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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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APPLICATION OF THE MLI CONVENTION AS A MEANS OF ENSURING THE CONSTITUTIONAL OBLIGATION TO PAY TAXES

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Summary

The purpose of the article is to determine the consequences of the application of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (Multilateral Instrument (MLI) in Ukraine, to evaluate it as a platform for coordinating the tax policy of various states, and also to make proposals to improve such coordination.

To achieve the outlined purpose and fulfill the set objectives in the research process, the following universal general scientific and special legal methods were used: dialectical, formal logical, formal legal, comparative legal, analysis and synthesis, and logical semantic.

The article emphasizes the importance of combating tax abuse as one of the main directions of the government's tax policy. It points out the need to support business and create a favorable investment climate on the one hand, and to counteract tax minimization strategies and the relocation of capital to low-tax jurisdictions on the other. It is noted that since business has crossed national borders, the coordination of the world community to harmonize tax policies of different states, their cooperation and interaction is necessary to solve the above problems. The main steps of the world community to coordinate their efforts to combat tax abuse are indicated. The leading role of the OECD in this process is noted, in particular with regard to the development of a model convention on the avoidance of double taxation, an initiative to combat harmful tax practices and, ultimately, an action plan on tax base erosion and profit shifting (BEPS). Considerable attention is focused on the MLI Convention as one of the main steps of the BEPS Plan. The article explains the purpose of the MLI Convention, which is to unify the rules for applying international tax conventions in terms of establishing taxation rules with respect to income taxes, to create an effective mechanism for implementing the agreed changes in a coordinated and efficient manner, according to which such agreements will fulfill the task of avoiding double taxation, but at the same time will not be an instrument for abuse, which creates opportunities for tax exemption or reduction of taxes through tax evasion. The author points to the provisions of the Convention limiting the application of benefits to dividend payment transactions and counteracting the abuse of the status of permanent establishments. Also, a critical assessment is given of the procedure for resolving tax disputes between residents of different countries provided for in the convention.

The study substantiates that the system of dispute resolution between taxpayers and competent authorities of different contractual jurisdictions as defined in the MLI Convention is not perfect, since it is not characterized by promptness of dispute consideration, and the system of determining arbitrators is unclear and not completely understood. The author proposes to establish an international tax arbitration court with clear rules of procedure and a professional panel of judges from among the most authoritative experts in the field of international tax law.

To ensure effective and efficient coordination of states in the fight against tax abuse, taxation of TNCs, the digital economy and many other areas where global cooperation is needed, it is proposed to establish an international intergovernmental organization with delegation of part of the sovereign tax powers to it.

Key words: tax; tax policy; constitutional obligation; double taxation; tax planning, low-tax jurisdictions; BEPS; MLI Convention; permanent establishment; tax disputes.

1. Introduction

Counteracting tax abuse, preventing tax base erosion and artificial tax minimization is one of the main areas of any state's budget policy, especially at a time when the global economy is experiencing a deep crisis. Governments are faced with the task of supporting businesses that have found themselves in difficult circumstances on the one hand, and protecting state budgetary interests on the other hand, as the decline in GDP leads to a decrease in tax revenues and a significant increase in the budget deficit. These tasks are not mutually exclusive. They can be implemented when the government creates a favorable domestic tax climate, improves conditions for faithful and conscientious taxpayers, at the same time taking measures to prevent tax abuse that may occur as a result of dishonest behavior of taxpayers, implementation of aggressive tax planning, and shifting profits and capital to low-tax jurisdictions. Given that business has long crossed national borders and skillfully uses differences in tax systems of different countries to optimize its payments, the efforts of one government are not enough to solve these problems. Clear and effective tools are needed to coordinate the governments' tax policies, which often requires finding compromise solutions. This problem is still relevant in Ukraine, as after winning the war, we will face the challenges of economic reconstruction, stabilization of the financial system and improvement of the investment climate.

The problems of combating tax abuse in the process of tax optimization and planning have received attention from scholars, in particular, O. Artyukh, O. Bazov, M. Vitlina, V. Ilyushenkova, V. Marchenko and others. However, the issue of application of such an instrument as the MLI Convention for the purpose of ensuring constitutional obligations has not yet been sufficiently covered in scientific sources.

The purpose of this article is to determine the consequences of the application of the MLI Convention in Ukraine, its evaluation as a platform for coordinating the tax policy of the states, and making proposals for improving such coordination.

To achieve this goal, it is necessary to solve the following research tasks: to find out what actions have been taken by the international community to coordinate tax policy, to determine the place of the MLI Convention in the system of measures to combat tax abuse, to disclose the main provisions of the MLI Convention and the consequences of its implementation in Ukraine, and to formulate proposals for improving the interaction of governments in coordinating tax policy.

2. Key Actions of the World Community to Coordinate Tax Policy

At some point, the active use of offshore and large-scale tax minimization abuse forced the world community to take measures to counter it. As O. Artyukh and V. Ilyushenkova rightly point out, the international community had to admit that tax evasion and tax fraud schemes cannot be overcome by the efforts of each country alone (Artyukh&Ilyushenkova, 2019, p. 6). The Organization for Economic Cooperation and Development (OECD) made a major contribution to this process. Back in 1977, the OECD Model Tax Convention was developed aiming to eliminate double taxation. In 1988, the OECD developed an initiative to combat harmful tax practices aiming to identify jurisdictions that wrongly lured businessmen from high-tax countries. In the same year a multilateral convention on mutual administrative assistance in tax issues was concluded (Implementation of the BEPS Plan in Ukraine: Problems and Prospects, 2019).

O. Bazov notes that in the current conditions, the leading countries of the world, in particular the G20 states, have come to the conclusion that the international legal framework of the principle of tax competition needs significant improvement. This is primarily reflected in the fact that the international taxation system, which was previously aimed at counteracting double taxation, is being actively improved by the international community with the purpose of preserving incomes and the possibility of their taxation by the countries where the income originates. earlier, within the framework of ordinary tax competition, states adhered to the so-called "right model" of taxation, based on the principle of tax competition and free circulation of capital, in the new conditions, the so-called "left model" of taxation is applied, i.e. governments have begun to fight the outflow of capital to offshore areas (Bazov, 2019, p. 258).

V. Marchenko argues that the G20 and the OECD have initiated a large-scale international effort to move from the era of indifferent contemplation, and even actual encouragement of the so-called aggressive tax planning to its limitation and elimination. It is obvious that international tax planning has become too expensive even for developed countries (Marchenko, 2018, p. 303). In view of this challenge, in 2012 the leaders of the G20 countries requested the OECD experts to develop an action plan to address the problems of erosion of the tax base and profit shifting. Already in 2013, the OECD presented its first report on this issue and proposed the Action Plan on Base Erosion and Profit Shifting or BEPS Plan (Implementation of the BEPS Plan in Ukraine: Problems and Prospects, 2019).

The conclusion of the MLI Convention on November 24, 2016 was one of the key steps in the regulatory implementation of certain measures of the BEPS Plan. This Convention was signed by Ukraine on July 23, 2018 and ratified in accordance with the Law of Ukraine No. 2692-VIII dated February 28, 2019 with certain reservations.

M. Vitlina emphasizes that the BEPS requirements relate to the reform of domestic tax legislation and the conclusion of double taxation treaties by the states. The purpose of BEPS is to create a mechanism to effectively combat schemes that facilitate the global transfer of company profits to offshore areas and a legal framework to combat corporate tax minimization to prevent the use of aggressive international tax planning schemes. (Vitlina&Shulga, 2019, p. 179).

The BEPS plan contains new or more stringent international standards, as well as specific measures to help the governments overcome the problems of tax base erosion and profit shifting, defining 15 actions aimed at addressing these problems comprehensively (BEPS, 2018).

3. Basic Provisions of the MLI Convention

The MLI Convention is Action15 of the BEPS Action Plan. By signing and ratifying this Convention, the participants simultaneously fulfill Actions 6 and 14, which are included in the BEPS Minimum Standard, as well as Actions 2 and 7, to which the parties can join. The purpose of the MLI Convention is to unify the rules for the application of international tax conventions in terms of establishing taxation rules with respect to income taxes, to create an effective mechanism for implementing the agreed changes in a coordinated and efficient manner, according to which such agreements will fulfill the task of eliminating double taxation without creating an opportunity for non-taxation or reduced taxation through tax evasion or avoidance. Concluding the MLI Convention, the parties defined in the Preamble the following factors they are guided by:

1) governments lose substantial corporate income tax revenues because of aggressive international tax planning that has the effect of artificially shifting profits to locations where they are subject to non-taxation or reduced taxation;

2) base erosion profit shifting is a pressing issue not only for industrialized countries but also for emerging economies and developing countries;

3) the importance of ensuring that profits are taxed where substantive economic activities generating the profits are carried out and where value is created;

4) the need to ensure swift, coordinated and consistent implementation of the treaty-related BEPS measures in a multilateral context (MLA, 2019).

The MLI Convention directly defines the so-called hybrid mismatches to reduce tax. In particular, it establishes rules for the application of double taxation treaties for fiscally transparent entities and dual resident entities. At the same time, the Convention provides for three options that can be applied by the parties to regulate the procedure for taxing the incomes of their residents, in particular, establishing the possibility of not applying the provisions of international treaties that provide for the exemption from taxation of income in one contracting jurisdiction, if another contracting jurisdiction exempts such income from taxation or applies a reduced rate. At the same time, instead of exemption from taxation, the possibility of deducting the amount of tax paid in this other contractual jurisdiction is applied.

Also, the MLI Convention provides for steps to prevent the abuse of the provisions of double taxation treaties, in particular by including in the text of the preamble of the tax treaties to which it applies, the provisions on the intention to eliminate double taxation with respect to the taxes to which this agreement applies, but without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including by improper use of agreements for the purpose of obtaining the benefits provided for in this agreement, for obtaining indirect benefits by residents of third jurisdictions).

An important provision of the MLI Convention is that the benefit provided by the tax treaty will not be granted if it is established, taking into account all the facts and circumstances, that obtaining this benefit was one of the main purposes of any arrangements or transactions that led to its application (implementation of Action 6 of the BEPS Plan). This is, in fact, a regulatory consolidation of the business purpose doctrine at the level of international law in terms of the possibility of applying the benefits provided by double taxation treaties. At the same time, the Convention also provides for mechanisms to protect the interests of taxpayers, preserving their right to apply for benefits if, at their request, the competent authority of a contracting state establishes that the relevant tax benefit would have been granted in the absence of the disputed transaction or arrangement.

Special conditions are provided for by the MLI Convention regarding the application of benefits to dividend payment transactions (it is established that the person receiving dividends must hold a part of the capital, shares or stock during a 365-day period). The Convention also regulates the procedure for applying tax treaties in case of alienation of shares or rights, the value of which is derived mainly from real property (under certain conditions, it is possible to tax such income in the contractual jurisdiction in which the real property is located).

Particular attention should be paid to the provisions of the MLI Convention on countering the abuse of permanent establishments (implementation of Action 7 of the BEPS Plan). Mechanisms have been established to counteract tax minimization schemes in cases where permanent establishments are situated in the third jurisdictions with a lower level of taxation, as well as in cases of artificial avoidance of the permanent establishment status. The main methods of such artificial avoidance have been identified, in particular by concluding commission contracts or other similar schemes. In particular, it is provided that an enterprise resident in one contractual jurisdiction has a permanent establishment in another contractual jurisdiction if it acts in a contracting jurisdiction through an entity that habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts, and these contracts are concluded in the name of the enterprise or relate to the transfer of the ownership of, or for the granting of the right to use, property owned or used by that enterprise, or they relate to the provision of services by such enterprise.

An important task of the MLI Convention is to regulate the procedure for improving the dispute resolution mechanism. Its provisions expand the ways of protecting taxpayers by granting them the right, irrespective of the remedies provided by the domestic law, to apply to the competent authority of either contracting jurisdictions if the taxpayer believes that their rights arising from the tax agreement are violated. This provides for coordination and interaction between the competent authorities of the contracting jurisdictions by reaching mutual agreement on any complex or disputed situations arising from the interpretation or application of the Tax Agreement. They may hold joint consultations or take other measures and make efforts to resolve disputes promptly and effectively. In this context, it should be noted that despite the ratification of the MLI Convention by Ukraine, the national legislation is currently not harmonized with its provisions on mutual agreement, in particular, it does not provide for a legal mechanism for consideration of appeals of non-residents to the tax authorities of Ukraine on the application of tax agreements, the procedure for making decisions based on the results of such appeals and the consequences.

If during the mutual agreement procedure the contracting parties fail to reach an agreement on the resolution of the dispute within a period of two years, the unresolved disputes shall be submitted to arbitration at the request of the interested party. Settlement of a dispute over the application of a tax agreement by an arbitration panel is a rather interesting institution of international tax law. The arbitration panel consists of three independent members with expertise and experience in international tax matters. Two members of the panel are appointed by the competent authorities of each of the contracting parties, and the third, who will be the chair of the arbitration panel, is appointed by these members of the panel. The chair of the panel cannot be a resident or citizen of any of the contracting jurisdictions. The arbitration decision, except in certain cases, shall be final and binding on the contracting jurisdictions. It should be emphasized that by ratifying the MLI Convention, Ukraine reserved the right not to apply the arbitration clause to its tax agreements, so domestic taxpayers cannot currently use this tool.

4. Effectiveness of Application of the MLI Convention in Ukraine and the World

In our opinion, such a dispute settlement system cannot be considered perfect, since, firstly, it is not characterized by the promptness of consideration of disputes, as the process, first at the national and then at the international level, may take years, and secondly, the system for determining arbitrators is unclear and not completely understood, nor does it guarantee an impartial and objective resolution of the dispute at the highest professional level. We believe that these tasks could be solved much more effectively by creating an international tax arbitration with clear rules of procedure and a professional panel of judges from among the most authoritative experts in the field of international tax law.

The introduction of the BEPS Plan into the legislation of Ukraine, which is expected in the near future, has certain advantages and disadvantages, which were described above. But it seems that another choice is hardly acceptable for Ukraine, because we cannot be isolated from global world processes and not recognize these realities. For business, this leads to a new quality of tax planning, with the rejection of artificial schemes, taking into account financial monitoring, the actual limitation of bank secrecy. Along with this, the main task for Ukraine in the coming period will be to ensure that these steps are properly legislated, that effective reform of the tax authorities and other necessary reforms are implemented, and that corruption is fought. This should ensure the necessary balance between the interests of the state and business. One way or another, we all have to get used to living and working under the new

taxation rules, which are stricter but more transparent and fairer. (Hretsa, 2020, p. 394).

Despite great efforts and significant steps in the issue of coordinating the actions of states in the field of tax policy, combating tax abuse at the global level, in our opinion, the level of cooperation is not sufficient today. Many steps identified within the framework of the BEPS Plan and other initiatives cannot be implemented due to the lack of appropriate international legal means of their implementation. It is not enough to define the necessary international tax rules, it is necessary to have effective tools to ensure their application. At the level of national tax systems, it is difficult to introduce such tools a priori. This applies to taxation of TNCs, the digital economy, and many other areas. The procedure for resolving disputes at the intergovernmental level regarding the avoidance of double taxation and other important aspects also needs to be improved. We believe that these problems can be effectively addressed only by establishing an international intergovernmental organization with delegation of some sovereign tax powers to it. The task of this organization could be to coordinate the tax policy of states, ensure the implementation of the BEPS plan, administer the tax payment of TNCs and the segment of large digital business, monitor their compliance with the rules of international tax treaties and paying taxes in the relevant jurisdictions. Another crucial task of such an international organization will be to resolve disputes at the international level.

5. Conclusions

The system of settling disputes between taxpayers and the competent authorities of different treaty jurisdictions defined in the MLI Convention cannot be considered perfect, since, firstly, it is not characterized by the promptness of dispute consideration, because the process, first at the national and then at the international levels, can drag on for years, and -secondly, the system of determining arbitrators is unclear and incompletely understood, it does not guarantee an impartial and objective resolution of the dispute at the highest professional level. We believe that these tasks could be solved much more effectively by creating an international tax arbitration, with clear work regulations and the formation of a professional panel of judges from among the most authoritative experts in the field of international tax law.

To ensure effective and efficient coordination of governments in countering against tax abuse, taxation of TNCs, digital economy and many other areas where global cooperation is necessary, we consider it expedient to create an international intergovernmental organization with the delegation of part of the sovereign tax powers to it. The task of this organization may be to coordinate the tax policy of states, implement the steps of the BEPS plan by developing international legal means for their implementation, take measures to administer the payment of taxes by TNCs and the segment of large digital business (creating a kind of international office of ultra-large taxpayers within the structure of an international organization), monitor their compliance with the rules of international tax treaties, pay taxes in the relevant jurisdictions, analyze master file and country-by-country reporting and provide recommendations on how to improve the tax system. The concept of tax cooperation should prevail over the policy of tax selfishness of states even in the context of the economic and financial crisis. Another crucial task of such an international organization will be to settle disputes at the interstate level by creating a body to resolve such disputes − international tax arbitration.

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ЗАСТОСУВАННЯ КОНВЕНЦІЇ MLI ЯК ЗАСІБ ЗАБЕЗПЕЧЕННЯ КОНСТИТУЦІЙНОГО ОБОВ'ЯЗКУ ЩОДО СПЛАТИ ПОДАТКІВ

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Анотація

Метою даної статті є визначення наслідків застосування багатосторонньої конвенції щодо виконання заходів, які стосуються угод про оподаткування, з метою протидії розмиванню бази оподаткування та виведенню прибутку з-під оподаткування (Multilateral Instrument (MLI) в Україні, її оцінка як платформи для координації податкової політики різних держав, внесення пропозицій щодо покращення такої координації.

Для досягнення окресленої мети й виконання поставлених завдань у процесі дослідження використано низку різноманітних універсальних загальнонаукових та спеціально-юридичних методів наукового пізнання: діалектичний, формально-логічний, формально-юридичний, порівняльно-правовий, аналізу та синтезу та логіко-семантичний.

У статті наголошується на важливості протидії зловживанням у сфері оподаткування як одному із основних напрямків податкової політики держави. Вказується на необхідності, з одного боку, підтримувати бізнес, створити сприятливий інвестиційний клімат, а з іншого – протидіяти мінімізації податкових зобов'язань та витоку капіталу в низькоподаткові юрисдикції. Зазначається про те, що оскільки бізнес

став транскордонним, для вирішення цих завдань необхідна координація світової спільноти по узгодженню податкової політики різних держав, їх співпраця і взаємодія. Зазначаються основні кроки світової спільноти для координації їх зусиль по протидії податковим зловживанням. Відмічається провідна роль ОЕСР у цьому процесі, зокрема щодо розробки модельної конвенції про уникнення подвійного оподаткування, ініціативи щодо протидії шкідливій податковій практиці і, зрештою, плану дій щодо розмивання податкової бази і виведення доходів з-під оподаткування (BEPS). Значна увага зосереджується на конвенції MLI як одному із основних кроків плану BEPS Розкривається мета конвенції MLI, яка полягає у тому, щоб уніфікувати правила застосування міжнародних податкових конвенцій у частині встановлення правил оподаткування стосовно податків на доходи, створення ефективного механізму впровадження погоджених змін скоординованим та ефективним способом, згідно з яким такі угоди будуть виконувати завдання уникнення подвійного оподаткування, однак разом з тим не будуть інструментом для зловживань, при яких створюються можливості для звільнення від оподаткування або зменшення розміру податків через ухилення або уникнення від сплати податків. Вказується на положення конвенції щодо обмеження застосування пільг до операцій з виплати дивідендів, а також протидії зловживання статусом постійних представництв. Дається критична оцінка передбаченому в конвенції порядку розв'язання податкових спорів між резидентами різних країн.

Виосновується, що визначена в конвенції MLI система врегулювання суперечок між платниками податків і компетентними органами різних договірних юрисдикцій не є досконалою, адже не відзначається оперативністю їх розгляду, крім того, система визначення арбітрів нечітка та неповністю зрозуміла. Пропонується створення міжнародного податкового арбітражу, з чітким регламентом роботи та формуванням професійного складу суддів з числа найбільш авторитетних фахівців у галузі міжнародного податкового права.

Для забезпечення ефективної та дієвої координації держав у питаннях боротьби з податковими зловживаннями, оподаткування ТНК, цифрової економіки та багатьох інших сфер, де необхідна глобальна взаємодія, пропонується створення міжнародної міжурядової організації з делегуванням їй частини суверенних податкових повноважень.

Ключові слова: податок; податкова політика; конституційний обов'язок; подвійне оподаткування; податкове планування; низькоподаткові юрисдикції; BEPS; конвенція MLI; постійне представництво; податкові спори.

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REALIZATION OF THE RIGHT TO FREE LEGAL AID: CONSTITUTIONAL AND SECTORAL ASPECTS

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Summary

The purpose of the article is to analyze the constitutional and sectoral aspects of the realization of the right to free legal aid, to determine the optimal subject of administration of the system of free secondary legal aid in Ukraine.

Research methods. The methodological basis of this work is a complex of general scientific and special methods and techniques of scientific knowledge, in particular, dialectical, system-structural, formal-logical, statistical method, as well as methods of modeling, analysis and synthesis, etc.

Results and conclusions. According to art. 59 of the Constitution of Ukraine, the Law of Ukraine «On free legal aid», procedural codes and by-laws, an extensive system of free legal aid has been created in Ukraine, including the provision of free primary and secondary legal aid.

Despite the harsh conditions of a full-scale war, the free legal aid system has demonstrated institutional stability and an intention to develop and strengthen its human resources. The advocate's corpus is an advanced vanguard and the basis of the FLA system, which is able to solve difficult professional and ethical issues that arose in connection with the russian military invasion. The realization of the management (administration) function of the FSLA system should be carried out by the Coordination center for legal aid provision. The transfer of this function to the bodies of the Ukrainian national bar association is not justified and carries the risks of reducing the clarity of the distribution of assignments for the provision of FSLA between advocates and payment for their services from the state budget.

Many ukrainian advocates have changed ethical approaches to protect those suspected of committing crimes related to facilitating russian military aggression. The main reasons were patriotic beliefs, risks of human condemnation, identification of advocate and client, reputational and moral factors.

To increase trust and transparency in the work of the FSLA system, it is advisable to stage the introduction of automated distribution of assignments among advocates based on certain criteria.

Key words: legal aid, advocate, court, defender, detention, war, free legal aid, ethics, ECHR, martial law.

1. Introduction

One of the consequences of russia's full-scale aggression against Ukraine was a 30.4% drop in GDP (Minekonomiky poperedno otsiniuie padinnia VVP v 2022 rotsi na rivni 30,4%, 2023), an increase in unemployment and poverty. Reducing the financial capabilities of citizens actualizes the importance of free legal aid as a mechanism that contributes to the defense of the rights and interests of socially unprotected categories of the population in the legal sphere.

During martial law, the actual conditions and legal foundations of the functioning of the system of free legal aid in Ukraine changed, the list of recipients of such assistance was expanded and changes were made to the procedure for providing it. Along with this, in 2022 there was a sharp aggravation of criticism of the free legal aid system by the bodies of the Ukrainian national bar association (Zvit Komitetu z pytan bezoplatnoi pravovoi dopomohy, shcho diie v skladi NAAU, z aktualnykh pytan funktsionuvannia systemy bezoplatnoi pravovoi dopomohy v Ukraini, 2022). The main leitmotif of the criticisms expressed on their part was the desire to transfer the administration of the system of free secondary legal aid from the Coordination center for legal aid provision to the Ukrainian national bar association.

Some aspects of the implementation of the right to free legal aid were the object of attention of such scholars as R.L. Abel, J.M. Barendrecht, Y.M. Bysaga, I. Chaara, J.-B. Falisse, V.V. Zaborovskyy, L.R. Nalyvaiko, M.V. Novikova, J. Moriceau, L.M. Moskvich, A. Paterson, M.A. Pogoretsky, O.Z. Khotynska-Nor and others (Barendrecht, 2011, p. 4; Chaara, Falisse & Moriceau, 2022, p. 820; Nalyvaiko & Novikova, 2021, p. 7; Moskvych, 2017, p. 125), however, at the theoretical level, the problems of exercising the right to free legal assistance in difficult conditions of large-scale war are not sufficiently investigated, which determines the need for further scientific researches in this area.

The purpose of this article is to analyze the constitutional and sectoral aspects of the realization of the right to free legal aid, to determine the optimal subject of administration of the system of free secondary legal aid in Ukraine.

2. Normative standards for providing free legal aid in Ukraine.

In 2016, Article 59 of the Constitution of Ukraine was stated in a new edition, according to which «everyone has the right to professional juridical assistance. Such assistance is provided free of charge in cases envisaged by law...» (Konstytutsiia Ukrainy, 1996).

The updated approach of the ukrainian legislator takes into account the standards of the European Convention on Human Rights and the case practice of the European Court of Human Rights. Thus, according to article 6 § 3 (c) of the Convention for the protection of human rights and fundamental freedoms, everyone charged with a criminal offence has the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

According to the practice of the ECHR, «the right to legal aid, is subject to two conditions, which are to be considered cumulatively (Quaranta v. Switzerland, § 27). First, the accused must show that he lacks sufficient means to pay for legal assistance (Caresana v. the United Kingdom (dec.)). He need not, however, do so «beyond all doubt»; it is sufficient that there are «some indications» that this is so or, in other words, that a «lack of clear indications to the contrary» can be established (Pakelli v. Germany, Commission report, § 34; Tsonyo Tsonev v. Bulgaria (no. 2), § 39). Second, the Contracting States are under an obligation to provide legal aid only «where the interests of justice so require» (Quaranta v. Switzerland, § 27). In this regard, the ECHR takes into account various criteria, in particular, the seriousness of the offence and the severity of the penalty at stake, the complexity of the case, the personal situation of the accused» (Guide on Article 6 of the European Convention on Human Rights, 2021) etc.

In any case, legal assistance should be «practical and effective», because the nomination of a defender does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations (Artico v. Italy, 1980, § 33).

It should be noted that at the sectoral level, the Law of Ukraine «On free legal aid», procedural codes and by-laws take into account key international legal and constitutional standards, develop and detail them.

Thus, according to the Law of Ukraine «On free legal aid» an extensive network of free legal aid has been created, including the provision of free primary and secondary legal aid. Before the start of full-scale military aggression of the Russian Federation against Ukraine, the system of providing free legal aid in Ukraine included 535 points of access to legal services: 23 regional, 84 local centers for providing free secondary legal aid and 428 legal assistance bureaus in all regions of Ukraine (Adresy tsentriv z nadannia bezoplatnoi pravovoi dopomohy, 2020). In 2022, part of the points of access to legal assistance temporarily suspended its activities due to the threat of shelling and occupation of Ukrainian territory.

The most feck of free primary legal aid is provided by in-house lawyers of the relevant points of access to legal assistance. At the same time, due to the existence of the so-called monopoly of the bar, the most significant part of free secondary legal aid (FSLA) is provided by advocates on the basis of agreements with centers for the provision of FSLA.

In 2022, the system of free legal aid supported 642 187 cases for the provision of free legal aid (in 2021 – 806 272, in 2020 – 656 207), of which 506 914 cases of providing free primary legal aid (in 2021 – 627 281, in 2020 – 510 118) and 135 273 cases of free secondary legal aid (in 2021 – 178 991, in 2020 – 146 089) (Bezoplatna pravova dopomoha. Zvit 2022, 2023).

Despite the war, the system of free legal aid (FLA) has demonstrated institutional stability and an intention to develop and strengthen its human resources. So, in 2022, according to the results of a new competition, 513 advocates were included in the Register of advocates providing free secondary legal aid (a total of 8639 advocates are in the register) (Bezoplatna pravova dopomoha. Zvit 2022, 2023). These processes are due, in particular, to the general decrease in the number of clients due to hostilities, the desire of advocates to obtain government funding in order to survive in difficult economic conditions.

3. Subject of administration of the system of free secondary legal aid

In 2022, criticism of the free legal aid system by the bodies of the Ukrainian national bar association (UNBA) sharply intensified. The key question is who should administer the FSLA system?

According to some representatives of the UNBA, the function of management (administration) the FSLA system should be transferred from the Coordination center for legal aid provision (CC) to the bodies of the advocate's self-government. This is justified by «the hypothesis of the presence of significant and conceptual problems in the implementation of free secondary legal aid in Ukraine» (Zvit Komitetu z pytan bezoplatnoi pravovoi dopomohy, 2022).

In favor of this position, arguments are made that the Ministry of justice of Ukraine and the CC are trying to encroach on the independence of the bar, introduce a subordinated model of relations with advocates, and demonstrate attempts to interfere in advocate secrecy under the guise of FSLA quality control (Zvit Komitetu z pytan bezoplatnoi pravovoi dopomohy, 2022).

Representatives of the UNBA note that this is facilitated by the artificial recognition of the competition for the position of director of the CC as invalid, as well as the fact that for two years the system has been headed by an acting director, that is, a person who has not passed the necessary selection and is directly dependent on the will to occupy this position. Thus, in fact, the state-created guarantees of the necessary degree of independence of the FLA system from the state represented by the Ministry of justice are leveled (Zvit Komitetu z pytan bezoplatnoi pravovoi dopomohy, 2022).

Critics of the existing model draw attention to the fact that FLA centers are influenced by corruption risks, which is manifested in the provision of unreasonable benefits and advantages in the distribution of assignments in criminal cases, the removal of «inconvenient» advocates from the provision of FLA, the formation of a procedural imbalance in criminal proceedings in favor of the prosecution (Zvit Komitetu z pytan bezoplatnoi pravovoi dopomohy, 2022).

A separate group of comments by members of the bodies of the advocate's self-government concerns the volume and types of legal aid, which should be provided free of charge. In their opinion, the FLA system forms a consumer attitude towards an advocate among the recipients of the FLA. Thus, the work of advocates is depreciated, and the latter are forced to work in competitively unhealthy conditions. Given that FLA is provided at the expense of taxpayers, and the volumes of FLA are excessively wide and constantly gravitate towards expansion, representatives of the UNBA pay attention to the threat to the commercial interests of the advocacy and dumping in the cost of legal services, emphasize the need to limit categories and narrow the list of recipients of FLA (Zvit Komitetu z pytan bezoplatnoi pravovoi dopomohy, 2022).

It should be noted that during the public discussion, deputy minister of justice of Ukraine V. Kolomiets gave her counterarguments regarding some of these arguments. From her point of view, the attempt to discredit the FLA system by the UNBA is due to the desire of the latter to get the opportunity to manage budget funds of the FLA system, which amount to approximately 800 million uah per year (Kolomiiets, 2023). The deputy minister of justice of Ukraine draws attention to the fact that in the world there are different models for providing FLA and each state independently chooses the best variant for itself. In Ukraine, as in many developed countries, the state is responsible for the distribution of budget funds for these purposes, which, in its opinion, seems correct taking into account more than 10 years of successful functioning of this system (Kolomiiets, 2023).

In our opinion, the giving to the state institution (CC) of the function of allocating budgetary funds to pay for the services of advocates is correlated with the need to provide its representatives with the authority to monitor the quality of assistance provided by advocates. Today, it is doubtful whether such control powers can be quickly and impartially implemented by the commissions for assessing the quality, completeness and timeliness of the provision of free legal aid by advocates created by the regional bar council, since in many areas these commissions do not work.

It should be admitted that to date, there is no convincing evidence that under the control of the UNBA, the FSLA system will be better administered than under the leadership of the CC. In fact, this is only an assumption, because numerous and systemic corporate problems identified by authoritative international institutions (CCBE follow-up report on

Ukraine, 2014, p. 6-8; Ukraina: konflikt, pozbavlennia prava zaimatysia advokatskoiu diialnistiu ta zupynennia dii litsenzii na zdiisnennia advokatskoi diialnosti, 2014, p. 7, 9-10, 13-14, 16-20; Report on the CCBE fact-finding mission to Kiev, 2013, p. 3, 5, 9, 11, 13-14) remain unresolved in the system of bodies of the advocate's self-government. In the professional community, there are views that the transfer of the function of distributing assignments between advocates to provide FSLA to the bar authorities will lead to nepotism, abuse and other voluntary actions, because it is becoming easier to control a government official than an elected representative of the advocate's self-government (Ivanytskyi, 2017, p. 392).

How to minimize the impact of corruption risks in the activities of FSLA centers for the distribution of assignments between advocates? It should be noted that the necessary steps on this path are constantly being implemented precisely at the initiative of the CC. So, from November 1, 2022, a new mechanism was introduced, according to which regional centers for the provision of FSLA in the Ternopil and Chernivtsi regions centrally accept and process all reports of detentions that come from subjects presenting information from all over Ukraine, as well as process solutions of criminal prosecution bodies and decisions of courts on the involvement of a defender in accordance with the provisions of the law. This approach will reduce the potential impact of «local informal communications», because the decision on a specific candidate for a advocate will usually be made by the center of the FSLA from another region. Among additional measures, the introduction of automated distribution of assignments among advocates based on certain criteria can be proposed. Similar software products are used to distribute cases and materials in the courts, the Qualification and disciplinary commission of public prosecutors, the High qualification commission of judges of Ukraine.

We agree with the position of representatives of the UNBA that the long non-appointment of the director of the CC limits the potential of this body and increases its dependence on the Ministry of justice of Ukraine. At the same time, it should be understood that the current legislation directly determines that the CC is a government agency and belongs to the sphere of management of the Ministry of justice. The director of the CC is appointed and dismissed by the Minister of Justice, and the staffing and estimates of the CC are approved by the Secretary of state of the Ministry of justice. The main tasks of the CC are organizational, expert-analytical, informational and material-technical support for the implementation of the powers of the Ministry of justice in the field of providing free legal aid, managing the system of free secondary legal aid, coordinating the activities of specialized institutions to provide free primary legal aid (Polozhennia pro Koordynatsiinyi tsentr z nadannia pravovoi dopomohy, 2012), etc.

At the same time, according to the amendments made to the relevant Regulation (Polozhennia pro Koordynatsiinyi tsentr z nadannia pravovoi dopomohy, 2012) of the 24.02.2023, during the period of martial law, the director of the CC is appointed by the Minister of justice without holding a competition.

It is necessary to agree with the arguments of the UNBA that the list of types of assistance and subjects receiving FSLA is excessively wide. Maintaining the status quo is possible during the war in difficult social and economic conditions, while after defeating the Russian aggressor, it is advisable to narrow the list of grounds for obtaining FSLA, and spend taxpayer funds more responsibly and economically.

The practice of providing FSLA under martial law also showed the need to correct (weaken) the normative requirements regarding the time of arrival of an advocate to the client by securing the possibility of the arrival of a defender after the end of an air raid, curfew or the resumption of transport connection.

4. Special ethical issues that arose before advocates participating in the FSLA system during martial law

During the war in Bucha, Izyum and many other cities of Ukraine, russian military committed crimes that hit the whole world with their excessive cruelty and sophistication. Along with the invaders, a significant amount of crimes were committed by collaborators and their accomplices. We are talking about a wide range of crimes against the foundations of national security of Ukraine, as well as criminal offenses against peace, security of mankind and international legal order.

For many advocates, the protection of those suspected of committing such crimes has become unacceptable on ethical grounds. There was a rise in patriotism among the advocates, some of the advocates joined the Armed forces of Ukraine with the aim of defence the country. Under these conditions, it has become much more difficult to find advocates who will agree to provide legal assistance in these categories of criminal cases.

A change in ethical approaches to customer service with «russian participation» occurred in relation to other branches of law (civil, administrative law, etc.). Many leading law firms in the world (Linklaters, Dentons, Baker McKenzie, etc.) and domestic advocate's companies have radically rethought their priorities in this area. This was partly facilitated by the introduction of sanctions against the Russian Federation.

At the same time, according to art. 49, 52, 53 of the Code of criminal procedure of Ukraine in criminal proceedings, the mandatory participation of a defense counsel for persons suspected of crimes, including those contributing to russian aggression, must be ensured.

The main part of this work is carried out by defenders included in the Register of advocates pro-

viding FSLA. Of course, they are subject to the risks of human condemnation, identification of advocate and client, reputational and moral losses. If this is contrary to the conscience of a lawyer, the UNBA Rules of professional conduct allow him to refuse to accept an assignment in defense of the client.

Nevertheless, the specifics of criminal proceedings require a balance of interests and abidance formal legal requirements, which necessitates to carry out such «unpopular» work, because in the long term this will avoid questions about the improper quality of evidence in this category of criminal proceedings for national and international courts. Awareness of justice, which should be realized in the future, is one of the moral reference point that can help an advocate agree to provide legal assistance to clients suspected of facilitating russian military aggression.

5. Conclusions

Thus, despite the harsh conditions of a full-scale war, the free legal aid system has demonstrated institutional stability and an intention to develop and strengthen its human resources. The advocate's corpus is an advanced vanguard and the basis of the FLA system, which is able to solve difficult professional and ethical issues that arose in connection with the russian military invasion. The realization of the management (administration) function of the FSLA system should be carried out by the Coordination center for legal aid provision. The transfer of this function to the bodies of the Ukrainian national bar association is not justified and carries the risks of reducing the clarity of the distribution of assignments for the provision of FSLA between advocates and payment for their services from the state budget. To increase trust and transparency in the work of the FSLA system, it is advisable to stage the introduction of automated distribution of assignments among advocates based on certain criteria.

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РЕАЛІЗАЦІЯ ПРАВА НА БЕЗОПЛАТНУ ПРАВОВУ ДОПОМОГУ: КОНСТИТУЦІЙНІ ТА ГАЛУЗЕВІ АСПЕКТИ

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Анотація

Метою статті є аналіз конституційно-правових та галузевих аспектів реалізації права на безоплатну правову допомогу, визначення оптимального суб'єкта адміністрування системи безоплатної вторинної правової допомоги в Україні.

Методи дослідження. Методологічною основою наукової праці є комплекс загальнонаукових та спеціальних методів і прийомів наукового пізнання, зокрема, діалектичний, системно-структурний, формально-логічний, статистичний метод, а також методи моделювання, аналізу та синтезу та ін.

Результати та висновки. Відповідно до ст. 59 Конституції України, профільного Закону України "Про безоплатну правову допомогу", процесуальних кодексів та підзаконних нормативно-правових актів в Україні створено розгалужену систему безоплатної правової допомоги, що включає надання безоплатної первинної й вторинної правової допомоги.

Незважаючи на суворі умови повномасштабної війни, система безоплатної правової допомоги продемонструвала інституційну стійкість й прагнення до розвитку та посилення свого кадрового потенціалу. Адвокатський корпус є передовим авангардом й основою системи безоплатної правової допомоги, що здатен вирішувати складні професійні та етичні питання, які постали у зв'язку з російським військовим вторгненням. Реалізація функції управління (адміністрування) системою БВПД має здійснюватися Координаційним центром з надання правової допомоги. Передача цієї функції до органів Національної асоціації адвокатів України не є обгрунтованою та несе ризики зменшення прозорості розподілу доручень про надання БВПД між адвокатами та оплати їх послуг з державного бюджету. Покладення на Координаційний центр з надання правової допомоги повноважень щодо розподілу бюджетних коштів на оплату послуг адвокатів корелюється із необхідністю надання його представникам повноважень щодо моніторингу якості наданої адвокатами допомоги.

Багато українських адвокатів змінили етичні підходи щодо захисту осіб, які підозрюються у вчиненні злочинів, пов'язаних із сприянням російській військовій агресії. Основними причинами цього стали патріотичні переконання, ризики людського осуду, ототожнення адвоката й клієнта, репутаційні та моральні втрати.

Необхідним є корегування нормативних вимог щодо часу прибуття адвоката до клієнта шляхом закріплення можливості приїзду захисника після закінчення повітряної тривоги, комендантської години або поновлення транспортного сполучення. Для підвищення довіри й транспарентності в роботі системи БВПД доцільним є поетапне запровадження автоматизованого розподілу доручень між адвокатами на підставі визначених критеріїв.

Ключові слова: правова допомога, адвокат, суд, захисник, затримання, війна, безоплатна правова допомога, етика, ЄСПЛ, воєнний стан.

SECTION 2
CONSTITUTIONALISM AS MODERN SCIENCE

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PEOPLE'S SOVEREIGNTY – THE FUNDAMENTAL PRINCIPLE OF CONSTITUTIONALISM

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Summary

Purpose. The scientific article is devoted to the study of popular sovereignty as a fundamental principle of constitutionalism.

Research methods. The methodological basis of the scientific article is a complex of general and special scientific methods of cognition. The author used the method of analysis and synthesis, the method of description and observation, modeling, formal-legal, axiomatic and logical-semantic methods of scientific knowledge.

Results and conclusions. The idea of popular sovereignty has been the subject of scientific analysis by prominent philosophers, historians, political scientists and other researchers. The issue of direct people's power in the context of the idea of popular sovereignty in a constitutional state is always relevant in view of the dynamics of the development of social relations and the evolution of democratic processes in the world. With the changes in the political-legal, socio-cultural and economic spectrum, there was a rapid wide-ranging breakthrough of scientific opinion regarding the understanding of the idea of democracy as a whole.

It is emphasized that the essence of people's sovereignty as the basic legal principle of the state's existence consists in the expression of the will and interests of the people, the development of society within the limits of these interests in accordance with the current legislation. People's authority in the political context is unified, it is exercised in the form of state power on behalf of the entire people or local government representing one or another territorial community, in accordance with their functional purpose.

Emphasized, constitutionalism is not only a political and legal doctrine, an idea, but also a practice of application in the states of the world.

It has been noted that the basis of constitutionalism in one or another state is always a certain constitutional ideology, which should be understood as fundamental (fundamental) principles, ideas, concepts, doctrines that arise and develop in tandem with the constitutional state.

It has been established that the implementation of direct people's power on a territorial basis can be carried out both within the boundaries of a separate administrative-territorial unit (a form of direct democracy at the local level) or the state as a whole (participation in the law-making process, national elections and referenda, etc.), and in the international arena. In the latter case, it is about the people's ability to strive for self-determination, the formation of a separate independent state, and joining supranational organizations.

Key words: people's rule, people, people's sovereignty, constitutionalism, direct democracy.

1. Introduction.

People's power is a dynamic system of power relations, which not only concentrates the main features of the supremacy of the power of the people, but also ensures the implementation of its state-legal status – popular sovereignty, the manifestation of which is largely determined by how the mechanism of people's power works (Todyka, 2007, p. 142). People's power is also considered in modern legal literature as «constitutional power of the people» (Barabash**,** 2010, p. 312–322; Yushchyk**)** and «state power of the people» (Havrylov, 2007).

The idea of popular sovereignty has been the subject of scientific analysis by prominent philosophers, historians, political scientists and other researchers. The issue of direct people's power in the context of the idea of popular sovereignty in a constitutional state is always relevant in view of the dynamics of the development of social relations and the evolution of democratic processes in the world. With the changes in the political-legal, socio-cultural and economic spectrum, there was a rapid wide-ranging breakthrough of scientific opinion regarding the understanding of the idea of democracy as a whole.

2. Constitutionalism as a fundamental idea, doctrine and concept.

From the point of view of A. Krusyan, the concept of «constitutionalism» has three dimensions – legal, political, and philosophical-historical. In the first case, in the legal context, the scientist proposes to understand the mentioned phenomenon in a narrow (the existence of state power in accordance with constitutional principles) and a broad (a complex system of political and legal nature) (Krusian, 2010, p. 72).

From the point of view of M. Shapoval, the concept of «constitutionalism» embodies the ideology of political and legal direction, the peculiarities of the exercise of state powers within the limits defined by the constitution, as well as fundamental developments in accordance with one or another historical period of the development of the state and society (Shapoval, 2005, p. 17).

As for the broad interpretation, constitutionalism is not only a political and legal doctrine, an idea, but also a practice of application in the states of the world (Stetsiuk, 2010, p. 7). According to M. Savchyn, constitutionalism is primarily a social phenomenon, as it embodies a set of ideas, concepts and views regarding the understanding of the constitution and the peculiarities of the application of its provisions in practice (Savchyn, 2009, p. 19).

Scientist D. Belov introduces the concept of «paradigm of constitutionalism» into scientific circulation, under which he proposes to understand «a set of ideal fragments of constitutional reality (concepts, values, principles, ideas and practices) that are shared by society at a given stage of state development and form a defined vision of constitutionalism, as well as specific directions for solving the problems of constitutionalism» (Bielov, 2012, p. 33).

According to O. Rohach and D. Belov, the concept of paradigm in the scope of the disciplinary matrix is more suitable for constitutionalism. Its narrow-minded interpretation leads to significant difficulties in distinguishing with such concepts as constitutional ideas, principles of constitutionalism, constitutional axioms, constitutional constructions, etc. (Bielov & Rohach, 2022), p. 40).

The basis of constitutionalism in one or another state is always a certain constitutional ideology, which should be understood as fundamental (fundamental) principles, ideas, concepts, doctrines that arise and develop in tandem with the constitutional state (Stetsiuk, 2004, p. 179).

3. People's sovereignty as a marker of direct participation of the people in the exercise of state power.

In terms of philosophical views of P.I. Novgorodtsev regarding consideration of the concept of popular sovereignty through the prism of the realization of the power of the people by state bodies. The nation, considered as a state, is primarily an organization, and every organization inevitably involves a certain arrangement of elements, separation of organs from the general mass, opposition and subordination of one to another. No matter how democratic this organization is in its foundations, it always and inevitably requires bodies separated from the totality of citizens, and no matter how many guarantees are created to establish the dependence of these bodies on the people, in practice they will always have a known right of disposition and discretion, known independence. The researcher defines the will of the people as just and unchanging, but in practice it is only the will of everyone, changeable, unstable in its private desires. In the unlimited rule of the majority lies the same injustice to the individual forced to obey it, as in the unlimited rule of the minority over the majority (Novhorodtsev, 2000).

One of the ascending foundations of constitutional democratic ideology is popular sovereignty. Scholar O. Shcherbanyuk in her dissertation for the Doctor of Laws degree on the topic: «People's sovereignty in the political and legal construction of the modern state» rightly notes that the essence of people's sovereignty as the basic legal principle of the state's existence is the expression of the will and interests of the people, the development of society within the limits of these interests according to current legislation. People's authority in the political context is unified, it is exercised in the form of state power on behalf of the entire people or a local government representing one or another territorial community, in accordance with their functional purpose (Shcherbaniuk, 2014, p. 25).

Also worthy of attention is the monographic study by O. Shcherbanyuk entitled «People's sovereignty in the theory of political and legal teachings: historical school», which contains an analysis of the fundamental concepts of people's sovereignty, the features of enshrining the principle of people's sovereignty in the legislation of foreign countries (Shcherbaniuk, 2013).

The work of the researcher Prieshkina O.V. is very interesting. «Constitutional system of Ukraine: topical issues of formation, institutionalization and development», in which, among other things, emphasis was placed on determining the sovereignty of the people as the basis of the constitutional system (Priieshkina, 2008).

Separate issues of the implementation of state-authority functions by the people were also the subject of Yu. Miroshnichenko's scientific research. Among other things, the researcher considered the specifics of ensuring the constitutionality of decisions of the Ukrainian people (Miroshnychenko, 2011).

4. Conclusions.

Realization of direct people's power on a territorial basis can be carried out both within the boundaries of a separate administrative-territorial unit (a form of direct democracy at the local level) or the state as a whole (participation in the law-making process, national elections and referenda, etc.), and in the international arena. In the latter case, it is about the people's ability to strive for self-determination, the formation of a separate independent state, and joining supranational organizations.

Finally, we note that the legal category «popular sovereignty» cannot be considered without an analysis of the rule of law, the supreme power of the people, constitutionalism and democracy as a whole. The concept of «people's rule» is not the same as people's sovereignty, since the existence of people's rule in a state does not mean that the principle of people's sovereignty is ensured. Presence in the state system and real observance of the principle of people's sovereignty is an important indicator of the existence of democratic foundations for the functioning of the state and civil society.

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НАРОДНИЙ СУВЕРЕНІТЕТ – ФУНДАМЕНТАЛЬНИЙ ПРИНЦИП КОНСТИТУЦІОНАЛІЗМУ

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Анотація

Мета. Наукова стаття присвячена дослідженню народного суверенітету як фундаментального принципу конституціоналізму.

Методи дослідження. Методологічною основою наукової статті є комплекс загальних та спеціально-наукових методів пізнання. Автором було застосовано метод аналізу та синтезу, метод опису та спостереження, моделювання, формально-юридичний, аксіоматичний та логіко-семантичний методи наукового пізнання.

Результати та висновки. Ідея народного суверенітету була предметом наукового аналізу видатних філософів, істориків, політологів та інших дослідників. Проблематика безпосереднього народовладдя в контексті ідеї народного суверенітету у конституційній державі є завжди актуальною з огляду на динаміку розвитку суспільних відносин та еволюцію демократичних процесів у світі. Зі змінами у політико-правовому, соціокультурному та економічному спектрі відбувся стрімкий широкоаспектний прорив наукової думки щодо розуміння ідеї демократії вцілому.

Підкреслено, сутність народного суверенітету як базового правового принципу існування держави полягає у вираженні волі та інтересів народу, розвитку суспільства у межах цих інтересів згідно чинного законодавства. Народне повновладдя у політичному контексті є єдиним, здійснюється у формі державної влади від імені всього народу або місцевої влади, котра представляє ту чи іншу територіальну громаду, відповідно до їх функціонального призначення.

Акцентовано, конституціоналізм є не лише політико-правовою доктриною, ідеєю, але і практикою застосування у державах світу.

Зауважено, основою конституціоналізму у тій чи іншій державі завжди є певна конституційна ідеологія, під якою варто розуміти фундаментальні (засадничі) принципи, ідеї, концепції, доктрини, котрі виникають та розвиваються в тандемі з конституційною державою.

Встановлено, реалізація прямого народовладдя за територіальною ознакою може здійснюватись як у межах окремої адміністративно-територіальної одиниці (форми безпосередньої демократії локального рівня) чи держави в цілому (участь у законотворчому процесі, загальнодержавні вибори та референдуми тощо), так і на міжнародній арені. В останньому випадку йдеться про можливість народу прагнути до самовизначення, утворення окремої незалежної держави, входження до наднаціональних організацій.

Ключові слова: народовладдя, народ, народний суверенітет, конституціоналізм, безпосередня демократія.

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ARGUMENTATIVE CONSTITUTIONAL TRIALLISM OF NORMS IN REELATIONAL TECHNIQUE

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Summary

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

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

1. Introduction.

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

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

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

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

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

2. Legal triallism of norms

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

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

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

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

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

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

3. Expert opinion

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

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

4. Classical relation technique

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

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

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

5. Expert style of judicial proceedings

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

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

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

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

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

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

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

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

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

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

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

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

6. Conclusions

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

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

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

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

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

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АРГУМЕНТАТИВНИЙ КОНСТИТУЦІЙНИЙ НОРМОТРІАЛІЗМ В РЕЛЯЦІЙНІЙ ТЕХНІЦІ

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Анотація

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

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

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DIRECT, INDIRECT DISCRIMINATION AND SUBJECTS OF CONSTITUTIONAL LEGAL LIABILITY IN THE CONDITIONS OF ARMED CONFLICTS

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Summary

The article clarifies the signs of direct and indirect discrimination in the conditions of armed conflicts and the circle of subjects that bears constitutional and legal responsibility for committing a constitutional offense - discrimination.

The methodological basis of the research is the general methods of scientific cognitivism as well as concerning those used in legal science: comparative law, methods of analysis and synthesis, formal logic, etc. The empirical basis of the research is international documents, decisions of the ECHR, current legal acts of Ukraine, and assessment of Ukrainian and foreign experts.

The norms of the Geneva Convention on the Protection of the Civilian Population in Time of War and the Prohibition of Discrimination are analyzed. It is noted that hostile discrimination is prohibited, and armed conflict is not an exception to such a prohibition. The provisions of the Geneva Convention, which prohibit hostile discrimination against the entire population of all states in conflict, are aimed at alleviating the suffering de facto caused to the populations of states by war. It is established that regardless of which of the states in conflict exercises jurisdiction over the territory and regardless of whether this state exercises legal or illegal control, but if the state's control over a certain territory is effective, this state is obliged to behave with all persons under protection equally, without discrimination; apply such measure or combination of control or security measures as may be necessary in time of war. Non-fulfilment or improper fulfillment of the above-mentioned obligations by the parties to the conflict is a violation of the norms of international law and the customs of war

The article clarifies the signs of direct and indirect discrimination in the conditions of armed conflicts. In order for discrimination during an armed conflict to be qualified as direct, it is not necessary to prove that the persons were in an identical situation - one hundred percent identity cannot be achieved – it is enough that their situations are similar in fundamentally important points. In order to qualify the treatment as exceptional, a sign must be found by which such different treatment in the conditions of an armed conflict can be identified. It is proven that a state party to the conflict, introducing this or that measure or general policy of the state, must assess the consequences of such a measure/policy of the state from the point of view of whether they may have disproportionately harmful consequences for a specific group of persons. There must be a reasonable relationship of proportionality between the means used and the goal that was planned to be achieved, regardless of whether the state carries them out on its territory, or whether it has resorted to extraterritorial behavior and carries out these measures/policies on the territory of another state that is temporarily occupied by it. A state party to the conflict, pursuing a legitimate (legitimate) goal and taking measures to achieve it, must at each stage of their implementation assess and predict what real consequences they lead to. The article emphasizes that on those parts of the territories of one state, over which another state has illegal but effective control, regardless of whether such control was exercised or is being exercised by this other state directly, through the armed forces, or through a subordinate local administration, this other state is considered to have jurisdiction in the specified territory, and therefore bears legal responsibility for its extraterritorial behavior – a violation of the

prohibition of discrimination. It is emphasized that international acts on human rights, international customs do not require a state party to the conflict to treat the population of another state party to the conflict more favorably, but direct discrimination is prohibited – worse treatment of this or that person or group of persons without adequate justification. Direct discrimination in the conditions of an armed conflict occurs when: 1) a person (group of persons) who are in the territory under the jurisdiction of the state are treated in a less favorable way, in comparison with the way others were treated or could be treated persons in a similar situation; 2) the reason for this attitude is that this person has certain characteristics that belong to the category of «protected characteristics». Indirect discrimination refers to different treatment of people in the same situations in the conditions of a military conflict; equal treatment of people whose situations are different in the conditions of war.

The article also proposes to improve the concept of the circle of subjects of constitutional legal liability by distinguishing: 1) the state that has jurisdiction over its entire territory; 2) of a state that exercises illegal but effective control over a part of the territory of another state, regardless of whether such control was carried out or is being carried out directly, through the armed forces, or through a subordinate local administration.

Key words: principle of equality; discrimination; types of discrimination; positive discrimination; constitutional legal liability; sanctions, armed conflicts; occupation; constitutional legal regulation; constitutional offense; state; head of state; parliament; local self-government bodies; executive bodies of state power; person.

1. Introduction

Ukraine is a sovereign and independent, democratic, social, legal state. The norms of the Constitution of Ukraine establish that all people are free and equal in their dignity and rights. Every day, our state makes efforts to ensure that the principle of equality is implemented in accordance with the international obligations assumed by Ukraine (Deshko L., 2018; Kudryavtseva O, 2021). We are talking about Ukraine's obligations under international human rights acts of the UN, and about Ukraine's international obligations in accordance with the Convention on the Protection of Human Rights and Fundamental Freedoms of 1950, and under other international human rights acts of the Council of Europe, and about obligations solutions arising from the foreign policy course of Ukraine – integration with the EU (Buletsa S., Deshko L., Zaborovskyy V., 2019). Equally important is the fact that equality is a fundamental value in Ukraine. Therefore, countering and prohibiting discrimination is one of the key issues for both practitioners and legal scholars.

This issue goes hand in hand with the issue of subjects of constitutional responsibility (Bysaga Yu., Deshko L., Nechiporuk H., 2020) for violation of the principle of equality. Russia's full-scale invasion of Ukraine, Russia's occupation of part of Ukraine's territory, systematic mass violations of human rights by civil administrations subordinate to Russia and the military of the Russian Federation on the territory of Ukraine (Deshko L., Vasylchenko O., Lotiuk O., 2023) became the impetus for in-depth complex studies of the problems of the circle of subjects, which bears constitutional and legal responsibility for committing a constitutional offense.

Therefore, the issue of direct and indirect discrimination in conditions of war is relevant, theoretically and practically ripe, as well as the issue of the circle of subjects, which bears constitutional and legal responsibility for committing a constitutional offense - discrimination.

2. Theoretical framework or Literature Review

In the legal literature, the work of Yu. Bysaga, O. Sovgyria, O. Maidannyk, L. Nalivaiko, N. Batanova and other scientists is devoted to the issues of the principle of equality, the prohibition of discrimination, and constitutional responsibility. At the same time, these studies were conducted before the full-scale invasion of Russia on the territory of Ukraine and before Russia's occupation of part of the territory of Ukraine, and therefore these studies do not analyze the issue of the range of subjects of constitutional and legal responsibility in the conditions of armed conflicts. The practice of the European Court of Human Rights and EU law on discrimination are also evolving. In particular, the concept of positive discrimination is undergoing changes (the decision of the European Court of Human Rights in the case «Chapman v. the United Kingdom» and others).

3. Methodology

The methodological basis of the research is the general methods of scientific cognitivism as well as concerning those used in legal science: comparative law, methods of analysis and synthesis, formal logic, etc. The empirical basis of the research is international documents, decisions of the ECHR, current legal acts of Ukraine, and assessment of Ukrainian and foreign experts.

4. Results and discussion

According to Art. 3 of the Geneva Convention on the Protection of the Civilian Population in Time of War and the Prohibition of Discrimination against Persons Who Do Not Take an Active Part in Hostilities, Including Persons from the Armed Forces Who Have Lay Down Their Arms, as well as Those Who Are Hors de Combat Due to Illness , injury, detention or for any other reason, are treated humanely, without any hostile discrimination based on race, colour, religion or belief,

sex, national origin or property or any other similar criteria. To this end, the following actions against the above-mentioned persons are prohibited and will remain prohibited at any time and in any place:

a) Violence against life and person, including all types of murder, mutilation, ill-treatment and torture;

b) taking hostages;

c) insult to human dignity, in particular offensive and humiliating treatment;

(d) Conviction and punishment without prior judgment by a court duly constituted and affording judicial guarantees recognized by civilized nations as necessary.

Therefore, hostile discrimination is prohibited. Armed conflict is no exception.

Moreover, the Geneva Convention establishes safeguards against enemy discrimination in wartime. According to Art. 13 of the Geneva Convention, the provisions of Part II of the Convention apply to the entire population of countries in conflict. Therefore, hostile discrimination is prohibited against the entire population of all states in conflict. These provisions are aimed at alleviating the suffering already caused to the population of the states by the war.

The Geneva Convention on the Protection of the Civilian Population in Time of War and the Prohibition of Discrimination has Part III, «Status of and Treatment of Protected Persons». It contains section I «Provisions common to the territories of the parties to the conflict and to the occupied territories». According to Art. 27 of the Geneva Convention, protected persons have the right under any circumstances to personal respect, respect for their honor, the right to a family, their religious beliefs and rites, habits and customs. They should always be treated humanely and protected, in particular from any act of violence or intimidation, insults and curiosity of the crowd.

Women need special protection against any violation of their honor and, in particular, protection against rape, forced prostitution or any other form of violation of their morals. Subject to provisions relating to health, age and sex, the party to the conflict under whose authority are protected persons shall have the right to treat them all equally, without any discrimination, in particular as to race, religion or political opinion. However, the parties to the conflict shall apply to protected persons such measures of control or security as may be deemed necessary in the conduct of war.

Therefore, regardless of which of the states in conflict exercises jurisdiction over the territory and regardless of whether this state exercises legal or illegitimate control, but if the state's control over a certain territory is effective, this state is obliged to deal with by all persons under protection, equally, without discrimination; apply such measure or combination of control or security measures as may be necessary in time of war.

Chapter VI of the Geneva Convention is devoted to private property and financial resources. According to Art. 98 all internees will receive payments for the purchase of such goods as tobacco, toiletries, etc. Such payments can be provided in the form of credits or coupons for purchases. In addition, internees may receive material assistance from the home state, from protecting states, from organizations that can provide them with assistance, or from their families, as well as income from property in accordance with the law of the detaining state.

According to Art. 98 of the Convention, the amount of material assistance received from the homeland must be equal for each category of internees. For example, if it is a category of «disabled» – the amount of such assistance should be equal for each such person. If it is, for example, the "pregnant women" category, the amount of assistance should be the same for each pregnant woman. In addition, the amount of aid must be equal not only when it is established by the state, but also when such aid is distributed by the withholding state. Therefore, discrimination against internees is prohibited.

Direct discrimination.

Direct discrimination consists in applying different treatment to persons in the same situation without an objective, reasonable justification. That is, we are talking about an illegal difference in the treatment of persons in a similar situation. We emphasize that the similarity of the situation is not the same as 100% identity of the situation. In order for discrimination during military operations to be qualified as direct, it is not necessary to prove that individuals were in an identical situation. It is enough that their situations are similar in fundamentally important points.

In order to qualify the behavior as exceptional, there must be a sign by which such a different attitude can be identified. Thus, the European Court of Human Rights in the decision in the case «D.H. and Others v. the Czech Republic» dated November 13, 2007 noted: «According to the consistent practice of the Court, discrimination means differential treatment, without objective and reasonable justification, of persons who are in relatively similar situations» (§ 175).

At the same time, we focus on the decision of the European Court of Human Rights in the case «relating to certain aspects of the laws on the use of languages in education in Belgium» v. Belgium (merits) of 23 July 1968. In it, the legal position of the European Court of Human Rights is that Article 14 of the Convention does not prohibit a Member State from treating groups of persons differently in order to remedy «actual inequalities» between them . But, in some cases, the failure to attempt to remedy the inequality by means of differential treatment may in itself lead to a violation of Article 14 (§ 44 of the decision of the European Court of Human Rights in the case «Thlimmenos v. Greece»). In addition, the legal position of the European Court of Human Rights is that a general policy or measure

that has disproportionately harmful effects on a specific group can be considered discriminatory, even though it is not specifically aimed at that group, and that discrimination, which is potentially inconsistent with the Convention, may result from a factual situation.

Therefore, the state, introducing this or that measure or general policy of the state, must evaluate the consequences of such a measure/policy of the state from the point of view of whether they may have disproportionately harmful consequences for a specific group of persons. There must be a reasonable relationship of proportionality between the means used and the goal intended to be achieved. The state, pursuing a legitimate (legitimate) goal and taking measures to achieve it, must at each stage of their implementation evaluate and predict what real consequences they lead to.

International acts on human rights, international customs do not require a state party to the conflict to treat the population of another state party to the conflict more favorably (Deshko L., Vasylchenko O., Lotiuk O., 2022). But direct discrimination is prohibited - worse treatment of this or that person or group of persons without adequate justification. For example, direct discrimination is when wives who live in the unoccupied territory of Ukraine cannot obtain from Russia, which is occupying a certain part of the territory of Ukraine, the entry of their husbands into the territory over which Ukraine exercises jurisdiction. This is partly due to the fact that Russia does not allow male citizens of Ukraine to leave the territory of Ukraine temporarily occupied by it for various reasons (in violation of international law to mobilize Ukrainian citizens, take hostages, etc.). At that time, it is easier for women living in the territory of Ukraine temporarily occupied by Russia to leave this territory to the territory over which Ukraine exercises jurisdiction. The existence of discrimination during the conflict can also be evidenced by the situation when Russia treats people who are in the territory of Ukraine temporarily occupied by Russia and are in a similar or similar situation, and such a difference does not have any objective or reasonable explanation.

Direct discrimination during a state conflict is associated with a difference in treatment of persons who are in the territory of a state under the jurisdiction of this state, are in the same situation, when they exercise this or that right, when such a difference does not pursue a legitimate goal and does not ensure reasonable proportionality of the measures taken by the state that has jurisdiction over the territory in which such persons are present and the objective. Direct discrimination in conditions of war occurs when a person (group of persons) who are in the territory under the jurisdiction of the state is treated in a less favorable way, compared to how other persons in a similar situation have been treated or could be treated and the reason for this attitude is the presence of certain characteristics belonging to the category of "protected features" in this person.

Indirect discrimination.

Indirect discrimination or discrimination of the result (de facto discrimination) in the conditions of war consists in the fact that the principle of equality is not realized in practice in relation to individuals. This may be caused by such reasons as the lack of a mechanism for the implementation of legislative provisions regarding, for example, internally displaced persons, sanctions for their violation, traditionally formed social stereotypes, etc. It is not only about different treatment of people in the same situations in the conditions of war, but also the same treatment of people whose situations in the conditions of war are different. Such situations are indirect discrimination in the context of war, since the difference is not in attitude or behavior, but in its consequences, which affect people with different characteristics differently.

The ECtHR's approach to the issue of indirect discrimination contained in the decision in the case «Thlimmenos v. Greece» dated 04/06/2000: «...the right to exercise the rights guaranteed by the Convention on a non-discriminatory basis is also violated if states do not apply, without an objective and justified explanation, different treatment to persons who are in a significantly different situation... The right is not to be discriminated against in the enjoyment of the rights guaranteed by the Convention may also be violated when States, without objective and reasonable grounds, do not apply a different approach to persons who are in substantially different situations».

Indirect discrimination occurs in such well-known cases, when, for example, Russia, in relation to children who are temporarily occupied by it and who have a certain national origin, takes these children to Russia and places them in special schools, as the media has repeatedly reported mass information, their national origin. The Russian commissioner for children's rights in her interviews has repeatedly officially stated that this is being done by Russia for the purpose of re-educating them. Such re-education, as noted by international experts, international public organizations, etc. It is carried out by Russia in order to eradicate from these children the connection and memory of their national origin, traditions and culture, language, etc. These children were forcibly removed, many of them have parents who did not agree to the separation of them from their children, the removal of children by force to Russia, placement in specialized schools, families of Russian citizens. Such actions by Russia are a common practice that has led to discrimination and national segregation, reflected in the side-by-side existence of two separately organized education systems, namely, special schools for children from the territories temporarily occupied by Russia and "normal" schools for the majority of the Russian population.

Jurisdiction over the territory and subjects of constitutional and legal responsibility in the conditions of armed conflicts

Constitutionalist scholars, when considering the issue of subjects of constitutional and legal responsibility, previously did not focus on the aggressor states. Thus, in the textbook on constitutional law by O. Sovgyria and N. Shuklin, they note that the circle of subjects of constitutional and legal responsibility is the state, which must bear constitutional and legal responsibility in all cases when it does not fulfill its officially assumed obligations, if as a result of this damage is caused to anyone; individuals; legislative body of state power; executive bodies of state power (Shyklina N., Sovhiria O., 2019). Scientists emphasize that peoples and nations are not the subjects of constitutional and legal responsibility, even though entire peoples and nations were subjected to repression during the Soviet regime.

According to the constitutionalist scientist V. Fedorenko, the system of subjects endowed with constitutional delictual capacity (delinquents) cannot be fully identified with the system of subjects of constitutional legal relations. The scientist singles out the following circle of subjects of constitutional and legal responsibility: the state, state authorities, local self-government bodies, their officials, political parties and institutions of civil society – public organizations, professional and creative unions, employers' organizations, charitable and religious organizations, bodies self-organizations of the population, non-state mass media and other non-business associations and institutions legalized in accordance with the law (Fedorenko V., 2016).

As for such a subject of constitutional and legal responsibility as the state, we emphasize that not all states exercise jurisdiction over their entire territory. In Ukraine, Moldova, Georgia, some territories are temporarily occupied by Russia. A full-scale war is going on in Ukraine because Russia committed an act of aggression against Ukraine.

No norm of international human rights law can be interpreted as allowing one state to violate its norms on the territory of another state (Polychko T., Bysaga Y., Berch V., Deshko L., Nechiporuk H., Petretska N., 2021). Although not legal, Russia exercises effective control over a number of territories occupied by it in Ukraine, Moldova, and Georgia. In parts of those territories over which it has illegal but effective control, regardless of whether such control was exercised or is exercised directly, through the armed forces, or through a subordinate local administration, Russia is considered to have jurisdiction over the specified territory, and therefore bears legal responsibility for one's extraterritorial behavior - violation of the prohibition of discrimination.

Thus, we propose to improve the concept regarding the circle of subjects of constitutional and legal responsibility. We propose to single out: 1) states that have jurisdiction over their entire territory; 2) a state that exercises illegal but effective control over a part of the territory of another state, regardless of whether such control was or is being exercised directly, through the armed forces, or through a subordinate local administration.

5. Conclusions

1. Hostile discrimination is prohibited. Armed conflict is no exception.

Regardless of which of the states in conflict exercises jurisdiction over the territory and regardless of whether that state exercises legal or illegitimate control, but if the state's control over a certain territory is effective, that state has an obligation to treat all persons , which are under protection, equally, without discrimination. It is also the duty of such a State to apply such measure or set of control or security measures as are necessary in time of war so that the civilian population is protected and that the prohibition of discrimination is not violated.

2. Similarity of the situation is not the same as 100% identity of the situation. In order for discrimination during military operations to be qualified as direct, it is not necessary to prove that individuals were in an identical situation. It is enough that their situations are similar in fundamentally important points.

In order to qualify the behavior as exceptional, there must be a sign by which such a different attitude can be identified.

3. The state, introducing this or that measure or general state policy, must assess the consequences of such a measure/state policy from the point of view of whether they may have disproportionately harmful consequences for a specific group of persons. There must be a reasonable relationship of proportionality between the means used and the goal intended to be achieved. The state, pursuing a legitimate (legitimate) goal and taking measures to achieve it, must at each stage of their implementation evaluate and predict what real consequences they lead to.

4. International acts on human rights, international customs do not require a state party to the conflict to treat the population of another state party to the conflict more favorably. But direct discrimination is prohibited - worse treatment of this or that person or group of persons without adequate justification.

5. We propose to improve the concept regarding the circle of subjects of constitutional and legal responsibility. We propose to single out: 1) states that have jurisdiction over their entire territory; 2) a state that exercises illegal but effective control over a part of the territory of another state, regardless of whether such control was or is being exercised directly, through the armed forces, or through a subordinate local administration.

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ПРЯМА, НЕПРЯМА ДИСКРИМІНАЦІЯ ТА СУБ'ЄКТИ КОНСТИТУЦІЙНО-ПРАВОВОЇ ВІДПОВІДАЛЬНОСТІ В УМОВАХ ЗБРОЙНИХ КОНФЛІКТІВ

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Анотація

В статті уточнюються ознаки прямої та непрямої дискримінації в умовах збройних конфліктів та коло суб'єктів, яке несе конституційно-правову відповідальність за вчинення конституційного правопорушення – дискримінацію.

Аналізуються норми Женевської Конвенції про захист цивільного населення під час війни та заборону дискримінації. Зазначається, що ворожа дискримінація є забороненою, а збройний конфлікт не є виключенням для такої заборони. Положення Женевської Конвенції, якими заборонена ворожа дискримінація щодо всього населення всих держав, які перебувають у конфлікті, спрямовані на полегшення страждань, які de facto спричинені населенню держав війною. Виосновується, що незалежно від того, яка з держав, що перебувають в конфлікті, здійснює юрисдикцію щодо території і незалежно від того чи здійснює ця держава законний чи не законний контроль, але якщо контроль держави над певною територією є ефективним – ця держава зобов'язана: 1) поводитися з усіма особами, що перебувають під захистом, однаково, без дискримінаці; 2) застосовувати такий захід або сукупність заходів контролю чи безпеки, які є необхідними під час війни. Не виконання чи не належне виконання вище зазначених зобов'язань сторонами конфлікту є порушенням норм міжнародного права та звичаїв війни.

В статті уточнюються ознаки прямої і непрямої дискримінації в умовах збройних конфліктів. Для того, щоб дискримінація під час збройного конфлікту була кваліфікована як пряма – немає необхідності доводити, що особи перебували в ідентичній ситуації – сто відсоткової ідентичності досягти неможливо – достатньо, щоб їх ситуації були схожі у принципово важливих моментах. Для того, щоб кваліфікувати поводження як відмінне – має бути виявлена ознака, за якою таке різне ставлення в умовах збройного конфлікту можна ідентифікувати. Доводиться, що держава-учасник конфлікту, запроваджуючи той або інший захід чи загальну політику держави, має оцінювати саме наслідки такого заходу/політики держави з точки зору чи можуть вони мати непропорційно шкідливі наслідки для конкретної групи осіб. Має бути розумне співвідношення пропорційності між засобами, що застосовуються, та метою, яку планувалось досягти, незалежно від того чи здійснює держава їх на своїй території, чи вдалась вона до екстериторіальної поведінки і здійснює ці заходи/політику на території іншої держави, яка тимчасово нею окупована. Держава-учасниця конфлікту, переслідуючи правомірну (легітимну) мету і вживаючи заходи для її досягнення, має на кожному етапі їх реалізації оцінювати і прогнозувати до яких реальних наслідків вони призводять. В статті наголошується, що на частинах тих територій однієї держави, над якими інша держава має незаконний, але ефективний контроль, незалежно від того, здійснювався чи здійснюється такий контроль цією іншою державою безпосередньо, через збройні сили, або через підпорядковану місцеву адміністрацію – ця інша держава вважається такою, що має юрисдикцію на зазначеній території, а відтак несе юридичну відповідальність за свою екстериторіальну поведінку – порушення заборони дискримінації. Акцентується увага, що міжнародні акти з прав людини, міжнародні звичаї не вимагають від держави-учасниці конфлікту сприятливішого поводження щодо населення іншої держави-учасниці конфлікту, але забороненою є пряма дискримінація - гірше поводження з тією чи іншою особою чи групою осіб без адекватного обґрунтування. Пряма дискримінація в умовах збройного конфлікту має місце, коли: 1) до особи (групи осіб), які перебувають на території, що знаходиться під юрисдикцією держави, ставляться у менш сприятливий спосіб, у порівнянні з тим, як ставилися чи могли б ставитися до інших осіб у подібній ситуації; 2) причиною такого ставлення є наявність у цієї особи певних характеристик, що відносяться до категорії «захищених ознак».

При непрямій дискримінації йдеться про різне ставлення до людей в однакових ситуаціях в умовах воєнного конфлікту; однакове ставлення до людей, ситуації яких в умовах війни відрізняються.

Також в статті пропонується вдосконалити концепцію щодо кола суб'єктів конституційно-правової відповідальності шляхом розрізнення: 1) держави, яка має юрисдикцію щодо всієї своєї території; 2) держави, яка здійснює над частиною території іншої держави незаконний, але ефективний контроль, незалежно від того, здійснювався чи здійснюється такий контроль безпосередньо, через збройні сили, або через підпорядковану місцеву адміністрацію.

Ключові слова: принцип рівності; дискримінація; типи дискримінації; позитивна дискримінація; конституційно-правова відповідальність; санкції; збройні конфлікти; окупація; конституційно-правове регулювання; конституційне правопорушення; держава; глава держави; парламент; органи місцевого самоврядування; виконавчі органи державної влади; фізичні особи.

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ON THE CONSTITUTIONAL REGULATION OF THE ACCESSION CLAUSE OF HUNGARY TO THE EUROPEAN UNION

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Summary

The accession of Hungary to the European Union brought unprecedented challenges from the viewpoint of constitutional law. The level of regulation and the possible content of the Europe clause gave rise to interesting debates. This article aims to shed light on the constitutional legal background of the accession of Hungary to the European Union, as well as the actual steps that were necessary to make the accession happen in accordance with the stipulations of the Constitution at the time. The emergence of the necessity of the accession clause, as well as the necessary constitutional amendment are described. One of the most crucial issues at the accession was the question of delegation of powers. In order for Hungary to take part in European integration, it was essential to give constitutional authorisation for the partial delegation of powers that are strongly associated with state sovereignty, and for the joint exercise thereof with other member states and institutions of the European Union. The article analyses and dogmatically evaluates the Europe Article of the current Fundamental Law of Hungary. This is done by way of a sentence-by-sentence interpretation of Article E) Paragraph (2) of the Fundamental Law. Due to the abstract nature of constitutional stipulations, the importance of the interpretations of the Constitutional Court is unquestionable. Relevant Constitutional Court decisions are also examined throughout. The article confirms the necessity of the integration of the Europe clause into the constitution, in order to ensure that the accession to the European Union and the application of EU law in Hungary conform with constitutional legal regulations, as well as to have normative authorisation for the delegation of powers.

Key words: accession, Europe clause, European Union, Hungary, delegation of powers.

1. Introduction

From a constitutional legal perspective,[1] the primary question arising from the accession to the European Union is whether it is necessary to regulate the clause giving authorisation to the accession to the European Union (the so-called Europe clause) on the constitutional level, and if so, what the content of this regulation should be. Answering the first question is fairly easy, depending on the constitution of the given state: whether and how the constitution regulates the relation between international and national law; and whether and how it gives possibility to fully or partly delegate the sovereign powers of the state (such as legislative, executive and judicial powers[2]) (Vincze & Chronowski,

[1] The conditions of accession to the European Union are laid down in Article 49 of the Treaty on European Union: "Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union." As we can see, the provision requires applicant states to be European, as well as outlines other criteria by referring to Article 2. From the viewpoint of member states, conditions may be laid down in the constitution of the given member state. (Vincze & Chronowski, 2018, p. 92-93). (For a historic perception on the accession to the EU, see also Hillion, 2011, p. 187–216).

[2] Functionally, the powers may be legislative, executive and judicial – so practically any kind of state competence.

2018, p. 72) to international or supranational organisations.[3] In case the legislation in force does not grant such possibility, it is necessary to lay down regulations and guarantees in order to prevent and solve the emerging problems. This is to be done in accordance with the constitutional regulation of the state.

Answering the second question seems to be more difficult. In this case, not only do we have to find answers to questions pertaining to constitutional dogmatic, there is also a need to reach certain political consensus (necessary to amend the constitution) in order to incorporate those answers into the constitution. During the preparation of the constitutional amendment in Hungary, numerous ideas emerged as to the content of the accession clause. The official stance regarding the matter changed several times, as well as renowned representatives of legal literature formed an opinion.[4] However, outlining the content of the clause is not only a legal professional or technical question. The interests and aspirations of political powers, as well as their stance on the limitations of the sovereignty of the accessing state are also important factors. These political powers are also the ones determining the timing and political environment of the accession, and also the constitutional content thereof. The constitutional regulation of the accession does not only apply to the moment of the accession itself, but also defines the future limits and possibilities of the given state as a member state. Therefore, constitutional regulation does not only grant possibilities, but also sets boundaries.

2. The emergence of the necessity of the accession clause in Hungary

The accession of Hungary to the European Union[5] made it necessary to lay down the accession clause (the so-called entry provision) on the constitutional level. This was not only necessary at the time of accession, but it is also an essential constitutional requirement of the membership to the Union, even to this day. European integration has numerous peculiarities that require a specific constitutional authorisation, separate from classic international law. Decision 30/1998. (VI. 25.) of the Hungarian Constitutional Court made it clear that the membership of Hungary to the European Union was not possible without an amendment to the Constitution.[6] The decision "declared with no doubt that the accession of Hungary to the European Union makes it absolutely necessary to amend the national constitution in order to regulate the relation between EU law and the Hungarian legal system."[7] (Kecskés, 2005, p. 862)

From a constitutional legal perspective, the accession clause ensured at the accession,[8] and has been ensuring to this day,[9] the participation of the Hungarian State in the activities of the European Union (as a supranational organisation).[10] The clause regulates the relation between Union and national institutions and legal systems, as well as determines the constitutional foundation of the contribution and partake of Hungary as a member state in EU decision making. The main issue is not the implementation of the obligation of legal harmonisation. From the EU law perspective, it is absolutely indifferent how a member state integrates its membership with its constitution. By obtaining membership to the European Union, member states become obliged to fulfil their obligations laid down in the treaties of the Union (as international treaties), regardless of their harmonisation process (Somogyvári, 2001, p. 22). The only means for member states to gain legal basis for the delegation of powers is from their constitution, hence the need for this constitutional author-

[3] We must agree with the statement that "the existence of the integration clause depends on the constitutional traditions. The content thereof may be judged upon the national constitutional framework for international co-operation." (Vincze & Chronowski, 2018, p. 57). "The independent Europe, integration or accession clause is not absolutely necessary, many countries are able to exercise their membership rights even without those. A part of these countries regulate their membership by rules pertaining to the relation of international and internal laws, while others by a general clause allowing the accession to international organisations. The third part of the countries do have a separate integration clause, however, the function thereof varies: either their aim to clear obstacles to EU law deriving from the hierarchy of national laws, or they outline requests towards the Union, as well as towards the national government regarding its engagement to the European Union. In each case, the aim is to fill the clause with meaningful content." (Vincze & Chronowski, 2018, p. 56-57).

[4] "The final text of the clause is shorter and less precise compared to the draft versions and proposals, which has caused disappointment amongst economists." (Fazekas, 2015, p. 42).

[5] The accession of the Republic of Hungary to the European Union (along with other states) was realised by signing the Treaty of Accession in Athens on 16 April 2003, and by promulgation thereof in Act XXX of 2004.

[6] The Constitutional Court was to make a statement whether the public law norms of another international entity may be directly applicable, even without implementing those in the Hungarian laws (Decision of the Constitutional Court 30/1998. (VI. 25.), Part III Point 1 of Reasoning). According to the Constitutional Court, the Union is an independent entity, completely separate from the Republic of Hungary. As Hungary was not a member state to the Union, it had no influence whatsoever on the lawmaking thereof. Therefore, applying its laws directly, without constitutional authorisation, would lead to the infringement of the sovereignty of Hungary. (Points 3 and 4, Part V of Reasoning).

[7] This interpretation by the Constitutional Court has been criticised in legal literature. (See especially Kecskés, 2003a, p. 21-30; Kecskés, 2003b, p. 22–33; Vincze & Chronowski, 2018, p. 37–52).

[8] The constitution in force at the time was Act XX of 1949 on The Constitution of the Republic of Hungary (hereinafter referred to as Constitution). An amendment to the Constitution introduced the Europe Article for the first time in 2002.

[9] Article 2/A of the Constitution was replaced by Article E) of the Fundamental Law, entering into force on 1 January 2012.

[10] A supranational organisation is a particular form of state relations, founded by international treaties. As opposed to traditional international organisations, its implementing body is able to execute its tasks solely with regard to the common interest of the community, regardless of the separate interests of individual member states. (Jaenicke, 1962, p. 423–428; Weiler, 1991, p. 2405; Vincze & Chronowski, 2018, p. 49).

isation. From the perspective of autonomous EU law, the internal regulation of the delegation of powers is irrelevant. However, in most states it is the constitution that gives authorisation for such actions (Somogyvári, 2001, p. 23).

In order to partake in European integration, it was also essential to formulate a stipulation in the Constitution that gives general authorisation (within the boundaries of the Constitution) to partly delegate powers concretising state sovereignty, and to exercise such powers jointly with other member states and European Union institutions.

3. The constitutional amendment related to the accession

Officially, Hungary submitted its request for accession to the European Union on 1 April 1994. The accession negotiations started on 31 March 1998, and were concluded on 13 December 2002. Four days after the conclusion of the negotiations, on 17 December, the National Assembly adopted (with 361 votes in favour, no votes against and no abstentions) Act LXI of 2002 on the Amendment of the Constitution of the Republic of Hungary. As a legal preresiquite for the accession of the Republic of Hungary to the EU, the amendment introduced Article 2/A to the Constitution – the so-called integration clause. The integration clause entered into force on 23 December 2002 (Csuhány & Sonnevend, 2009, p. 239).

This constitutional amendment was necessary because the ratification and promulgation of the accession treaty was only possible if the treaty was in accordance with the stipulations of the Constitution (General Reasoning of Act LXI of 2002; Kecskés, 2005, p. 864–882). Two issues had particular relevance in relation to the accession (General Reasoning, Act LXI of 2002). First, the question of exercise of powers (as one of the main components of state sovereignty), as the authority to take decisions significantly transforms due to the accession. This is because the founding treaties authorise EU institutions to exercise legislative power, thus restricting the legislative power of member states to an extent that shall be specifically regulated on the constitutional level. Therefore, special authorisation had to be given in the Constitution for such restriction of jurisdiction. Second, the accession treaty partly affected rights and obligations regulated on the constitutional level, hence it was not possible to prescribe rules in a source of law that is placed lower in the hierarchy of laws.

The integration clause fulfilled its function both towards the European Union and the constitutional system of Hungary as a member state: it created a "bridge" in order to make it possible to delegate powers between the Union and Hungary, as well as defined a particular, supranational exercise of power as a specific form of exercise of powers.

4. The Europe Article of the Fundamental Law

The new Fundamental Law, entering into force in 2012, has not introduced significant changes to the content of the Europe Article (Fundamental Law Article E). Although the modification merged two provisions, i.e. the State goal to establish European unity (Fundamental Law Article E) (1), formerly included in Article 6 (4) of the Constitution) and the integration clause (Article 2/A. of the former Constitution), the content of those provisions remained almost untouched until the seventh amendment to the Fundamental Law. The amendment introduced a completely new provision,[11] containing restrictions regarding the delegation of powers. According to the Reasoning to the amendment, this was necessary in order to concretise the wording "as required" of former Paragraph (2), which essentially means a clear clarification of the exercise of EU powers."

The text of the current regulation outlines four general aims. First, it sets a state goal as a legal obligation of the state to participate in European development, as well as stipulates the general and constitutional framework for the contribution in the creation of European unity. The compliance with such a state goal creates concrete tasks to the state, which tasks are usually more exact and include more defined obligations.

Second, it creates the constitutional legal conditions of the membership to the European Union by establishing a legal basis thereof.[12] In order for the Hungarian state to possess the constitutional authorisation to delegate powers regarding certain aspects of its sovereignty, it gives authorisation on the level of Fundamental Law to conclude such international treaties, thus allowing the exercise of legislative and decision making powers of Hungarian state organs by a supranational organisation. (This is the case even if the Hungarian state, by means of its own state organs, also takes part in the exercise of such power.)

[11] Article 2 of the seventh amendment to the Fundamental Law of Hungary (28 June 2018) complemented Article E) (2) with the following sentence: "Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure." The amendment contained further additions. For instance, it added the following sentence to the National avowal (the Preamble of the Fundamental Law): "We hold that the protection of our identity rooted in our historic constitution is a fundamental obligation of the State." Article R) was complemented with the following sentence: "The protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State." (For further information on the previous proposal of a similar amendment to the Fundamental Law, see Chronowski & Vincze, 2017, p. 120–129)/

[12] According to the Constitutional Court, Article E) of the Fundamental Law contains the constitutional foundation by which Hungary acts as a member of the European Union, and which constitutes a continuous legal basis for the direct implementation of EU law. (Decision of the Constitutional Court 2/2019. (III. 5.), Reasoning [14]).

Third, it legitimates certain powers of the Union, exercised by the organs of the Union on the territory of Hungary, against Hungarian citizens. This is done on a democratic, constitutional level, by guaranteeing the acknowledgement of the international treaty by the National Assembly, hence consenting to the limitation of national exercise of powers.

Fourth, it defines on the constitutional level those conditions and limitations that are to be considered by the Hungarian state when concluding an international treaty delegating powers, as well as when exercising such powers. Should these provisions not prevail, the international treaty is against the Fundamental Law.

While interpreting the Europe Article of the Fundamental Law, it is worth studying the paragraphs separately (even though they are strongly related to one another), as they regulate different topics. A paragraph clearly standing out is Paragraph (2), regulating the delegation of powers and the relation between the powers of the European Union and Hungary as a member state. Hence, the present article focuses on this Paragraph.

5. The Europe Article as an authorisation clause – the question of delegation of powers

The Europe Article of the Fundamental Law lays down the constitutional foundation and framework for the participation of Hungary as a member state in the European Union.[13] The European Union is not a state, nor a sovereign institution, but a supranational organisation with autonomous legal order and international legal entity, formed by the member states by way of treaties (Consolidated versions of the Treaty on European Union [TEU] and the Treaty on the Functioning of the European Union [TFEU], Article 1). In order to achieve common goals, the member states have delegated a part of their powers to the Union, as the common exercise of such powers are more efficient than exercising those individually. The powers may be exclusive[14] or shared with member states[15] – different rules apply to each category. The Union, as a supranational organisation, acquires powers by way of treaties,[16] however, this does not mean that it has sovereign power.[17] The European Union is a community of law, authorised to make laws independently (within the boundaries set by member states), as well as to conclude international treaties in its own name. It is also a community of values (TEU, Article 2), based on solidarity between the member states (TEU, Article 3 (1)), as well as the territory of law: an area with no internal borders, based on freedom, security and the enforcement of rights (TEU, Article 3 (2)). The Union achieves its goals within the boundaries set by the treaties (TEU, Article 3 Paragraph (6)): it acts according to the powers delegated by the member states (Blutman, 2019, p. 475). All powers that are not delegated to the Union remain with the member states (see also TEU, Article 5 Paragraph (2)). As the delegation of powers pertain to sovereign powers of the state (such as legislative, executive and judicial powers), its conditions shall be laid down in the Fundamental Law (see also Petrétei, 2009, p. 175–193). However, by its accession to the European Union, Hungary has not given up its sovereignty,[18] it only enabled the common exercise of state powers (Decision of the Constitutional Court 22/2016. (XII. 5.), Reasoning [60]). Therefore, in accordance with the concept of suspended sovereignty, membership to the Union does not mean the renouncement of sovereignty, but the exercise of powers jointly with the international community (Decision of the Constitutional Court 2/2019. (III. 5.), Reasoning [23]; Blutman, 2019, p. 469–478).

According to the Fundamental Law, the source of public power in Hungary is the people, who exercise this power by their elected representatives, (or, in exceptional cases, directly). Hence, the principle of popular sovereignty prevails, *i.e.* the supreme power of the people is the basis and source of the constitution. However, after the creation of the constitution, the power of the people may only be exercised within the framework of the Fundamental Law, indirectly (by the parliament, a body consisting of elected representatives), or directly (in exceptional cases, such as in the form of a referendum).[19] The Fundamental Law, based on popular sovereignty, constitutes the state in a legal sense,[20] including the sovereignty of the state, as well as the individual state organs of high importance. It establishes their most important purpose, structure, tasks and powers, the most characteristic features of their op-

[13] Reasoning to Article E) of the Fundamental Law states that it is necessary for the Fundamental Law to give explicit authorisation for the exercise of powers within the European Union.

[14] The categories of Union competences are laid down in Article 3 of the TFEU.

[15] The shared competences of the Union and member states are laid down in Article 4 of the TFEU.

[16] According to Article 5 Paragraph (1) of the TEU, "The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality." (Blanke & Mangiameli, 2013, p. 261–267)/

[17] "The European Union remains an international organisation without sovereignty as long as it ceases to exist or transforms into a federal state." (Blutman, 2019, p. 670).

[18] There have been numerous attempts to define sovereignty. Hence, the possible definitions are also numerous, depending on discipline, particular historical and concrete political environment. This is because sovereignty is not absolute, it is a functional concept dependent on historical development, which is formed in a particular historical environment in order to reach a specified goal. (Prodromos, 1966, p. 2321).

[19] Popular sovereignty incorporates both the decision on the constitutional power (government) and its legitimation. Thereafter, popular will is not unlimited, but bound by the constitution. (Stern, 1980, p. 23).

[20] The sovereignty of the state, as well as the powers concretising the sovereignty and the division thereof, is dependent on the regulation laid down in the actual constitution of the time. This statement applies only to constitutional democracies, as it is only in those cases where the constitution creates, legitimates and limits state sovereignty.

eration, as well as their relationship with each other. In a constitutional state, state power, as a legally ordered form of political rule, can only be legally constituted, structured, rationalised and organised by the constitution. Hence, the constitution establishes, shapes, stabilises and limits the possibilities of action of state power. This is therefore carried out by defining tasks and powers, exercised by specified organs.[21] Consequently, state power is not unlimited power, as the legal definition and categorisation of the sovereign power of the state is done with all the public law powers (more precisely, the powers established for individual state organs in the Fundamental Law) that enable the enforcement of the sovereign power of the state, the declaration of state decisions and serve to enforce these decisions. The sovereign power of the state is indivisible, however, the totality of the sovereign rights expressing the sovereign power are concretised in the form of the powers of individual state organs. The exercise thereof may and should be divided,[22] which is reflected in the delegation of certain powers to different organs. Also the Parliament, functioning as the representative body of the people (Article 1 Paragraph (1) of the Fundamental Law: HUNGARY's supreme organ of popular representation shall be the National Assembly), may act only within the framework of the Fundamental Law, the limits of its power are determined by the provisions of the Fundamental Law (Decision of the Constitutional Court 2/1993 (I. 22.), ABH 1993, 33, 36; Decision of Constitutional Court 22/2016 (XII. 5.), Reasoning [59]). The subject of sovereignty is therefore the people, so the representative body itself does not possess the popular sovereignty, nor the state sovereignty as a whole. (State sovereignty is a benchmark of state entirety and the essence of statehood. No state organ incorporates state sovereignty on its own.) It is merely a means of exercising the power (Somogyvári, 2001, p. 24), and may only exercise the powers established in the Fundamental Law. (Undoubtedly, the National Assembly holds the most significant powers, but not all of them.)

Sovereignty was therefore not laid down in the Fundamental Law as powers, but as the ultimate source of powers. As a result of the delegation of the exercise of certain powers resulting from sovereignty, the way of their exercise may change (Somogyvári, 2001, p. 24). However, even the joint exercise of powers cannot result in the people losing their possibility to final decision-making and continuous control over[23] the exercise of public power (whether joint or individual, carried out in the form of member states) (Decision of the Constitutional Court 22/2016. (XII. 5.), Reasoning [59, 60]).[24]

According to the Decision containing the interpretative decision of the Constitutional Court, Article E) Paragraph (2) of the Fundamental Law allows Hungary to exercise some of its powers as a member state of the European Union, through the institutions of the European Union. However, this joint exercise of powers is not unlimited, as Article E) Paragraph (2) of the Fundamental Law ensures both the validity of EU law in relation to Hungary, and at the same time represents the limitation of delegated and jointly exercised powers (Decision of the Constitutional Court 22/2016. (XII. 5.), Reasoning [53]). The Constitutional Court defined two main limits to the joint exercise of powers. "On one hand, the joint exercise of powers shall not violate the sovereignty of Hungary (sovereignty control), and on the other hand, it shall not harm the constitutional self-identity (identity control) (Decision of the Constitutional Court 22/2016. (XII. 5.), Reasoning [54])." The Constitutional Court stated that the joint exercise of powers is made possible by the Fundamental Law, consequently, even in the case of jointly exercised powers, the framework set by the Fundamental Law shall be respected. This primarily means the protection of fundamental rights (Article I Paragraph (1) of the Fundamental Law, "primary obligation of the state"), as well as the inalienable elements of sovereignty, as laid down in the last sentence of Article E) Paragraph (2) of the Fundamental Law (Decision of the Constitutional Court 2/2019. (III. 5.), Reasoning [23]).[25] However, it shall be noted here that the Fundamental Law only enables the organs of the Hungarian state (not the Union or other member states) to exercise

[21] In constitutional democracies, powers laid down in the constitution define the framework of possible actions of individuals. A system that does not comply with such criteria may not be regarded as constitutional democracy.

[22] This derives from Article C) Paragraph (1) of the Fundamental Law: The functioning of the Hungarian State shall be based on the principle of the division of powers.

[23] On one hand, the possibility of final decision-making means the constitution-making power of the people, and on the other hand, the establishment and operation of the representative body of the people that indirectly implements popular sovereignty through democratic elections (within the existing constitutional framework). The possibility of continuous control is achieved through periodically recurring elections, through the exercise of parliamentary control rights, and through the functioning of the public as a mediating system.

[24] As long as Article B) of the Fundamental Law lays down the principle of independent, sovereign statehood, and stipulates that the source of public power shall be the people, the Union clause based on Article E) shall not empty out these provisions. Blutman states that even though member states do have the possibility to influence certain Union decisions, they do not have the actual possibility to exercise control as they are unable to prevent decisions that are not to their liking. In a legal sense, member states have lost control over the exercise of powers by the state. However, they have not lost the ultimate control, as there is a possibility for withdrawal from the European Union (Article 50 of the TEU). Therefore, the sovereignty of the member state is ultimately granted: the state takes back its powers by withdrawing from the Union. The "ultimate control" is therefore granted by the guarantees for the delegation of powers (two-third majority in the National Assembly, referendum) and by the legal possibility for withdrawal. Blutman at 476.

[25] Confirming its previous interpretation, this requirement was formulated by the Constitutional Court in Decision 32/2021. (XII. 20.) as follows: Paragraph 2 of Article E) of the Fundamental Law (taking into account other provisions of the Fundamental Law) provides the Constitutional Court with three types of control options. „The Constitutional Court may, within its own authority, on the basis of a motion, in exceptional cases and as an ultima ratio, *i.e.* while respecting the constitutional dialogue between the member states, examine whether the essential content of a fundamental right is violated as a result of joint exercise of powers based on Paragraph (2) of Article E) of the Fundamental Law (fundamental rights control), or the sovereignty of Hungary (including the extent of the delegated powers - sovereignty and ultra vires control), or its constitutional self-identity (identity control)." (Justification [24]).

their powers jointly. Therefore, it is their responsibility to make sure that decisions made during the joint exercise of powers are in compliance with the stipulations of the Fundamental Law.

6. Dogmatic analysis and evaluation of Article E) Paragraph (2) of the Fundamental Law

According to Article E) Paragraph (2) of the current Fundamental Law, "With a view to participating in the European Union as a Member State and on the basis of an international treaty, Hungary may, to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties, exercise some of its competences arising from the Fundamental Law jointly with other Member States, through the institutions of the European Union. Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure."

6.1. Interpretation of Article E) Paragraph (2), sentence 1

This provision of the Fundamental Law substantially defines the purpose of the exercise of powers (which is done for the sake of the participation of the member states in the exercise of EU powers), its extent (determined by the modifier "necessary"), as well as its means and form (which is only possible by way of an international treaty, in the form specified for this purpose, and finally the way of exercising powers (which may be done jointly with the other member states, through the institutions of the Union).[26] Based on a more detailed interpretation of certain elements of this provision, the following meaning is to be established.

– It clearly follows from the formulation *"with a view to participating in the European Union as a Member State"* that this clause was phrased with the aim of enabling the Hungarian state to participate in the EU. The limitation of the exercise of powers contained in this paragraph may only and exclusively take place in favour of the European Union, as a member of the European Union. Therefore, it does not give a general authorisation, but establishes a specific "purpose limitation", enabling the Hungarian state to exercise its power in a specific way.[27] On one hand, participation in the Union as a member state may not be transferred to participation in other international or supranational organisations.[28] On the other hand, it may only mean participation in the Union in the capacity of a member state, no other kind of contribution opportunity is provided. The additional provisions of the Fundamental Law were formulated only for the sake of the participation of the Hungarian state as a member of the European Union. At the same time, this also expresses that in case the participation is not carried out as a member state, the conclusion of an international treaty may be considered unconstitutional according to this provision. The explicit statement of the participation of Hungary in the operation of the Union as a member state clarifies the scope of application of the provision. Furthermore, it also means that it is not constitutionally possible for the European Union to evolve into a different entity that is more than a special form of cooperation between member states (Somogyvári, 2001, p. 24).[29]

The addressee of this provision is specifically the Hungarian state, therefore it receives a general constitutional authorisation to jointly exercise the powers under certain conditions. The decision regarding this matter should not be made by any other entity, as it would require a new constitutional provision. Hence, a referendum on this matter may not be held without amending the Fundamental Law, *i.e.* the right to decision making may not be taken away from the representative body of the people in this way.[30]

– The text *"on the basis of an international treaty"* requires that the form of the decision to exercise powers as a result of accession is to be an international treaty. At the same time, it gives the constitutional authority for the Hungarian state to conclude an international treaty on the basis whereof certain powers (derived from the Fundamental Law) are shared with the other member states and may be exercised through the institutions of the European Union. The precise rules thereof shall be contained in the international treaty in question, not in other legal documents (*i.e.* a mere statutory provision or other methods not meeting the requirements of the international treaty).

The concept of "international treaty" is not defined in the Fundamental Law, therefore giving relatively

[26] According to the Reasoning, Article E) creates the possibility for Hungary to exercise its powers through the institutions of the European Union, as a member state. The specific powers shall be determined by international treaties. Exercising powers via European Union institutions shall not exceed the extent necessary based on the international treaty, nor shall it mean a power broader than the one outlined in the Fundamental Law.

[27] This stipulation is an authorisation that may be regarded as a peculiar level of exercise of power. (Chronowski, 2009, p. 345).

[28] The constitutional foundation of possible participation in other international and supranational organisations are laid down in Article E) Paragraph (1) and Article Q) of the Fundamental Law.

[29] Therefore, the clause may not be a basis of federal operation, the Union is composed of different member states. This is based on the theoretical thesis that the legitimate basis of integration is the member state, despite the high level integration of the Union.

[30] No referendum shall be held, as the decision on European Union membership would mean the amendment of the Fundamental Law, and holding a referendum regarding such matter is forbidden by Article 8 Paragraph (3) Point (a) of the Fundamental Law. Also, European Union membership is considered an obligation arising from an international treaty. Holding a referendum regarding such matter is forbidden by Article 8 Paragraph (3) Point (d) of the Fundamental Law.

wide scope for legal regulation. According to the wording of Act L of 2005 on the procedures regarding international treaties, an international treaty (as a legal definition in the application of this law)[31] is "a treaty concluded with another state or another subject of international law with the capacity to enter into a treaty, establishing, modifying or terminating international legal rights and obligations for Hungary, regulated by international law, any written agreement by any name or title, regardless of whether it is contained in one, two or more documents related to one another (Point 2. § a) of Act L of 2005 on the procedures regarding international treaties)."[32] This law also regulates the issues of international contract conclusion procedure.

An international treaty enabling the joint exercise of powers may only be created constitutionally in accordance with the legal regulations. Provisions of the Fundamental Law (specified partly in Article E) Paragraph (4))[33] are to be taken into account, as well as legal regulations pertaining to the preparation and creation of the international treaty, the final determination of its text, the authorisation to recognise its binding effect and the recognition of its binding effect.[34]

– The wording *"to the extent necessary to exercise the rights and fulfil the obligations deriving from the Founding Treaties"* sets up a material limitation. It states that the joint exercise of powers may take place in order to exercise rights and fulfil obligations arising from the treaties establishing the European Union. Hence, it establishes a limitation according to the subject of the given powers to the extent that not any, but only such powers may be considered that concern rights and duties arising from the founding treaties.[35] Furthermore, the Fundamental Law also states that the joint exercise of certain specific powers may only take place in such a way that it cannot exceed the "necessary extent". It follows from the concept of "necessary extent" that only the exercise of the power is transferred, not the power as a whole. The extent thereof may be established in accordance with the scope stipulated in the EU treaties.

– The wording of *"exercise some of its competences arising from the Fundamental Law"* refers to the fact that these powers[36] are to be the ones assigned for the Hungarian state (more precisely, for its organs) in the Fundamental Law, or by other means that may be derived from the Fundamental Law. The exercise of delegated powers must have a constitutional foundation, only those powers may be exercised that are based on the Fundamental Law. This also indicates the obvious consequence that only the exercise of those powers may be delegated over which the Hungarian state has a right to disposal (Somogyvári, 2001, p. 24). Given that this provision authorises the joint exercise of certain powers arising from the Fundamental Law, this power may only be one that a Hungarian state organ may otherwise constitutionally exercise based on the Fundamental Law. The clause "some of its competences" also indicates that it is not a delegation of the general exercise of powers, not a general authorisation, but rather the act of granting the exercise of powers specifically of constitutional origin, precisely identified and therefore limited in terms of content (Decision of the Constitutional Court 2/2019. (III. 5.). Reasoning [22]). The Fundamental Law does not specify these powers, as the exact list of powers shall be contained by the international treaty upon which the Hungarian state transfers the exercise of powers to the Union (Somogyvári, 2001, p. 25). On other hand, it follows that the joint exercise of powers may only take place in a precisely defined form, extent and manner. The Fundamental Law does not grant the possibility for the general delegation of powers, only the granting of limited, specific powers is possible. As a constitutional program and limitation, this also applies to subsequent delegations of powers.[37]

– The formulation *"jointly with other Member States, through the institutions of the European Union"* makes it clear that the state may delegate the exercise of its powers in such a way that it will exercise those powers in the future together with other states (possessing the status of a member state) jointly, through the institutions of the Union. This definition also sets a limitation:

[31] According to Article 2 Point (a) of the Vienna Convention on the Law of Treaties (concluded on 23 May 1969, in Vienna), "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. This is a more general definition compared to that of Hungarian laws. As the international treaty in this case is concluded by Hungary, and thus the conclusion is to be done based on the Act L of 2005, the Hungarian regulation is applicable.

[32] According to the dominant part of legal literature, European Union treaties may be regarded as international treaties. (Szabó, 2012, p. 193; Mohay, 2014, p. 273).

[33] According to Article E) Paragraph (4), for the authorisation to express consent to be bound by an international treaty referred to in paragraph (2), the votes of two thirds of the Members of the National Assembly shall be required. Therefore, no legal rules shall leave the National Assembly out of the conclusion of such an international treaty.

[34] Article 1 of the Act L of 2005 on the procedures regarding international treaties stipulates the scope of the Act, listing the phases of the conclusion of bi- and multilateral treaties concluded by Hungary, as well as the elements thereof.

[35] On one hand, this means the rights and obligations already applicable before the accession. On the other hand, the content of the treaties may obviously change, however, changes may only take place on the basis of Article E) Paragraph (4) of the Fundamental Law.

[36] From the viewpoint of constitutional law, power is clearly regulated by laws. (For detailed description of powers see: Petrétei, 2014, p. 9).

[37] On the other hand, this is absolutely consistent with the concept of limited powers of European Union law. See Article 4 Paragraph (1) and Article 5 Paragraph (2) of TEU.

powers may be delegated only and exclusively for this purpose, namely in such a way that the Hungarian state (more precisely, one of its organs) continues to participate in their exercise, in the form and to the extent defined by EU law.[38] Therefore, the exercise of powers is to be joint, otherwise the condition for the joint exercise of powers is missing. Consequently, it is not possible to exercise powers in which Hungary could not otherwise participate, or which would not be exercised jointly with the other member states. Furthermore, the joint exercise of powers shall be carried out "through the institutions of the European Union", *i.e.* the actual way of jointly exercising powers is through the institutions of the Union. Hence, the exercise of powers also has an organisational limitation: the joint exercise of powers with the other member states takes place within the EU institutions, *i.e.* not by the Union in general, but by its specific institutions. Thus, delegating the exercise of a power to the Union means that the Hungarian state must continue to participate in this activity, and must do so together with other member states, through the institutions of the Union (Somogyvári, 2001, p. 24). The Fundamental Law therefore allows the Hungarian state and its organs to jointly exercise their powers in this way and to this extent.[39]

On the other hand, it follows from the term "may exercise" that it is merely a question of the joint exercise of the power, not the transfer of the power itself, which indicates the reversible nature of the process.[40] The wording of the Fundamental Law (as a constitutional authorisation) does not actually enable the delegation of the exercise of powers, much less the delegation of the powers themselves, but merely the exercise of certain powers jointly, together with other member states, through the institutions of the Union. However, the joint exercise of powers also means that in these cases the Hungarian state, more precisely its individual organs, do not exercise their powers granted by the Fundamental Law exclusively by themselves. At the same time, through the joint exercise of powers, the Hungarian state receives cooperation opportunities in certain EU areas*, i.e.* affairs that it manages jointly with the other member states.

6.2. Interpretation of Article E) Paragraph (2), sentence 2

Before interpreting the aforementioned provision of the Fundamental Law, it is reasonable to point out that the Treaty on the European Union refers to the national identity of the member states (Article 4 Paragraph (2) of the TEU). Accordingly, *"the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."*

In this context, the Hungarian Constitutional Court ruled that the concept of constitutional identity "means the constitutional self-identity of Hungary, and specifies its content case by case, on the basis of the Fundamental Law as a whole and some of its provisions, in accordance with Article R) Paragraph (3) of the Fundamental Law, the National Avowal and the achievements of the historical constitution." According to the Constitutional Court, "the constitutional identity of Hungary is not a list of static and closed values, but at the same time several important components may be highlighted as examples, which are identical to the constitutional values generally accepted today: freedoms, division of powers, form of state, respect for public law autonomies, freedom of religion, the legal exercise of power, parliamentarism, equality of law, the recognition of judicial power, the protection of the nationalities. Among others, these are the achievements of our historical constitution, on which the Fundamental Law and the Hungarian legal system rest (Decision of the Constitutional Court 22/2016. (XII. 5.). Reasoning [65])." According to the Constitutional Court, "the constitutional self-identity of Hungary is a fundamental value that is not created by the Fundamental Law, it is only recognised by it. Therefore, the constitutional self-identity cannot be renounced even by an international treaty, only the final termination of sovereignty and independent statehood can deprive Hungary of it. Accordingly, the protection of constitutional identity remains the task of the Constitutional Court as long as Hungary has sovereignty. As a result, sovereignty and constitutional self-identity come into contact with each other at many points, so the two relevant controls shall be carried out in some cases with regard to each other (Decision of the Constitutional Court 22/2016. (XII. 5.). Reasoning [67])." The question was also raised whether the Constitutional Court has the authority to examine whether, as a result of the exercise of powers based on Article E) Paragraph (2) of the Fundamental Law, there is an infringement of human dignity and the

[38] European Union law has priority at implementation, as the delegation of the execution of powers is exercised in order to comply with the stipulations of the TEU.

[39] The exercise of powers within the European Union is barely "common", as there are European Union institutions independent from member states, such as the European Commission and the Court of Justice of the European Union (Blutman, 2019, p. 476). Nevertheless, these organs may also be regarded as common Union organs, as their powers and composition of personnel are determined by member states.

[40] Even the complete delegation of a power does not mean the full transfer thereof, as the power remains at the organ stipulated by the Fundamental Law (even though the power is partly or fully exercised by other organs).

essential content of other fundamental rights, as well as the sovereignty and constitutional identity of Hungary. After reviewing the practice of the highest courts performing constitutional court duties and constitutional courts of the member states, the Constitutional Court found that it may examine these issues within its own authority, upon motion, in exceptional cases and as an *ultima ratio*, *i.e.* while respecting the constitutional dialogue between the member states (Decision of the Constitutional Court 22/2016. (XII. 5.). Reasoning [46]).[41] In accordance with the decision of the Constitutional Court, and also as a consequence thereof, the amendment to the Fundamental Law was adopted, adding a new provision to Article E) Paragraph (2).[42]

According to Article E) Paragraph (2) sentence 2, "Exercise of competences under this paragraph shall comply with the fundamental rights and freedoms provided for in the Fundamental Law and shall not limit the inalienable right of Hungary to determine its territorial unity, population, form of government and state structure."[43]

The second sentence of Article E) Paragraph (2) therefore formulates further constitutional-level requirements and content limitations in relation to the joint exercise of powers within the framework of the Union, *i.e.* it only allows the delegation of the exercise of powers under certain conditions, subject to the enforcement of certain provisions. These requirements and limitations obviously do not apply to the European Union or its member states, but to the Hungarian state, more specifically to state organs and officials participating in the exercise of EU powers. The Fundamental Law of Hungary is not binding on either the Union or other member states, as neither its territorial nor its personal scope extends to them. At the same time, it is the duty of the Hungarian state to bear in mind these requirements of the Fundamental Law when exercising its powers within the European Union, to act in accordance with the constitutional provisions, to comply with those, because the framework set by the Fundamental Law must also be respected in the case of jointly exercised powers (Decision of the Constitutional Court 2/2019. (III. 5.), Reasoning [23]).

This general definition does not clarify the situation when the exercise of EU powers (jointly with the other member states, through Union institutions) conflicts with the requirements laid down in the Fundamental Law. It is clear that in case the joint exercise of powers is not consistent with the fundamental rights and freedoms laid down in the Hungarian constitution, or in case it limits the inalienable right of Hungary to make decisions related to its territorial unit, population, form of government and state structure, then a violation of the Fundamental Law will occur. According to Article R) Paragraph (4) of the Fundamental Law, "the protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State."[44] This constitutional order makes it clear for the Hungarian state organs that they may no longer participate in the joint exercise of powers in violation of the prescribed constitutional conditions, otherwise they must bear the constitutional responsibility. The Constitutional Court made it clear that the respect and protection of the constitutional identity of Hungary is mandatory for everyone (including the Parliament, participating in the decision-making mechanism of the European Union, as well as the Government, directly participating therein). According to Article 24 Paragraph (1), the principal organ for the protection of the Fundamental Law is the Constitutional Court (Decision of the Constitutional Court 22/2016. (XII. 5.), Reasoning [55]).[45] Therefore, when jointly exercising powers within the Union, the organs of the Hungarian state are to act in such a way that no EU decision could be made that violates the provisions of the Fundamental Law of Hungary. They must create a situation where the ob-

[41] However, the Constitutional Court also underlined that the subject of sovereignty and identity control is not directly the legal act and its interpretation. Thus, the Court does not make a statement about the validity, nor about the priority of application thereof (Reasoning [56]). According to Article 19 Paragraph (3) of the TEU, the Court of Justice of the European Union shall ensure that in the interpretation and application of the Treaties the law is observed. It also gives preliminary rulings, on the interpretation of Union law or the validity of acts adopted by the institutions. (For further details on the Decision see: Blutman, 2017, p. 1-10.; Chronowski & Vincze, 2017, p. 117-132.; Drinóczi, 2017. From the viewpoint of the European Union see Mohay & Tóth, 2017, p. 468-475).

[42] According to the Reasoning of Article 2 of the seventh amendment to the Fundamental Law of Hungary, the definition of national identity of a member state is the fundamental right of the given state, laid down primarily (but not exclusively) in the constitution. Therefore, it is appropriate to lay down the elements of national identity on the constitutional level. The interpretation of the relation between national and Union law pertaining to constitutional identity is constantly on the agenda of the constitutional courts of European states. According to Union law, the values of national and political identity, laid down in the constitutions of the member states shall not be questioned.

[43] According to the Constitutional Court, the seventh amendment to Article E) lays down constitutional control in the first phrase; and sovereignty and identity control in the second phrase. This is done on the level of Fundamental Law. (Decision of the Constitutional Court 32/2021. (XII. 20.), Reasoning [25]).

[44] The seventh amendment to the Fundamental Law of Hungary added the following sentence to the National Avowal: "We hold that the protection of our identity rooted in our historic constitution is a fundamental obligation of the State." Article 3 of the amendment added the following paragraph to Article R) of the Fundamental Law: "(4) The protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State."

[45] In case there is a probability that human dignity, other fundamental rights, the sovereignty of Hungary or its identity based on its historical constitution are infringed due to the exercise of powers based on Article E) Paragraph (2), the Constitutional Court may examine whether the presumed infringement is real (Reasoning [69]).

ligations of the European Union may be completely fulfilled without violating the Fundamental Law. This means a constitutional command and standard for the participation of Hungary as a member state in the EU decision-making process. On one hand, it has an impact on the activities of state organs as a mandatory norm of conduct and a standard of action. On the other hand, it also serves as a restriction and a point of reference whereby the participation of Hungary in the exercise of EU powers may be controlled. It should be noted, however, that the term "state structure" in Article E) Paragraph 2, sentence 2 of the Fundamental Law, and especially the concept of constitutional identity established by the practice of the Constitutional Court (such as the constitutional self-identity of Hungary), allows for a fairly broad interpretation of whether the joint exercise of powers through the institutions of the European Union meets the aforementioned requirements. Nevertheless, from the point of view of clarifying the concept of "necessary measure", this provision may mean a more specific normative content and thus a more precise point of reference, since the aspects formulated here form part of the "necessary measure".

The Constitutional Court also examined whether the incomplete enforcement of jointly exercised powers based on Article E) Paragraph (2) could lead to the loss of sovereignty and constitutional identity of Hungary, or to the infringement of the fundamental rights and freedoms laid down in the Fundamental Law (with special regard to human dignity, bearing special relevance in the context of constitutional identity) (Decision of the Constitutional Court 32/2021. (XII. 20.)).[46]

First of all, the Constitutional Court examined whether the joint exercise of powers, or its incomplete enforcement, could violate the fundamental rights and freedoms laid down in the Fundamental Law – the protection whereof is the primary obligation of the state. The Constitutional Court established that the joint exercise of powers through the institutions of the European Union, according to the authorisation given in Article E) of the Fundamental Law, may neither directly nor indirectly lead to the enforcement of a lower level of fundamental rights protection than that required by the Fundamental Law. The same applies to those cases where an EU norm binding the member states meets the fundamental rights protection requirements of the Fundamental Law, but its implementation is insufficient (Decision of the Constitutional Court 32/2021. (XII. 20.), Reasoning [47]).[47] Therefore, if the incomplete enforcement of the joint exercise of powers may lead to consequences causing the infringement of the right to self-identity of persons living in the territory of Hungary, the Hungarian state is obliged to ensure the protection of this right (Decision of the Constitutional Court 32/2021. (XII. 20.), Operative part Point 2, as well as Reasoning [60]). As part of its obligation of institutional protection, the state "must ensure that, as a result of an international commitment of the state, no act of another institution outside of the Hungarian state organ may carry out an interference from which the state itself is obliged to refrain (Decision of the Constitutional Court 32/2021. (XII. 20.), Reasoning [38])." However, the decision does not specify the form, nor the means and method thereof.[48]

The Constitutional Court also examined the impact of the shortcomings of joint exercise of powers on the sovereignty of Hungary and the joint exercise of powers itself (Decision of the Constitutional Court 32/2021. (XII. 20.), Reasoning [61]). The Constitutional Court stated that "the presumption of reserved sovereignty excludes all competences that are not classified as competences by the Treaty on the Functioning of the European Union (TFEU). In these cases, not only the Fundamental Law, but also the TFEU itself stipulates that member states are entitled to exercise the specified scope of powers even after the termination of the TFEU (Decision of the Constitutional Court 2/2021. (XII. 20.). Reasoning [66])." The European Union and its institutions do not only exercise the delegated powers in accordance with the purpose set by the EU treaties if they constitute secondary sources of law. The condition for the exercise of the powers is also to ensure the effective enforcement of the secondary legal sources.[49] Article E) Paragraph 2 of the Fundamental Law may not be interpreted to mean that Hungary has definitively delegated the right to exercise the certain power to the institutions of the European Union in case the institutions of the European Union manifestly ignore their obligation to exercise

[46] Regarding this Decision, Blutman states that it reserves the possibility of acting unilaterally in case of insufficient implementation of European Union law. However, this reservation is made on the concerning ground that the insufficiently implemented Union act is an *ultra vires* act, as the execution of power in such case is not appropriate. Therefore, the Hungarian delegation of powers is not applicable based on Article E) Paragraph (2) (Blutman, 2022, p. 5).

[47] "If, as a result of the incomplete enforcement of the joint exercise of powers defined in Article E) Paragraph (2) of the Fundamental Law, a foreign population remains permanently and *en masse* in the territory of Hungary without democratic authorisation, it may violate the right to self-identity and self-determination of the people living in Hungary, which derives from their human dignity. This is because, as a result of the incomplete enforcement of the exercise of powers, the traditional social environment of persons living in the state territory of Hungary may change without democratic authorisation, without any influence of the concerned, and without state control mechanisms." (Reasoning [51]).

[48] According to the Constitutional Court, the obligation of institutional protection is to be regarded as a state function pertaining to the public order of Hungary, and thus shall be respected by the European Union according to Article 4 Paragraph (2) of the TEU. (Decision of the Constitutional Court 32/2021. (XII. 20.), Reasoning [43]).

[49] According to the Constitutional Court, only in this case the exercise of power complies with the conditions laid down in Article E) Paragraph (2) of the Fundamental Law. (Decision of Constitutional Court 32/2021. (XII. 20.), Reasoning [78]).

the delegated power, as well as this joint exercise of power is carried out in a way that it obviously does not ensure the requirement for the effective enforcement of EU law (Decision of the Constitutional Court 32/2021. (XII. 20), Reasoning [79]). However, the Constitutional Court also emphasised that the presumption of reserved sovereignty may only be applied exceptionally and only in the event when the lack of exercise of the relevant joint powers, or incomplete exercise thereof, obviously does not ensure the requirement of effective enforcement of EU law, and leads to the infringement of fundamental rights, or may lead to restrictions on the fulfilment of state obligations. Even in this case, Hungary will only be entitled to solely exercise a jointly exercised power as long as the European Union and its institutions create guarantees for the effective enforcement of EU law (Decision of the Constitutional Court 32/2021. (XII. 20.), Operative part Point 1). The exercise of powers is to be carried out in accordance with the EU treaties, with the aim to promote those (Decision of the Constitutional Court 32/2021. (XII. 20.), Reasoning [80]).[50] The Constitutional Court also stated that an obstacle of the enforceability of mandatory European acts may be the inefficient enforcement of powers exercised jointly with the European Union (Decision of the Constitutional Court 32/2021. (XII. 20.), Reasoning [84]). According to the Constitutional Court, in case the enforcement of the joint exercise is incomplete, Hungary may (in accordance with the presumption of reserved sovereignty) exercise its specific, non-exclusive powers as long as the institutions of the European Union do not take the necessary measures for the effective enforcement of the joint exercise of powers (Decision of the Constitutional Court 32/2021. (XII. 20.), Reasoning [85]). It should be noted that this statement only applies to Hungarian state organs, as EU organs are not bound by the decision of the Hungarian Constitutional Court, nor by the Fundamental Law of Hungary.

Finally, the Constitutional Court examined how the consequences of the possible incomplete enforcement of joint exercise of powers are related to the constitutional identity of Hungary. As already discussed, in the interpretation of the Constitutional Court, constitutional identity and sovereignty are not complementary, but interrelated concepts in several aspects. On one hand, the preservation of the constitutional identity of Hungary (as a member state of the European Union) is made possible by its sovereignty and the preservation thereof. On the other hand, constitutional identity is primarily manifested through a sovereign act. Thirdly, taking into account the historical struggles of Hungary, the effort to preserve its sovereign decision-making powers is itself a part of national identity and of its constitutional identity (through constitutional recognition). Fourthly, due to the historical conditions of the country, the main criteria of state sovereignty recognised in international law are closely connected with the constitutional identity of Hungary (Decision of the Constitutional Court 32/2021. (XII. 20.), Reasoning [99]). The Constitutional Court also noted that the issues covered by Article E) Paragraph (2) of the Fundamental Law regarding the inalienable right of disposal show a close connection with several criteria of statehood itself.[51] "The values that make up the constitutional self-identity of Hungary evolved during the historical development of the constitution. They are considered to be legal facts that could not be renounced neither by an international treaty, nor by amending the Fundamental Law, as legal facts may not be changed by means of legislation (Decision of the Constitutional Court 32/2021. (XII. 20.), Reasoning [101])."[52] In this regard, the Constitutional Court established that the protection of the inalienable right of Hungary to dispose of its territorial unity, population, form of government and state organisation is part of the constitutional self-identity (Decision of the Constitutional Court 32/2021. (XII. 20.), Operative part Point 3, Reasoning [110]).

The interpretation of Article E) Paragraph (2) of the Fundamental Law by the Constitutional Court therefore came to the conclusion that in case "the enforcement of the joint exercise is incomplete, Hungary may, in accordance with the presumption of reserved sovereignty, exercise its specific, non-exclusive powers as long as the institutions of the European Union do not take the necessary measures for the effective enforcement of the joint exercise of powers." In this decision, however, the Constitutional Court did not examine whether the incomplete enforcement of the joint exercise of powers is realised in the specific case. The Court stated that this abstract constitutional interpretation may not become a position applicable to the specific case under motion, nor it is possible to draw up a sufficiently abstract solution to the problem that could serve as a precedent in subsequent cases (Decision of the Constitutional Court 32/2021. (XII. 20.), Reasoning [21]). Consequently, the incomplete enforcement of the joint exercise of pow-

[50] According to Blutman, in the event of incomplete enforcement of EU regulations adopted under non-exclusive powers, the state becomes entitled to unilateral action. In this case, such European Union regulation may be interpreted unilaterally, its execution may be suspended, or even a differing national regulation may be adopted (Blutman, 2022, p. 5-6).

[51] The Constitutional Court stated that according to Article 1 of the convention on the rights and obligations of the member states (signed on 26 December 1933, in Montevideo), "states as subjects of international law must bear the following attributes: (a) permanent population; (b) defined territory; (c) government; and the ability to contact other states. The disposal right regarding these issues and the ability to effectively exercise such right is undoubtedly a fundamental state function. This is also reflected in Article 4 Paragraph (2) of the TEU." (Decision of the Constitutional Court 32/2021. (XII. 20.), Reasoning [100]).

[52] The achievements of the historical constitution are listed in Points [102]-[105] of the Reasoning.

ers, requiring a case-by-case interpretation, may only be investigated in specific cases. Nevertheless, this raises several problems. On one hand, the determination (by the Constitutional Court) of whether the joint exercise of powers is incompletely implemented in a specific case has consequences only for the organs of the Hungarian state, as the interpretation of the Hungarian Constitutional Court does not apply to the organs of the Union. On the other hand, the decision of the Constitutional Court binds the Hungarian state organs participating in the joint exercise of powers, as well as the organs implementing the decisions made in this context. For them, the provision of the Fundamental Law prescribes the protection of the sovereignty and constitutional self-identity of Hungary, as well as the fundamental rights and freedoms contained in the Fundamental Law, which may be infringed in case of insufficient enforcement of joint powers.

In such a case, Hungarian state organs shall take the steps that they are entitled to under EU law. This may result in a dispute between the EU bodies and the Hungarian state organs regarding the assessment of the effectiveness of the joint exercise of powers. Ultimately, the dispute may only be resolved by the Court of Justice of the European Union, given that the power in question is that of the EU. Another source of problems may be if the organs of the Hungarian state participating in the exercise of joint EU powers may exercise the joint powers, then such decisions may be made that alter from the decisions made by the EU or by other member states. This may result in the reduced effectiveness of EU decision-making and EU law, possibly causing further conflicts. The Constitutional Court also established that the enforceability of EU acts recognised as mandatory may be hindered by the inefficient enforcement of powers exercised jointly with the European Union, thus creating an opportunity to postpone the implementation of mandatory EU acts. Since the final decision in this case is also with the Court of Justice of the European Union, this solution may only gain time corresponding to the duration of the court proceedings.

7. Conclusion

According to the majority of Hungarian constitutional legal scholars, the integration of the Europe clause into the constitution was indeed necessary. Without that, the accession to the European Union and the application of EU law in Hungary would not have been constitutional. Also, there would have been a lack of normative authorisation for the delegation of powers. The interpretation of the accession clause of the Fundamental Law of Hungary points out that these stipulations prescribe and concretise the conditions and limitations of the delegation of powers between the European Union and the Hungarian state. It attempts to define the boundaries of the integration process, *i.e.* to set the "necessary extent" to which Hungarian state organs may delegate their powers, and what are the powers that may not be delegated. Despite their concretisation, these constitutional stipulations are rather abstract, hence the interpretations of the Constitutional Court are of great importance. It should be noted that political practices have a fairly great room to manoeuvre within constitutional legal boundaries. Therefore, the question of the actual transfer of powers largely depends on the current political considerations of the governing body.

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31.

ЩОДО КОНСТИТУЦІЙНОГО РЕГУЛЮВАННЯ ПОЛОЖЕННЯ ПРО ВСТУП УГОРЩИНИ ДО ЄВРОПЕЙСЬКОГО СОЮЗУ

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Анотація

Вступ Угорщини до Європейського Союзу приніс безпрецедентні виклики з точки зору конституційного права. Цікаві дискусії викликали відповідний рівень регулювання та можливий зміст європейського положення. Ця стаття має на меті висвітлити конституційно-правове підґрунтя вступу Угорщини до Європейського Союзу, а також фактичні кроки, які були необхідні для того, щоб вступ відбувся відповідно до положень тогочасної Конституції. У статті розкривається необхідність положення про приєднання, а також необхідні конституційні правки. Одним із найгостріших питань при вступі було питання делегування повноважень. Для того, щоб Угорщина взяла участь у європейській інтеграції, необхідно було надати конституційний дозвіл на часткове делегування повноважень, які тісно пов'язані з державним суверенітетом, а також на їх спільне виконання з іншими державами-членами та інституціями Європейського Союзу. У статті аналізується та догматично оцінюється Європейська стаття чинного Основного закону Угорщини. Це робиться шляхом покрокового тлумачення пункту (2) статті Е Основного закону. Через абстрактний характер конституційних положень важливість тлумачень Конституційного Суду не викликає сумнівів. Відповідні рішення Конституційного Суду також розглядаються. Стаття підтверджує необхідність інтеграції Європейського положення до конституції, щоб забезпечити відповідність вступу до Європейського Союзу та застосування права ЄС в Угорщині, таким що відповідають конституційним правовим нормам, а також мати нормативний дозвіл для делегування повноважень.

Ключові слова: приєднання, європейське положення, Європейський Союз, Угорщина, делегування повноважень.

SECTION 3

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

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DECENTRALIZATION AS THE MAIN COMPONENT OF LOCAL SELF-GOVERNMENT REFORM

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Summary

The purpose of the article is to study the reform of local self-government, the main component of which is decentralization. At the same time, the main goal of the reform of local self-government, in our opinion, is timely, effective, independent provision of its effective activity, first of all, to solve issues of local importance at one's own expense, which will further lead to the full mobilization of all internal reserves and the endowment of all territorial communities with large resources.

During the research, general scientific methods were used, in particular: historical, logical, systematic. The historical method was used when considering the objective process of development of the concept of decentralization with all its twists and turns. The logical method was used to reflect the historical process of the concept of decentralization in a theoretical and abstract form. The system method made it possible to consider decentralization in the form of an extremely complex socio-political system. It is through the systematic approach that an opportunity is created to comprehensively assess the current state of decentralization, its significant resource and intellectual potential, opportunities for the establishment and development of a democratic legal state.

The very concept of «decentralization» is defined, which is generally interpreted as the transfer of powers from state authorities to local self-government bodies.

In foreign countries, decentralization is considered as a kind of process of transferring power and corresponding financial resources from the central to lower levels of government, such as provinces, regions, districts and municipalities. The main types of decentralization are analyzed and defined: political, administrative and fiscal, as well as the main forms of decentralization: devolution, delegation and deconcentration.

Recently, in the state and society, there is a need to develop new approaches to the system analysis, composition and content of the category of «decentralization», which is traditionally defined as a kind of process in which relevant independent units are formed in a centralized state, which are the bearers of public self-governing power (Local Government). At the same time, an urgent necessary condition for the stable and sustainable development of civil society and a democratic legal state is the effective provision of an effective balance not only of national and local interests, but also the appropriate coordination and cooperation of these interests at various levels of public authority.

We believe that the continuation of the most effective reform of local self-government, the main component of which is decentralization, will contribute to strengthening the capacity of not only local executive bodies, but first of all, local self-government bodies, which by their nature are the primary institution of direct people's power.

Key words: local self-government, local self-government reform, decentralization, deconcentration, devolution, delegation, territorial community, public authority.

1. Introduction

At the current stage of reforming public power in Ukraine, the reform of local self-government, the main component of which is the decentralization of public power, is one of the most important reforms that needs to be carried out as soon as possible.

The reform of local self-government involves the creation of local self-government and the corresponding territorial organization of public power with the aim of creating and properly effective support of a full-fledged living environment for residents of the respective territorial communities, providing them with accessible and more or less high-quality public services, establishing effective institutions of direct people's power and satisfying their interests in full volume in all spheres of civil society activity in the relevant territory, coordination of the interests of the state (state bodies) and relevant territorial communities.

In addition, the importance of the study of this topic lies in the fact that the implementation of the reform of local self-government and decentralization of power, which is defined as one of the main priorities of reform in modern Ukraine, has begun in Ukraine.

Also, I would like to note that the current state of state formation requires the development of new approaches to the analysis and content of the very concept of "decentralization", despite the fact that in modern society, until now, the traditional view of decentralization is considered to be a process in which independent units are formed within the framework of the centralized state, which are the carriers of local self-government.

2. Literature Review

In modern theoretical and practical studies, the categorical concept of "decentralization" is considered in various ways, which is primarily related to the multifaceted definition of the concept itself.

As a general rule, "decentralization is the process of redistribution or dispersion of functions, powers, people or things from central to local management" (Definition of decentralization, 2013).

At the semantic level, "decentralization (from the Latin de - opposition, centralis - central) is interpreted as the destruction, weakening or cancellation of centralization"(Definition of decentralization, 2013). Thus, it is a peculiar system of distribution of both functions and powers between the state and local levels of management with the extension of the rights of the latter. "The role of decentralization of management in the processes of formation of the institution of local self-government is decisive. After all, decentralization is a kind of management system under which part of the functions of the central government are transferred to local self-government bodies".

In 2014, the Cabinet of Ministers of Ukraine approved the Concept of reforming local self-government and territorial organization of power in Ukraine, which was caused by important political processes that took place and are taking place in modern Ukraine on the way to European integration and bringing Ukraine closer to the European community. The concept provides for decentralization, the creation of appropriate material (property, in particular, land owned by territorial communities), financial (taxes and fees related to the territory of the relevant administrative-territorial unit) and organizational conditions to ensure the fulfillment by local self-government bodies of their own and delegated powers. In addition, it provides for the implementation of structural reforms that will make it possible to achieve a sustainable economic effect, provided that the priorities and stages of the specified reforms are harmonized with the reform of local self-government and territorial organization of power.

As for decentralization, these issues were also classically studied in the writings of J. Wedel, who saw decentralization primarily "in the transfer of power not to civil servants and bodies representing the central government, but to other bodies that are not hierarchically subordinated to the latter, mainly those elected by the population" (Wedel J., 1973). Despite this, it should be noted that in foreign scientific legal literature, the endowment of local self-government bodies with separate state powers is often considered not as a method of decentralization, but rather as a method of deconcentration (Baltsii Y., 2007).

In the countries of Latin America, as well as in the countries of Europe, if the principles of centralization and decentralization regulate the relationship between the center and places, then both the principle of deconcentration and the principle of concentration are used to distribute competence between different bodies of the same level of public administration. At the same time, the very powers of public authorities are concentrated in the hands of one authority, when it exercises all the powers granted to a given corresponding administrative-territorial unit, while the envisaged system of deconcentration provides for the distribution of functions between different public authority of exactly one link.

3. Methodology

During the research, general scientific methods were used, in particular: historical, logical, systematic. The historical method was used when considering the objective process of development of the concept of decentralization with all its twists and turns.

The logical method was used to reflect the historical process of the concept of decentralization in a theoretical and abstract form. In its essence, logical, it is also a manifestation of the historical, but freed from any details, accidents, and zigzags. At the same time, it should be noted that the historical and logical methods of researching the concept of decentralization are the same, because it is with their effective help that one and the same object, the historical stages of its emergence and development, are studied.

The system method made it possible to consider decentralization in the form of an extremely complex socio-political system, conditionally outline this complex system, determine the composition of the system from a large number of interconnected and complementary elements, identify and direct the proper functioning of this complex system. It is through the systematic approach that an opportunity is created to comprehensively assess the current state of decentralization, its significant resource and intellectual potential, opportunities for the establishment and development of a democratic legal state.

4. Case studies/experiments/demonstrations/ application functionality

Decentralization, as a general rule, is the transfer of powers from the center to local places, which allows to bring the relevant services provided by the legal democratic state into compliance with the needs and requests of the population of the corresponding administrative-territorial unit. Moreover, it can be noted that this very transition to decentralization is a kind of more or less global shift of public power, which frees a person (man) from the so-called state guardianship in advance and allows building an effective democracy from the bottom up.

In foreign countries, decentralization is considered as a kind of process of transferring power and corresponding financial resources from the central to lower levels of government, such as provinces, regions, districts and municipalities.

Also, "Decentralization will be understood as the devolution by central (i.e. national) government of specific functions, with all of the administrative, political and economic attributes that these entail, to local (i.e. municipal) governments which are independent of the center and sovereign within a legally delimited geographic and functional domain" (Faguet Jean-Paul, 1997, p. 5).

When systematically analyzing the literature on the concept of "decentralization", it is sometimes noted that "decentralization is necessary for more even economic growth and redistribution of income, while local self-government bodies must implement their own projects, and for this they need their own tax base, the ability to protect their a share in central taxes and a certain autonomy in the use of part of the collected taxes" (Perezhnyak B., Baltsii Y., 2018, p. 12).

At the current stage of state formation, the very issue of decentralization is one of the important components of modern democratic legal reforms, which in the future will contribute to the transparency of the activities of public authorities.

Proceeding from and summarizing the above, we can state that the traditionally established view of decentralization as a peculiar process by which independent more or less independent units are formed within the framework of a centralized state, which are the carriers of local self-government (management), require the development of innovative approaches to system analysis its content. At the same time, it should be noted that a necessary condition for the sustainable development of civil society and the effective functioning of the rule of law is to ensure a kind of balance of national interests and values not only with the interests of the relevant territorial communities, but also coordination and sometimes cooperation of these interests at different levels of public authority. Despite the weighty information array of the "decentralization" category, it is very important to divide it into the so-called types (types) of decentralization, since they have different specific qualitative characteristics and signs, are usually political in nature and reflect the corresponding successful achievements in the establishment of legal democratic statehood and civil society.

Today, in the global space, as a general rule, there are three so-called types (types) of decentralization: administrative, fiscal and political, as well as three main forms of decentralization: delegation, deconcentration and devolution.

The most interesting from a scientific and practical point of view is the political type of decentralization, which involves, on the one hand, the transfer of power to authorities from the central to a lower level of management, and on the other hand, the involvement of stakeholders in the joint development and implementation of the appropriate policy. In addition, it should be noted that political decentralization manifests itself through devolution.

Also, supporters of political decentralization believe "that decisions made through broad public involvement will be better and more responsive to the various interests of society, compared to those made by political authorities at the national level. This definition means that the election of political representatives from local polling stations allows citizens to know their political figures better, and in turn, political figures to respond in time to the needs and wishes of their voters" (Slater Richard, 1989).

Hence, it can be noted that political decentralization very often requires appropriate reforms, both constitutional and defined by law, development of political pluralism, strengthening of existing legislation, creation of separate local political units and support of local initiatives and interests of various public groups and strata of the population.

In contrast to political decentralization, fiscal decentralization involves the appropriate delegation (transfer) of certain financial powers and relevant resources and the proper formation of the revenue part of the relevant budget. In addition, it transfers to local public authorities and private enterprises the financial authority to collect local taxes and fees, as well as the right to determine the expenditures of local budgets for

the purpose of their performance of decentralized functions. Fiscal decentralization plays an important role in the formation of the local budget.

As for administrative decentralization, unlike the aforementioned, it is aimed at the appropriate delegation of authority regarding the process of development, adoption and implementation of decisions, powers and relevant resources for the provision of state (administrative) services in specified areas from the central to lower levels of public authority.

Administrative decentralization refers to "the redistribution of power, financial resources and responsibility for the implementation of planning, financing and management of specified state functions from the central government and its bodies to the relevant branch units of local authorities, subordinate units at all levels of state administration, semi-autonomous state authorities, or regional authorities, or associations (joint-stock companies), as well as regional or functional authorities within the defined territory" (Smetanin R., 2010).

In addition, there are two ways of implementing the administrative decentralization itself: through the form of delegation and the form of deconcentration.

The weakest form of decentralization is deconcentration, which is most often used in countries with a unitary form of government. Deconcentration includes the redistribution of authority in relation to the process of making relevant decisions, management authority, financial authority, as well as responsibility between different levels of central executive authorities. It follows from this that territorial or sectoral management bodies are subordinated only to central bodies of public authority.

In contrast to deconcentration, delegation is more or less considered a complete model of decentralization, as it involves the transfer of a large array of state powers to the exclusive competence of local self-government bodies.

Thus, local self-government bodies receive a certain set of rights in some areas in accordance with the current legislation, act independently and have their own sources of funding for this. At the same time, the very process of decision-making and their implementation fully belongs to the competence of local self-government bodies. In the event of certain conflicts between them and the central authorities, they can be resolved either by agreement of the parties or in court.

It is believed that delegation, which is in the middle between the transfer of powers and the power of decentralization, is actually a compromise model of decentralization. In this case, according to the current legislation, local self-government bodies are entrusted with the performance of certain state functions, while central government bodies carry out certain control over the performance of tasks and, as a rule, must allocate funds from the state budget for the performance of these tasks and transfer them to the relevant bodies Local Government.

Also, I would like to note that one of the most important issues of modern decentralization is the question of the appropriate and under which powers decentralization can be carried out. Based on the fact that the main criterion of rational decentralization is the achievement of the highest quality of service to citizens (the population), where the main principle is the principle of subsidiarity, which determines the lowest optimal limit of government intervention in any local affairs.

As a general rule, "the principle of subsidiarity (English subsidiary - auxiliary, complementary) is a general principle that involves the transfer of decision-making powers from the central to lower organizational levels" (Tkachuk A., 2016).

At the same time, the very principle of subsidiarity permeates (instilled) the entire political system of the countries of the European Union, primarily because it is enshrined in Part 3 of Art. 4 of the European Charter of Local Self-Government: "Municipal functions, as a rule, are performed mainly by those authorities that have the closest contact with the citizen. When assigning this or that function to another body, it is necessary to take into account the scope and nature of the task, as well as the requirements for achieving efficiency and economy." The same article contains another very important principle that explains approaches to the decentralization of power: "If powers are delegated to local self-government bodies by a central or regional body, local self-government bodies have the right to adapt their activities to local conditions to the extent possible." Despite the fact that Ukraine has ratified this Charter, the very principle of subsidiarity has unfortunately not been reflected in the current profile Law of Ukraine "On Local Self-Government in Ukraine".

Thus, we believe that the decentralization of powers in Ukraine should take place taking into account the principle of subsidiarity, that is, by transferring powers to the level of management that is as close as possible to the citizen, which is able to fulfill these powers more effectively than other public authorities.

In contrast to the above-mentioned forms of decentralization, devolution as a form of decentralization is considered the most complete form of decentralization and can generally take different forms, but at its core (foundation) lies the idea of increasing powers in favor of local self-government bodies.

At the same time, the main goal of devolution is to strengthen the competence of local self-government bodies precisely for the benefit of the residents of the respective territorial communities, which in general will effectively contribute to the process of democratization of the entire civil society. It should be noted that devolution as a form of decentralization is certainly a winning model for local autonomies (entities) and implies the presence of not only capable but also responsible local self-government.

I would like to note that central authorities, no matter how much we would like it today, still retain power and the corresponding influence during the conclusion of relevant contracts, agreements, agreements, despite the fact that the above classified types (types) of decentralization provide delegation of authority and responsibility to lower levels of public authorities to varying degrees.

5. Conclusions

Summarizing the above, we can state that decentralization is one of the important components of modern democratic reforms carried out in democratic countries of the world and in Ukraine, which effectively promotes transparency in the activities of any public authority.

Recently, in the state and society, there is a need to develop new approaches to the system analysis, composition and content of the category of "decentralization", which is traditionally defined as a kind of process in which relevant independent units are formed in a centralized state, which are the bearers of public self-governing power (Local Government). At the same time, an urgent necessary condition for the stable and sustainable development of civil society and a democratic legal state is the effective provision of an effective balance not only of national and local interests, but also the appropriate coordination and cooperation of these interests at various levels of public authority.

We believe that the continuation of the most effective reform of local self-government, the main component of which is decentralization, will contribute to strengthening the capacity of not only local executive bodies, but first of all, local self-government bodies, which by their nature are the primary institution of direct people's power.

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ДЕЦЕНТРАЛІЗАЦІЯ, ЯК ГОЛОВНИЙ КОМПОНЕНТ РЕФОРМИ МІСЦЕВОГО САМОВРЯДУВАННЯ

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Анотація

Метою статті є дослідження реформи місцевого самоврядування, головним компонентом якої є – децентралізація. При цьому, головною метою реформи місцевого самоврядування на наш погляд є своєчасне, дієве, самостійне забезпечення його ефективної діяльності, перш за все, за власний рахунок вирішувати питання місцевого значення, що в подальшому призведе до повної мобілізації всіх внутрішніх резервів та наділення всіх територіальних громад великими ресурсам.

Під час дослідження були використані загальнонаукові методи, зокрема: історичний, логічний, системний. Історичний метод був використаний при розгляді об'єктивного процесу розвитку поняття децентралізації з усіма її поворотами, особливостями. Логічний метод був використаний при відображення історичного процесу поняття децентралізації в теоретичній і абстрактній формі. Системний метод дозволив розглянути децентралізацію у вигляді надзвичайно складної соціально-політичної системи. Саме через системний підхід створюється можливість всебічно оцінити сучасний стан децентралізації, її вагомий ресурсний та інтелектуальний потенціал, можливості для становлення та розвитку демократичної правової держави.

Визначено саме поняття «децентралізація», яке за загальним правилом інтерпретується як передача повноважень від органів державної влади до органів місцевого самоврядування.

В зарубіжних країнах, децентралізація розглядається як своєрідний процес передачі владних повноважень і відповідних фінансових ресурсів з центрального до нижчих рівнів державного управління, таких як провінції, регіони, райони та муніципалітети.

Проаналізовано та визначено основні типи децентралізації: політична, адміністративна і фіскальна, а також основні форми децентралізації: деволюція, делегування і деконцентрація.

Останнім часом, в державі та суспільстві, потребує вироблення нових підходів до системного аналізу, складу та змісту категорії «децентралізації», яка традиційно визначається, як своєрідний процес, в рамках якого в централізованої держави утворюються відповідні самостійні одиниці, які є носіями публічно-самоврядної влади (місцевого самоврядування). При цьому, нагальною необхідною умовою стабільного та сталого розвитку громадянського суспільства та демократичної правової держави є ефективне забезпечення дієвого балансу не тільки загальнодержавних та місцевих інтересів, а й відповідна координація та кооперація цих інтересів на різних рівнях публічної влади.

Вважаємо, що продовження найбільш ефективної реформи місцевого самоврядування, головним компонентом якої є – децентралізація, буде сприятиме посиленню спроможності не тільки місцевих виконавчих органів, а передусім, органів місцевого самоврядування, які по своїй природі є первинним інститутом безпосереднього народовладдя.

Ключові слова: місцеве самоврядування, реформа місцевого самоврядування, децентралізація, деконцентрація, деволюція, делегування, територіальна громада, публічна влада.

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JUDICIAL REFORM IN UKRAINE AS AN IMPORTANT STEP ON THE WAY TO THE STATE'S MEMBERSHIP IN THE EUROPEAN UNION

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Summary

The purpose of the article is to analyze the current state of the judicial reform in Ukraine, to elicit problematic aspects in this area, and to identify trends in the further development of judicial reform.

The methodological basis of the research article is a set of cognition methods, the application of which allowed to reveal the essence of the proposed problem.

Since gaining independence, Ukraine has chosen to pursue European integration. Since then, the process of adapting national legislation to that of the European Union has begun. Therewith, the Visa Liberalization Action Plan should be recognized as one of the most effective incentives in terms of judicial reform. However, despite the numerous achievements in the field of judicial reform, the judicial reform in our country is still incomplete, which is a significant obstacle to Ukraine's full membership in the European Union, in view of the violation of the Convention's right to a fair trial. The level of access provided by national legislation must be sufficient to ensure the right to a trial in view of the rule of law in a democratic society. In order for access to be effective, a person must have a clear, practical opportunity to challenge actions that interfere with his or her rights. Effective access to justice for any individual and the proper administration of that justice indicate the success of judicial reform and the restoration of its confidence in national courts. The supremacy of law will not be possible without proper access to justice. Therefore, the judicial reform needs to be further implemented.

To continue the judicial reform is one of the steps Ukraine must take to become a full member of the European Union. Priority areas for further reform of the judiciary should include strengthening the supremacy of law; combating corruption; eliminating shortcomings of the information and telecommunication system of electronic justice; raising the level of professional competence of judges by creating a professional development system that will include training, advanced training and exchange of experience with colleagues from other countries; introducing initiatives for such vulnerable groups of court users as victims and witnesses of war crimes, combatants and members of their families.

Key words: visa liberalization; right to a trial; judicial reform; European integration; Ukraine's membership in the European Union.

1. Introduction

On June 23, 2022, EU member states voted to grant Ukraine candidate status (Grant EU candidate status to Ukraine and Moldova without delay, MEPs demand, 2022). However, granting our country candidate status is just another step on the road to full membership. After all, we still need to complete a number of reforms and adapt our national legislation to European criteria. The EU has clearly outlined seven tasks that must be completed before accession negotiations begin (Michael Emerson et al., EU Accession Prospects of Ukraine, Moldova and Georgia, Center for European Policy Studies, March 2023, 5-16). In particular, the continuation of judicial reform in Ukraine is among a number of requirements to be fulfilled on the path to European integration.

It is well known that the development of a law-based society and state is impossible without independent and impartial justice, which is a guarantee of respect for rights and freedoms, and legitimate interests (Bandurka, Teremetskyi, Boiko, Zubov, & Patlachuk, 2023). In turn, the concept of

access to justice imposes on the state the obligation to guarantee the right of every person to appeal to the court, to obtain legal protection if the person's rights have been violated (Drozdov, 2021).

Given the above, our state should continue implementing reforms in this area. This, in turn, necessitates a systematic analysis and evaluation of the changes already made in order to determine the trends in the further development of judicial reform.

The purpose of the article is to analyze of judicial reform in Ukraine, identify problematic aspects in this area, and determine the trends of further development of judicial reform. The use of appropriate methods of scientific cognition ensures the achievement of the research objective and its main tasks. Applying the dialectical method made it possible to identify the problems reforming the judicial system of Ukraine in their dynamics. The main trends in the development of the judicial reform were determined using the complex application of methods of analysis and synthesis.

The problem of judicial reform in Ukraine has been repeatedly studied in the works of Ukrainian scholars, including the following: V. Berch (Berch, 2022), A. Zavydniak (Zavydniak, 2022), O. Zubrytskyi (Zubrytskyi, 2023), I. Korzh (Korzh, 2023), A. Remezok (Remezok, 2023), and others. However, the existing works are fragmentary.

2. Ensuring the Right to a Trial as a Guarantee of European Integration

The right to a trial is fundamental in a country governed by the rule of law and democracy. Its realization is a guaranteed opportunity for everyone to go to Court to protect their rights and interests. It is the effective access to justice for any person and the proper administration of justice that is an indicator of the success of the judicial reform. It will be impossible to ensure the rule of law without proper access to justice.

It is about the opportunity guaranteed by law for a person to exercise their rights (Drozdov, 2021). Thus, in Bellet v. France, the court stated: «Article 6 § 1 of the Convention contains guarantees of a fair trial, one of the aspects of which is access to a court. The level of access provided by national law must be sufficient to ensure a person's right to a trial in view of the rule of law in a democratic society. In order for access to be effective, an individual must have a clear and practical opportunity to challenge the actions that constitute an interference with his or her rights» (Bellet v. France, 1995).

However, there are currently certain problems in the area of access to justice in Ukraine, as evidenced by the relevant case law of the European Court of Human Rights (hereinafter – ECHR, the Court). That the right to judicial protection includes: 1) the right to a trial; 2) fairness of the trial; 3) publicity of the trial and announcement of the decision; 4) reasonable time for the trial; 5) trial by a court established by law; 6) independence and impartiality of the court. Thus, in the case of Strannikov v. Ukraine (Strannikov v. Ukraine, 2005), the Court concluded that the duration of the contested process was excessive and did not meet the requirement of «reasonable time for the trial». In another case, the Court found a violation of the applicant's right of access to court, noting that it is impossible to assume that Article 6 § 1 of the Convention describes in detail the procedural guarantees of a fair, public, and speedy hearing, and at the same time does not guarantee the parties that the dispute concerning their rights and obligations of a civil nature will be finally resolved» (Balatsky v. Ukraine, 2007).

In the context of European integration aspirations, compliance with certain criteria of the right to access to justice (the right to a fair trial) by our state must be ensured at the level of legislative, executive, and judicial authorities.

3. Ukraine's Achievements in Judicial Reform

For many years, our country has been steadily, albeit slowly and with some difficulties, moving towards the adaptation of Ukrainian justice to international standards. An analysis of the current legislative framework of Ukraine shows that the process of adapting national legislation to EU law began as early as the declaration of Ukraine's independence in 1991. Subsequently, in 1995, our country became a member of the Council of Europe and committed itself to constitutional and judicial reform. However, the most significant changes in Ukrainian legislation were made in the context of implementing the Visa Liberalization Action Plan (Visa Liberalization Action Plan, 2010).

Thus, in 2010, the introduction of an automated court document management system in courts of general jurisdiction began (On the Judiciary and the Status of Judges, 2010). In 2016, a new stage of judicial reform began with amendments to the Constitution of Ukraine (Constitution of Ukraine, 1996) in the part of justice (Law of Ukraine «On Amendments to the Constitution of Ukraine (regarding Justice)», 2016) and the adoption of a qualitatively new Law of Ukraine «On the Judicial System and Status of Judges» in the same year (Law of Ukraine «On the Judicial System and Status of Judges», 2016). The purpose of the amendments was to ensure the independence of judges and courts in accordance with international and European standards. At the same time, some aspects of the construction of judicial systems and the work of judges, as well as the experience of judicial reforms in European

countries, were implemented in Ukrainian legislation (Korzh, 2023, p. 164).

In 2018, the EU Pravo-Justice Project launched an initiative to establish court-based Support Services for Vulnerable Users of Court Services, which aimed to provide comprehensive services to vulnerable categories of users of the judicial system. It is worth noting that a number of courts in Ukraine have already implemented the relevant innovations. For example, the Ternopil District Court in the Ternopil region was one of the first to launch a volunteer service. Since then, the volunteers of the court have been helping to find courtrooms, providing practical information, explaining rights and obligations, providing emotional support, and monitoring all social projects in which the court may be involved in order to establish interagency cooperation in implementing services for victims, informing about the work of the court, the possibility of receiving legal aid from the state, being responsible for referring citizens to free legal assistance, promoting the use of electronic services for remote court proceedings, etc.

Ukraine is successfully fulfilling the requirements for the start of EU accession negotiations in terms of appointing new members of the High Council of Justice and the High Qualification Commission of Judges (hereinafter – HQCJ) of Ukraine, changes in the selection procedure for the Constitutional Court of Ukraine, etc. In particular, in July 2021, the Verkhovna Rada of Ukraine amended the Law «On the High Council of Justice» to create a new independent body, the Ethics Council, which is to assess the integrity of all candidates to the High Council of Justice (HCJ). The adoption of legislation in December 2022 regulating the procedure for selecting candidates for the position of a judge of the Constitutional Court of Ukraine (hereinafter referred to as the CCU) on a competitive basis should also be considered obvious progress in implementing modern judicial reform. The document contains a number of progressive provisions (Ukraine on the way to the EU: Realities and Prospects, 2022, p. 47). As scholars rightly point out, Ukraine's successful fulfillment of the formal requirements of an EU candidate is an external indicator of positive judicial reform processes (Bandurka, Teremetskyi, Boiko, Zubov, & Patlachuk, 2023).

And the above changes are not exhaustive. In addition, it is worth noting that in June 2023, the Committee on Legal Policy considered the draft Law on Amendments to the Code of Administrative Procedure of Ukraine, the Civil Procedure Code of Ukraine, the Commercial Procedure Code of Ukraine, and other legislative acts on the implementation of legal proceedings during martial law or a state of emergency and the settlement of disputes with the participation of a judge (Draft Law No. 8358, 2023). The legislative draft proposes: to provide for the possibility of granting the powers of the secretary to other court staff and the possibility of remote work of the secretary; to establish that the court shall summon or notify the parties to the trial of the date, time and place of the court hearing in the case by any possible means, to all known means of communication, as well as through announcements on the official web portal of the judiciary of Ukraine; to provide that preparatory proceedings and/or court hearings should be conducted within a reasonable time, taking into account the ability of the parties to the case to participate in the proceedings; to expand the scope of written proceedings in courts of all jurisdictions; to extend the peculiarities of court proceedings that were applied in connection with the introduction of quarantine to prevent the spread of coronavirus disease (COVID-19) to the period of the martial law or the state of emergency; to provide for the possibility of remote access to the automated court document management system using a judge's own qualified electronic signature.

In settlements where court buildings have been destroyed or where military operations are still ongoing, justice cannot be administered. This problem was partially solved by changing the territorial jurisdiction. The Unified Register of Court Decisions is functioning properly, thanks to which court case files are stored electronically. «Backups» of such materials have also (Berch, 2022, p. 55).

In its turn, the Council of Judges of Ukraine, in order to regulate the operation of courts under martial law, developed recommendations on the work of courts, stipulating that the specifics of court operation should be determined taking into account the current situation in the region, and each court should have a responsible person who should ensure up-to-date accounting of staff and judges, taking into account the specific form of court operation (remote, etc.), etc. (To all courts of Ukraine. Recommendations of the Council of Judges of Ukraine).

4. Prospects for Further Judicial Reform in Ukraine

Of June 2022 recommending that Ukraine be granted candidate status, the European Commission noted, among other things, the following main shortcomings: weak rule of law and widespread corruption, which hinder investment and growth; incomplete implementation of EU legislation (Opinion on Ukraine's Application for Membership of the European Union, European Commission, 5-19). Therefore, it is quite obvious that further reform of the judiciary in Ukraine should take into account these shortcomings.

In particular, a powerful component of judicial reform is the fight against corruption and, thus, the

development of an independent judiciary. Judicial and anti-corruption reforms are separate institutional processes that go hand in hand. The need to develop and implement effective mechanisms to overcome corruption in the justice system is long overdue. This includes: improvement of the rules for selection and access to the judicial profession; strengthening public oversight of judges through the newly established Public Integrity Council, etc. (Bandurka, Teremetskyi, Boiko, Zubov, & Patlachuk, 2023, p. 63). At the same time, anti-corruption measures should be implemented in symbiosis with other transformational steps (Reznik, Bondarenko, Utkina, Klypa, & Bobrishova, 2023, p. 2).

At the same time, it should be noted that although the importance of fighting corruption to ensure an independent and objective judiciary is undoubtedly enormous, anti-corruption measures should be implemented in symbiosis with other transformational steps. After all, fighting corruption in the courts is only one aspect of judicial reform. It is a separate, though important, step. While anti-corruption reform touches on many aspects and has many forms and manifestations, the reform of the judicial system is aimed at transforming judicial institutions. These transformations concern the process of selection and appointment of judges, distribution of court cases, material support of courts and court staff, the procedure for making and appealing decisions, bringing judges to disciplinary responsibility, judicial self-government, etc. (Reznik, Bondarenko, Utkina, Klypa, Bobrishova, 2023, p. 2).

An equally pressing problem is the insufficient level of digitalization in the administration of justice. Ukrainian courts actively use electronic case management documents and the possibility of participating in court hearings via video conferencing. However, it is known that the Unified Judicial Information and Telecommunication System (hereinafter - UJITS), which, according to the provisions of the Procedural Code of Ukraine of 2017, was supposed to digitize all processes, from filing a lawsuit to the execution of a court decision, is still not working properly (Bandurka, Teremetskyi, Boiko, Zubov, & Patlachuk, 2023, p. 65). Successful e-court proceedings are possible provided that: the legislation regulating the functioning of the judicial system and the judicial process is improved; technical and information support of courts; development of measures to ensure information security; training seminars for court staff and other users of the system; systematic monitoring of the system's performance and its continuous modernization, and a broad awareness campaign on e-courts (Remezok, p. 199).

In addition, global practices of using artificial intelligence in judicial proceedings deserve attention. This will help to ease the burden on the judicial system and judges. (Krupchan, Oleksandr; Salmanova, Olena; Makarenko, Nataliia; Paskar, Aurika; Yatskovyna, Vitalii, 2023, p. 104).

It should also be borne in mind that during the legal regime of martial law and the state of emergency, which often lead to the lack of minimum acceptable conditions for the usual and safe work of a large number of judges, the remote form of justice is the most justified and acceptable, since material and technical obstacles cannot prevent the state from performing its exclusive activities in the field of justice (Smokovych, 2022, pp. 33-34).

At the same time, the reform should be aimed at ensuring a high level of professional competence of judges. To this end, the proposal in the literature to create a professional development system that will include training, advanced training, and exchange of experience with colleagues from other countries, which will allow judges to improve their professional competence, is worthy of attention (Zubrytskyi, p. 44).

It is worth agreeing with the Council of Europe's European Commission on the Efficiency of Justice that judicial systems should prioritize cases involving vulnerable groups of persons. Vulnerabilities resulting from the crisis must also be taken into account (CEPEJ Declaration, June 10, 2020). The problem of ensuring access to court for vulnerable groups of court service users is even more urgent. The ongoing war in Ukraine is increasing the number of victims and witnesses of war crimes, combatants, and their families every day. All of them need special attention, information assistance, advice, and support to reduce psychological stress while in court. Therefore, one of the priorities of further judicial reform should be to introduce initiatives for the relevant vulnerable groups of court users.

5. Conclusions

Despite Ukraine's significant achievements in reforming the judiciary, judicial reform in our country is still incomplete. A number of issues remain unresolved, which impedes the proper implementation of the Convention's right of access to court and, consequently, the establishment of the rule of law. As a result, the European integration aspirations of Ukrainians remain under threat. Continuing judicial reform is one of the steps that Ukraine must take to become a full member of the European Union. This is due to the need to ensure irreversibility of establishing fair and impartial judicial proceedings. In particular, the priority areas for further reform of the judiciary should include, first of all, a set of measures aimed at: strengthening the rule of law; combating corruption; eliminating the shortcomings of the information and telecommunication system of electronic justice; raising the level of professional

competence of judges by creating a professional development system that will include training; introducing initiatives for such vulnerable groups of court users as victims and witnesses of war crimes, combatants and their families; promoting and improving remote proceedings; implementing the best international practices of using artificial intelligence to reduce the workload of courts and judges, etc.

Finally, it should be noted that the issue of judicial reform in Ukraine requires further research. In particular, in the direction of finding ways to improve the judicial system based on the example of foreign experience.

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СУДОВА РЕФОРМА В УКРАЇНІ ЯК ВАЖЛИВИЙ КРОК НА ШЛЯХУ ДО НАБУТТЯ ДЕРЖАВОЮ ЧЛЕНСТВА В ЄВРОПЕЙСЬКОМУ СОЮЗІ

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Анотація

Метою статті є аналіз поточного стану судової реформи в Україні, виявлення проблемних аспектів у цій сфері та визначення тенденцій подальшого розвитку судової реформи.

Методологічною основою наукової статті є комплекс методів пізнання, застосування яких дозволило розкрити сутність запропонованої проблеми.

З набуттям незалежності Україна обрала курс на європейську інтеграцію. Відтоді розпочався процес адаптації національного законодавства до законодавства Європейського Союзу. Разом з тим, одним із найефективніших стимулів в аспекті судової реформи варто визнати План дій з лібералізації візового режиму. Проте, попри числення досягнення у сфері реформування судової влади, судова реформа у нашій державі все ще залишається незавершеною, що є значною перешкодою на шляху до набуття повноправного членства України у Європейському Союзі, зважаючи на обумовлення порушення конвенційного права на справедливий суд. Рівень доступу, наданий національним законодавством, має бути достатнім для забезпечення права особи на суд з огляду на принцип верховенства права в демократичному суспільстві. Для того, щоб доступ був ефективним, особа повинна мати чітку практичну можливість оскаржити дії, які становлять втручання у її права. Ефективний доступ будь-якої особи до правосуддя та належне здійснення цього правосуддя є показником успішності судової реформи та відновлення його довіри до національних судів. Без належного забезпечення доступу до правосуддя неможливим буде і забезпечення верховенства права. Тому судова реформа потребує подальшого впровадження.

Продовження судової реформи є одним із кроків, які Україна повинна виконати задля набуття повноправного членства Європейського Союзу. До пріоритетних напрямків подальшого реформування судової влади варто віднести, зокрема: посилення верховенства права; протидію корупції; усунення недоліків інформаційно-телекомунікаційної системи електронного судочинства; підвищення рівня професійної компетентності суддів, шляхом створення системи професійного розвитку, яка буде включати навчання, підвищення кваліфікації та обмін досвідом з колегами з інших країн; запровадження ініціатив для таких вразливих груп користувачів суду як жертви та свідки воєнних злочинів, учасники бойових дій та члени їх сімей; популяризації та удосконалення дистанційного судочинства; реалізації найкращих світових практик використання штучного інтелекту, з метою зменшення навантаження на судову систему та суддів.

Ключові слова: лібералізація візового режиму, право на суд, судова реформа, європейська інтеграція, членство України в Європейському Союзі.

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THE CONCEPT AND MAIN PATTERNS OF COMPULSORY VOTING

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Summary

Elections are one of the main institutions of good governance. The correct and relevant functioning of the mentioned institution determines the quality of democracy, the legal self-awareness of society and the index of political-economic development of the country.

The democratic nature of the elections is indicated by the existence of specific principles, which are stipulated by the electoral law, in particular, universal suffrage, equality, free elections, and secret ballots. The relevant interpretation of each principle determines the effectiveness of the institution.

The presented paper focuses on the institution of compulsory voting, which is directly related to the expression of free will. The aim of the paper is to review the institution of compulsory voting, to study its impact on electoral integrity and the overall legitimacy of the political system.

According to literature review, the pros and cons of compulsory voting are highly debated. The reason is that there are a lot of supporters and opponents of a given institution with quite strong arguments supporting or opposing the institution.

Based on the goals of the paper, it provides a description of the concept of compulsory voting and the reasons for establishing the mentioned institution. The paper reviews the types of obligation and their characteristics, explains the different systems of sanctions imposed on the persons avoiding their voting obligations, and the exemption rules based on the legislation of various countries.

Based on literature review and collected data analysis, authors highlight the main patterns of compulsory voting, its relationship with legitimacy and efficiency of elected body. The final part of the paper outlines and evaluates the arguments for and against compulsory electoral participation and presents main findings according to comparative analysis of different cases.

Based on the analysis it's obvious that the institution of compulsory voting cannot be considered with the same results in different societies or states with different social-economic conditions.

Key words: compulsory voting; elections; sanctions; pull and push factors, electoral turnout; legitimacy of elections

1. Introduction

One of the most important principles of democratic elections is the principle of free election, which implies the free exercise of the will of each voter. According to this principle, the voter can make a choice according to his/her will without any pressure. The formation of an individual's own opinion regarding the elections should be ensured by the state, in particular, lists of candidates and their programs should be available/accessible.

According to the Venice Commission: "the voting procedure should be simple", and in order to achieve this goal, it is necessary to form an electoral administration based on the principle of proportionality from representatives of different political forces; Counting of votes should be done directly in the polling station and should be transparent (Demetrashvili, Kobakhidze, 2011, pp. 149-150).

Discussing the principle of free elections, it is necessary to mention the compulsory voting system, regarding which opinions are divided. Both sides have strong arguments to support their positions.

Democracy means the rule of the people, but what happens if the people do not have the will to rule and participate in elections? At the end of the XIX century, 70-80% of voters in the United States of America participated in presidential elections; by the XX century, this ratio had dropped to 50-60%. In more detail, Lyndon Johnson was elected by 38% of the voters in the 1964 elections, Reagan by a third of the voters in 1984, and Bill Clinton by a quarter of the voters in 1996. Canada's statistics are similar to those of the United States, while Switzerland's figures are lower (Brennan, Hill, 2014, p. 3).

The question of compulsory voting has recently sparked increased interest in both political and scholarly circles. Most democracies are concerned about increasing voting turnout. Electronic elections, mail and online voting, and encreased compaigns – all of the, have been proposed to raise voter turnout, but evidence suggests that none of them are as effective as compulsory voting. The legitimacy of compulsory voting is frequently contested by supporters and opponents.

The presented paper analyzes the arguments of both sides, discusses the characteritics in the formation and development of the concept of compulsory voting, the practice, and the results in different states. Based on literature review and collected data analysis, the final finding related to the legitimacy of compulsory voting and its compliance with constitutional rights are outlined.

2. The Concept of Compulsory Voting

In the constitutions adopted after the World War II, compulsory voting is found very often. The constitutions of some countries stipulate mentioned institution for participation in elections (Melkadze, 2012, p. 53). However, compulsory voting was used before World War II in countries, like Belgium (from 1892), Argentina (from 1914), Australia (from 1924). There are some stated that used the institution, but then abolished it, like Austria, Netherlands, Venezuela.

Compulsory voting can be defined very simply as the legal obligation to attend the polls at election time and perform whatever duties are required there of electors. The terms "obligatory voting" and "mandatory voting" do make their appearances in the English-language literature, yet the most used term to designate this practice is "compulsory voting". (Birch, 2009, p. 13). According to Sara Birch, a more appropriate term might be "the legal obligation to participate in elections", but in the present study we will mostly use "compulsory voting" as recognized term.

Electoral behavioralists determine two types of factors, that are motivating voters to participate in elections, in particular:

- Pull factors – desire to influence electoral outcome, expressive aims, identification with political contestants, perceptions of civic duty [Norris, 2004; Blais, 2000].
- Push factors – Legal obligation to vote with the threat of sanctions, social and political influence (Bruner, 1990, pp. 24-25).

There are two types of obligation to vote: informal (social, political) and formal (legal). It's important to mention that legal and informal socio-political forces interact in complex ways, which means that social and political norms can be congruent with legal obligation (Birch, 2009, p. 17).

The example of a formal obligation to vote combined with effective sanctions can be Australia, where the sanctions are very small, but effectively imposed. In contrast, in Latin American Countries, despite the legal obligation, sanctions either do not exist or do not apply. There are also cases where formal obligation is absent, but socio-political pressure is high, for instance former Soviet Union and modern North Korea. The other case is informal voting combined with no sanctions – this model is used in more developed democracies (Birch, 2009, pp. 18-19).

3. Sanctions for non-participation and their regulation

Compulsory voting is linked to a complicated set of rules controlling election administration, and these rules shape one another. States with compulsory voting are obliged to make voting as simple as possible for citizens, as this reduces the costs of enforcement and increases the institution's popular acceptability and validity. However, when voting is made as easy as possible, there will still be those who refuse to participate in elections. For this reason, states with compulsory voting impose some sanctions, that differ from one country to another, in particular demand for an explanation, Reprimand, name-and-shame systems, fines,

use-it-lose-it system, prohibition of public employment for non-voters, loss of services, imprisonment (Birch, 2009, pp. 19-20).

In Belgium, the electoral right granted by the constitution is at the same time an obligation, the non-fulfillment of which leads to a monetary penalty (Constitution of Belgium, article 62). After the election, the judiciary has a duty to contact all non-declared citizens and ***demand a written explanation***. In the case of an unfair reason, the fine ranges from 25-50 euros for the first time, and 50-125 euros for repeated violations. A voter who has not participated in elections four times in 15 years is ***restricted from participating in elections and public service for the next 10 years*** (Pilet, 2007, p. 2). These sanctions are not often used, as compulsory voting in Belgium is more of a moral obligation than a legal one. That is why a large number of voters always go to the elections. According to statistical data from 1981 to 2003 elections, the number of citizens who came to the elections was never less than 90.6% (Pilet, 2007, p. 3).

According to Article 67 of the Turkish Constitution, participation in elections is a right, although voting is mandatory. A fine is provided for non-fulfilment of this obligation (Constitution of Republic of Turkiye, 1982, article 67). However, this sanction is not used in practice.

In Singapore, the right to vote is also an obligation. As in other countries, in the absence of good cause, a person is fined $50 and removed from the electoral roll for the next election. He will be re-registered after paying the fine based on his own application.

In Australia in case of non-fulfillment of the obligation, the voter is obliged to submit an explanation indicating the legitimate reason for the absence, in order not to be sanctioned (Commonwealth Electoral Act 1918, Section 245).

As in all regulations some exemptions exist from the general rule, that is divided in two categories: Exclusions from the right to participate and exclusions from the legal obligation to participate.

Exclusions from the right to participate are mostly related to the principle of universal suffrage, according to which the franchise is granted to all members of community, with notion of minimum competence. The determinants that are used for defining minimum competence are age, mental incompetence, citizenship, residence, military service, imprisonment. In previous centuries, this list was longer, and it included property ownership, male gender, literacy.

In countries with institutions of obligation to vote, there are a number of categories of persons, who commonly have the right to vote but not an obligation to participate. In some cases, people are formally exempted from the mentioned duty, while in other cases sanctions are not applied for non-participation [Birch, 2009, 30]. The main exemptions are as follows:

- In many states, when compulsory voting was first introduced, women had not right to vote. In Ecuador voting was obligatory for men from 1929, but for women from 1967 (Nohlen and Pachano, 2005, p. 374); In Guatemala – for men from 1894, for women from 1981 (Somoza, 2005, p. 402). In modern world in countries with compulsory voting system, Egypt is the only country where participation remains mandatory for men only (Birch, 2009, 30).
- Several Latino American Countries, including Argentina, Brazil, Peru, make electoral participation voluntary for the persons over 70 years of age, in addition Brazil does not impose sanctions to non-voters aged 16-17.
- People in Argentina who are more than 500 kilometers from their place of registration on election day for a reasonable reason are exempt from voting. The same is in Chile for individuals who live more than 200 kilometers from their place of registration, and in Cyprus for those who live 50 miles or more from their polling location.
- Different rules apply to citizens living abroad. States that allow foreign residents to vote do not necessarily make it mandatory. Belgian Citizens residing abroad have had the right to vote since 1999, although they are not required to do so. If they want to register, they are subject to the same criteria as ordinary Belgians, although they have the option of not registering (Birch, 2009, pp. 31-32).
- Several countries, including Australia, Belgium, Chile, and Luxembourg, give sanctions relief retroactively if sufficient grounds are presented to a judge or court (Birch, 2009, 32).

4. Pros and Cons of Compulsory Voting

As mentioned above, democracy is ensured together with other institutions by elections, which in its turn, means participation and collective decision-making process. But the debates about democratic elections always include how much and what forms of participation are necessary for the democratic electoral process. According to the mentioned, the opinion of scientists and policymakers about compulsory voting is divided.

Advocates of compulsory voting declare that democratic obligations accompany rights, and that voting is a civic duty. Compulsory electoral participation promotes cooperative behavior by requiring people to act in the collective interest (Lijphart, 1997, Engelen, 2007).

Opponents of compulsory voting contend that the right to vote entails the right not to vote. If one lacks the ability to choose whether or not to exercise a right, it is not a right. As a result, political obligations should not be made legally binding (Mackenzie, 1958, p. 131, Lever, 2007, pp. 26-35).

In the modern world, pressure from society is no longer capable of functioning as a social bond that would impose communal norms, hence legal com-

pulsion might be required to achieve that goal. While unified communities offered a vehicle for upholding standards of involvement in prior generations, this system has broken down in many contemporary settings (Birch, 2009, p. 232).

Citizens require a different way of self-binding in the absence of conventional forms of norm enforcement, which can only be implemented in modern society through legal rules. Compulsory voting is an example of such a regulation.

Supporters of compulsory voting claim that it assures that decisions made by representative institutions are democratically legitimate. Democratic decisions must represent the opinions of the majority, but decisions will be inadequate in democratic terms, and less valid, unless we have some means of determining everyone's position (Katz, 1997, p. 243; Lijphart, 1997, p. 9).

Compulsory electoral participation is the only method to effectively consider all points of view while distributing the expenses of voting evenly among all those who benefit from political institutions.

Critics of compulsory voting argue that it simply addresses the symptoms of low levels of political involvement and the resulting lack of legitimacy of democratic institutions, rather than solving the problem. If the real issues are voter indifference with politics, there is no point in artificially expanding turnout levels by convincing individuals to vote (Ballinger, 2006, p. 20).

Advocates of compulsory voting state that compelling citizens to vote will increase citizen awareness, engagement in politics, and participation in society. Therefore, it will have both mobilizing and instructive impacts, enhancing public involvement and political awareness. Furthermore, since elections will consider the views of all citizens, instead of the socio-demographically biased selection of those who vote voluntarily, the governments' decisions will better reflect the necessities of the entire population.

Opponents of compulsory voting indicate that it is both expensive to administer and likely to be unpopular. Other more effective, and less expensive methods of enhancing public engagement include selective voting incentives, vote facilitation tools, and other improvements in the political process. Furthermore, many people are misinformed about public policy concerns and hence will not make educated decisions. Their votes will be unjust, and they may even vote for extremist parties in protest against electoral necessity, lowering the quality of policy results (Birch, 2009, pp. 234-235).

5. Conclusion

As a conclusion, debates about compulsory voting reach to the core of many central concerns of contemporary political theory, including the nature of rights, the nature of democracy, and the possible tension between these two key concepts. They also address the central concern of the legitimacy of political decision-making, and the capacity of individuals to take part therein [Birch, 2009, p. 106].

Even though many of the preceding justifications have been framed in normative terms, the debate has revealed that they are based on an empirical statement that are frequently unsupported by evidence.

The main suggestions related to compulsory voting after discussion are as follows:

- It raises citizens' levels of political awareness.
- It either increases or decreases citizen engagement in politics.
- It either strengthens or weakens the legitimacy of the electoral process and democracy in general.
- Boosts turnout.
- It increases the number of invalid and random votes cast.

The institution of compulsory voting and related sanctions definitely increase the number of voters in elections, but the problem of absenteeism remains unsolved. Although the legitimacy level of the government depends on the number of voters, how legitimate is the government that is elected by the voters against their will.

Regardless of how we evaluate the compulsory voting institution in theory, the implementation and the results of this mechanism will vary in different countries based on different patterns. Before applying to the mentioned system, it's significant to address the issue of the conditions under which obligatory participation should be adopted and how it could be used in practice.

By mentioning conditions under which the compulsory voting institution should be adopted, we mean if there's a necessity and capacity of it. In some states, where turnout is high even without mandatory participation, there is no need for such an institution. In cases where sanctions are not imposed, mandatory participation has little impact on outcomes. Lack of state administrative capacity is typical for developing countries, where use of the mentioned institution makes no sense. And finally, if a mandatory participation system will be implemented in less democratic or authoritarian states, it will be used as an attempt to legitimize one-party contests, which is totally opposite to democratization process.

Based on Literature review and data analysis, there are some considerations that can be used as a replacement of compulsory voting, in particular: the constitutionalizing electoral obligation, collective sanctions in the form of turnout requirements, and the provision of incentives for voting. All of them are used in various countries even today, but there is no direct evidence which option will be more effective, since it can be influenced with legal and political culture of particular nations, but at the same time mentioned options can serve as the mechanism for raising awareness and motivation for willingly participate in electoral process.

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ПОНЯТТЯ ТА ОСНОВНІ ЗАКОНОМІРНОСТІ ОБОВ'ЯЗКОВОГО ГОЛОСУВАННЯ

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Анотація

Вибори є одним із головних інститутів хорошого урядування. Правильне та актуальне функціонування зазначеного інституту визначає якість демократії, правову самосвідомість суспільства та є показником політико-економічного розвитку країни.

Про демократичність виборів свідчить наявність конкретних принципів, які передбачені виборчим законодавством, зокрема, загального виборчого права, рівності, вільних виборів, таємного голосування. Від відповідного тлумачення кожного принципу залежить ефективність діяльності установи.

Представлена стаття присвячена інституту обов'язкового голосування, який безпосередньо пов'язаний із волевиявленням. Метою роботи є огляд інституту обов'язкового голосування, дослідження його впливу на чесність виборів та загальну легітимність політичної системи.

Згідно з оглядом літератури, плюси та мінуси обов'язкового голосування є предметом активних дискусій. Причина в тому, що є багато прихильників і противників того чи іншого інституту з досить вагомими аргументами на підтримку або проти нього.

Виходячи з цілей роботи, подано опис поняття обов'язкового голосування та підстав для встановлення зазначеного інституту. У статті розглядаються типи зобов'язань та їх характеристики, пояснюються різні системи санкцій, що застосовуються до осіб, які ухиляються від своїх обов'язків голосування, а також правила звільнення, засновані на законодавстві різних країн.

На основі огляду літератури та аналізу зібраних даних автори виділяють основні закономірності обов'язкового голосування, його зв'язок із легітимністю та ефективністю виборного органу. У заключній частині статті викладено та оцінено аргументи «за» та «проти» обов'язкової участі у виборах, а також представлено основні висновки за результатами порівняльного аналізу різних ситуацій.

Виходячи з аналізу, стає очевидним, що інститут обов'язкового голосування не може розглядатися з однаковими результатами в різних суспільствах або державах з різними соціально-економічними умовами.

Ключові слова: обов'язкове голосування; вибори; санкції; фактори притягування та підштовхування; явка на виборах; легітимність виборів

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CONSTITUTIONAL PRINCIPLES OF CIVIL SOCIETY UKRAINE IN THE PERIOD OF MARTIAL LAW

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Summary

The purpose of the article is to clarify the peculiarities of the functioning civil society institutions Ukraine during the martial law. This became possible through the analysis of constitutional provisions, which are fundamental guarantees ensuring their activity; determination of certain aspects constitutional provision citizens' right of to association during martial law, identification of contradictions between the provisions of the Constitution of Ukraine and other laws that determine the peculiarities functioning civil society institutions.

Specialists in various fields of law, including A. Kolodii, N. Filyk, Y. Bysaga, S. Kyrychenko V. Korniienko, O. Lotiuk, H. Berchenko, P. Liubchenko, S. Kovalchuk, have dealt with constitutional foundations of the formation of civil society. However, the new threats posed by the military actions, changes in the legal system necessitate additional detailed scientific analysis.

Research methods. The author's methodological analysis included a number of general scientific and special scientific methods of cognition, the application of which made it possible to reveal the essence of the proposed problem. The method of analysis and synthesis, systematic methods of scientific knowledge, the method of comparative jurisprudence and synergetic method were used. In particular, the method of comparative jurisprudence was used to identify contradictions and inconsistencies between the legal provisions of the Constitution and some other laws of Ukraine. Synergetic method allowed to state binary nature of legal reality and uncertainty in a martial law.

Results and conclusions. According to the results of the analysis of the constitutional provisions, it was determined that the basis of the functioning of civil society institutions is the rights and freedoms of a person and a citizen. In the conditions of martial law, some of the rights and freedoms of a person may be violated. Given the presence of threats to national security, the management of state institutions is being strengthened. Strengthened state regulatory activity consists in granting additional powers to its bodies and institutions. This also affects the peculiarities of the activities of non-state entities, which are institutions of civil society. Some inconsistencies between the provisions of the Constitution of Ukraine and the laws that determine the procedure for the creation and functioning of civil society institutions have been revealed.

Key words: institution of civil society; special legal regime; constitutional principle; civil society organization; democratic process; Ukraine.

1. Introduction

The activities of civil society institutions in Ukraine are regulated by legislation acts. The main among them is the Constitution of Ukraine. It defines the people's rights, freedoms and duties. The Constitution of Ukraine has the highest legal force. Laws and other normative legal acts are adopted based on the Constitution of Ukraine and must comply with it.

Constitutional rights and freedoms cannot be limited, except in cases provided for by the Constitution of Ukraine. Such cases include martial law or state of emergency. On February 24, 2022, a special legal re-

gime "martial law" was introduced. It continues to this day. That is the institutions of the state and civil society functions in a special legal regime. In order to ensure national security, a significant number of changes were made to laws of Ukraine among this period. The question of how these changes limit human rights and the harmonious functioning of civil society institutions is still open. Scientists have not yet studied them in detail.

The task of the constitutional legal doctrine of nowadays is to analyze the transformation of legal practice in the context of global challenges and determine the optimality of limited rights and legitimacy of state measures of a preventive nature (Zharovska, 2022, p. 16). Therefore, several questions are remain unsolved. The first is about what constitutional mechanisms for the realization of rights are available to civil society institutions under the conditions of the legal regime of martial law taking into account the existing restrictions. The second is about how the changes made to the normative legal acts affect this process is relevant. That`s why the new threats posed by the military actions, changes in the legal system necessitate additional detailed scientific analysis. Completing this task is possible by applying the methods of analysis, synthesis, comparative legal method, system-structural, synergistic and other methods.

2. Human rights as the guarantee of civil society development

The prerequisites for the adoption of The Constitution of Ukraine were the course to ensure the rights and freedoms of people and citizen, the creation of decent living conditions and the development of civil society, the strengthening of civil harmony on the land of Ukraine, etc. That is why the person, his life and health, honor and dignity, inviolability and security are recognized as the highest social value in Ukraine. Human rights, freedoms and their guarantees determine the essence and direction of state activity. The state is responsible to the individual for its activities. The establishment and provision of human rights and freedoms is the main duty of the state (The Constitution of Ukraine, 1996).

The principles of civil society are: freedom and initiative of the individual to them; the development of social relations in accordance with the fundamental principle of Kantian philosophy, according to which a person should always be considered as an end and never as a means; elimination of human alienation, people's non-acceptance of socio-economic reforms and transformations, economic and political structures and institutions; real implementation of the principle of equal opportunities; permanent protection of human and citizen rights and freedoms; pluralism of all forms of ownership; the existence among the absolute majority of the population of the so-called "middle layer"; pluralism of the spiritual life of society; the official prohibition and practical absence by the state and other social entities of absolute regulation and any interference in the private life of members of society; the existence and functioning of a developed social structure; active participation in all spheres of public life of non-state self-governing organizations; development of market relations; recognition and guarantee of the ideas of the rule of law; subordination to civil society of a democratic legal social state (Kolodiy, 1999, p. 16-17). In other words, the civil society institutions activity guarantees by the components of the legal status of a person.

3. Citizens' right to association: constitutional guarantees

Citizen of Ukraine has the right to freedom of association in political parties and public organizations to exercise and protect their rights and freedoms and satisfy political, economic, social, cultural and other interests. According to Art. 36 of the Constitution of Ukraine, the defining duty and principle of the rule of law state is the principle of non-interference by the state in the exercise of the right to freedom of association by citizens, their activities.

At the same time, it is necessary to emphasize the inconsistency of the provisions of Art. 36 of the Constitution of Ukraine and Art. 7 of the Law of Ukraine "On Public Associations". The first provides that only citizens of Ukraine have the right to freedom of association in public organizations (The Constitution of Ukraine, 1996). The second enshrines such a right even for foreigners, stateless persons (About public associations, 2012). In our opinion, after the end of martial law, appropriate changes should be made to the Constitution of Ukraine.

It is the right of a citizen of Ukraine to participate in trade unions in order to protect their labor and socio-economic rights and interests. Trade unions are formed without prior permission based on the free choice of their members. All trade unions have equal rights. Exclusively Constitution of Ukraine and the laws of Ukraine establish restrictions on membership in trade unions.

Citizens are guaranteed the right to religious associations. At the same time, the provisions of Article 35 of the Constitution of Ukraine should be taken into account. It guarantees the right to freedom of worldview and religion, to participate in religious cults and rites, to conduct religious activities, to separate the church and religious organizations from the state, etc.

The principles of formation and activity of citizens are determined exclusively by laws. Therefore, it is important to take into account the fact that some components of the policy of promoting the formation of civil society and its institutions were reflected in the Laws of Ukraine: "On Freedom of Conscience and Religious Organizations" (1991), "On Professional Creative Workers and Creative Unions" (1997), "On local

self-government in Ukraine" (1998), "On trade unions, their rights and guarantees of activity" (1999), "On self-organization bodies of the population" (2001), "On the principles of regulatory policy in the field of economic activity" (2003), "On social dialogue in Ukraine" (2010), "On volunteering" (2011), "On public associations" (2012), "On employers' organizations, their associations, rights and guarantees of their activities" (2013) , "On charitable activities and charitable organizations (2013)", "On social services" (2019), "On the basic principles of youth policy" (2021), "On the basic principles of state policy in the sphere of establishing Ukrainian national and civic identity" (2022) etc.

4. Principles of activity of civil society institutions during martial law

The democratic institutions activities under special legal regimes are characterized by the presence of a significant number complications and contradictions. Ukrainian society, personified by institutions civil society, is currently actually involved in countering the military aggression of the enemy, in the material and financial support of the Armed Forces of Ukraine and paramilitary formations, as well as assisting to the victims and carrying out other types of activities. The active civic position of Ukrainians contributed to the consolidation our people. However, the prerogative in the performance of these tasks and functions should still be by state authorities.

Article 64 of the Constitution of Ukraine defines those rights that may be limited during martial law. They include the right to participate in the management of state affairs, in all-Ukrainian and local referendums, to freely elect and be elected to state and local self-government bodies (Article 38); the right to assemble peacefully, without weapons, and to hold meetings, rallies, marches and demonstrations (Article 39) among them (The Constitution of Ukraine, 1996). That is, the constitutional principles that are fundamental for the construction and development of civil society during the operation of the legal regime of martial law may be limited. At the same time, in order to prevent arbitrarily restricting the constitutional rights of a person, the legislation defines guarantees of the inadmissibility of using these regimes to restrict the rights and freedoms of a person, etc. (Kryvoruchko et al., 2023, p. 229; Shelever et al., 2023, p. 256). It should also be taken into account that the European Court of Human Rights indicated that restrictions on the rights and freedoms of a person and a citizen are permissible if they are carried out in accordance with the current legislation and comply with the rule "preserving the basic content of rights and freedoms".

The interests of national security, a significant number of changes were made to the laws during the martial law. They were mostly related to the procedure for the operation and registration of such associations. Thus, in Ukraine it is categorically prohibited to form and operate public associations whose activities are aimed at liquidating the independence of Ukraine, changing the constitutional order by violent means, violating the sovereignty and territorial integrity of the state, undermining its security, illegal seizure of state power, propaganda of war, violence , to incite inter-ethnic, racial, religious enmity, encroachment on human rights and freedoms, public health, propaganda of communist and/or national socialist (Nazi) totalitarian regimes and their symbols, violation of the equality of citizens depending on their race, skin color, political, religious and other beliefs, gender, ethnic and social origin, property status and other (About public associations, 2012).

If the purpose of public associations activities is at least one of the above, it must be prohibited by the court. The activities of those organizations whose leaders are convicted of treason are also subject to termination. The Law of Ukraine "About Freedom of Conscience and Religious Organizations" also underwent such changes (About Freedom of Conscience and Religious Organizations, 1991). These provisions are the embodiment of the norm provided for in Art. 37 of the Constitution of Ukraine. The formation and activity of political parties and public organizations are prohibited whose program goals or actions are aimed at eliminating the independence of Ukraine, changing the constitutional order by violent means, violating the sovereignty and territorial integrity of the state, violence etc. (The Constitution of Ukraine, 1996).

There is currently a provision at the legislative level on the termination of the activities of trade unions and their associations for the purposes of Ukraine national security. This happens if the activity of the latter contradicts the Constitution of Ukraine and the laws of Ukraine. In particular, in the case of criminal liability conviction for collaboration with the Russian Federation. As a rule, their activity is prohibited based on a decision of a local court, and trade unions with the status of All-Ukrainian and National and associations of trade unions with the corresponding status – only by a decision of the Supreme Court of Ukraine (About trade unions, their rights and guarantees of activity, 1999).

The activity of civil society institutions in the direction of charitable activities was intensified, in particular, volunteer assistance. Law of Ukraine "About volunteering" also was changed. Currently, the areas of volunteer activity are meeting the needs of the Armed Forces of Ukraine, other military formations, law enforcement agencies, state authorities and individual citizens, implementing evacuation measures (About volunteering, 2011).

5. Conclusions and prospects for further exploration

According to the results of the analysis of the constitutional provisions, it was determined that the basis of the functioning of civil society institutions is the

rights and freedoms of a person and a citizen. In the conditions of martial law, some rights and freedoms person may be violated. Given the presence of threats to national security, the management of state institutions is being strengthened. Strengthened state regulatory activity consists in granting additional powers to its bodies and institutions. This also affects the peculiarities of the activities civil society organizations. Some inconsistencies between the provisions of the Constitution of Ukraine and the laws about creation and functioning of civil society institutions have been revealed. It is expedient to make appropriate changes to the Constitution of Ukraine after the termination of martial law.

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ІНСТИТУТИ ГРОМАДЯНСЬКОГО СУСПІЛЬСТВА В УМОВАХ ВОЄННОГО СТАНУ: КОНСТИТУЦІЙНИЙ ВИМІР

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Анотація

Метою статті є з'ясування особливостей функціонування інститутів громадянського суспільства України в умовах воєнного стану. Це стало можливим завдяки аналізу конституційних положень, які є основними гарантіями забезпечення їх діяльності; визначення окремих аспектів конституційного забезпечення права громадян на об'єднання під час воєнного стану, виявлення суперечностей між положеннями Конституції України та інших законів, що визначають особливості функціонування інститутів громадянського суспільства.

Дослідженням конституційних засад формування громадянського суспільства займалися фахівці різних галузей права, зокрема А. Колодій, Н. Філик, Ю. Бисага, С. Кириченко, В. Корнієнко, О. Лотюк, Г. Берченко, П. Любченко, С. Ковальчук та багато інших. Проте нові загрози, пов'язані з військовими діями, змінами, яких зазнає правова система, вимагають додаткового детального наукового аналізу.

Методи дослідження. Авторський методологічний аналіз включав низку загальнонаукових та спеціально-наукових методів пізнання, застосування яких дозволило розкрити сутність запропонованої проблеми. Використано метод аналізу та синтезу, системні методи наукового пізнання, метод порівняльного правознавства та синергетичний метод. Зокрема, методом порівняльного правознавства виявлено протиріччя та неузгодженість правових положень Конституції та деяких інших законів України. Синергетичний метод дозволив констатувати бінарність правової реальності та невизначеності в умовах воєнного стану.

Результати та висновки. За результатами аналізу конституційних положень встановлено, що основою функціонування інститутів громадянського суспільства є права і свободи людини і громадянина. В умовах воєнного стану деякі права і свободи людини можуть бути обмежені. Враховуючи наявність загроз національній безпеці, посилюється управління державними установами. Посилення державної регуляторної діяльності полягає в наданні додаткових повноважень її органам і установам. Це позначається і на особливостях діяльності недержавних суб'єктів, які є інститутами громадянського суспільства. Виявлено деякі неузгодженості положень Конституції України та законів, які визначають порядок створення та функціонування інститутів громадянського суспільства.

Ключові слова: інституція громадянського суспільства; особливий правовий режим; конституційний принцип; організація громадянського суспільства; демократичний процес; Україна.

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