterion of proportionality, which limits the right to authoritative intervention in the activities of local government to cases of a material violation of the law. In addition, the legislator assigns criteria of a purposeful or efficiency nature to supervisory authorities. Many government administration bodies, such as the Minister of Foreign Affairs or the Voivodeship Superintendent of Schools, exercise supervisory powers over local governments, even though they are not supervisory bodies within the meaning of the Constitution.

The incompatibility of the laws with the Constitution in terms of the criterion of supervision and the number of bodies with supervisory competences does not have a significant impact on the independence of local government. This is due to the occasional application of supervisory criteria other than legality and the generally uniform position of administrative courts, which always reduce the assessment of supervisory activities to the criterion of legality. The practice of administrative courts allows for the elimination of these differences. There is no mention of the need for an urgent change to the Polish Constitution.

Key words: supervision; control; legality; proportionality; supervisory authorities.

1. Introduction

Supervision over local government is one of the basic determinants not only of its functioning, but above all of its independence, which directly affects the definition of local government (Wiktorowska, 2002, p. 193-194; Żelasko-Makowska, 2024, p. 6). The perception of local government depends on how supervision will be regulated, and in fact the assessment of whether a given structure can be defined as self-government at all within the meaning of, for example, Article 3 of the EChLSG (European Charter of Local Self-Government, 1985). The broadly defined scope of

supervision, along with many criteria for its exercise, will lead to both the dependence of local government on the government administration and its depreciation. Moreover, when performing public tasks, a local government dependent on government administration will not be able to properly meet the expectations of residents, which will lead to the perception of local government as part of government administration, and not as a form of real influence of residents on the public tasks performed.

Therefore, the concept of supervision and the principles of its regulation in constitutional provisions has a fundamental role in defining it. This is not only theoretical, but above all practical, as the activities of the local government are not autonomous and are subject to continuous assessment by supervisory authorities and administrative courts.

The above justifies the definition of research problems. The question to which this publication will seek answers is to indicate what is the understanding of the concept of supervision in the Polish Constitution (Constitution of the Republic of Poland, 1997). Another research problem will be to assess whether the definition of the supervision criterion in the Polish Constitution is exhaustive, or whether there are other criteria and what is the regulation of the legal system in it. An important research problem will be to assess whether the Polish Constitution fully defines supervisory bodies or only half-heartedly. The last research problem will be the assessment of the compliance of this regulation with the Polish legal order regulating the functioning of local government.

The basic research method will be a dogmatic research method consisting in the analysis of the applicable law, court rulings and the views of representatives of the doctrine. An additional method of research will be an empirical method involving the presentation of practical examples of the application of law in the field of supervision over local government.

2. Analysis of the latest research and publications

The issue of supervision over local government in the Constitution of the Republic of Poland has been the subject of studies, most often combined with a comprehensive definition of supervision over local government. The authors, when analysing individual supervisory institutions, do not focus on the Constitution itself, but pay the most attention to statutory solutions. Among the authors dealing with this issue are P. Chmielnicki, B. Dolnicki, M. Karpiuk, H. Izdebski, W. Kisiel, Z. Kmieciak, J. Korczak, Z. Leoński, A. Matan, I. Niżnik-Dobosz, M. Stahl, M. Szewczyk, J.P. Tarno, K. Ziemski and others. Practically every study on local government includes an analysis of its supervision to a greater or lesser extent. The subject matter covered by this study is usually not an independent subject of research.

3. The logic of the presentation of the research material

The order of the detailed issues presented below is logical and resultant. In the first place, the issue of defining the concept of supervision in the Polish Constitution will be presented. Next, the constitutional criterion of supervision and other criteria of supervision existing in the Polish legal system, but not explicitly mentioned in the Constitution of the Republic of Poland, will be indicated. The next part of the publication will include an analysis of constitutional and non-constitutional supervisory bodies. The last substantive fragment includes conclusions.

4. The concept of supervision in the Polish Constitution

Supervision over the activities of local government is regulated by Article 171 of the Polish Constitution. The Polish Constitution does not define the concept of supervision itself (Skoczylas, Piątek, Bach-Golecka, Bosek, Capik, Chybalski, et. al., 2016, p. 953). This lack is of significant practical importance. Both in the doctrine of Polish law and in the legal system, in addition to supervision, there is also the concept of control. These terms are not synonymous (Niżnik-Dobosz, 2016, p. 55; Ziemski, Matan, Jagielski, Góralczyk, Szyrski, Kulig, et. al., 2023, p. 28-32). Supervision is defined as an authoritative and unilateral interference in the activities of local government (Izdebski, 2020, p. 63-64; Gromek, 2022, p. 449). On the other hand, the audit consists in examining the compliance of the existing factual situation with the postulated state and is aimed at determining the extent and causes of the discrepancy and providing the audited entity with the results of this discrepancy along with the obligation to remove them (Niżnik-Dobosz, 2016, p. 86). The basic difference between supervision and control is, as a rule, the inability of the controlling entity to take governing actions in the face of identified deficiencies in the activities of the controlled entity (Żelasko-Makowska, 2024, p. 1-3). Such a meaning of these terms has also been approved by judicial jurisprudence (Resolution of the Constitutional Tribunal, 1994, W1/94; [Resolution of the composition of 7 judges of the Supreme Administrative Court of Poland (hereinafter SAC), 2014, II GPS 3/13).

The Polish legislator sometimes tries to expand the scope of supervision over the activities of local government without using the term “supervision” itself. An example is the regulation of public tasks in the field of education. These tasks are the own tasks of the municipal and county self-government. They are carried out by the educational administration functioning primarily in public schools and kindergartens. In practice, due to the permanent underfunding of these tasks from the state budget and the visible decrease in the number of pupils, especially in rural communes,

local government bodies adopt resolutions on the liquidation of some redundant schools or generating disproportionate expenditures for their maintenance. In such cases, education is provided in another school in a given municipality, and children are sometimes transported by school buses. The condition for the liquidation of a public school is to obtain a positive opinion of the government body of the education administration, which is the voivodeship superintendent of schools as a part of central administration. Without such a positive opinion, the resolution initiating the process of liquidation of a school cannot produce legal effects (Article 89(3) of the Law on School Education, 2016; Patyra, 2019, p. 94). Despite the lack of definition of this power as supervisory, the head of education does in fact have such a competence.

5. Legality as a supervisory criterion

According to Article 171(1) of the Polish Constitution, the only constitutional criterion for supervision is legality (Banaszak, 2012, p. 861). Legality is understood as compliance with generally applicable law, and thus supervisory authorities may intervene in the activities of local government in an authoritative manner only when the law is violated (Masternak-Kubiak, Balicki, Bartoszewicz, Complak, Haczkowska, Ławniczak, 2014, p. 417; Dolnicki, 2024, p. 426; Filipek, 2001, p. 218). Legality should be understood as the non-contradiction of a given act with the entire legal order, adopted on the basis of a specific legal norm and resulting from a proper interpretation and understanding of that norm (Zimmermann, 2022, p. 330). Sometimes such an understanding of legality is treated as "compliance with the law" (Filipek, 2001, p. 218).

It is sometimes argued that legality means both compliance "with the letter of the law" and compliance with the "spirit of the law" (Wiktorowska, 2002, p. 209-210; Zimmermann, 2022, p. 329), however, legality as a criterion for supervision cannot mean any other basis for action than the assessment of legality. The only thing that means is that in each case, when assessing the legality of a given provision, a derivative method of interpretation should be used, assuming primarily the decoding of the legal norm and the application of all legal provisions, or of a functional interpretation emphasizing the purpose and function to be achieved by a given provision (the so-called compliance with the spirit of the law). directives of interpretation in order to achieve its proper meaning (Zieliński, 2012, p. 84-85; Zirk-Sadowski, Leszczyński, Wojciechowski, 2012, p. 164-165).

The Polish constitutional legislator did not take advantage of the possibility provided by Article 8(2) of the EChLSG allowing for an additional criterion of expediency in supervising the performance of tasks entrusted to local government. In the hierarchical system of legal acts in the Polish legal system, the EChLSG is a subordinate act to the Polish Constitution, and thus no act of supervision may refer to the criterion of expediency (Chmielnicki, 2006, pp. 59–62).

Polish local government is three-level and each level of local government has been regulated by its own law. Each of these acts contains a regulation of supervision and it is essentially congruent. While the Constitution indicates legality as a criterion for supervision, each of the acts regulating individual levels of self-government uses the criterion of legality (Article 85 on Commune Self-Government, 1990 – hereinafter LCG; Article 77 On District Self-Government, 1998 - hereinafter LDG; Article 79 On Voivodeship Self-Government, 1998 – hereinafter LVG). Despite the lack of full agreement in Polish science, these concepts: legality and compliance with the law should be treated as synonyms (Dolnicki, 2015, p. 62-63; Lemańska, 2017, p. 29). Thus, legality and compliance with the law is not only compliance with a clear legal norm, but also with the values observed by the law. This compliance applies not only to generally applicable law, but also to local law applicable in the territory of a given local government unit and the law that binds the bodies and administration of a given local government unit. The concept of legality (legality) must be understood broadly.

6. Proportionality criterion

Despite the fact that the Polish Constitution defines legality as the only criterion for supervision over Polish local government, the legislator does not comply with this limitation. Apart from this criterion, the laws regulating individual levels of local government additionally use proportionality, despite the lack of a clear indication of them. It is already clear from the wording of Article 8(3) of the EChLSG that "supervison over local government authorities shall be exercised in such a way as to ensure that the intervention of the controlling authority is kept in proportion to the importance of the interests which it is intended to protect". This is an explicit principle of proportionality, which must be applied in the supervisory mode. According to Article 91(4) of the LCG, in the event of a violation of the law in the form of an insignificant infringement, the supervisory authority does not take an authoritative action aimed at eliminating the affected person with such a defect of the act, but is limited to indicating that the resolution or order of the municipal authority was issued in violation of the law (Lemańska, 2017, p. 30). Identical solutions are contained in Article 79(4) of the LDG and Article 82(5) of the LVG. The effect of such an indication is that the act containing this insignificant violation of the law is in force without the possibility of correcting it in the supervisory procedure (Judgement SAC in Warsaw, 2023, III FSK 1381/22; Kmieciak & Stahl, 2001, p. 102; Ziemski, Matan, Jagielski, Góralczyk, Szyrski, Kulig, et. al., 2023, p. 89-90).

This should result in the assumption that legality is only a criterion for supervisory activities if it takes the form of a material breach of the law. In the case of an insignificant breach, we can talk about control activities, not supervisory ones. Nevertheless, such a direction of interpretation does not dominate in Polish science. It is assumed that every action of a supervisory authority regulated in supervisory proceedings constitutes a supervisory act (Skrzydło-Niżnik, 2007, p. 575-578; Dolnicki, 2024, p. 431-450; Ura, 2024, p. 300). In the case law, this issue is not uniformly perceived. Administrative courts assume that any form of action of a supervisory authority constitutes an act of supervision (Resolution of the composition of 7 judges SAC in Warsaw (1999), OPS 5/99; Decision of SAC in Warsaw (2008), II OSK 839/08). However, if the supervisory authority finds an insignificant violation of the law, the local government unit cannot effectively file a complaint with the administrative court (Decision of SAC in Wroclaw (2002), II SA/Wr 2151/00; Judgment of SAC in Warsaw (2019 r.), II OSK 917/19). This leads to a difficult to accept thesis according to which an insignificant violation of the law constitutes a form of supervisory action over the local government, but the local government cannot appeal such an action to the administrative court. In principle, any form of supervisory interference must be secured by the possibility of appealing it to an administrative court. This is required by the constitutional principle of autonomy, and even if the law restricts or even prohibits the filing of complaints against supervisory acts (for example, Article 6c of the "Decommunization Act", 2016), the judicial jurisprudence has overwhelmingly found such a solution to be inconsistent with the Polish Constitution and allowed for the filing of complaints against such acts (Judgment of SAC in Warsaw (2018) II OSK 2643/18; Judgment of SAC in Warsaw (2021) III OSK 2110/21). This is also how it is perceived in the doctrine of Polish law (Patyra S., 2019, p. 94 and 97).

The application of the principle of proportionality is consistent with Article 8(3) of the EChLSG, and while Polish science recognizes its existence in the field of supervision, it is most often indicated that it is not a criterion of proportionality, but the principle of proportionality (Izdebski H., 2020a, p. 316). If we observe the concept of supervision as a form of authoritative and unilateral influence on a given act of a local government body, then the division into material and insignificant defects is a manifestation of the application of proportionality, resulting in the limitation of supervisory competences only to material defects (Chlipała, 2014, p. 26–280; Izdebski, 2020a, p. 316-317; Kmieciak, 1994, p. 16). If it is found that a given act contains insignificant defects (and thus nevertheless violates the law), the supervisory authority does not intervene imperiously, but undertakes control actions (Lemańska, 2017, p. 30). Thus, the criterion of proportionality is ancillary and is directly linked to the criterion of legality. The proportionality criterion does not exist in its own right, but must always be taken into account by the supervisory authorities.

This is not the only regulation that allows for demonstrating the application of this criterion. Pursuant to Article 171(3) of the Constitution of the Republic of Poland, the Sejm (The Lower House of Parliament), at the request of the Prime Minister, may dissolve a body constituting a local government if such body grossly violates the Constitution or laws. The concept of a "gross" violation of the Constitution or the law presupposes an assessment of the degree of such violation. At the same time, it seems that this is a breach to a greater extent than "material". Thus, in the way of the gradation of violations of the law, it is undoubtedly the most glaring violation.

Importantly, the Constitution allows the supervisory powers of the parliament only in the case of a gross violation of the law in the field of the Constitution or laws. On the other hand, according to the provisions of the acts regulating individual levels of government, the Sejm has the right to dissolve bodies constituting local government units already in the event of repeated violations of the Constitution or laws by the commune council/county council and regional (Radajewski, 2016, p. 29). Undoubtedly, the repeated violation of laws or the Constitution is not synonymous with a gross violation of these legal acts. Bearing in mind the hierarchy of legal acts, the constitutional norm should be given priority in the dissolution of the decision-making body by the Chamber of Parliament. Thus, it is not sufficient for a repeated violation of laws or the Constitution by an authority, but it is necessary to demonstrate that such a violation was of a gross nature (Kmieciak & Stahl, 2001, p. 98). Sometimes the criterion resulting from Article 171(3) of the Polish Constitution is treated as an expedient criterion (Korczak, 2019, p. 230). However, this view seems to be too far-reaching.

7. The criterion of purposefulness?

It is no coincidence that this criterion has been given a question mark. In Polish doctrine of law, there is no doubt that the criterion of expediency after 2001 is not and cannot be the basis for exercising supervision over local government. This criterion consists in taking such actions that are consciously aimed at achieving a specific goal or result (Miodek, 2002, p. 6). Nevertheless, the legislator uses this criterion, without calling it "expediency". It is "the lack of prognosis for rapid improvement and prolonged ineffectiveness in the performance of public tasks" by the body or bodies of a given local government unit. This is an identically defined criterion for bodies at all levels of local government. This criterion is of a purposeful nature (Kisiel, 2003, p. 276; Chmielnicki, 2006, p. 261; Kasiński, 2016, p. 530-531) and is sometimes referred

to as an efficiency criterion (Majewski & Majewska, 2016, p. 120; Zimmermann, 2022, p. 331). What should be understood as "lack of hope for a quick improvement" and at the same time "prolonged ineffectiveness in the performance of public tasks" has not been defined (Lemańska, 2017, p. 34). This criterion is most often also associated with a violation of the law (Masternak-Kubiak, Balicki, Bartoszewicz, Complak, Haczkowska, Ławniczak, 2014, p. 419-420), but it can also occur independently of this violation. In practice, the state of failure to improve quickly and the prolonged state of ineffectiveness most often results either from the catastrophic indebtedness of a given local government unit (Judgment of SAC in Warsaw (2013), II OSK 135/13; Judgment of SAC in Warsaw (2016), II OSK 2347/16), or from obstruction of the bodies of the local government unit preventing cooperation between them (e.g. resignation from the performance of activities by the chairman and vice-chairman of the commune council and failure to elect other persons in their place – judgment of SAC in Warsaw (2009) II OSK 1786/09). The view that this criterion is not in accordance with Article 171(1) of the Polish Constitution (Majewski & Majewska, 2016, p. 120; Chmielnicki, 2006, p. 261-262; Patyra, 2019, p. 93). Nevertheless, it is necessary because there is no other way to interfere in the functioning of local governments, if they do not violate the law, but e.g. recklessly indebted a local government unit.

8. Supervisory authorities

In accordance with Article 171(2) and (3) of the Constitution of the Republic of Poland, the supervisory bodies over the activities of local government units are the Prime Minister and voivodes, and in the field of financial matters, regional audit chambers. In addition, the body exercising supervisory powers is the Sejm (the lower house of parliament). In Polish doctrine of law, it is assumed that this catalogue contains an exhaustive enumeration (Banaszak, 2012, p. 862; Skoczylas, Piątek, Bach-Golecka, Bosek, Capik, Chybalski, et. al., 2016, p. 965). Apart from the above-mentioned bodies, none of the others are bodies of supervision over local self-government (Chmielnicki, 2006, p. 50-51; Gromek, 2022, p. 453-458; as well as the Constitutional Tribunal in its judgment, 2015, Kp 2/13). Such a list of supervisory authorities is also contained in Article 86 of the LCG, Article 76(1) of the LDG and Article 78(1) of the LVG. The supervisory competences of each of the above-mentioned bodies are described in the Acts. The competences of the Prime Minister and regional audit chambers are strictly defined in the acts, while the remaining scope of supervision is exercised by the voivode (Masternak-Kubiak, Balicki, Bartoszewicz, Complak, Haczkowska, Ławniczak, 2014, p. 418). However, even in the case of a voivode, there is no room for a presumption of supervisory competence. Any action of the supervisory authority must be based on a legal basis resulting from the Act.

If we consider that the essence of supervision over local government is the exercise of governmental powers, otherwise interfering with the validity of acts of local government bodies, then the catalogue of bodies with such powers is significantly larger (e.g. Kmieciak & Stahl, 2001, pp. 95-96; Dolnicki, 2015, p. 63-64; Leoński, 2001, p. 163-167). Such supervisory competences are held, for example, by the voivodeship superintendent of schools, whose positive opinion is a condition for the entry into force of a resolution on the intention to liquidate a public school (Article 89(3) of the Education Law). Such an opinion (positive or negative) is issued by the Superintendent of Schools by way of a decision appealable to the Minister of Education, and then to the administrative court.

Another example is provided by the Act regulating the rules for the accession of local government units to international associations (On the rules of accession of local government units to international associations of local and regional communities, 2000, hereinafter – RJIA). Under Article 4(2) of the RJIA, a resolution of a body constituting local government units to join an international association enters into force after obtaining the consent of the minister of foreign affairs issued by means of an administrative decision. This resolution is invalid in the event of a final refusal by the minister to grant consent or failure to present it to him for expression (Article 4 of the RJIZ).

The examples given indicate that bodies other than those listed in the Constitution of the Republic of Poland also have supervisory powers. Denying them such status may lead to situations in which these powers will be classified not as supervision, but as competences similar to those of supervisors, which may raise the question of the criterion for their application. In the case of the RJIA, the supervisory criteria are defined as follows: a) compliance with the tasks and competences of the bodies of a given local government unit, b) compliance with Polish internal law, c) compliance with the foreign policy of the state and its international obligations, d) in the case of a self-governing voivodeship, additionally compliance with the resolution of the regional assembly of that voivodeship on the priorities of foreign cooperation of the voivodeship (Article 2(1) and (2) of the RJIA). Most of the indicated criteria are in fact the criterion of legality (compliance with internal law, tasks and competences), but the criterion of compliance with the foreign policy of the state is not such a criterion. In accordance with Article 146, paragraphs 1 and 2 of the Constitution of the Republic of Poland, the Council of Ministers is responsible for Polish's foreign policy (decision of the Constitutional Tribunal (2009), Kpt 2/08). Local self-government neither has its own tasks in the field of conducting the foreign policy of the state, nor can it gain independence in this respect in a unitary

state. Therefore, the criterion of compliance with the foreign policy of the state is not consistent with Article 171(1) of the Constitution of the Republic of Poland (Lemańska, 2017, p. 37). This criterion allows for the preservation of the constitutional right of the Council of Ministers to conduct the foreign policy of the state (Article 146(1) and (2) of the Polish Constitution of the Republic of Poland) and is consistent with the principle of state unitarity expressed in Article 3 of the Polish Constitution.

In practice, greater doubts arise about the supervisory activities of the voivodeship superintendent of school. In accordance with the above-mentioned Article 89(3) of the Law on School Education, this superintendent of school issues a positive opinion on the adopted resolution on the intention to liquidate a public school (public kindergarten). No provision explicitly specifies what criteria this body is to follow when issuing a negative opinion. The legislator, seemingly wanting to weaken the activities of the head of education, defined his competence as the right to issue opinions. The opinion is not binding and generally contains only the position of the issuing authority, which may not be taken into account by the authority issuing the act. Such is the significance of opinions issued in the course of proceedings on a given case, while in the case of issuing an opinion on a resolution on the intention to liquidate a public school, the opinion is issued after the resolution has been adopted. It is therefore of a consequential and binding nature, because the legislator directly made the validity of such a resolution dependent on the expression of a positive opinion. Sometimes, when refusing to issue a positive opinion, the superintendent of school pointed to the conduct of the state's education policy, the welfare of pupils or the protection of the interests of the local community as criteria justifying the refusal to express a positive position (Judgment of SAC in Warsaw (2020) I OSK 3360/19; Judgment of SAC in Warsaw (2021) III OSK 2935/21). In such a case, Polish science also admits the possibility of refusing to issue a positive opinion on the basis of non-compliance with the state's educational policy (Pilich, 2022, pp. 606-607). This is a flawed view, because it would lead to basing the government's interference in the performance of tasks by the local government on the basis of criteria other than legality. Administrative courts have held that since the head of education has been endowed with the competence to decide authoritatively and unilaterally on the validity of a given resolution of a body constituting local government units and has not introduced any separate regulation in this regard, the criterion of legality should be applied (Judgment of SAC in Warsaw (2024) III OSK 542/23; Judgment of SAC in Warsaw (2023) III OSK 2689/21).

Importantly, there is no doubt that the bodies cooperating at the stage of adopting legal acts by local government bodies in terms of agreeing or giving opinions should also base their position only on the criterion of legality (Dolnicki, 2024, p. 434-435). Such action of these bodies is within the limits of the exercise of supervisory competences, if the validity of the adopted resolution depends on their position (Matan, Ziemski, Jagielski, Góralczyk, Szyrski, Kulig, et. al., 2923, p. 50–84).

9. Conclusion

The Polish Constitution separately regulates only the supervision of local government. Supervision has not been defined in the Constitution, but in principle there is no greater doubt that this term should be understood as the right to authoritative and unilateral interference in the activities of local government bodies. Any scope of powers resulting in the annulment or repeal of an already adopted resolution, or conditioning its entry into force, should be understood as the exercise of supervision.

In this respect, the constitutional regulation limiting the catalogue of supervisory authorities is incomplete, as the acts extend supervisory competences to other authorities. A distinction can be made between supervisory authorities in the normative sense (i.e. those listed in Article 171(2) of the Polish Constitution) and supervisory authorities in the functional sense, i.e. those to which the provisions of law grant such powers (Dolnicki, 2024, p. 430-431). In this respect, it is not possible to speak of the compliance of the provisions of the Polish Constitution with the laws.

However, granting supervisory powers to other bodies is not treated as an unacceptable interference with the autonomy of the local government. In practice, interference with autonomy is related not so much to the catalogue of bodies exercising supervisory competences, but to the supervisory criteria. Apart from the exceptions resulting from the unitary nature of the state, in which foreign policy tasks cannot be delegated to the local government to be carried out independently, no criteria other than legality and proportionality of supervision should be allowed, in particular in the scope of the local government's own tasks. These criteria allow for the most objective assessment of whether the activities of the local government are in accordance with the law and at the same time serve to meet the needs and goals of the local government community. Sometimes the concept of "legality" is treated very broadly as encompassing any interference in the functioning of local government based on any legal provision, which leads to the dangerous naming of other criteria as legality (Patyra, 2023, p. 10).

Practice has shown that sometimes the expediency criterion defined as "lack of hope for a quick improvement and prolonged ineffectiveness in the performance of public tasks" fulfils its role as an additional way to remove very significant shortcomings in the functioning of a local government unit, which

could not otherwise be removed (Lemańska, 2017, p. 32). The prudent application of this criterion, subject to the control of the administrative court, is not perceived as a too far-reaching interference with the autonomy of the local government. The possibility of dismissing a body constituting a local government unit in the event of a gross violation of the law should be assessed differently. The inability to review an act of parliament by the courts is aptly treated as violating the autonomy of local government (Rulka, 2017, p. 45).

The adoption of other criteria (such as compliance with state policy) leads not only to the dependence of local government on government administration, but above all resulted in the omission of the needs of residents as the main factor determining the manner of performing public tasks (Patyra, 2019, p. 98). Unfortunately, sometimes the Polish legislator takes actions aimed at expanding the criteria of supervision, which cannot be assessed positively both in terms of compliance with the Polish Constitution and should be perceived as too far-reaching interference in its independence, and thus in the essence of local government. Thus, it should also be stated that the regulation of the criterion of supervision over local government in the Polish Constitution is not exhaustive, and the acts complement the catalogue of other criteria.

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ВІДПОВІДНІСТЬ ПОЛОЖЕНЬ ПРО НАГЛЯД ЗА МІСЦЕВИМ САМОВРЯДУВАННЯМ КОНСТИТУЦІЇ ПОЛЬЩІ ТА ПРАВОВИМ АКТАМ

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Анотація

Метою статті є аналіз регулювання процедури нагляду за місцевим самоврядуванням у польській Конституції та в правовій системі, що регулює нагляд за місцевим самоврядуванням. Реалізація цієї мети надає можливість продемонструвати, наскільки нагляд має конституційну владу та чи дотримується конституційна норма в законодавстві. Тому в цьому дослідженні не досліджуються питання, що пов'язані з наглядом, які безпосередньо не випливають з Конституції. Зокрема, це стосується процедури нагляду. Зміст даного дослідження включає аналіз самого поняття нагляду, критеріїв нагляду та контролюючих органів.

Основним методом дослідження є догматичний метод, орієнтований на тлумачення конституційних норм і виклад позицій і поглядів представників науки. Використаний метод дослідження також включає аналіз судової практики обраних та представницьких судів та презентацію практичних прикладів нагляду та їх оцінки адміністративними судами.

У Конституції Польщі поняття нагляду використовується без його визначення. Так само його трактують і в польській доктрині, і в судовій юриспруденції, наголошуючи на найважливішому його елементі – владному та односторонньому втручанні контролюючого органу в діяльність органів місцевого самоврядування. Цим він відрізняється від контролю, який не включає в себе цю форму впливу.

Конституція Польщі занадто вузько визначає критерій нагляду за наглядом, а також неповно визначає наглядові органи. При цьому ігнорується критерій пропорційності, який обмежує право на владне втручання в діяльність органів місцевого самоврядування випадками істотного порушення закону. Крім того, законодавець закріплює за контролюючими органами критерії цілеспрямованого або результативного характеру. Багато органів державного управління, такі як міністр закордонних справ або воєводський інспектор шкіл, здійснюють наглядові повноваження над місцевими органами влади, хоча вони не є наглядовими органами в розумінні Конституції.

Несумісність законів з Конституцією з точки зору критерію нагляду та кількості органів з наглядовою компетенцією не має суттєвого впливу на незалежність місцевого самоврядування. Це пов'язано з епізодичним застосуванням наглядових критеріїв, відмінних від законності, та загалом єдиною позицією адміністративних судів, які завжди зводять оцінку наглядової діяльності до критерію законності. Практика адміністративних судів дозволяє усунути ці розбіжності. Про необхідність термінової зміни до польської Конституції у дослідженні не йдеться.

Ключові слова: нагляд; контроль; законність; пропорційність; контролюючі органи.

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EUROPEAN REGIONAL STANDARDS AND RECOMMENDATIONS ON PROBATION

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Summary

This article explores the institutional and normative mechanisms of probation at the european regional level, focusing on their alignment with international legal standards. The aim is to identify specific features of regional probation systems, taking into account international human rights instruments and their practical implementation. The study employs a comprehensive methodological approach. The descriptive method is used to outline the content of international documents related to probation. The formal-logical method helps clarify the structure and meaning of legal provisions. The axiological method highlights the value and significance of european regional standards and recommendations. Legal analysis and synthesis are applied to examine the practices of regional human rights institutions and to identify institutional and legal mechanisms relevant to probation. The research finds that regional human rights protection systems incorporate key probation standards, particularly the rights to humane treatment and dignity. These standards are generally consistent with universal international instruments. The european system is the most advanced, with the European Court of Human Rights and the Council of Europe providing a clear legal and practical framework for probation policies and practices. Their recommendations significantly influence national legal systems. Regional probation standards play a critical role in shaping effective and humane criminal justice policies. The european model, with its structured recommendations and legal interpretations, offers a robust framework for integrating probation into national systems. These recommendations should be recognized as essential components of broader international probation standards. For Ukraine, prioritizing the implementation of these recommendations is crucial to advancing legal reforms and aligning with european practices.

Key words: regional standards, human rights and freedoms, probation, execution of court sentences, criminal justice, justice.

1. Introduction

In legal terms, probation is a legal institution that governs the application of a set of probation measures to individuals held criminally liable. Essentially, probation is an alternative form of punishment, which involves the imposition of specific obligations and restrictions on the convicted person aimed at fostering awareness of unlawful behavior and promoting rehabilitation. International legal standards of probation exist at both the universal and regional levels. The majority of scholars in international law identify three primary regional human rights protection systems: the European, Inter-American, and African systems. However, other approaches to the classification of regional mechanisms in this field also exist in academic discourse. For Ukraine the most relevant and important european regional system. However, each of these systems is characterized by specific historical, legal, economic, social, and cultural features, which shape the approaches to enshrining human rights and freedoms. Regional mechanisms are considered a significant achievement of modern international law, as they incorporate key normative and institutional elements of probation within the mentioned regional systems and are implemented into national legal frameworks. Given the dynamic development of the international legal institution of probation, the study of the legal nature of regional-level probation standards remains relevant for many countries, including Ukraine. This is evidenced by the country's ongoing efforts to ensure proper legal regulation of this institution.

In scholarly literature, the international human rights protection system is studied across several dimensions. According to I. M. Ryzhenko and O. M. Demianiuk, there are – first, the global level – represented by international organizations that safeguard human rights globally; second, the regional level – represented by regional human rights protection systems; and third, the national level – focused on the guarantee and protection of human rights within individual states (Риженко, Демянюк, 2019, p. 146). This approach is widely recognized in the academic community as it comprehensively reflects the influence of international legal standards both globally and nationally.

K. P. Vladovska and V. S. Tysovska emphasize that regional standards, in particular, represent the core achievements of international human rights law and more comprehensively reflect the specific context of each region (Владовська, Тисовська, 2020). At the same time, we consider it appropriate to point out that not only binding regional standards but also non-binding regional instruments («soft law») constitute important components of international law. Regional-level probation standards are typically the result of cooperation between groups of states in the field of criminal justice and include both normative mechanisms and soft-law instruments. Moreover, the number of soft-law acts far exceeds that of binding standards. Therefore, a comprehensive approach should be taken to probation regulation, considering both normative and recommendatory documents at the regional level.

The French researcher Charlotte Piveteau notes that treaties generally have an open-textured character and their provisions are concise, which is precisely why "soft law" plays a key role in "developing, refining, and clarifying standards, more precisely defining their meaning and the scope of states' obligations" (Piveteau, 2021). In this context, regional probation standards and recommendations reflect the specific functioning of probation within a particular group of states. They do not adhere to a strict hierarchical structure and significantly expand the content of normative provisions.

In this article, we aim to comprehensively characterize the legal nature and specific features of institutional and normative mechanisms at the regional level, including recommendations in the field of probation, through an in-depth analysis of international instruments and institutional practices. Achieving this objective is possible through a legal study of the implementation of international legal standards of probation at the regional european level.

2. European regional system for the protection of human rights and freedoms

The european regional system for the protection of human rights and freedoms is considered the most influential set of normative and functional mechanisms safeguarding human rights. The adoption of the European Convention on Human Rights (1950) is viewed as the starting point in shaping regional international probation standards, as it enshrines the prohibition of torture (Article 3) and the principle of no punishment without law (Article 7).

Although probation is not explicitly mentioned in the Convention, its underlying principles provide a legal foundation for probation as part of the criminal justice system. The additional protocols to the Convention are also significant. Protocol № 6 (1983) and Protocol № 13 (2002) abolished the death penalty, while Protocol № 7 (1984) guarantees the right to appeal in criminal matters (Art. 2) and the right not to be tried or punished twice (Art. 4).

To monitor compliance, the European Court of Human Rights (ECtHR) was established. This institution interprets the Convention and determines whether human rights violations have occurred. The Convention holds significant value for international criminal justice, with the ECtHR consistently emphasizing punishment aligned with the principles of rehabilitation and humanity.

This perspective supports the development of probation as an alternative to imprisonment that complies with human rights standards. The ECtHR has also addressed cases involving inadequate prison conditions—such as overcrowding and poor sanitation—which further underline the need for alternative sanctions. Relevant cases include *Rivni v. Greece* (№. 28524/95, 2001, §75), *Saleymanovich v. Italy* (№ 22635/03, 2009, §51), and *Neshkov and Others v. Bulgaria* (№ 36925/10 et al., 2014, §228)[1].

Alternatives to imprisonment, including probation, help reduce prison overcrowding and enhance the effectiveness of criminal justice by promoting individualized sentencing, offender rehabilitation, and recidivism prevention. This aligns with international legal standards, which urge states to use imprisonment only as a last resort when less severe measures are inadequate.

Several ECtHR cases indirectly demonstrate that individuals subject to probation or conditional release must have access to adequate procedural safeguards when challenging decisions that affect their liberty. In this regard, the Court assessed the actions of national authorities in *Waite v. the United Kingdom* (№ 53236/99,

[1] See cases: 1) Case of Peers v. Greece. (2001). European Court of Human Rights. [in English]. Retrieved June 14, 2025, from https://hudoc.echr.coe.int/eng?i=001-59413 2) Case of Sulejmanovic v. Italy. (2009). Strasbourg: European Court of Human Rights. [in English]. Retrieved June 14, 2025, from https://hudoc.echr.coe.int/eng?i=001-93564 3) Case of Neshkov and Others v. Bulgaria. (2015). Strasbourg: European Court of Human Rights. [in English]. Retrieved June 14, 2025, from https://hudoc.echr.coe.int/eng?i=001-150771

2002), examining the offender's release from prison based on the level of threat posed to society (Waite v. the United Kingdom , ECtHR, 2002, §68).

A similar conclusion was reached in *Leger v. France* (№ 19324/02, 2006), where the applicant contested the conditions of his detention and the lack of effective judicial review during his suspended sentence. Additionally, judge Mularoni, in a dissenting opinion, highlighted the importance of considering the probation officer's assessment of the offender's rehabilitation (Leger v. France, ECtHR, 2006). In *Külekci v. Austria* (№ 30441/09, 2017), the ECtHR evaluated repeated criminal behavior. The case concerned the deportation of an individual, with the Court noting that violent offenses can justify such a measure. Although integration is an important factor, it must be balanced against the seriousness of the crimes (Külekci v. Austria, ECtHR, §48–49). In *T. v. the United Kingdom* (№ 24724/94, 1999), the Court examined the treatment of minors in criminal proceedings, particularly whether holding children criminally responsible for actions committed at the age of ten constituted inhuman or degrading treatment. Although no violation was found, Judge Lord Reed, in his dissenting opinion, stressed the importance of rehabilitation and reintegration –core elements of probation (T. v. the United Kingdom, ECtHR,1999). Finally, in *Vinter and Others v. the United Kingdom* (№ 66069/09, 130/10, 3896/10, 2013), the Court emphasized that all punishments must serve a rehabilitative purpose, reinforcing the importance of alternative forms of punishment, such as probation.

An illustrative case is *Valeriu and Nicolae Roşca v. Moldova* (№ 41704/02, 2009), in which three officers were convicted of ill-treatment of the applicants and sentenced to three years of imprisonment, along with a two-year ban from working in law enforcement. The ECtHR examined how national courts imposed punishment and stated clearly that it is for the national courts sentencing an offender to determine the punishment they consider most appropriate to ensure the educational and preventive effect of a conviction (Valeriu and Nicolae Roşca v. Moldova, ECtHR, §72). However, in this case, the national courts suspended the custodial sentence and imposed a one-year probation period. The ECtHR noted that the courts failed to mention a number of clearly applicable aggravating factors. In particular, none of the officers showed any sign of remorse, denying throughout the proceedings that any ill-treatment had occurred (Valeriu and Nicolae Roşca v. Moldova, ECtHR, §72). This case highlights the importance of properly applying probation measures, with due consideration of both aggravating and mitigating circumstances, as well as the offender's potential for rehabilitation without imprisonment. Additional relevant elements concerning probation are indirectly addressed in the following cases: *Weeks v. the United Kingdom* (№ 9787/82, 1987); *Thynne, Wilson and Gunnell v. the United Kingdom* (№ 11787/85, 11978/86, 12009/86, 1990); *Paul and Audrey Edwards v. the United Kingdom* (№ 46477/99, 2002); *Ezeh and Connors v. the United Kingdom* (№ 39665/98 and 40086/98, 2003); and *M. G. v. Lithuania* (№ 6406/21, 2024)[1].

The ECtHR, through its judgments, indirectly assesses the impact of probation measures on offender behavior when interpreting the circumstances of a case and applying the provisions of the European Convention on Human Rights. This demonstrates a new perspective on probation – not only as a tool for enforcing punishment with a focus on reintegration, but also as a means of realizing the fundamental rights and freedoms of individuals with the status of convicted persons. During the execution of alternative sanctions, these rights and freedoms are often subject to certain restrictions. This raises the question of how to balance the interests of society – which expects that offenders serve a fair sentence – with the individual need for offender rehabilitation.

3. European Soft Law Instruments in Probation

An important role in shaping regional-level international legal standards of probation is played by the Committee of Ministers of the Council of Europe. This body is considered one of the most productive, having adopted a number of instruments directly addressing the functioning of probation systems. In particular, the Committee provided a comprehensive conceptual definition of probation in Recommendation CM/Rec(2010)1 on the Council of Europe Probation Rules, adopted on 20 January 2010. It stated that probation refers to the implementation in the community of sanctions and measures defined by law and imposed on offenders (Committee of Ministers, 2010). This interpretation allows for a broad understanding of probation as a set of specific sanctions and measures, which may vary across countries. However, the overall goal remains the same: reducing reoffending by establishing positive relationships with offenders for

[1] See cases: 1. Case of Weeks v. The United Kingdom. (1987). Strasbourg: European Court of Human Rights. [in English]. Retrieved June 14, 2025, from https://hudoc.echr.coe.int/?i=001-57594 2. Case of Thynne, Wilson and Gell v. The United Kingdom. (1990). Strasbourg: European Court of Human Rights. [in English]. Retrieved June 14, 2025, from https://hudoc.echr.coe.int/?i=001-57646 3. Case of Paul and Audrey Edwards v. The United Kingdom. (2002). Strasbourg: European Court of Human Rights. [in English]. Retrieved June 14, 2025, from https://hudoc.echr.coe.int/?i=001-60323 4. Case of Ezeh and Connors v. The United Kingdom. (2003). Strasbourg: European Court of Human Rights. [in English]. Retrieved June 14, 2025, from https://hudoc.echr.coe.int/?i=001-60608 5. Case of M.G. v. Lithuania. (2024). Strasbourg: European Court of Human Rights. [in English]. Retrieved June 14, 2025, from https://hudoc.echr.coe.int/?i=001-231083

supervision, guidance, assistance, and successful social reintegration.

The recommendations adopted by the Committee of Ministers possess the following features[1]. First, by nature, regional treaties and mechanisms are territorially limited, hence their designation as «regional.» This applies equally to probation recommendations, which are aimed at European countries only. Second, such recommendations are largely of an orientational character. They do not provide mandatory guidelines but offer general principles without targeting a specific state. Third, these acts are not legally binding; rather, they represent proposals or calls to action for states to behave in a certain way in a given legal context, not rigid legal prescriptions.

Due to the soft law nature of these documents, the Council of Europe lacks an oversight body to monitor compliance with these recommendations. This complicates the evaluation of their actual implementation. A specific issue affecting these probation recommendations is the absence of any institutional control mechanisms. Unlike binding international treaties that provide for monitoring or reporting bodies, probation recommendations depend entirely on the political will of states. A change in a country's political or legal priorities, or a decline in focus on probation, carries no legal consequences or procedural responses – raising concerns about the effectiveness of such international legal standards.

4. Other European Regional Normative and Enforcement Mechanisms

Among regional instruments relevant to the functioning of the probation system is the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (1987). This Convention reaffirms the prohibition of torture and inhuman or degrading treatment or punishment (Council of Europe, 1987). According to Article 1, it established the *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (CPT), tasked with visiting places of detention to assess how persons deprived of their liberty are treated, and to strengthen their protection where necessary.

Although primarily focused on custodial settings, the CPT's activities also indirectly touch upon probation-related issues, particularly when assessing broader penal policy. For instance, in its *34th General Report (2024)*, the CPT highlighted the urgent need to reconsider penal execution systems and explore comparative European strategies for tackling prison overcrowding and associated challenges (CPT, 2024, p. 14). As probation offers a non-custodial alternative, it plays a humanitarian role in reducing pressure on penitentiary systems while promoting a more individualized, socially integrative approach that mitigates reoffending – particularly by addressing the needs of vulnerable groups (e.g., women, minors) through tailored interventions.

Additionally, the *Council for Penological Co-operation* (PC-CP), a consultative body under the Council of Europe's *European Committee on Crime Problems*, supports work in this area. According to Rob Canton, the practical experience of the PC-CP members – especially in prison and probation management – adds authority to their views and ensures complex technical issues are properly addressed (Canton, 2019, p. 5). However, it should be emphasized that this body does not directly develop or adopt probation standards. Its role is limited to expert support and advisory contributions.

5. The Influence of EU Law on Regional Probation Standards

To deepen the analysis of european regional probation standards and recommendations, it is essential to consider the supranational legal system of the European Union (EU), comprising 27 Member States. A foundational provision is the prohibition of torture and inhuman or degrading treatment or punishment, enshrined in Article 3 of the *Charter of Fundamental Rights of the EU* (2012/C 326/02).

[1] This list includes, but is not limited to, the following: 1. Resolution (70)1 on the Practical Organization of Supervision and Post-Penitentiary Care of Probationers and Conditional Releasees, adopted on 26 January 1970; 2. Recommendation CM/Rec(99)19 concerning mediation in penal matters, adopted on 15 September 1999; 3. Recommendation CM/Rec(99)22 concerning prison overcrowding and the increase in prison populations, adopted on 30 September 1999; 4. Recommendation CM/Rec(2003)22 on conditional early release, adopted on 24 September 2003; 5. Recommendation CM/Rec(2006)2 on the European Prison Rules, adopted on 11 January 2006; 6. Recommendation CM/Rec(2006)8 on assistance to victims of crime, adopted on 14 June 2006; 7. Recommendation CM/Rec(2008)11 on European Rules for juvenile offenders subject to sanctions or measures, adopted on 5 November 2008; 8. Recommendation CM/Rec(2010)1 on the Council of Europe Probation Rules, adopted on 20 January 2010; 9. Recommendation CM/Rec(2017)3 on community sanctions and measures, adopted on 22 March 2017; 10. Recommendation CM/Rec(97)12 on staff involved in the implementation of sanctions and measures, adopted on 10 September 1997; 11. Recommendation CM/Rec(2014)4 on electronic monitoring, adopted on 19 February 2014; 12. Guidelines for Prison and Probation Services on Radicalisation and Violent Extremism, adopted on 2 December 2015; 13. Recommendation CM/Rec(2018)8 on restorative justice in criminal matters, adopted on 3 October 2018; 14. Recommendation R(97)12 of the Committee of Ministers on staff involved in the implementation of sanctions and measures, covering recruitment, selection, education, training, and continuing professional development of penitentiary and probation staff, adopted on 25 April 1997; 15. Recommendation CM/Rec(2024)5 of the Committee of Ministers on the ethical and organisational aspects of the use of artificial intelligence and related digital technologies by prison and probation services, adopted on 9 October 2024.

While the Charter has the status of primary EU law, probation-specific legal frameworks are governed by *Council Framework Decisions*, which Member States are obliged to transpose into national law.

The *Council Framework Decision 2008/909/JHA* of 27 November 2008 concerns the mutual recognition of judgments imposing custodial sentences for enforcement within the EU. Its objective is to promote social rehabilitation by enabling a sentence to be served in the Member State of residence (Art. 3). Although the Court of Justice of the EU (CJEU) has not directly addressed probation in this context, it has emphasized safeguarding fundamental rights when enforcing foreign judgments (e.g., *Jeremy F. v. Prime Minister*, C-168/13 PPU, §32, 34). A key principle in this framework is that enforcement in the executing state must support the social rehabilitation of the offender (Recital 9). This aligns with probation's rehabilitative goal—facilitating reintegration without imprisonment through multifactorial, individualized support.

The *Council Framework Decision 2008/947/JHA* further regulates probation in the EU by promoting mutual recognition of probation decisions and alternative sanctions. It allows Member States, other than the sentencing state, to supervise compliance with probation measures, enhancing security and protecting offenders' rights (Art. 1). It defines a specific list of measures such as informing authorities of residence changes, complying with conduct instructions, avoiding certain contacts, compensating victims, community service, therapy, and rehabilitation (Art. 4) (Council Framework Decision, 2008).

This framework aims to support the rehabilitation of offenders; protect victims and society and to enable cross-border enforcement of non-custodial sanctions. While this harmonized approach helps unify probation systems across the EU, practical challenges persist. For example, Spanish courts have reportedly avoided applying this framework due to the limited transnational enforceability of some probation measures. Moreover, the framework lacks strict enforcement mechanisms, relying mainly on inter-state communication, which may hinder its practical effectiveness and reduce accountability.

Lastly, the *Council Framework Decision 2009/829/JHA* introduces mutual recognition of supervision measures as alternatives to pre-trial detention. Although it does not directly regulate probation, it conceptually supports its philosophy – encouraging non-custodial measures and reinforcing probation services' role during pre-trial phases (Art. 2). It forms part of the EU's broader efforts to humanize criminal justice and facilitate intra-EU mobility (Council Framework Decision 2009/829/JHA, 2009).

The EU Council Framework Decisions illustrate a unified understanding of the content and purpose of probation within the EU's supranational legal system. Firstly, they share a common goal – enabling the mutual recognition and execution of non-custodial sanctions across Member States. Secondly, these instruments confirm that probation serves both the rehabilitation of offenders and the protection of victims of crime. Thirdly, from a legal form perspective, Framework Decisions are binding upon Member States as to the results to be achieved, while leaving them the freedom to choose the means and methods of implementation. Their adoption signifies recognition of probation as a pan-European legal instrument. For example, if a probation order is issued in one Member State, others are obliged to recognize and execute it. This enhances cross-border cooperation in criminal justice through information sharing and coordinated supervision of individuals under probation. However, a major shortcoming is the absence of enforcement mechanisms to hold states accountable for non-compliance with probation-related judicial decisions. In conclusion, these EU Framework Decisions aim to harmonize probation-related practices, thereby improving legal coherence and consistency among Member States.

6. Conclusions

Therefore, the european regional system for the protection of human rights guarantees the right to humane treatment and respect for the dignity of individuals subject to criminal sanctions. These principles are enshrined both in general legal instruments and in those protecting specific categories of persons. Among international legal frameworks, the european system stands out as the most developed and comprehensive in regulating probation, offering a range of interconnected, structured, and value-based legal and policy documents, interpreted by human rights institutions.

These provisions establish a common understanding of the aims and functions of probation in Europe and form a solid foundation for national-level implementation. This is particularly important for Ukraine as it aligns its legislation with european standards. The ECtHR, through its interpretations, has underscored the need to ensure access to adequate procedural safeguards, including in the context of probation. These conclusions can be incorporated into national sentencing and enforcement practices.

We argue that probation-related recommendations should be viewed as an integral part of international probation standards in a broad sense, as they influence the development of concrete supranational mechanisms in this field. Ukraine should pay special attention to such soft-law instruments and enhance their implementation within the domestic legal system—an essential step in its path toward EU accession.

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ЄВРОПЕЙСЬКІ РЕГІОНАЛЬНІ СТАНДАРТИ ТА РЕКОМЕНДАЦІЇ У СФЕРІ ПРОБАЦІЇ

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Анотація

Актуальність теми зумовлена зростанням ролі інституту пробації в системі кримінальної юстиції, зокрема в контексті впровадження гуманістичних підходів до покарання. У сучасних умовах особливої важливості набуває узгодження національної системи пробації з міжнародно-правовими стандартами, що визначають напрям розвитку ефективних та альтернативних до позбавлення волі заходів впливу на правопорушників. Мета статті полягає в тому, щоб комплексно охарактеризувати інституційні та нормативні механізми у сфері пробації регіонального європейського рівня та визначити їх особливості з урахуванням положень міжнародних актів та практики їх застосування. Для досягнення вказаної мети пропонується проаналізувати закріплення міжнародно-правових стандартів пробації у європейській регіональній системі захисту прав та свобод людини. У статті розкривається зміст положень регіональних актів, що визначають правове регулювання прав та свобод осіб до яких застосовуються покарання та інші заходи кримінально-правового характеру та надається їх інтерпретація під кутом втілення пробаційних заходів. Використано комплекс методів наукового пізнання, а саме описовий метод – для загальної характеристики положень міжнародних документів регіонального рівня у сфері пробації, щоб показати їх зовнішній прояв; формально-логічний метод – при встановленні змісту та особливостей правових положень викладених у джерелах; аксіологічний метод застосовано для підкреслення значення регіональних стандартів та рекомендацій у сфері пробації; методи правового аналізу та синтезу – для опрацювання практики правозахисних інституцій та встановленні особливостей інституційних та нормативних механізмів регіонального рівня, включно з рекомендаціями у сфері пробації. За результатами дослідження встановлено, що регіональні системи захисту прав людини закріплюють ключові стандарти пробації, зокрема право на гуманне поводження та повагу до гідності, переважно узгоджуючи свої положення з універсальними міжнародними актами. Найбільш розвиненою є європейська система, яка через практику ЄСПЛ і рекомендації Ради Європи формує орієнтири для законодавчого й практичного регулювання пробації на національному рівні. Доведено, що рекомендації у сфері пробації слід вважати невід'ємною складовою системи міжнародно-правових стандартів пробації у їх широкому розумінні, оскільки їх прийняття впливає на розробку конкретних наднаціональних механізмів у цій сфері. Україні слід звернути особливу увагу на відповідні рекомендаційні акти та посилювати їх імплементацію в національній правовій системі.

Ключові слова: регіональні стандарти, права і свободи людини, пробація, виконання судових рішень, кримінальне правосуддя, справедливість.

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JURY TRIAL AS A FORM OF DIRECT DEMOCRACY IN UKRAINE: CHALLENGES AND PROSPECTS FOR ITS DEVELOPMENT

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Summary

The purpose of this article is to conduct a comprehensive constitutional and legal analysis of the institution of jury trials as a form of direct participation of the people in the administration of justice in modern Ukraine, as well as the problems and prospects of its development. Based on the conceptual framework presented, it can be argued that the jury trial represents one of the most effective forms of direct democracy. In the context of Ukraine's current constitutional development, the jury trial plays an important role in ensuring fairness and transparency in judicial proceedings. The Constitution of Ukraine explicitly provides for public participation in the administration of justice through juries. However, the constitutional right of Ukrainian citizens to participate in the administration of justice via jury trials in cases defined by law has not been fully realized. Moreover, even the limited instances in which jurors have been involved in the adjudication of certain categories of cases have often taken place in violation of existing legislation. These circumstances highlight the need for reform of this institution, taking into account international legal standards and the particularities of Ukraine's legal system in the post-war period.

Reforming the jury trial system in wartime conditions presents significant challenges. Nevertheless, such reform is essential to preserve the traditions of constitutional democracy. The main direction of the reform process should include addressing several urgent issues: introducing a classical model of jury trial that maintains a balance between public participation and judicial independence; ensuring the independent status of jurors during the adjudication process; and improving the procedures for compiling jury lists and enhancing jurors' qualifications.

Key words: jury trial, public participation, direct democracy, constitutional democracy, justice reform, judiciary, fairness and transparency in the judiciary, judicial integrity.

1. Introduction.

Ukraine's path toward European integration requires the establishment of an effective mechanism for the participation of civil society institutions and individual citizens in the governance of public affairs, including the functioning of the judiciary. Civil society is a full-fledged co-creator of legal reality – a reality that cannot be formed by state authorities alone. It is shaped collectively by the people, by all structures of civil society, and by each individual.

Even under martial law, the topic of this study remains highly relevant. This is due to the need to preserve and strengthen the traditions of constitutional democracy, which have shown consistent development in Ukraine. It is vital not to lose the democratic gains achieved since independence. On the contrary, it is necessary to preserve, expand, and institutionalize the democratic memory associated with the development of constitutional governance. History offers numerous examples of how war or prolonged authoritarian rule can disrupt or even reverse the democratic development of a state and nation. For example, in the 1920s and 1930s, Japan had a jury trial system similar to that of Spain. However, it was dismantled in 1943 during the war. While it was partially revived during the country's liberal political period, it was subsequently abolished again during the era of militarism and autocracy. As Richard O. Lempert notes, this illustrates a discernible pattern (Lempert, 2001, p. 3).

The conceptual foundations of the jury trial institution have been explored in the works of numerous foreign legal scholars and political theorists, including Alexis de Tocqueville, Patrick Devlin, Camille Slominsky, Mykhailo Laskovsky, Richard O.

Lempert, Robert Yastrebsky, among others. In Ukraine, the specific features of the jury trial system have been examined by such scholars as V. Bigun, E. Bohdanov, A. Hryhorenko, V. Voinorovych, I. Zharovska, R. Kuybida, S. Prylutskyi, O. Ursuliuv, and V. Shcherba. While this topic has received considerable attention in the academic literature, a number of important issues – particularly those concerning the challenges and prospects for the development of jury trials in Ukraine in the post-war period – remain underexplored.

2. Jury trials as a form of direct of democracy and legitimacy of public authority.

The right to participate in the governance of public affairs can be defined as the legal opportunity for citizens to engage in the activities of public authorities, either on their own initiative or at the initiative of the authorities themselves, with the aim of more effectively taking into account, observing, and ensuring the interests of society in the exercise of state power. Citizens may also exercise this right through direct or indirect participation in the administration of justice. This right can be implemented in various forms: public oversight and monitoring of judicial bodies, participation in court proceedings as jurors, and mediation as a means of pre-trial dispute resolution. In this context, it is appropriate to speak of a particular form of democracy – judicial democracy – a model of exercising judicial power in which the people participate either directly or indirectly (Bihun, 2011 p. 215).

The principal advantage of implementing this model of democracy lies in the high level of legitimacy of decisions made through it. Judicial legitimacy is an axiological characteristic – one of the fundamental features of the judiciary – expressed in citizens' recognition of the procedures for the formation and functioning of state authority as fair, lawful, and appropriate. This recognition results in a willingness to comply with government regulations and decisions. Citizen participation serves as the foundation for the legitimacy – or perceived fairness – of both individual decisions and public institutions as a whole. Accordingly, the legitimation of the judiciary refers to the process of direct and indirect public involvement in the administration of justice, which, in turn, reinforces the legitimacy of the judicial system.

The jury trial is one of the key forms of direct citizen participation in the administration of justice. In the context of modern constitutional development, the jury trial plays a vital role in ensuring fairness and transparency in judicial proceedings. The institution of jury trial has been established and applied in many legal systems around the world as a key mechanism for securing democratic safeguards. Its core principle is the delegation of decision-making in certain court cases to a group of impartial citizens who serve as peers – equals among equals. This model is grounded in the belief that ordinary citizens are capable of applying the values of their community to the pursuit of justice. Such a mechanism not only promotes fairness in individual trials, but also serves as an important check on the arbitrary exercise of state power. As P. Devlin aptly observed, the jury trial is "a lamp that shows that freedom lives" (Patrick, 1970 p. 36).

Citizen participation in the administration of justice is a key condition for fostering public trust in the judiciary and for its recognition as fair and impartial. Public confidence in the courts is one of the fundamental pillars of democracy, while trust in the judge presiding over a case is an essential component of the rule of law. This understanding is particularly important in the context of Ukraine's development as a constitutional democratic state, even under conditions of martial law.

Current levels of public trust in the judiciary, as demonstrated by sociological studies and expert assessments, remain unsatisfactory. Between 2013 and 2022, trust in the judiciary fluctuated between 44% and 48%. The lowest levels of trust were recorded in 2014 and during the period from 2016 to 2019, while the highest levels were observed in 2015 and 2021.

According to the results of the study *"Attitudes of Ukrainian Citizens Towards the Judicial System"* conducted in 2020 by the Razumkov Centre's sociological service at the request of the Council of Europe Office in Ukraine, most Ukrainian citizens without personal experience interacting with the courts form their views based on secondhand information or media coverage – and these views are predominantly negative. The judiciary was found to be one of the least trusted state and public institutions. For instance, when asked about a hypothetical court case involving a wealthy citizen and a low-income citizen, 78.2% of respondents believed that the wealthier individual would have a better chance of winning. Only 1.4% of respondents thought the opposite (Report on the results of the study „Attitude of Ukrainian citizens to the judicial system": Supreme Court).

However, the level of trust among citizens who have had recent personal experience interacting with the courts is significantly higher. Moreover, the trust balance within this group is positive – meaning that the number of citizens who trust the courts exceeds the number who do not. Among those who have participated in court proceedings as plaintiffs, defendants, accused persons, victims, witnesses, or experts, 53.3% stated that the court decision was lawful and fair, while 22.5% considered it neither lawful nor fair. An additional 13.1% were unfamiliar with the decision in their case, and 12.0% found it difficult to answer this question. The proportion of respondents who regarded the court decision as lawful and fair does not differ statistically from the results of previous surveys conducted in 2012, 2017, and 2019 (3, ibid.). These findings suggest that the social dimension of the judiciary's functioning – in

particular, citizen participation in court proceedings – can positively influence public trust in the judicial system.

The same study also found that a significant number of citizens continue to believe that public involvement in the formation and functioning of the judiciary is justified. In 2017, a plurality of Ukrainians believed that, in order to ensure judicial independence, judges should be elected by the people – a view supported by 37.7% of respondents. By 2019, this figure had declined to 31.3%. Although still among the most supported positions, it shared first place with the view that judges should be appointed by the High Council of Justice or another independent judicial body (28.8%) (3, ibid.). When assessing the potential role of civil society representatives in conducting judicial qualification assessments and competitive selection procedures, a relative majority of respondents expressed the view that they should play a supporting, rather than decisive, role.

Citizens' trust in the judiciary under martial law from 2022 to 2025 remains low, with 73% of all citizens expressing distrust in the courts and the judicial system in general – regardless of whether they have had personal experience participating in legal proceedings (4, Assessment of the situation in the country, trust in social institutions, politicians, officials and public figures, attitude to elections during the war, belief in victory).

This figure should be interpreted with caution, as the Razumkov Centre study in question did not focus specifically on the judiciary but rather on state governance more broadly, which may have negatively influenced the results. Nonetheless, the findings reveal certain important trends. For instance, the 2023 Human Rights Report on Ukraine, prepared by the Bureau of Democracy, Human Rights, and Labor of the U.S. Department of State, supports this critical assessment. The authors note that although the Constitution of Ukraine guarantees judicial independence, in practice the courts remained ineffective and highly susceptible to political influence and corruption (5, 2023 Country Reports on Human Rights Practices: Ukraine.).

Naturally, citizen participation in the administration of justice alone cannot fully resolve the problem of public distrust in the judiciary – particularly when it comes to eliminating corruption among certain judges. However, such participation can enhance the transparency of judicial processes. In transitional democracies, the establishment of a legitimate (fair) and independent judiciary rests on at least two foundational principles: the integrity of judges and the involvement of citizens in the administration of justice.

3. Constitutionaal and legislative regulation of citizens' participation in the administration of justice.

The principle of citizen participation in the administration of justice is enshrined in Part 4 of Article 124 of the Constitution of Ukraine (as amended by Law No. 1401–VIII of June 2, 2016), which states: "The people shall participate in the administration of justice through juries" (Constitution of Ukraine, 1996). Despite the brevity of this constitutional provision, it contains substantial potential for the development of judicial democracy in Ukraine. From this norm, one may derive a constitutional standard of minimum public participation in judicial processes. The wording of Article 124 – "participate in the administration of justice" – resonates with Article 38 of the Constitution of Ukraine, which guarantees citizens the right to "participate in the administration of state affairs." It also aligns with Article 5, which affirms that the people exercise power directly or through public authorities, and with Article 6, which establishes the principle of separation of powers into legislative, executive, and judicial branches.

Although the Constitution, quite naturally, assigns primary responsibility for the administration of justice to professional judges, the role of public participation in this process is, in my view, highly significant. A minimal level of citizen involvement in the administration of justice does not in any way violate the principle of judicial independence; on the contrary, it enhances the legitimacy of the judiciary. The judiciary differs fundamentally from the other branches of government in terms of the scope of permissible public oversight. It is not a representative body directly elected by the people, but rather one formed through a meritocratic process. Judges are appointed based on competitive selection procedures designed to assess their professional competence and personal integrity. Citizen participation in the judicial appointment process – for example, through expert panels that evaluate judicial integrity – can have a positive effect on public trust in the judiciary as an institution.

Article 124 of the Constitution is complemented by Article 127, which stipulates that justice is administered by judges, but in cases specified by law, it may also be administered with the participation of jurors. Jury trials should thus be viewed as a form of the direct exercise of state power – specifically, judicial power – by citizens through their participation in legal proceedings. At the same time, the Constitution provides safeguards to prevent excessive public interference in judicial affairs. The determination of the categories of cases eligible for jury trials is a matter reserved exclusively for the legislature. It is therefore essential to maintain a proper balance, at the legislative level, between preserving judicial independence and enabling direct community involvement in the administration of justice.

Even in the first edition of the Constitution of Ukraine, adopted on June 28, 1996, fundamental provisions were enshrined that affirmed the people's direct participation in the administration of justice through the institution of lay assessors and jurors. Specifically, Article 124

stated that the people participate in the administration of justice through lay assessors and jurors; Article 127 established that justice is administered by professional judges and, in cases prescribed by law, also by lay assessors and jurors; and Article 129 provided that judicial proceedings are conducted by a single judge, a panel of judges, or a jury. However, at that time, there was no legislative framework regulating this form of democratic participation in the judicial process.

It was only in 2012, with the adoption of the new Criminal Procedure Code of Ukraine (hereinafter – CPC of Ukraine), that the institution of jury trials was formally introduced. According to Part 3 of Article 31 of the current CPC, criminal proceedings at the court of first instance involving crimes punishable by life imprisonment shall be conducted, at the request of the accused, by a jury composed of two professional judges and three jurors. In cases involving multiple defendants, the trial shall be conducted by a jury for all co-defendants if at least one of them submits a motion for such proceedings. Pursuant to Article 383 of the CPC, all matters relating to the trial – with the exception of issues concerning the selection, revocation, or modification of preventive measures during court proceedings – shall be decided jointly by the judge and the jurors (Criminal Procedure Code of Ukraine, 2012).

Currently, the Criminal Code of Ukraine (hereinafter – CC of Ukraine) provides for life imprisonment as a penalty for the following crimes: encroachment on the territorial integrity and inviolability of Ukraine (Part 3 of Article 110 CC); encroachment on the life of a state or public figure (Article 112 CC); intentional murder (Part 2 of Article 115 CC); terrorist act (Part 3 of Article 258 CC); falsification of medicinal products or distribution of falsified medicines (Part 3 of Article 321-1 CC); encroachment on the life of a law enforcement officer, a member of a public formation for the protection of public order and the state border, or a servicemember (Article 348 CC); encroachment on the life of a judge, lay assessor, or juror in connection with the administration of justice (Article 379 CC); encroachment on the life of a defense attorney or representative in connection with legal assistance activities (Article 400 CC); resistance to a superior officer or coercion to violate official duties (Part 5 of Article 404 CC); violation of the laws and customs of war (Part 2 of Article 438 CC); use of weapons of mass destruction (Part 2 of Article 439 CC); genocide (Part 1 of Article 442 CC); encroachment on the life of a representative of a foreign state (Article 443 CC); mercenary activity (Part 3 of Article 447 CC).

Therefore, only two conditions must be met for jurors to be involved in a case: the person must be charged with a crime punishable by life imprisonment, and the defendant must request that their case be heard by a jury.

Under martial law, pursuant to Part 10 of Article 615 of Criminal Procedure Code of Ukraine, criminal proceedings in the court of first instance for crimes punishable by life imprisonment shall be conducted collegially by a court composed of three judges, except for criminal proceedings in a court in which, prior to the introduction of martial law and the entry into force of this part, the composition of the court was determined with the participation of jurors.

On June 2, 2016, constitutional amendments concerning the judiciary were adopted, which abolished the institution of lay assessors while retaining the provision that the people directly participate in the administration of justice through jury trials. At the same time, Chapter 3, titled «Jury», was introduced into the Law of Ukraine «On the Judiciary and the Status of Judges». According to Article 63 of this Law, a juror is defined as a person who, in cases prescribed by procedural law and with his or her consent, participates in adjudication alongside a judge or is otherwise involved in the administration of justice. The law provides that jurors may be involved in the adjudication of criminal and civil cases at courts of first instance (On Justice and the Status of Judges, 2016).

In 2017, corresponding amendments were made to the Civil Procedure Code of Ukraine (hereinafter – CPC of Ukraine), which replaced lay assessors with jurors. Currently, the CPC provides that certain categories of civil cases shall be heard in courts of first instance by a panel composed of one professional judge and two jurors. These cases include: limitation of an individual's civil capacity, recognition of an individual as incapacitated, and restoration of civil capacity (Articles 295–300 CPC); recognition of an individual as missing or declaration of death (Articles 305–309 CPC); adoption (Articles 310–314 CPC); compulsory psychiatric care (Articles 339–342 CPC); compulsory hospitalization in a tuberculosis treatment facility (Articles 343–346 CPC). In such cases, jurors enjoy the same rights as professional judges when administering justice (Civil Procedure Code of Ukraine, 2004).

Thus, Ukrainian legislation provides for the participation of jurors in certain categories of cases in both criminal and civil proceedings. In practice, jurors deliberate and decide on virtually all matters of the trial together with judges. However, there are notable differences between civil and criminal proceedings regarding the involvement of jurors. In civil proceedings, the participation of jurors is mandatory in specific categories of non-contentious (special) proceedings, with no alternative procedure available. In contrast, criminal proceedings allow for the involvement of jurors only at the request of the accused in cases punishable by life imprisonment. The right to such a trial is ensured through corresponding obligations of certain actors within the criminal justice system.

The institution of the jury in Ukraine, as regulated by criminal procedure law, comprises a panel of three jurors

and two professional judges. According to Articles 64 and 65 of the Law of Ukraine "On the Judiciary and the Status of Judges", the territorial office of the State Judicial Administration of Ukraine submits a proposal to the relevant local council for the approval of a list of jurors. The local council is responsible for forming and approving a list of citizens – in the number specified in the proposal – who permanently reside within the territorial jurisdiction of the relevant district court and have consented to serve as jurors. A citizen of Ukraine who has reached the age of thirty and resides permanently in the jurisdiction of the district court may be appointed as a juror.

The following categories of citizens are excluded from jury lists:

individuals who have been declared by a court to have limited legal capacity or to be legally incapacitated;

individuals with chronic mental or other health conditions that prevent them from fulfilling the duties of a juror;

individuals with an unexpunged or unserved criminal conviction;

Members of Parliament of Ukraine, members of the Cabinet of Ministers of Ukraine, judges, prosecutors, law enforcement officers, military personnel, court staff, other civil servants, officials of local self-government bodies, attorneys, notaries, members of the High Qualification Commission of Judges of Ukraine, and the High Council of Justice;

individuals who have been subject to administrative sanctions for committing a corruption-related offense within the past year;

citizens aged sixty-five or older;

individuals who do not speak the state (Ukrainian) language.

4. Problems of practical implementation of the jury institute in Ukraine.

The introduction of jury trials in Ukraine, despite their symbolic and practical importance, has so far resulted in only minimal citizen participation in the administration of justice. The current model falls short of the classical Anglo-Saxon jury system and more closely resembles the Soviet-era institution of jurors known under the socialist legal framework. Because of its limited and inconsistent implementation, the Ukrainian jury system has proven ineffective within the broader context of democratic transformation and constitutional reform in post-Soviet Ukraine. This conclusion is supported by statistical findings from a study conducted in 2017–2018 by the Ukrainian Center for Public Data and the Center for Democracy and the Rule of Law, with the support of the United States Agency for International Development (USAID), which analyzed the adjudication of criminal and civil cases involving jurors.

A statistical analysis of court decisions involving jury participation in criminal and civil cases reveals a low level of citizen involvement in judicial proceedings relative to the total number of cases. This is illustrated by the fact that in the vast majority of criminal cases where a jury trial could have been conducted, the trial was instead held before a panel of professional judges without the participation of jurors. In fact, only one in seven defendants eligible for a jury trial was actually tried with a jury. This is despite the fact that such cases involve charges punishable by life imprisonment. The data indicate that defendants frequently choose not to exercise their right to a jury trial, as such trials are only held at the request of the accused (Statistical analysis of the consideration of criminal and civil cases with the participation of juries).

Even in criminal cases where jurors were involved, no active participation by jurors in the proceedings was observed. The analysis did not identify a single instance of a separate opinion issued by a juror. This suggests that jurors fully concurred with the verdicts prepared by professional judges. According to the statistical findings, the acquittal rate in jury trials was even lower than in trials presided over solely by professional judges – 5% compared to 6.6%, respectively.

Similarly, in the analysis of civil cases involving jurors, no separate opinions by jurors were found. In the overwhelming majority of such cases – involving limitation of legal capacity, adoption, recognition of a person as missing or deceased, involuntary psychiatric care, or compulsory hospitalization in an anti-tuberculosis institution – the courts granted the applications.

There have also been numerous instances in which civil cases were adjudicated without the participation of a jury, despite the explicit legal requirement that such cases be heard by a panel consisting of one judge and two jurors. Given that these cases involve the limitation of an individual's legal capacity, the declaration of a person as missing or deceased, or the involuntary provision of psychiatric care or hospitalization, such practices constitute a violation of the rights of the individuals concerned (ibid.).

Based on the foregoing, the following preliminary conclusion may be drawn: the constitutional right of Ukrainian citizens to participate in the administration of justice through jury trials in cases specified by law has not been properly implemented. Moreover, even the limited instances in which juries have participated in judicial proceedings have often taken place in violation of existing legal provisions. This highlights the urgent need to reform the institution of jury trial, taking into account both international legal standards and the specific challenges facing the Ukrainian legal system in the post-war context.

5. Prospects for reforming the jury system in Ukraine.

The first point to emphasize is that the current model of jury trial in Ukraine significantly restricts public

participation in the administration of justice. It has failed to fulfill its intended function due to its incomplete and hybrid character, which reflects only the formal features of the classical liberal model, while retaining a paternalistic substance. Accordingly, the Ukrainian system of jury trial requires reform toward a classical model, which has demonstrated its effectiveness not only in England and the United States, but also in various continental European countries. A particularly interesting example is offered by Poland, where the practice of jury participation has been thoroughly examined in the monograph *"People's Participation in the Administration of Justice"*, published in Warsaw in 2021 (Piotrowski, 2021, p.218).

The classical model of jury trial is characterized by a clear division of competences between the jury and the professional judge. The jury delivers an unmotivated (non-reasoned) verdict, and such a decision may only be overturned in cases of substantial violations of procedural law. Under this model, the jury deliberates and reaches its verdict independently, without the involvement of the professional judge in the decision-making process. The jury is tasked specifically with answering the question of whether the defendant is guilty of the alleged crime. If the jury returns a guilty verdict, the professional judge is then responsible for determining the appropriate sentence and resolving other legal matters requiring specialized legal knowledge. This functional division of roles allows the jury to be regarded as the «judge of fact», while the professional judge serves as the «judge of law».

The classical model of jury trial makes it possible to maintain a balance between public participation in the administration of justice and the independence of the judiciary, which is why it may be considered an effective mechanism for Ukraine's democratic development in the post-war period. For practical and institutional reasons, the introduction of a new model of jury trial in Ukraine should proceed gradually, allowing for the establishment of a truly effective instrument for delivering justice. Nonetheless, it is imperative that the foundations of such a model be laid at the legislative level today – one that guarantees the genuine participation of jurors in judicial proceedings and ensures they are provided with the necessary rights and procedural safeguards.

The second essential aspect of reforming the jury system in Ukraine concerns the guarantee of the independent status of jurors in the exercise of their judicial functions. A jury remains effective only insofar as it is free from external pressure, whether from the state or the public. To ensure this, it is necessary to establish effective legal mechanisms that protect jurors from unlawful interference in the performance of their duties. In particular, the removal of jurors from ongoing criminal proceedings must not be based on political expediency; rather, it must occur on reasonable and lawful grounds, and such a decision should not be made unilaterally by the presiding judge, but rather by a panel that includes the jurors themselves. Furthermore, a jury verdict must not be undermined through appellate review conducted without the participation of jurors. A jury's acquittal verdict should take immediate legal effect upon its pronouncement and be subject to appeal only in cases where procedural violations occurred in the jury selection process. The proposal to introduce jury participation at the appellate and cassation levels also merits serious consideration (Jury trial in Ukraine: the chosen model must take into account the risks of martial law.).

Ensuring the independent status of jurors also entails the provision of legal guarantees of immunity during the period of their service, similar to those afforded to professional judges. Additionally, financial independence is crucial: jurors should receive remuneration equivalent to the official salary of a local court judge, along with reimbursement of travel expenses and per diem allowances. While implementation of this proposal may be difficult during wartime, it should become the standard practice in the post-war period.

In times of war, the issue of juror mobilization becomes particularly relevant. Expert opinion on this matter is divided. For example, the authors of draft law No. 3843 *"On Jury Trial"* hold the view that jurors are subject to military mobilization on general grounds. The draft law does not provide any procedures for exempting jurors from military service in order to ensure their participation in trials during martial law (14, On jury trial. Law). An alternative position suggests that if a juror is mobilized during the course of a trial, their continued participation becomes impossible. In such circumstances, the court would be forced to suspend the proceedings until a new jury is empaneled. If a juror is replaced or the jury panel is left incomplete, the court may determine that the case must be retried. Such delays can undermine the parties' confidence in the transparency and efficiency of the process, the legitimacy of the court's composition, and the objectivity of its decisions.

Furthermore, the mobilization of a juror has a direct impact on the rights of the accused, the victim, and other participants in the proceedings. It raises concerns related to the right to trial within a reasonable time, as guaranteed by Article 6 of the European Convention on Human Rights and Fundamental Freedoms (1950). We concur with Yu. Hryhorenko in the view that one possible solution to this problem would be to provide exemptions from military mobilization for jurors for the duration of their service in court (ibid.).

The third important aspect concerns the improvement of the procedure for compiling jury lists and enhancing jurors' qualifications. The effective functioning of the jury system largely depends on the

mechanism for selecting candidates to serve as jurors. However, the current legal provisions governing the selection of jurors do not establish a clear or coherent procedure. As previously noted, Article 64 of the Law of Ukraine "On the Judiciary and the Status of Judges" assigns responsibility for the formation, approval, and revision of jury lists to the territorial departments of the State Judicial Administration of Ukraine and to local councils. It should be emphasized that this process is often lengthy and inefficient, presenting obstacles to the timely formation and approval of jury lists. Moreover, the selection process lacks transparency for the general public. The absence of clear procedures for submitting applications to serve as a juror – including public announcements, deadlines, and criteria – contributes to a disorganized and opaque process.

To streamline and enhance the jury selection procedure in Ukraine, it would be advisable to remove local councils from this process and assign exclusive responsibility to the territorial departments of the State Judicial Administration of Ukraine. This reform should be accompanied by the development and implementation of a centralized information system for compiling jury lists and by the establishment of clear, standardized selection criteria. Such an approach would significantly simplify and accelerate the process of forming jury pools, as the State Judicial Administration and its territorial offices would be able to directly access and process the necessary information to ensure the proper and efficient functioning of the jury system in Ukraine.

Another important issue concerns the legal culture and legal education of civil society, particularly in the context of jury trials (Bogdanov 2024, p. 15). Ukrainian legislation does not establish any qualification requirements for individuals serving as jurors – a practice that is also common in many foreign jurisdictions. However, it must be acknowledged that the general level of legal awareness and culture among citizens in Western democracies is significantly higher than in post-Soviet Ukraine. This objective gap can only be bridged through a long-term democratic process, closely tied to the development of a robust system of legal education.

In this regard, it would be advisable to improve the legal awareness of prospective jurors by introducing targeted educational initiatives – including training programs, conferences, and roundtables hosted by universities, as well as the distribution of video and audio materials on the basics of law and judicial procedure. It is also worth noting that the institution of jury trial itself serves as a tool for civic legal education. Through jury service, citizens gain direct exposure to legal procedures, core principles of law, and the operation of the judiciary – thereby increasing their understanding of rights and responsibilities. Such engagement not only enhances individual legal competence, but also contributes to strengthening public trust in the judiciary and in democratic institutions more broadly (Zharovska, 2024, pp. 1–6).

All of the above underscores the urgent need for substantial legislative reform. It is encouraging that on December 5, 2024, the Verkhovna Rada of Ukraine adopted, as a basis, two draft laws: Draft Law No. 3843 of July 14, 2020, *"On Jury Trial"* (, ibid.), and Draft Law No. 3844 of July 14, 2020, *"On Amendments to the Law of Ukraine 'On the Judiciary and the Status of Judges'* in Connection with the Adoption of the Law of Ukraine 'On Jury Trial'", authored by members of parliament P. Frolov, F. Venislavskyi, I. Fris, and P. Pavlish.

According to the explanatory note to Draft Law No. 3843 *"On Jury Trial"*, its principal aim is to implement the provisions of Article 124 of the Constitution of Ukraine, which, as previously discussed, enshrines the participation of citizens in the administration of justice through the institution of the jury. To achieve this goal, the draft proposes the adoption of a new, standalone law on jury trial. In particular, it defines key concepts, jurisdiction, and the composition of jury trials; regulates the procedure for forming juries; sets out the eligibility requirements for jurors; and outlines their rights and responsibilities. The draft also regulates the grounds and procedures for releasing a juror from duty, provides a mechanism for substituting retired jurors with alternates, and governs the internal functioning of juries, including deliberation and voting procedures during verdict adoption.

These draft laws represent a marked departure from current legislation governing citizen participation in the justice system, as they are based on the classical model of jury trial. The very fact that parliament approved the concept of these laws signals the beginning of systemic reform aimed at enhancing the role of civil society in the administration of justice.

It is also worth noting that other draft laws submitted to the Verkhovna Rada of Ukraine in 2020 reflect a similar conceptual approach to enhancing public participation in the justice system. These include several initiatives introduced by the Cabinet of Ministers of Ukraine: Draft Law No. 4190 of October 5, 2020, *"On Amendments to the Code of Ukraine on Administrative Offenses, the Criminal Code of Ukraine, and the Criminal Procedure Code of Ukraine to Ensure the Participation of Ukrainian Citizens in the Administration of Justice",* Draft Law No. 4191 of October 5, 2020, "*On Amendments to the Law of Ukraine 'On the Judiciary and the Status of Judges' to Improve the Procedure for Involving Ukrainian Citizens in the Administration of Justice and the Formation of Jury Lists",* Draft Law No. 4192 of October 5, 2020, *"On Amendments to Certain Laws of Ukraine to Ensure the Participation of Ukrainian Citizens in the Administration of Justice".*

In addition, a separate legislative initiative was submitted by People's Deputy Serhiy Vlasenko — Draft Law No. 2062 of September 4, 2019, *"On Amendments to the Criminal Procedure Code of Ukraine and the Law of Ukraine 'On the Judiciary and the Status of Judges' Regarding the Improvement of the Functioning of the Jury Trial in Ukraine".*

These legislative proposals reinforce the general trend toward expanding the role of citizens in the justice system and indicate growing recognition of the need to reform the institution of jury trial in line with constitutional principles and international standards.

6. Conclusions

The participation of the people in the administration of justice through jury trials is explicitly guaranteed by the Constitution of Ukraine and has been further enshrined in a number of legislative acts. However, the constitutional right of Ukrainian citizens to participate in the administration of justice through juries, in cases specified by law, has not been fully realized in practice. Moreover, even the limited instances of jury participation that have occurred have often been conducted in violation of existing legal provisions. These circumstances underscore the urgent need for comprehensive reform of the jury trial system, with due consideration for international legal standards and the unique conditions of Ukraine's legal development in the post-war period.

Reforming the institution of jury trial in the context of martial law presents substantial challenges. Nevertheless, such reform is essential for preserving and strengthening the tradition of constitutional democracy in Ukraine. The key directions for reform should include: the introduction of a classical model of jury trial that ensures a balance between public participation and judicial independence; the guarantee of jurors' independent status during the administration of justice, including safeguards against external influence and undue interference; the improvement of the procedure for compiling jury lists and the enhancement of juror qualifications through legal education and institutional support.

Successful implementation of these reforms will help establish a legitimate, transparent, and democratic system of justice that reflects both the constitutional values of Ukraine and the expectations of its citizens.

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СУД ПРИСЯЖНИХ ЯК ФОРМА БЕЗПОСЕРЕДНЬОЇ ДЕМОКРАТІЇ В УКРАЇНІ: ВИКЛИКИ ТА ПЕРСПЕКТИВИ ЙОГО СТАНОВЛЕННЯ

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Анотація

Метою статті є здійснення комплексного конституційно–правового аналізу інституту суду присяжних як форми безпосередньої участі народу у здійсненні правосуддя в умовах сучасної Україні, проблем та перспектив його становлення. На основі вище наведених концептуальних положень можна стверджувати, що суд присяжних є одним із дієвих форм безпосередньої демократії. У контексті сучасного конституційного розвитку, суд присяжних виступає важливим елементом забезпечення справедливості та транспарентності судових процесів. Участь народу у здійсненні правосуддя за участі присяжних прямо передбачена Конституцією України. Однак, конституційне право громадян України щодо здійснення правосуддя шляхом участі присяжних у визначених законом випадках не було належним чином реалізоване. Більше того, навіть ті незначні випадки залучення присяжних до судового розгляду окремих категорій справ відбувалися з порушенням чинного законодавства. Це зумовлює необхідність реформування цього інституту з урахуванням міжнародних правових стандартів та особливостей становлення правової системи України в післявоєнний період.

Реформування суду присяжних в умовах війни суттєво ускладнюється. Однак воно повинно відбуватися з метою збереження традиції конституційної демократії. Основний вектор розвитку процесів реформування передбачає вирішення низки нагальних питань: запровадження класичної моделі суду присяжних, яка дозволяє зберегти баланс між участю народу у здійсненні правосуддя та незалежністю судової влади; гарантування незалежного статусу присяжних в процесі здійснення правосуддя; удосконалення процедури формування списків присяжних та рівня їх кваліфікації.

Ключові слова: суд присяжних, участь народу, безпосереднє народовладдя, конституційна демократія, реформа правосуддя, судова влада, справедливість та транспарентність судової влади, доброчесність суддів.

Наукове видання

КОНСТИТУЦІЙНО-ПРАВОВІ АКАДЕМІЧНІ СТУДІЇ

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