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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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MEDICINES: CONSTITUTIONAL AND LEGAL REGULATION ON RESTRICTION OF THE PROPERTY RIGHT CONCERNING TECHNOLOGY TRANSFER SUBJECTS AND THE RIGHT TO CONDUCT ENTREPRENEURSHIP ON IMPORT OF MEDICINAL PRODUCTS IN CONDITIONS OF CONFLICT AND TEMPORARY OCCUPATION

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Summary

The purpose of this article is to identify the features of restriction of ownership on the subjects of technology transfer regarding production of medicines and the right to run business on the import of medicines in conditions of conflict and temporary occupation.

The methodological basis of the conducted research is the general methods of scientific cognitivism as well as concerning those used in legal science: methods of analysis and synthesis, formal logic, comparative law etc.

When determining the legitimate purpose of restriction, it is necessary to apply the principle of proportionality, which is the concordance of measures applied to the above entities in order to limit the exercise of their rights with those public values that are protected by such restriction. On the procedural level, the State having realized the right for withdrawal has to comprehensively inform the General Secretary of the Council of Europe as for the measures taken and the reasons for them, as well as the time when those measures have ceased to apply and the provisions of the Convention are profoundly applied again. As the case law of the European Court of Human Rights shows, the derogation from the obligations under the Convention must have territorial and temporal specifications.

The following features of the constitutional and legal regulation of restriction of property rights for subjects of technology transfer to the production of medicines are revealed: 1) restrictions on the implementation of these rights should be provided by the law, which must meet the following requirements: clarity, accuracy, accessibility; 2) the measure is a temporal one; 3) the range of entities in respect of which it is applied to are the subjects of technology transfer being residents of the aggressor country; 4) legitimate purpose of implementation is protection of public values (national security, life and health of persons staying on the territory of Ukraine, territorial integrity, etc.); 5) necessary in democratic society.

The following features of the constitutional and legal regulation of restrictions on the right for running business activities regarding import of medicines during conflict and temporary occupation of the part of the territory of Ukraine by the Russian Federation are revealed: 1) restrictions on the exercise of these rights are provided by the Law of Ukraine "On Foreign Economic Activity" from 04.07.2017 №18.1-07/18369, which meets the following requirements: clarity, accuracy, accessibility; 2) the measure is temporal one; 3) the range of entities in respect of which it is applied to is addressed to the applicants of medicinal products, alternative and/or potential manufacturers, applicants-holders of registration certificates of which are the subjects of the Russian Federation; 4) legitimate purpose of implementation is protection of life and health of persons staying on the territory of Ukraine in connection with the impossibility of providing Ukraine with proper control over the quality of production of medicines within the Russian Federation; 5) necessary in democratic society.

Key words: medicines; human rights; the field of technology transfer; international cooperation; derogations; the right to entrepreneurial activity; the right to health care, medical aid and medical insurance.

1. Introduction

In conditions of conflict between Ukraine and the Russian Federation and temporal occupation of a part of the territory of Ukraine by the Russian Federation, the issues of state obligations to protect property of business entities in pharmaceutical sector, as well as the legal balance of private and public interests within health care system have become relevant up to date.

Indeed, it is well known that the implementation of business activities for the production of medicines requires significant resources (Buletsa, 2018; Volkov, 2006; Volkov, 2007; Deshko, 2007). The development of new technologies through pharmaceutical sector is resource-intensive (Buletsa, 2019; Deshko, 2014). At the same time, there are no guarantees of rapid implementation of the results and reimbursement of costs incurred by the business entity. Moreover, under certain requirements the State may apply derogation which may result in a ban on the transfer of technology for the production of medicinal products (or their components) by enterprises, research institutions, organizations, higher education establishments and other legal entities of the aggressor state, regardless of ownership property rights to use the objects of intellectual property rights, that are components of technology; prohibition on the importation of medicinal products manufactured on the territory of the aggressor state into its territory, etc.

Thus, according to Art. 49 of the Constitution of Ukraine, everyone has the right to health care, medical aid and medical insurance. A structural element of the subjective legal right to health care is the right of everyone to be provided with quality medicines (Deshko, 2018; Deshko, 2020). Accordingly, the state is obliged to create effective constitutional and legal mechanism to ensure these rights. At the same time, the Constitution of Ukraine guarantees everyone the right to entrepreneurial activity, which is not prohibited by law. Accordingly, the state is also obliged to create an effective constitutional and legal mechanism to ensure this right.

In the context of the armed aggression of the Russian Federation, Ukraine has withdrawn from its obligations to protect the property of business entities in pharmaceutical sector – the Ministry of Health of Ukraine has taken measures to withdraw from circulation of drugs in Ukraine, that manufactured in the Russian Federation and in Ukrainian territoties, which are not under the control of the Government of Ukraine.

In science on constitutional law the issue of withdrawal of the state from the obligations to protect the property of business entities within pharmaceutical sector is not sufficiently disclosed. This issue is considered individually by some constitutional scholars through the study of the constitutional and legal mechanism for

ensuring property rights in Ukraine; the right of everyone to apply onto international judicial institutions and international organizations, etc.

The purpose of this article is to identify the features of restriction of ownership on the subjects of technology transfer regarding production of medicines and the right to run business on the import of medicines in conditions of conflict and temporary occupation.

2. Legal, economic, organizational and financial principles of state regulation as for activities in the field of technology transfer

The Law of Ukraine "On State Regulation of Activity in the Sphere of Transfer of Technologies" defines legal, economic, organizational and financial principles of state regulation as for activities in the field of technology transfer and aims to ensure effective use of scientific, technical and intellectual potential of Ukraine, as well as the protection of property rights for domestic technologies and/or their components on the territory of the states where their use is planned or being carried out, expansion of international scientific and technical cooperation in this field. Legislation on state regulation of activities in the field of technology transfer is based on the Constitution of Ukraine, the Civil Code of Ukraine, the Economic Code of Ukraine, the laws of Ukraine "On Foreign Economic Activity", "On Scientific and Scientific and Technical Expertise", "On Scientific and Scientific and Technical Activity", "On Protection Against Unfair Competition", other normative legal acts, as well as current international treaties of Ukraine, consent for obligation of which was approved by the Verkhovna Rada of Ukraine (Parliament of Ukraine) in the field of scientific and technical cooperation, innovation, technology transfer.

By ratifying international treaties such as the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms, Ukraine has committed itself to internationally establishing on effective domestic mechanism to ensure the human rights guaranteed by them. During armed conflict and other public insecurity that threatens the life of the nation, the state has the right to withdraw from certain agreed obligations. This is provided by the above-mentioned international documents. In 2015, Ukraine applied the derogation. Thus, on May 21, 2015, the Verkhovna Rada of Ukraine adopted a resolution "On the Statement of the Verkhovna Rada of Ukraine "On Ukraine's waiver of certain obligations under the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms". The Statement approves that "in order to ensure the vital interests of society and the state is facing armed aggression by the Russian Federation, the Verkhovna Rada of Ukraine, the Cabinet of Ministers of Ukraine and other public authorities have to make decisions that derogate from Ukraine's obligations under the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms".

3. The point of view on derogations

As E. M. Hafner-Bjorton, L. R. Helfer, and S. J. Fariss rightly point out, derogations belong to the "rescue mechanisms" for the state, which perform several beneficial functions (Hafner-Bjorton, 2011). The flexibility they provide acts as an "insurance policy", reassuring governments that they can legitimately waive certain contractual obligations during a crisis. Constitutional scholars and scientists of international law come to agreement that provisions to derogate from human rights obligations, especially in such a sensitive area as health care, must meet strict international standards and be subject to strict monitoring mechanisms (Hafner-Bjorton, 2011; Khrystova, 2018).

Article 29 of the Law of Ukraine "On Foreign Economic Activity" provides for measures taken by Ukraine in response to discriminatory and/or unfriendly actions against Ukraine applied by the state and recognized by the Verkhovna Rada of Ukraine as an aggressor state and/or an occupying state. The Article 21 of the Law of Ukraine "On State Regulation of Activity in the Sphere of Transfer of Technologies" does not allow the conclusion of agreements on technology transfer, which provide for the import of technologies and/or their components into Ukraine that may harm the environment or human health. The measures taken by the Ministry of Health of Ukraine to withdraw from circulation on the

territory of Ukraine medicines manufactured on the territory of the Russian Federation, as well as on the territories of Ukraine not controlled by the Government of Ukraine is legitimate right of Ukraine as a sovereign state to protect its constitutional and democratic order. With these measures, Ukraine not only publicly demonstrates its "repressive" policy, aligning its actions with international standards, but also aims to reduce the prevalence and scale of potential human rights violations in the field of health care.

In this regard, the point of view of E. M. Hafner-Bjorton, L. R. Helfer, and S. J. Fariss on derogations that are to be the rational response to internal political uncertainty (Hafner-Bjorton, 2011). On the contrary, they seem to be evidence of political determination and the desire of the state to fulfill properly its international obligations in conditions of conflict and temporary occupation.

4. The application of derogations under the Convention for the Protection of Human Rights and Fundamental Freedoms

We also agree with G. Hristova that the restrictions *should be necessary, temporary and lawful* and be carried out within the legal framework, in compliance with the requirements set by them (Khrystova, 2018). The application of derogations under the Convention presupposes compliance with the following procedural and substantive conditions: the right for withdrawal may be exercised only during war or other public insecurity threatening the life of the nation; the State may take measures to derogate from its obligations according to the Convention only to the extent required by the urgency of the situation; any derogations may not be incompatible with other obligations of the State under international law (Deshko, 2018; Deshko, 2020; Khrystova, 2018; Nechyporuk, 2020).

T. Slinko draws attention to the fact that "… in accordance with the Constitution of Ukraine, owners, exercising the right for ownership, must comply with the Constitutional provisions on ownership obligations. It must not be used to the detriment of person or society. Also, the use of property may not harm the rights and freedoms and dignity of citizens, the interests of society. … it follows from the systematic analysis of the provisions of the Constitution of Ukraine that the right for ownership may be limited. The right of a state to restrict the possession, use and disposal of property is also defined by the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. … The state has the right to "enact such laws as it deems necessary to control the use of property in accordance with the general interest (Slinko, 2018).

This view is seen debatable as for ownership of technology and medicines transfer. First, the right for medicines is a structural element of the right for medical aid, and the right for medical aid is a guarantee of the right for life. The Convention for the Protection of Human Rights and Fundamental Freedoms does not allow any non-derogative rights regarding the right for life, except in cases of death as the consequence of lawful hostilities. Thus, if a patient is not provided with quality medical care due to a state's ban on the transfer of medicinal product or the transfer of the manufactured product from another country, which would violate the right for life, the Convention does not allow such a derogation from the right for life. It is also not allowed to deviate from the prohibition of torture and cruel or degrading treatment in connection with the state's ban on the transfer of medicinal product manufacture or transfer of products from another country, so the patient is not provided with quality medical care and the patient is subjected to suffer due to the lack of treatment with this drug (s), which is tantamount to torture, humiliating or degrading treatment.

Secondly, indeed, the Article 1 of Protocol No. 1 of the Convention guarantees everyone the right for owning property peacefully. In particular, this statement can be applied to the object of technology, i. e. scientific and scientifically applied results, objects of intellectual property rights, which reflect the list, timing, procedure and sequence of operations, the process of production and/or sale and storage of products, provision of services, etc. Technology transfer involves the transfer of technology, which is formalized by concluding a bilateral or multilateral agreement between individuals and/or legal entities, which establishes changes or terminates property rights and obligations in relation to technology and/or its components.

At the same time, with regard to the transfer of technology for the production of medicines, the transfer of medicines, the right for peaceful property owning, which is guaranteed by the Article 1 of Protocol No. 1 to the Convention, is the guarantee of realization of the right for life and the prohibition of torture and cruel or degrading treatment, and the State may not derogate from it if it may or it does violate the above-mentioned rights by preventing improper quality medical treatment.

5. Conclusions

When determining the legitimate purpose of restriction, it is necessary to apply the principle of proportionality, which is the concordance of measures applied to the above entities in order to limit the exercise of their rights with those public values that are protected by such restriction. On the procedural level, the State having realized the right for withdrawal has to comprehensively inform the General Secretary of the Council of Europe as for the measures taken and the reasons for them, as well as the time when those measures have ceased to apply and the provisions of the Convention are profoundly applied again. In addition, as the case law of the European Court of Human Rights shows, the derogation from the obligations under the Convention must have territorial and temporal specifications.

6. Results

The following features of the constitutional and legal regulation of restriction of property rights for subjects of technology transfer to the production of medicines are revealed: 1) restrictions on the implementation of these rights should be provided by the law, which must meet the following requirements: clarity, accuracy, accessibility; 2) the measure is a temporal one; 3) the range of entities in respect of which it is applied to are the subjects of technology transfer being residents of the aggressor country; 4) legitimate purpose of implementation is protection of public values (national security, life and health of persons staying on the territory of Ukraine, territorial integrity, etc.); 5) necessary in democratic society.

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Bibliography:

1. **Волков, В. & Дешко, Л.** (2006). На захист медичного права. *Юридичний Вісник України*, 8, С. 8.
2. **Волков, В. & Дешко, Л.** (2007). Медичне право – реальність сьогодення. *Інформаційний правовий простір*, 18, С. 45-48.
3. **Дешко, Л.** (2007). Державне регулювання системи цін на лікарські засоби в Україні. *Підприємництво, господарство і право*, 6, С. 21-30.
4. **Дешко, Л.** (2007). Державне регулювання ціноутворення на лікарські засоби в країнах Європейського Співтовариства та інших країнах. *Підприємництво, господарство і право*, 5, С. 113–119.
5. **Дешко, Л.** Правове регулювання господарювання в сфері охорони здоров'я: проблеми вдосконалення спеціального законодавства. *Підприємництво, господарство і право*, 5, С. 57-62.
6. **Дешко, Л.** (2018). Restitutio in integrum: підходи Європейського суду з прав людини. *Порівняльно-аналітичне право*, 5, С. 365–368.
7. *Конвенція про захист прав людини і основоположних свобод* (1950). URL: https://zakon.rada.gov.ua/go/995_004.
8. *Конституція України* (1996) URL: https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text
9. Лист Міністерства охорони здоров'я України (2017). No 18.1-07/18369. URL: https://moz.gov.ua
10. **Нечипорук, Г. Ю., Бисага, Ю. М. , Берч, В. В., Дешко, Л. М., Бисага, Ю. Ю., Нечипорук, К. О.** (2020) *Консти-*

туційне право на звернення до Європейського суду з прав людини та механізм реалізації права на виконання його рішень. Ужгород, ТОВ «РІК-У», 2020.

11. *Про відступ України від окремих зобов'язань, визначених Міжнародним пактом про громадянські і політичні права та Конвенцією про захист прав людини і основоположних свобод* (2015): постанова Верховної Ради України «Про Заяву Верховної Ради України. URL: rada.gov.ua/laws/show/462-19#Text.
12. *Про державне регулювання діяльності у сфері трансферу технологій* (2006): Закон України. URL: rada.gov.ua/laws/show/143-16#Text
13. *Про зовнішньоекономічну діяльність*: Закон України. URL: rada.gov.ua/laws/show/959-12#Text
14. **Слінько, Т. М.** (2018). Правові підстави обмеження реалізації прав і свобод людини і громадянина. *Україна і Європейський Союз: шлях до сталого розвитку*: Збірник наук. статей за матер. І наук.-практ. конф. з європ. Права (41-46). Харків, 2018.
15. **Христова, Г.** (2018).)Позитивні зобов'язання держави у сфері прав людини: сучасні виклики: монографія. Харків: Право, 2018.
16. **Buletsa, S. & Deshko, L.** (2018). Comprehensive Reforms of the Health Care System in Different Regions of the World. *Medicine and Law*. 2018, 37, 4, P. 683-700.
17. **Buletsa, S., Deshko, L. & Zaborovskyy, V.** (2019). The peculiarities of changing health care system in Ukraine. *Medicine and Law*, 2019, 38. 3, P. 427-442.
18. **Deshko, L.** (2018). The principle of «de minimis non curat praetor» in International Law. *Зовнішня торгівля: економіка, фінанси, право*, 2018, 4, С. 5-15.
19. **Deshko, L.** (2018). Patenting of medicinal products: the experience of implementation of the flexible provisions of the TRIPS-plus Agreement by foreign countries and the fundamental patent reform in Ukraine. *Georgian Medical News*, 9, P. 161-164.
20. **Deshko, L.** (2018). Application of Legal Entities to the European Court of Human Rights: a Significant Disadvantage as the Condition of Admissibility. *Croatian International Relations Review*, 24 (83), P. 84-103.
21. **Deshko, L.** (2014). Domestic remedies that have to be exhausted in Ukraine when everyone applying to international judicial institutions or to the relevant bodies of international organizations. *Вестник Пермского университета*, 1, P. 332-336.
22. **Deshko, L., Bysaga, Y. & Bysaga, Y.** (2019). Public procurement in the healthcare sector: adaptation of the administrative legislation of Ukraine to the EU legislation. *Georgian Medical News*, 6, P. 126-130.
23. **Deshko L. M., Bysaga Y.M. & Zaborovskyy V.V.** (2019). Protection of human rights by the Constitutional Court of Ukraine in the field of health care. *Georgian Medical News*, 7, P. 160-166.
24. **Deshko L., Bysaga Y., Vasylchenko O., Nechyporuk A., Pifko O. & Berch V.** (2020). Medicines: technology transfer to production, cession of ownership rights for registration certificates and transfer of production in conditions of modern challenges to international and national security. *Georgian Medical News*, 10, P. 180-184.
25. **Deshko, L.** (2018). Patenting of medicinal products: the experience of implementation of the flexible provisions of the TRIPS-plus Agreement by foreign countries and the fundamental patent reform in Ukraine. *Georgian Medical News*, 9, P. 161-164.
26. **Ezer, T., Deshko, L., Clark, N. et al**. (2010). Promoting public health through clinical legal education: Initiatives in South Africa, Thailand, and Ukraine. *Human Rights Brief*, 17/27, P. 32. URL: http://www.wcl.american.edu/hrbrief/17/2ezer.pdf

References:

1. **Volkov, V. & Deshko, L.** (2007). Medychne pravo – realnist sohodennia [Medical law is a reality of today] *Informatsiinyi pravovyi prostir*, 18, S. 45-48. [in Ukrainian].
2. **Volkov, V. & Deshko, L.** (2006). Na zakhyst medychnoho prava [In defense of medical law]. *Yurydychnyi Visnyk Ukrainy*, 8, 8. [in Ukrainian].
3. **Deshko, L.** (2007). Derzhavne rehuliuvannia systemy tsin na likarski zasoby v Ukraini [State regulation of the price system for medicines in Ukraine]. *Pidpryiemnytstvo, hospodarstvo i pravo*, 6, 21-30. [in Ukrainian].
4. **Deshko, L.** (2007). Derzhavne rehuliuvannia tsinoutvorennia na likarski zasoby v krainakh Yevropeiskoho Spivtovarystva ta inshykh krainakh [State regulation of pricing of medicines in the European Community and other countries]. *Pidpryiemnytstvo, hospodarstvo i pravo*, 5, 113-119. [in Ukrainian].
5. **Deshko, L.** (2007). Pravove rehuliuvannia hospodariuvannia v sferi okhorony zdorovia: problemy vdoskonalennia spetsialnoho zakonodavstva [Legal regulation of health care: problems of improving special legislation]. *Pidpryiemnytstvo, hospodarstvo i pravo*, 5, 57-62. [in Ukrainian].
6. **Deshko, L.** (2018). Restitutio in integrum: pidkhody Yevropeys'koho sudu z prav lyudyny [Restitutio in integrum: approaches of the European Court of Human Rights]. *Porivnyal'no-analitychne pravo*, 5, 365-368. [in Ukrainian].
7. *Konventsiia pro zakhyst prav liudyny i osnovopolozhnykh svobod [Convention for the Protection of Human Rights and Fundamental Freedoms]* (1950). URL: https://zakon.rada.gov.ua/go/995_004. [in Ukrainian].

8. *Konstytutsiia Ukrainy [Constitution of Ukraine*] (1996). URL: https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text. [in Ukrainian].
9. Lyst Ministerstva okhorony zdorovia Ukrainy [Letter from the Ministry of Health of Ukraine] (2017). No18.1-07/18369. URL: https://moz.gov.ua. [in Ukrainian]
10. **Nechyporuk, H. Iu, Bysaha Yu. M., Berch, V. V., Deshko, L. M., Bysaha Yu. Iu. & Nechyporuk, K. O.** *Konstytutsiine pravo na zvernennia do Yevropeiskoho sudu z prav liudyny ta mekhanizm realizatsii prava na vykonannia yoho rishen [The constitutional right to appeal to the European Court of Human Rights and the mechanism for exercising the right to enforce its decisions].* Uzhhorod, TOV «RIK-U», 2020. [in Ukrainian].
11. Pro vidstup Ukrainy vid okremykh zoboviazan, vyznachenykh Mizhnarodnym paktom pro hromadianski i politychni prava ta Konventsiieiu pro zakhyst prav liudyny i osnovopolozhnykh svobod [On Ukraine's withdrawal from certain obligations set out in the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms]. (2015): Postanova Verkhovnoi Rady Ukrainy. URL: rada.gov.ua/laws/show/462-19#Text. [in Ukrainian].
12. Pro derzhavne rehuliuvannia diialnosti u sferi transferu tekhnolohii [On state regulation of activities in the field of technology transfer] (2006): Zakon Ukrainy. URL: rada.gov.ua/laws/show/143-16#Text. [in Ukrainian].
13. Pro zovnishnoekonomichnu diialnist [On foreign economic activity] (1991): Zakon Ukrainy. URL: rada.gov.ua/laws/show/959-12#Text. [in Ukrainian].
14. **Slinko, T. M.** (2018). Pravovi pidstavy obmezhennia realizatsii prav i svobod liudyny i hromadianyna [Legal grounds for restricting the exercise of human and civil rights and freedoms]. *Ukraina i Yevropeiskyi Soiuz: shliakh do staloho rozvytku*: Zbirnyk nauk. statei za mater. I nauk.-prakt. konf. z yevrop. prava. (pp. 41-46). [in Ukrainian]
15. **Khrystova, H.** (2018). *Pozytyvni zoboviazannia derzhavy u sferi prav liudyny: suchasni vyklyky: monohrafiia [Positive commitments of the state in the field of human rights: current challenges: a monograph]*. Kharkiv: Pravo [in Ukrainian]

ЛІКАРСЬКІ ЗАСОБИ: КОНСТИТУЦІЙНО-ПРАВОВЕ РЕГУЛЮВАННЯ ОБМЕЖЕННЯ ПРАВА ВЛАСНОСТІ СУБ'ЄКТІВ ТРАНСФЕРУ ТЕХНОЛОГІЙ ТА ПРАВА НА ЗДІЙСНЕННЯ ПІДПРИЄМНИЦТВА З ІМПОРТУ ЛІКАРСЬКИХ ЗАСОБІВ В УМОВАХ КОНФЛІКТУ ТА ТИМЧАСОВОЇ ОКУПАЦІЇ

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Анотація

Мета цієї статті полягає в виявленні особливостей обмеження права власності суб'єктів трансферу технологій у виробництво лікарських засобів та права на здійснення підприємництва з імпорту лікарських засобів в умовах конфлікту та тимчасової окупації. Методологічною основою цього дослідження є загальні та спеціальні методи наукового пізнання: формально-логічний метод, порівняльно-правовий, структурно-логічний, інші.

Зазначається, що при визначенні легітимної мети обмеження необхідно застосовувати принцип пропорційності, що полягає у співрозмірності заходів, які застосовуються до вище зазначених суб'єктів з метою обмежити реалізацію їх прав, з тими суспільними цінностями, які захищаються шляхом здійснення такого обмеження. На процедурному рівні, держава, використавши це право на відступ, у повному обсязі повинна інформувати Генерального секретаря Ради Європи про вжиті нею заходи і причини їх вжиття, а також повідомити про час, коли такі заходи перестали застосовуватися, а положення Конвенції знову застосовуються повною мірою. Крім того, як свідчить практика Європейського суду з прав людини, відступ від зобов'язань за Конвенцією повинен мати територіальний і тимчасовий характер.

Виявлено такі особливості конституційно-правового регулювання обмеження права власності суб'єктів трансферу технологій у виробництво лікарських засобів: 1) обмеження щодо реалізації цих прав має бути передбачено законом, який має відповідати таким вимогам: ясність, чіткість, доступність; 2) захід є заходом тимчасового характеру; 3) коло суб'єктів, щодо яких засосовується – суб'єкти трансферу технологій - резиденти країни-агресора; 4) легітимна мета здійснення - захист суспільних цінностей (національної безпеки, життя і здоров'я осіб, які перебувають на території України, територіальної цілісності тощо); 5) є необхідним у демократичному суспільстві. Виявлено такі особливості конституційно-правового регулювання обмеження права на здійснення підприємницької діяльності з імпорту лікарських засобів в умовах конфлікту та тимчасової окупації Російською Федерацією частини території України: 1) обмеження щодо реалізації цих прав передбачається Законом України «Про зовнішньоекономічну діяльність», листом Міністерства охорони здоров'я України від 04.07.2017 року №18.1-07/18369, який відповідає таким вимогам: ясність, чіткість, доступність; 2) захід є заходом тимчасового характеру; 3) коло суб'єктів, щодо яких засосовується – адресований заявникам лікарських засобів, альтернативним та/або потенційним виробникам, заявникам-власникам реєстраційних посвідчень яких є суб'єкти Російської Федерації; 4) легітимна мета здійснення – захист життя і здоров'я осіб, які перебувають на території України у зв'язку з неможливістю забезпечення Україною належного контролю за якістю виробництва лікарських засобів в РФ ; 5) є необхідним у демократичному суспільстві.

Ключові слова: *лікарські засоби; права людини; трансфер технологій; міжнародне співробітництво; дерогації; право на підприємницьку діяльність; право на охорону здоров'я, медичну допомогу та медичне страхування.*

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LIFE AND THE RIGHT TO LIFE AS THE BASIC CONSTITUTIONAL RIGHT OF A PERSON

Among the natural rights of the colonists are these:
First a right to life, secondly to liberty, and thirdly to property;
together with the right to defend them in the best manner they can.
Samuel Adams

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Summary

The purpose of this article is to study the concept of life and the constitutional right to life, define their essence, the relationship of these concepts, disclose their features, as well as the experience of the European Court of Human Rights in their protection.

In the context of disclosing the subject of research to achieve the goal of scientific research and to ensure the completeness, objectivity, reliability and persuasiveness of the results, the author used a set of general and special methods that are characteristic of legal science. In particular, the origin and long historical path of development of these human rights were studied with the help of the historical method. The use of the system-structural method formulated the general structure of the study, and dialectical method analyzed the provisions of law and case law on the peculiarities of the right to life. Using a comparative legal method, the legislation of foreign countries was analyzed, which provided an opportunity to use their positive experience in terms of protection of the right to human life.

This article reveals the scientific approaches of researchers to determine the essence of life, the right to life, death, identifying their features and distinguishing between them. The paper analyzes ways to protect the right to life. A great deal of the work is devoted to the analysis of the law enforcement practice of the European Court of Human Rights, both in general and on the feasibility of the existence of certain criteria for restricting the right to life.

Based on the study, it is concluded that life and the right to life are similar concepts. It is argued that restrictions on the right to life due to a pandemic are possible if the disease is confirmed. In all other cases, the state must provide free access to coronavirus testing, in the case of a negative test, the opportunity to freely exercise the right to life. It is noted that a significant number of foreign countries provide for the right to life in the constitutions, but there are countries where the right to happiness or physical well-being is still being developed. It is well known that everyone has the right to happiness, which is different for everyone, so the creation of a mechanism to ensure and respect the right to life rests with the state and the individual.

Key words: life, right to life, person, Constitution, European Court, protection.

1. Introduction

Since 1982, the issue of the human right to life has been considered at the UN under the title «Human Rights and Scientific and Technological Progress». The resolutions adopted on this issue emphasize that the right to life is an inalienable right of all people and that implementation of this right is a necessary condition for the realization of the full range of human rights. The UN General Assembly called on States, relevant UN bodies, specialized agencies, interested intergovernmental and governmental organizations to take measures to ensure that the results of scientific and technological progress are used exclusively in the interests of international peace, for the benefit of mankind, and for universal respect for human rights. This confirms the close relationship between the use of scientific and technical results and the protection of human rights, especially the right to life (Bakhin, 1998, p.34). It has been 24 years and given the current situation with the Covid 19 coronavirus pandemic, the world is increasingly turning to new information technology results, to artificial intelligence, to detect, prevent and treat this disease, ie modern information technology protects the human right to life.

The right to life is a fundamental human right enshrined in many universal and regional international legal instruments and in the constitutions of most countries. The human right to life as a natural right arises from the beginning of life and originates from human nature itself (Fedorova, 2009, p.44). The right to life has always attracted scientists and scholars, who, recognizing it as the absolute value of human civilization, have tried to explore all its aspects as deeply as possible. Thus, such well-known domestic and foreign scientists as M.V. Buromensky, V.I. Yevintov, V.N. Denisov, L.G. Zablotskaya, P.M. Rabinovich, R.E. Stefanchuk, S.V. Shevchuk, Y.V. Baulin, O.V. Onufrienko, O.Y. Svetlov, V.A. Kartashkin, V.V. Kozan, Ja.P. Kuzmenko, O.A. Lukashova and other paid their attention to the right to life. Historically, the first ideological prerequisite for the emergence of ideas about the right to life should be considered humanism, which in the days of mythological and religious perception of the world was the basis for denoting the value, independence and uniqueness of human life. The analysis of the evolution of axiological views on human life allowed us to state that in the context of the religious (Christian) worldview there was an interpretation of human nature as spiritual and corporeal. The interpretation of the spiritual and the corporeal in man as antagonistic spheres caused the elevation of the spiritual essence of man with the complete devaluation of man bodily or vital. The ontological essence of human life was associated with the fall of mankind, and its life on earth was associated with the process of its redemption. In medieval philosophical and legal thought, the right to life was not considered as an independent category, because religious axiology did not leave room for human life as a social or even individual value. The status of man in the medieval world, his relationship with society was based on principles that can be defined as a universal «presumption of guilt» (Kuz´menko, 2015, p.25).

John Locke emphasized the right to life, reminding that life is sacred because man is a creation of God. The main thing is that no one could appropriate the life force of another person. Locke opposes economic slavery. Defending the right to freedom, he also opposes political slavery, that is, against any relationship of personal dependence. An individual is a subject of independent beliefs not only from another person, but also from the state. No one should be a servant of the state, the state cannot interfere in the inner world of man.

For example, the Great Charter of Liberties in the thirteenth century enshrined only guarantees of personal inviolability. During the French Revolution, equality and freedom were proclaimed as fundamental values. Only the Declaration of Independence of the United States, adopted in 1776, enshrines that all people are equal and endowed with inalienable rights, including life. Subsequently, in the Universal Declaration of Human Rights, the right to life is enshrined in the subjective right: «Everyone has the right to life ...». Thus, the right to life was clearly enshrined in the Universal Declaration of Human Rights and Freedoms in Art. 3: «Everyone has the right to life, liberty and security of person».

2. The right to life in the constitutions of the world

The Constitution of Ukraine proclaimed human life as the highest social value. Central to the system of rights that ensure the natu-

ral existence of man is the right to life. In June 1998, the Strategy for Ukraine's Integration into the European Union was defined, which states that Ukraine's national interests need to be established as an influential European state, a full member of the EU. Therefore, it is necessary to explore the place of the right to life among the constitutions of European states.

So, the Romanian Constitution by the art. 22, regulates the right to life, to physical and mental health of the person, in art.26, align. 2, it provides the right of every person to dispose of its own person, without prejudicing the rights and liberties of others, the public order or the morals, art. 34 of the fundamental law guarantee the right to health care (Varvara, Maftei, Negrut, 2012, p.239).

The Turkish Constitution includes rules on the right to life, and restrictions thereof, similar to Article 2 of the Convention. According to Article 17 of the Constitution: "Every one has the right to life.» «The cases of carrying out of death penalties under court sentences and the act of killing in legitimate-defense, the occurences of death as a result of the use of a weapon permitted by law as a necessary measure in cases of apprehension, or the executing of warrants of arrest, the prevention of escape of lawfully arrested or convicted persons, the quelling of riot or insurrection, the execution of orders of authorized bodies during martial law or state of emergency are outside the provision of paragraph 1 (right to life)" (Reisoğlu, 1998-1999, p.4).

The Constitution of the Slovak Republic, where Article 15 stipulates that everyone has the right to life. A person's life must be protected before birth. No one can be deprived of life. Doctor of Embryology Renata Mikushova claims that from a genetic point of view the development of the embryo is based on the principles of determination, ie it belongs to the human species from conception and in its genetic nucleus is encoded information on the basis of which it will develop. Biology considers human development as a long process of human development from conception to death (Forum, 2004, p.2). Microgenets support the position of the beginning of human life from the moment of conception of the human fetus in the womb (Sudo, 2001, p.135).

Article 13 of the Constitution of Japan (Constitution of Japan, 1945) states that all citizens are respected as individuals. The right of people to life, liberty and the pursuit of happiness requires the highest respect in law and other national affairs if it is not contrary to public welfare, and Article 25 of the Japanese Constitution states that «all citizens have the right to live a healthy and cultural minimum» (para. 1). The National Government of Japan must work to improve and promote social welfare, social security and health in all aspects of life (paragraph 2), and guarantee the right of people to live and to live as fundamental human rights. Article 25, paragraph 1, of the Constitution of Japan is a text that can be sufficiently read as a wording calling for cultural life in accordance with the times, which guarantees the content of the right to survival, and as a constitutional basis for cultural rights based on international development trends (Nakamura, 2017). Interestingly, the concept of life includes the right to assistance for the cost of food and beverages, clothing, utilities and other items that meet the basic needs of everyday life. There is a standard of living assistance as the main daily cost of living and a supplement that meets the special needs of pregnant women and people with disabilities. If necessary, temporary assistance will be provided for additional expenses, such as school admissions and the cost of purchasing refrigerators and microwaves needed for a new life (2020). Article 10 of the Constitution of the Republic of Korea states that all citizens have the dignity and worth of people and have the right to pursue happiness. The state is obliged to affirm and guarantee fundamental human rights (Constitution of the Republic of Korea, 1987).

Thus, most constitutions of the world enshrine the right to life, however, it means well-being, happiness, personal development, social assistance and so on. That is, everything that will allow a person to live in comfort, well-being, security. The human right to life is a fundamental right, the most important value of human civilization, which has been recognized and enshrined in the constitutions of many countries.

3. The concept of life and the right to life

The concept of natural rights and the concept of human rights arises from the common

law, which is the right to life, which follows from the human essence, ie ipso facto common law. Human rights are expressed through the right to life, for example, the right to live in a healthy environment, in a social environment where everyone has the right to move freely, has the right to freedom of speech, the right to form societies. Human demands for an adequate standard of living follow from the essence of life and thus create the basic values of protecting life when it is in danger (Blahož, 1998, p.875). The component of the right to personal inviolability as the right to one's own actions includes the right of a person to independently decide on the integrity of his / her body during life or after death and on contact with the environment (Punda, 2004, p.39).

On the one hand, the right to life requires the state to fight against criminal encroachments, terrorist acts in which people die, and on the other hand, the state establishes possible cases of lawful deprivation of life. At the same time, the right to life as the highest value for any person is subject, in any case, to the primary protection of the state (Fedorova, 2009, p.48).

«The right to life is the first fundamental natural human right, without which all other rights remain meaningless, because the dead do not need any rights,» - said Professor M.I. Matuzov (Matuzov, 1998, p.198). Considering this question, it should be noted that depending on the field of application, the category of «life» has a complex structure and is endowed with diverse meanings. For example, from the point of view of philosophy, «life» is understood as a way of being endowed with the inner activity of beings, or the integrity of the reality of being, understood intuitively. The natural understanding of life encompasses the way systems exist, which involves metabolism, irritability, the ability to self-regulate, reproduce, and adapt to environmental conditions. From the point of view of biology, there is also no single approach to defining the concept of life. There are two main areas. Representatives of the first believe that the main in the interpretation of the essence of life is the substrate (protein or DNA molecules), which is the carrier of the basic properties of living things. Proponents of the other direction are convinced that life should be considered in terms of its basic properties (metabolism, self-reproduction, etc.) (Karako, 1998, p.241). Medicine with the concept of «life» covers one of the highest forms of motion and organization of matter, which is formed on the basis of the progressive development of carbon compounds, organic substances and supramolecular systems formed on their basis (Oparim, 1978, p.253). Human life is the unity of three spheres of human existence: physiological life as the functioning of the human body; social life as a set of social relations into which a person enters; inner life, the inner world of man (Zajceva, 2008, p.11). The concept of «life» notes Kalchenko NV in the broadest sense of the word, includes all social relations that allow a person not only to exist as a biological person, but also to socialize, feeling part of society in the process of life (Kalchenko, 1995, p. 27).

Selikhova O.G. believes that human life begins with fetal development, and from birth we should talk about social life. Being in the mother's womb in the state of the embryo, she (man) is physically independent, because it is not part of the body of its carrier and is capable of self-development, because the life processes that take place in it act as an internal driver of its development. The mother's body is only an ideal environment for the development of the embryo, which provides it with nourishment and protection. With birth there is a second stage of biological existence of the person, and is more exact, a stage of stay of an organism in a social environment (Selikhova, 2002, p.13-14).

Defining the concept of «life», Rubanova N.A. assumes the need to protect life by a positive law from conception to the moment of irreversible brain death (Rubanova, 2006).

J.P. Kuzmenko that «the concepts of» right to life «and» life «are not identical» (Kuzmenko, 2017, p.16). So, V.V. Kozhan notes: "The right to life must be viewed through the prism of the concept of 'life', but not identified. After all, life is a biological category, law is a social category" (Kozhan, 2016, p.127). In this context, as noted, A.M. Kolodiy and A.Yu. Oliynyk defines human life as «his bio-social state of existence in time and space» (Kolodiy & Oliynyk, 2008, p.169). Thus, the category of «life» is broader and can be considered in many aspects - biological, social, spiritual and religious, etc., while the category of «right to life» is only one of those aspects

that covers the regulated social relations related to the implementation (order), protection and defense of the right to life.

Many definitions of «life» are also offered to us by religious teachings, the sciences of genetics, psychology, psychiatry, and so on. However, of all the variety of definitions of life, we are mostly interested in what would be suitable for law enforcement, ie the definition of life as a non-property good. In our opinion, scientists are close to the truth, who claim that life is inherently a complex concept and includes two main aspects: the biological existence of man and his social development as an intelligent being in time and space. Therefore, the concept of «life» scientists understand the natural (biological and mental) existence and social functioning of the human body as a whole.

So, L.O. Krasavchikova found that in biological terms, «life» - is the physiological existence of man or animal, and «vital activity» - a set of vital supports that make up the body (Krasavchikova, 1983, p.14). However, despite the importance of this definition, it must be agreed that life is only a non-property good, ie the object of civil relations. In order for this good to become legally significant and protected, it must be legally enshrined as the object of the relevant right to life, which is the content of these legal relations with a certain range of powers of its owner (Stefanchuk, 2004, p.44). The right to life cannot be considered only as a right to biological existence, because cloning, transplantation, genetic experiments are problems that also concern the issue of the right to life, so it is necessary to understand this concept more broadly. N.V. Kalchenko notes that the right to life is a natural, inalienable possibility of protecting the inviolability of life and freedom of disposal, guaranteed by domestic law and legal international acts (Kalchenko, 2004, p.75). A similar position is held by G.B. Romanovsky, who notes that the right to life is a fundamental human right enshrined in both major international human rights instruments and national constitutions (Romanovsky, 2006, p. 79).

O.G. Rogova points out that the human right to life is the freedom of man to directly realize the opportunities he has as a result of his belonging to the species Homo sapience, and to meet the necessary essential biological, social, spiritual, economic and other needs inseparable from man himself. are objectively determined by the achieved level of human development and must be universal (Rogova, 2006, p. 13).

The human right to life is an inalienable right of an individual, which ensures his natural existence and is protected by international and national legal acts (Sloma, 2012, p.78). It belongs to all citizens, regardless of belonging to the citizenship of Ukraine from the moment of birth and regardless of the right and legal capacity.

Under the human right to life is understood the total subjective right, which implies provided for the individual by the rules of objective law measure of possible behavior to use life as a social good in order to maintain their biological existence and self-development of the individual by his own factual and legal actions, including requirements to other subjects of law, except the state, and also the absolute obligation provided by the state and society concerning preservation, protection and maintenance of a worthy life (Kuzmenko, 2014, p.30).

In Ukraine, the right to life is also enshrined in the Central Committee, which placed man at the center of any legal system, defining human life as self-worth. Article 281 of the CCU fixes among the first personal non-property rights the right to life. Such a legal characteristic presupposes, firstly, the realization and real provision of human rights as an individual in the conditions of normal life, and not only in violation of these values. Secondly, in order to give stability to public relations and to fulfill their main purpose, new methods and means of legal influence are needed. These factors determine the relevance and significance of the issues under consideration, and necessitate its comprehensive analysis.

However, having identified a number of higher social benefits, the legislator bypassed the issue of their differentiation. In our opinion, it would still be appropriate to recognize at the legislative level that among all the existing non-material goods available, human life is the fundamental component that is at the top of all social priorities, and human life should occupy a decisive position among other social values. After all, if a person loses his life, all other benefits and corresponding rights that arise in relation to them, lose their meaning.

Despite the role and place that the legislator assigns to human life, another omission, in our opinion, is that there is no official interpretation of life as a personal intangible asset that would promote a common understanding and application of the rules of law governing or protecting legal relations, related to it.

The Civil Code of Ukraine assumes that the right to life should be considered as a broader, broader category, which necessitates a revision of a number of legal concepts and requires the development of new approaches to legal regulation in this area at the present stage.

Human life is a physical, mental, spiritual and biosocial state of human existence that arises from conception and continues to exist until the biological death of a person recognized by the competent health authorities. However, the right to life arises from birth (Buletsa, 2006, p.35).

It should be noted that, the Human Rights Act 1998 sets out the fundamental rights and freedoms that everyone in the UK is entitled to. It incorporates the rights set out in the European Convention on Human Rights (ECHR) into domestic British law. The Human Rights Act came into force in the UK in October 2000. Everyone's right to life shall be protected by law. This right is one of the most important of the Convention since without the right to life it is impossible to enjoy the other rights. Noone shall be condemned to death penalty or executed. The abolition of death penalty is consecrated by Article 1 of Protocol No. 6.

The right to life is regulated in article 2 from the Convention, according to which „The right to life of any person is protected by law. Death cannot be caused with intention, except the death penalty given by the court of law when the crime in sanctioned with this penalty by law". Analyzing in detail the cases where there is no violation of the right to life, in the line 2 of the same article, the Convention provides that „death is not considered to be caused by the violation of this article in case it results from force proven to be absolutely necessary: a) in order to ensure the protection of any person against illegal violence (self-defence); b) in order to make a legal arrest or to prevent the escape of a person lawfully detained; c) in order to suppress, according to the law, a riot or an insurrection" (Coman, Maftei & Negruț, 2012, p.241). According to this regulation, it results that the right to life is "intangible". By adopting the Protocol 6 of the European Convention of Human Rights, the European Council gave a special attention to death penalty, stating the rule according to which "nobody can be convicted to such a penalty, nor executes", excepting the cases when, at national level is provided the death penalty for exceptional situations (crimes of war or of imminent danger of war). The Protocol 13 of the same convention, signed at 3 May 2002, solves this problem in a radical way by determining the member states of the Europe Council to eliminate the death penalty in any circumstances, eliminating any derogation from this rule. The jurisprudence of the European Court of Human Rights was a fundamental element in the research of the content regarding the right to life, confronting with cases where there was asked to identify the limits of the right to life in cases of euthanasia, and regarding the right to life of the fetus. In the jurisprudence of the Court there are various cases regarding the protection of the right to life including cases regarding euthanasia, the right to life of the fetus, and situations where there was asked for the conviction of the states for breaking the right to life by the lack of investigations in cases of missing or suspect death (Selejan-Guţan & Rusu, 2006, p. 136).

For example, in Hungary, Slovakia and the Czech Republic, the right to life arises from the moment of conception, provided that the child is born alive, and is also a basic personal inalienable right. In addition, everyone's life is good not only for them. It is one of the highest social values for Ukrainian society, as emphasized in Article 3 of the Constitution of Ukraine, and for the world, as follows from a number of international conventions, and society's attitude to the life of each individual is the best indicator of its cultural and spiritual development.

Thus, in most European countries, the unborn child has the right to life. In Ukraine - just born. This means that an 8-month-old fetus that has all the characteristics of a human, but does not have the right to life.

4. Protection of the right to life

Everyone's right to life is defined as an inalienable right and universally recognized by the

international community. This means that such a right cannot be separated from the holder either voluntarily, compulsorily, permanently or temporarily. An individual cannot be deprived of the right to life. However, this wording in Article 281 of the Civil Code of Ukraine does not quite correspond to the provisions of the Constitution of Ukraine, which declares that no one can be arbitrarily deprived of life (Article 27 of the Constitution of Ukraine). At the same time, the state cannot guarantee that all people will live forever, because it depends on the state of health and on the person himself (suicide) (Rabinovich & Havronyuk, 2004, p.260). It also means that no one can be deprived of life without a proper legal basis. But the death penalty is not the only legal way to restrict the right to life of individuals. Such methods, for example, can also include the necessary defense (Article 1169 of the Civil Code of Ukraine). In this regard, the constitutional provision on the prohibition of arbitrary deprivation of life seems more precise (Stefanchuk, 2003, p.89).

According to Article 2 of the EC (European Convention on Human Rights), deprivation of life is not considered a violation of the right to life, when it is a consequence of the inevitable need to use force: a) to protect anyone from unlawful violence; b) in the event of a lawful arrest or in the prevention of the escape of a person lawfully in custody; c) during acts committed lawfully in order to suppress a riot or insurrection.

The limits of the realization of the human right to life are also established by giving a person the right to protection of his own life from unlawful encroachments through the use of opportunities provided by the institutions of extreme necessity and necessary defense. The Constitution of Ukraine stipulates that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. To ensure the correct and uniform application of the law in cases of crimes against life and health, a resolution of the Plenum of the Supreme Court of Ukraine was adopted, which provides in detail the conditions for liability for crimes against life and health. This provision is confirmed by the Hungarian directive on the protection of life and health, which emphasizes that encroachment on human life is the most serious crime, ie encroachment on human life is prohibited by law. As already mentioned, the right to life is an inalienable human right, ie neither the state nor society can violate this right, and its protection is the duty of the state. Violation of these rights causes an individual to a state where he can, without sparing his life, challenge society and the state, defending their inalienable rights and freedoms (Danilov, 2002, p.62).

What concerns the US and the UK both already having implemented individual human rights sanctions, the EU is about to enact its own human rights sanctions regime: The European Commission and the EU High Representative for Foreign Affairs, Josep Borrell, have recently presented a proposal for the introduction of EU human rights sanctions. This follows an announcement by the President of the European Commission, Ursula von der Leyen, in her September 2020 State of the Union Address on the Commission's attention to bring forward such EU human rights sanctions framework.

The EU's move towards human rights sanctions comes after the UK adopted a similar sanctions regime this summer and increasing pressure by different stakeholders on the implementation of EU human rights sanctions. The idea for a global human rights sanctions programme originates form the US Magnitsky Act which was adopted in response to the killing of Russian whistleblower Sergei Magnitsky in 2009.

The global regime of EU sanctions for human rights violations - namely the name of the European version of the American «Magnitsky Act», will not be tied to specific names or countries, but will impose sanctions on individuals and institutions involved in serious human rights violations all over the world. It must be adopted unanimously 7.12.2020. Sanctions can be applied to both state and non-state actors, people and organizations. Therefore, the range of individuals and legal entities that will be able to fall under the new restrictive measures is very wide. Sanctions can be applied for human rights violations where they would not be committed in the world. While the draft is not available for the public yet, it is expected to include the imposition of asset freezes and travel bans on individuals / entities responsible for serious human rights violations, including genocide, torture, crimes against humanity, slavery,

human trafficking, extrajudicial killings, sexual violence. Other than with the current economic / cyber / chemical weapons sanctions, the proposal would provide the European Commission with oversight functions on the implementation of travel bans. The set of sanctions instruments is normal: it is a ban on travel to the European Union and the freezing of financial assets (Sanctions And Human Rights, 2020).

Gabriel Toggenburg said that there are at least three reasons why it is important the EU Charter protects the right to life (Toggenburg, 2020): Firstly, the scope of EU legislation is expanding. Back in 2000 when the Charter was proclaimed, questions of 'life and death' were beyond the EU's scope. This has changed as the European Arrest Warrant or the fight against terrorism show. Or take the example of FRONTEX and the protection of the EU's external border, not to mention the Common Foreign and Security Policy of the EU and possible EU military missions in third countries: all contexts where the EU could run the risk of violating the right to life. Secondly, the right to life goes beyond drastic scenarios. It is present and relevant also in more daily contexts. The right to life might for instance pop up in the context of public health and the question of what sort of claims can be made in advertisements for medicinal products. Or even in the context of environment given that the EU rules on, for instance, air quality can be seen as putting „in concrete terms the Union's obligations to provide protection following from the fundamental right to life". Thirdly, the EU has been propagating the abolition of the death penalty vis-à-vis third countries for many years and continues to do so. In fact, the global trend is positive. 142 countries, representing three quarters of the UN member states, have stopped using the death penalty. In 2018, executions were carried out in 20 countries, "representing a historic low of 10% of the countries of the world". Committing internally to the prohibition of the death penalty increases the EU's legitimacy when fighting the death penalty externally.

This does not provide for the additional right to die to be conferred, unlike the Universal Declaration of Human Rights, the ICCPR or the Bill of Rights Act because it explicitly states the situations that do not contravene the order that "No one shall be deprived of his life intentionally". That the right to life implies a right to choose to not continue living may still be inferred however, as was argued in Pretty v United Kingdom: "…the Article recognises that it is for the individual to choose whether or not to live and so protects the individual's right to self-determination in relation to issues of life and death. Thus a person may refuse lifesaving or life-prolonging medical treatment, and may lawfully choose to commit suicide. The Article acknowledges that right of the individual. While most people want to live, some want to die, and the Article protects both rights. The right to die is not the antithesis of the right to life but the corollary of it, and the State has a positive obligation to protect both."6 This argument was rejected by the European Court of Human Rights, concluding that the right to life is unconcerned with what a person chooses to do with their life: "Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life." Arguing that the right to life also grants a right to death may be unfounded, but there is compelling reason to support an additional right to choose whether to live or die. It seems that the right to life is not inconsistent with a right to die, but is not sufficient to protect assisted suicide alone (Holford, 2012, p.25).

The Court has held that no right to die, whether at the hands of a third person or with the assistance of a public authority, can be derived from Article 2 of the Convention. It underlined that the consistent emphasis in all the cases before it has been the obligation of the State to protect life (Pretty v. the United Kingdom, § 39).

In the case of Vo v. France, where the applicant had to undergo a therapeutic abortion as a result of medical negligence, the Court considered it unnecessary to examine whether the abrupt end to the applicant's pregnancy fell within the scope of Article 2, seeing that, even assuming that that provision was applicable, there was no failure on the part of the respondent State to comply with the requirements relating to the preservation of life in the public-health sphere (§ 85; see also for a similar approach Mehmet Şentürk and Bekir Şentürk v. Turkey, § 109) (Guide, 2020, p.17).

The problem of protection of the right to life in Ukraine remains relevant, and therefore there is a European mechanism for the protection of such a right, which provides an opportunity for a person whose right has been violated to obtain fair satisfaction. In order to obtain justice from the European Court, it is proposed to understand with arguments: whether the fact of violation of the right to life was true, whether the restriction of the right met the three-part test, whether the state took measures to prevent or eliminate the violation and whether there are real grounds , evidence, etc.) to bring the state to justice (Shevchenko, 2018, p.306).

The protection of the right to life occurs under any circumstances, to any person, regardless of race, nationality, religion, sexual orientation in any way, provided that no harm is done to other living beings, regardless of place of residence, status, sanctions for violation the right to life applies under all conditions.

The right to life today is not an inalienable human right, because in the context of Covid 19 pandemic there is a constant restriction and violation of the right to human life, the right to unconfined movement. A person is deprived of the right to personal, physical development due to the lockdown introduced by most of the states. The current situation in the world leads to the conclusion that the violation of the right to life occurs for unexpected reasons, for all people with no-expection in omnipresent places. States are unable to protect people from the coronavirus that is spreading around the world and thus violate human rights to life by restricting a person's ability to move, make new contacts, generate business income, and communicate with each other.

5. Conclusions

The constitutions of the world provide for the right to life, happiness, and well-being, and respect for these rights must be instilled in children from an early age. Despite the role and place that the legislator assigns to human life, another omission is that there is no official interpretation of life as a personal intangible asset that would promote a common understanding and application of the rules of law governing or protecting legal relations related to with him.

What states need to do is to develop a clear, adaptive mechanism of actions, in order to protect the citizens without violating their right to life. This mechanism needs to be constantly revised and improved according to the newest scientifically proven data. Also, this can include pre-pandemic preparations of the medical care system on a larger scale, on smaller - access to free testing with quick results on a daily basis.

The protection of the right to life occurs under any circumstances, to any person, regardless of race, nationality, religion, in any way, provided that no harm is done to other living beings, regardless of place of residence, status, ie sanctions for violation the right to life applies under all conditions. The opportunity to freely exercise the right to life needs to remain protected.

Bibliography:

1. **Бахин, С. В.** (1998). Всеобщая декларация 1948 года: от каталогов прав человека к унификации правового статуса личности. *Правоведение,* 4, С.34–35
2. **Булеца, С. Б.** (2006). *Право фізичної особи на життя та здоров'я (порівняльно-правовий аспект). Монографія*. Ужгород, Поліграфцентр „Ліра", 172 с.
3. **Данілов, С. О.** (2002). Ідея невід'ємних прав людини у Конституції України. *Держава і право*, 18, С.61–65
4. **Зайцева, А. М. (**2008). *Жизнь человека как объект конституционноправового регулирования* (автореф. дис. … канд. юрид. наук: 12.00.02). М., 28 с.
5. **Кальченко, Н. В.** (2004). *Гражданские права человека: современные проблемы теории и практики. Монография*. Волгоград, 187 с
6. **Кальченко, Н. В.** (1995). *Право человека и гражданина на жизнь и его гарантии в РФ* (дис. …канд. юрид. наук: 12.00.02). Волгоград, 1995, 193 с.
7. **Карако, П. С.** (1998). Жизнь. *Новейший философский словарь*. Сост. А.А. Грицианов. Минск: Изд. В.М. Скакун,
8. **Кожан, В. В.** (2016). *Особисті права та свободи людини: загальнотеоретичне дослідження* (дис. … канд. юрид. наук: 12.00.01). Львів, 229 с.
9. **Колодій, А. М., & Олійник, А. Ю.** (2008). *Права, свободи та обов'язки людини і громадянина в Україні. Підручник*. К., Всеукраїнська асоціація видавців «Правова єдність», 350 с.
10. **Красавчикова, Л. О.** (1983). *Личная жизнь граждан под охраной закона.* М.: Юридическая литература, 160 с.
11. **Кузьменко, Я. П.** (2014). Загальна характеристика права людини на життя. *Науковий вісник Ужгородського національного університету.* Серія Право, 28, Том 1, С.26-30

12. **Кузьменко, Я. П.** (2015). Право людини на життя: історико-правові аспекти. *Юридичний науковий електронний журнал*, 3, С.25. URL: http://www.lsej.org.ua/3_2015/6.pdf
13. **Кузьменко, Я. П.** (2017). Право на життя як природне право людини: теоретико-правовий аналіз. *Науковий вісник Ужгородського національного університету. Серія «Право»*, 46, Т.1, С. 15-18
14. **Матузов, Н. И.** (1998). Право на жизнь в свете российских и международных стандартов. *Правоведение*, 1, С.198 – 203
15. **Опарим, А. Й.** (1978). Жизнь. Большая медицинская энциклопедия. Гл. ред. акад. Б.В. Петровский. Т.8: Евгеника-Зыбление. М., Изд. «Советская знциклопедия», С.253-258.
16. *Про захист прав людини і основоположних свобод.* (1950): Конвенція. URL: https://zakon.rada.gov.ua/laws/show/995_004#Text
17. *Про судову практику в справах про злочини проти життя та здоров'я особи* (2003): постанова Пленуму Верховного Суду №2. URL: https://zakon.rada.gov.ua/laws/show/v0002700-03#Text
18. **Пунда, О. О.** (2004). Право на фізичну недоторканність у системі особистих немайнових прав фізичної особи. *Вісник Верховного Суду України*, 7(47), С.38-40
19. **Рабінович, П. М., Хавронюк, М. І.** (2004). *Права людини і громадянина. Навчальний посібник*. К. Атіка, 464 с.
20. **Рогова, О. Г.** (2006). *Право на життя в системі прав людини* (автореф. дис. … канд. юрид. наук:12.00.01). Х., 21 с.
21. **Романовський, Г. Б.** (2006). Право на жизнь: юридическая норма и доктрина. *Університетські наукові записки,* 2(18), С. 75-79.
22. **Рубанова, Н. А.** (2006). *Право человека на жизнь в законодательстве РФ: понятие, содержание, правовое регулирование*. (дис. … канд. юрид. наук: 12.00.01). Ростов-на-Дону», 24 с.
23. **Селихова, О. Г.** (2002). *Конституционно-правовые проблемы осуществления права индивидов на свободу и личную неприкосновенность*. (дис. … канд. юрид. наук: 12.00.02). Екатеринбург, 23 с.
24. **Слома, В. М.** (2012). Право на життя як особисте немайнове право фізичної особи. *Юридичний вісник,* 1(22), С.77-81. URL: http://www.law.nau.edu.ua/images/Nauka/Naukovij_jurnal/2012/statji_n1_22_2012/Sloma_77.pdf
25. **Стефанчук, Р. О.** (2004). Право на життя як особисте немайнове право фізичної особи. *Юридична Україна*, 7, С.44-49.
26. **Стефанчук, Р.О.** (2003). Цивільно-правові засади закріплення, здійснення та охорони права на життя як особистого немайнового права фізичних осіб. *Методологія приватного права: Зб наук. праць*. К. Юрінком Інтер, 2003, 480 с.
27. **Судо, Ж.** (2001). Біологічний статус людського ембріона (доповідь для медиків). *Родина і биоэтика*, 5, С.131-139
28. **Федорова, А. Л.** (2009). Право на життя як невід'ємне природне право людини. *Актуальні проблеми міжнародних відносин*, 83, (Частина ІІ), С.43-49.
29. *Цивільний кодекс України* (2003): Закон України №435-IV. URL: https://zakon.rada.gov.ua/laws/show/435-15#Text
30. **Шевченко, Ю. А.** (2018). Механізм захисту права на життя у світлі практики європейського суду з прав людини у справах проти України. *«Young Scientist»,* 3 (55), March, С. 301-307
31. 대한민국헌법 [시행 1988. 2. 25.] [헌법 제10호, 1987. 10. 29., 전부개정]. URL: **https://www.law.go.kr/lsEfInfoP.do?lsiSeq=61603#**
32. 中村　美帆.　　日本国憲法第*25*条「文化」概念の研究—文化権（*cultural right*）との関連性. (2017). URL: http://www.l.u-tokyo.ac.jp/postgraduate/database/2017/6187.html
33. 日本国憲法. (1945). URL: https://elaws.e-gov.go.jp/document?lawid=321CONSTITUTION
34. 生活保護制度. URL: https://www.gender.go.jp/policy/no_violence/e-vaw/law/22.html
35. Aj nenarodené dieťa má právo na život. (2004). *Spravodaj občianskeho združenia Fórum života,* 3, S.1-16
36. **Blahož, Josef.** (1998). Úvaha o podstatě lidských a občanských práv (1998). *Právnik,* 10-11, С.874–894
37. **Coman, V., Maftei J. & Negrut V.** (2012). The Right to Life. *Conference: EIRP*, 7, p. 239-243.
38. **Gabriel, Toggenburg**. (2020). *The 2nd of all EU-r rights: the right to life and what the Charter has to contribute*. URL: https://beta.eurac.edu/en/blogs/eureka/the-2nd-of-all-eu-r-rights-the-right-to-life-and-what-the-charter-has-to-contribute
39. *Guide on Article 2 of the European Convention on Human Rights. Right to life.* (2020). URL: https://www.echr.coe.int/documents/guide_art_8_eng.pdf
40. **Safa, Reisoğlu.** (1998-1999). Right to life. *Perceptions journal of international affairs,* III (4). URL: https://dergipark.org.tr/en/download/article-file/817142
41. **Sam, Holford**. (2012). There is a right to life; is there a right to die? *The New Zealand Medical Student Journal,* 16 (November), P.25 URL: http://www.nzmsj.com/uploads/3/1/8/4/31845897/16_feature2.pdf
42. *Sanctions and Human Rights: towards a European framework to address human rights violations and abuses worldwide*. (2020). URL: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1939

43. **Selejan-Guţan, B., & Rusu, H**. (2006). *Jurisprudenţa CEDO/ ECHR Jurisprudence*. Bucharest: Hamangiu, Updated on 31 August 2020, P.17. URL: https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf

References:

1. **Bakhin, S. V.** (1998). Vseobshchaya deklaratsiya 1948 goda: ot katalogov prav cheloveka k unifikatsii pravovogo statusa lichnosti. [Universal Declaration of 1948: from catalogs of human rights to the unification of the legal status of individuals]. *Pravovedeniye*, №4, 34-35 [in Russian].
2. **Buletsa, S. B.** (2006). *Pravo fizychnoyi osoby na zhyttya ta zdorov"ya (porivnyal'no-pravovyy aspekt). [The right of an individual to life and health (comparative legal aspect)]. Monohrafiya*. Uzhhorod, Polihraftsentr „Lira", [in Ukrainian].
3. **Danilov, S. O.** (2002). Ideya nevid"yemnykh prav lyudyny u Konstytutsiyi Ukrayiny. [The idea of inalienable human rights in the Constitution of Ukraine]. *Derzhava i pravo,* 18, .61-65 [in Ukrainian].
4. **Zaytseva, A. M.** (2008). *Zhizn' cheloveka kak ob»yekt konstitutsionno pravovogo regulirovaniya*. [Human life as an object of constitutional legal regulation]. (Extended abstract of Candidat's thesis). M. [in Russian].
5. **Kal'chenko, N. V.** (2004). *Grazhdanskiye prava cheloveka: sovremennyye problemy teorii i praktiki. [Civil human rights: modern problems of theory and practice]. Monografiya*. Volgograd, [in Russian].
6. **Kal'chenko, N. V.** (1995)**.** *Pravo cheloveka i grazhdanina na zhizn' i yego garantii v RF*. [The human and citizen's right to life and its guarantees in the Russian Federation]. *(*Candidat's *thesis)*. Volgograd [in Russian].
7. **Karako, P. S.** (1998*). Zhizn'. [Life]. Noveyshiy filosofskiy slovar'. Sost.* A.A. Gritsianov. Minsk: Izd. V.M. Skakun, [in Russian].
8. **Kozhan, V. V.** (2016). *Osobysti prava ta svobody lyudyny: zahal'noteoretychne doslidzhennya*. [Personal rights and human freedoms: general theoretical research]. *(*Candidat's *thesis)*. L'viv, 2016, [in Ukrainian].
9. **Kolodiy, A.M. & Oliynyk, A. YU.** (2008). *Prava, svobody ta obov'yazky lyudyny i hromadyanyna v Ukrayini. [Rights, freedoms and responsibilities of man and citizen in Ukraine]. Pidruchnyk*. K., Vseukrayins'ka asotsiatsiya vydavtsiv «Pravova yednist'», [in Ukrainian].
10. **Krasavchikova, L. O.** (1983). *Lichnaya zhizn' grazhdan pod okhranoy zakona. [The personal life of citizens is protected by law]*. M.: Yuridicheskaya literatura, 160 s. [in Russian].
11. **Kuz'menko, YA. P.** (2014). Zahal'na kharakterystyka prava lyudyny na zhyttya. [General characteristics of the human right to life]. *Naukovyy visnyk Uzhhorods'koho natsional'noho universytetu. Seriya PRAVO,* 28, Tom 1, 26-30 [in Ukrainian].
12. **Kuz'menko, YA. P.** (2015). Pravo lyudyny na zhyttya: istoryko-pravovi aspekty. [People's right to life: historical and legal aspects]. *Yurydychnyy naukovyy elektronnyy zhurnal*, 3, 25. Available from: http://www.lsej.org.ua/3_2015/6.pdf [in Ukrainian].
13. **Kuz'menko, YA. P.** (2017). Pravo na zhyttya yak pryrodne pravo lyudyny: teoretyko-pravovyy analiz. [The right to life as a natural human right: theoretical and legal analysis]. *Naukovyy visnyk Uzhhorods'koho natsional'noho universytetu. Seriya «Pravo»,* 46, T.1, 15-18 [in Ukrainian].
14. **Matuzov, N. I.** (1998). Pravo na zhizn' v svete rossiyskikh i mezhdunarodnykh standartov. [The right to life in the light of Russian and international standards]. *Pravovedeniye*, 1, 198-203 [in Russian].
15. **Oparim, A. Y.** (1978). *Zhizn'. [Life]. Bol'shaya meditsinskaya entsiklopediya. [Great medical encyclopedia].* Gl. red. akad. B.V. Petrovskiy. T.8: Yevgenika – Zybleniye. M., Izd. «Sovetskaya zntsiklopediya», S.253 – 258. [in Russian].
16. *Pro zakhyst prav lyudyny i osnovopolozhnykh svobod. [On the protection of human rights and fundamental freedoms].* (1950): Konventsiya. Available from: https://zakon.rada.gov.ua/laws/show/995_004#Text [in Ukrainian].
17. *Pro sudovu praktyku v spravakh pro zlochyny proty zhyttya ta zdorov'ya osoby. [On Judicial Practice in Cases of Crimes against the Life and Health of a Person].* (2003): postanova Plenumu Verkhovnoho Sudu No 2. Available from: https://zakon.rada.gov.ua/laws/show/v0002700-03#Text [in Ukrainian].
18. **Punda O. O.** (2004). Pravo na fizychnu nedotorkannist' u systemi osobystykh nemaynovykh prav fizychnoyi osoby. [The right to physical inviolability in the system of personal non-property rights of an individual]. *Visnyk Verkhovnoho Sudu Ukrayiny,* 7(47), 38-40 [in Ukrainian].
19. **Rabinovych, P. M. & Khavronyuk, M. I. (**2004*). Prava lyudyny i hromadyanyna [Human and civil rights]. Navchal'nyy posibnyk*. K. Atika, 464 s. [in Ukrainian].
20. **Rohova, O.H.** (2006). *Pravo na zhyttya v systemi prav lyudyny.* [The right to life in the human rights system] (Extended abstract of Candidat's thesis). KH. [in Ukrainian].
21. **Romanovs'kyy, H. B.** (2006). Pravo na zhyzn': yurydycheskaya norma y doktryna [The right to life: legal norm and doctrine]. *Universytet·s'ki naukovi zapysky*, 2(18), 75-79. [in Russian].

22. **Rubanova, N. A.** (2006). *Pravo lyudyny na zhyttya v zakonodavstvi RF: ponyattya, zmist, pravove rehulyuvannya* [The human right to life in the legislation of the Russian Federation: concept, content, legal regulation] (Extended abstract of Candidat's thesis). Rostov-na-Donu. [in Russian].
23. **Selykhova, O. H.** (2002). *Konstytutsiyno-pravovi problemy zdiysnennya prava indyvidiv na svobodu ta osobystu nedotorkannist'*. [Constitutional and legal problems of the exercise of the right of individuals to freedom and personal inviolability]. Extended abstract of Candidat's thesis). Yekaterynburh [in Russian].
24. **Sloma, V. M.** (2012). Pravo na zhyttya yak osobyste nemaynove pravo fizychnoyi osoby. [The right to life as a personal intangible right of an individual]. *Yurydychnyy visnyk,* 1(22), 77-81. Available from: http://www.law.nau.edu.ua/images/Nauka/Naukovij_jurnal/2012/statji_n1_22_2012/Sloma_77.pdf [in Ukrainian].
25. **Stefanchuk, R. O.** (2004). Pravo na zhyttya yak osobyste nemaynove pravo fizychnoyi osoby [The right to life as a personal intangible right of an individual]. *Yurydychna Ukrayina,* №7, 44-49 [in Ukrainian].
26. **Stefanchuk, R. O.** (2003). Tsyvil'no-pravovi zasady zakriplennya, zdiysnennya ta okhorony prava na zhyttya yak osobystoho nemaynovoho prava fizychnykh osib. [Civil law principles of consolidation, exercise and protection of the right to life as a personal non-property right of individuals]. *Metodolohiya pryvatnoho prava: Zb nauk. prats'*. K. Yurinkom Inter [in Ukrainian].
27. **Sudo, Z. H.** (2001). Biolohichnyy status lyuds'koho embriona (dopovid' dlya medykiv). [Biological status of the human embryo (report for physicians)]. *Rodyna i byoétyka,* 5, 131-139 [in Ukrainian].
28. **Fedorova, A. L.** (2009). Pravo na zhyttya yak nevid"yemne pryrodne pravo lyudyny. [The right to life as an inalienable natural human right].. *Aktual'ni problemy mizhnarodnykh vidnosyn, 83, (Chastyna II),* 43-49 [in Ukrainian].
29. *Tsyvil'nyy kodeks Ukrayiny.* [Civil Code of Ukraine]. (2003): Zakon Ukrayiny №435-IV. Available from: https://zakon.rada.gov.ua/laws/show/435-15#Text [in Ukrainian].
30. **Shevchenko, Yu. A.** (2018). Mekhanizm zakhystu prava na zhyttya u svitli praktyky yevropeys'koho sudu z prav lyudyny u spravakh proty Ukrayiny. [Mechanism for the protection of the right to life in the light of the case law of the European Court of Human Rights in cases against Ukraine.]. *Young Scientist,* 3 (55), March, 301-307/]/ [in Ukrainian].
31. 대한민국헌법 [시행 1988. 2. 25.] [헌법 제10호, 1987. 10. 29., 전부개정]. [The Constitution of the Republic of Korea [Enforcement on February 25, 1988] [Constitution No. 10, October 29, 1987, all amended]. Available from: **https://www.law.go.kr/lsEfInfoP.do?lsiSeq=61603#** [in Korean].
32. 中村　美帆. **Nakamura, Miho** (2017) 日本国憲法第25条「文化」概念の研究—文化権（cultural right）との関連性. [Research on the concept of "culture" in Article 25 of the Japanese Constitution-Relationship with cultural rights].. Available from: http://www.l.u-tokyo.ac.jp/postgraduate/database/2017/6187.html [in Japanese].
33. 日本国憲法. *[Constitution of Japan].* (1945). Available from: https://elaws.e-gov.go.jp/document?lawid=321CONSTITUTION [in Japanese].
34. 生活保護制度. *[Life protection system*]. Available from: https://www.gender.go.jp/policy/no_violence/e-vaw/law/22.html [in Japanese].

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ЖИТТЯ ТА ПРАВО НА ЖИТТЯ ЯК ОСНОВНЕ КОНСТИТУЦІЙНЕ ПРАВО ГРОМАДЯНИНА

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Резюме

Мета цієї статті – вивчити поняття життя та конституційне право на життя, визначити їх сутність, взаємозв'язок цих понять, розкрити їх особливості, а також досвід Європейського суду з прав людини щодо їх захисту.

В контексті розкриття предмета дослідження для досягнення мети наукового дослідження та забезпечення повноти, об'єктивності, надійності та переконливості результатів автор використав комплекс загальних та спеціальних методів, характерних для юридичної науки. Зокрема, за допомогою історичного методу було вивчено походження та довгий історичний шлях розвитку цих прав людини. За допомогою системно-структурного методу сформульовано загальну структуру дослідження, а діалектичного - проаналізовано положення законодавства та судової практики щодо особливостей права на життя. За допомогою порівняльно-правового методу було проаналізовано законодавство зарубіжних країн, що дало можливість використовувати їх позитивний досвід з точки зору захисту права на життя людини.

У цій статті розкриваються наукові підходи дослідників щодо визначення сутності життя, права на життя, смерті, виявлення їх особливостей та розмежування між ними. У статті проаналізовано способи захисту права на життя. Значна частина роботи присвячена аналізу правозастосовчої практики Європейського суду з прав людини як загалом, так і доцільності існування певних критеріїв обмеження права на життя.

На підставі дослідження зроблено висновок, що життя та право на життя є подібними поняттями. Стверджується, що обмеження права на життя через пандемію можливі у разі підтвердження захворювання. У всіх інших випадках держава повинна забезпечити вільний доступ до тестування на коронавірус, у разі негативного тесту можливість вільно реалізувати право на життя. Відзначається, що значна кількість зарубіжних країн передбачає право на життя в конституціях, але є країни, де право на щастя чи фізичне благополуччя розвивається. Загальновідомо, що кожен має право на щастя, яке у кожного різне, тому створення механізму забезпечення та дотримання права на життя лежить на державі та людині.

Ключові слова: *життя, право на життя, людина, Конституція, Європейський суд, захист.*

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CONSTITUTIONAL RIGHT TO ENTREPRENEURIAL ACTIVITY: THEORETICAL AND LEGAL ASPECT

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Abstract

The purpose of the article is theoretical-legal research of the constitutional right to entrepreneurial activity in order to clarify its essence, subject and object composition, to identify the peculiarities of implementation and guarantees of this right.

Methods. To achieve the research goal, dialectical, formal-legal, comparative-legal, system-structural, logical-semantic and other methods of scientific cognition have been used.

Results. The essence and content of the constitutional right to entrepreneurial activity have been analysed. The content of this right is defined as the totality of an entrepreneur's powers that are necessary for his/her achieving a specific goal – certain economic and social results and obtaining profit.

The subject composition of the constitutional right to entrepreneurial activity has been examined. The shortcomings of establishing this right in Section II of the Constitution of Ukraine have been identified. The expediency of further development of the constitutional provision on subjects of the right to entrepreneurial activity in the framework of the Commercial Code of Ukraine has been emphasized.

The concept and attributes of entrepreneurship as an object of the right to entrepreneurial activity have been elucidated.

New ways of developing the institution of entrepreneurship and means of effectively ensuring the exercise of the constitutional right to entrepreneurial activity have been proposed.

The role of guarantees of the constitutional right to entrepreneurial activity has been studied to ensure its effective enforcement.

Conclusion. The introduction of amendments to the Constitution of Ukraine regarding the right to entrepreneurial activity is proved to be unreasonable. In order to ensure the stability of the legal status of an entrepreneur, instead of updating the constitutional regulations, it has been proposed to improve practical guarantees, methods and mechanisms of implementing the right to entrepreneurial activity within the framework of the Commercial Code of Ukraine.

The significance of the Constitutional Court of Ukraine has been substantiated for ensuring the understanding of the content and peculiarities of the implementation of the constitutional right to entrepreneurial activity and further development of legislative regulation in accordance with the constitutional principles.

The main factors that hinder the development of entrepreneurship in Ukraine in the current conditions have been singled out as follows:

- the infringement by state and local authorities of the guarantees of the constitutional right to entrepreneurial activity enshrined in the Constitution of Ukraine and legislation;

- excessive administrative pressure on business entities;

- poor economic incentives for the effective development of the entrepreneurial institution;

- insufficient attention to the issues of preparing for entrepreneurial activities in educational institutions.

The necessity to conduct further scientific research in the direction of minimizing the harmful impact of these factors on the development of entrepreneurship in Ukraine has been substantiated.

Key words: Constitution of Ukraine, entrepreneur, entrepreneurship, legal form of organization, Constitutional Court of Ukraine, Commercial Code of Ukraine.

1. Introduction

Problem statement. Among the rights of individuals defined by the Constitution of Ukraine, the right to entrepreneurial activity has a special place since entrepreneurship is the fundamental basis and driving force of the economy, as well as one of the factors of socio-economic progress of society.

However, the absence of a long-term strategy for the economic development in Ukraine impels the "turbo mode" of law-making, and in its turn increases the economic and legal uncertainty for business.

To become a nation of entrepreneurs, Ukrainians need to change two things: their attitude to the Constitution of Ukraine and to entrepreneurship. The Ukrainian Constitution should be perceived as a dynamic system of values, principles and norms having supreme legal force and due to this, citizens can change the development of any public or private institution, including entrepreneurship in the right direction (Kampo, 2020).

Under these conditions, the understanding of the constitutional human right to entrepreneurial activity acquires relevance.

Degree of problem development. To a greater or lesser extent, the issues of the constitutional human right to entrepreneurial activity have been studied by many representatives of legal science, including O. V. Bezukh, Yu. M. Bysaha, O. V. Bihnyak, D. V. Zadykhaylo, V. M. Kampo, L. O. Nikitenko, S. V. Riznyk, M. V. Savchyn, Yu. M. Todyka, N. H. Shuklina etc.

The available research findings of the mentioned and other scholars will form an important basis for our research. Herewith, it should be noted that the previously published works do not always take into account the latest changes in legislation as well as new realities of social and economic development of the state. The issues of the constitutional right to entrepreneurial activity in the works of the aforementioned researchers were considered mainly in a fragmented manner. Theoretical elaborations on the issues of defining the essence of the constitutional right to entrepreneurial activity, its content, subjective and objective composition, implementation remain insufficient, which significantly affects the efficiency of its use in practice. In this regard, the scientific analysis of the constitutional right to entrepreneurial activity receives particular attention.

According to Article 42 of the Constitution of Ukraine, everyone shall have the right to entrepreneurial activity that is not prohibited by law (The Constitution of Ukraine, 1996).

The establishment of the right of a person and a citizen to entrepreneurial activity (in particular private entrepreneurial activity) in the Constitution of Ukraine of 1996 has historical institutional significance for the Ukrainian legislation and public life, despite the fact that the right to entrepreneurial activity has long acquired a mandatory element of the block of economic rights and freedoms of a person in the world experience of constitutional law-making and international legal practice of establishing human rights standards (Tatsii at al. 2011, p. 308).

The right to entrepreneurial activity belongs to a group of economic rights in the Fundamental Law of Ukraine, including the right to utilise the natural objects of the people's right of property (Art. 13), the right to private property (Art. 42). In the group of economic rights and freedoms, the right to entrepreneurial activity

occupies an independent position and as part of this system has its own characteristics, subject and object composition.

Establishing the right to entrepreneurial activity in the Fundamental Law of Ukraine, the legislator does not provide its definition. There is no legal definition in other normative and legal acts. The legislator's approach is inconsistent with the principle of legal certainty as a constituent principle of the rule of law guaranteed by Part 1 Article 8 of the Constitution of Ukraine.

The scholars' opinions differ regarding the necessity to clarify the constitutional and legal norm concerning the right to entrepreneurial activity and other norms of the Constitution of Ukraine. Some researchers emphasize the need to disclose the concept and content of the right to entrepreneurial activity in the Fundamental Law, while others consider it unreasonable to constantly review constitutional provisions.

In this regard, V. Kampo rightly notes that Ukrainian politicians and scholars, due to the traditional formal-dogmatic understanding of the Constitution of Ukraine, are often eager to constantly change it instead of ensuring the formation of new precedents and practices based on it (through the Constitutional Court of Ukraine, the ordinary courts). Due to the domination of this type of legal understanding, the role of the Fundamental Law of the state is actually reduced to an ordinary legislative act which has lost its constitutional functions (Kampo, 2020).

Legal literature considers the right to entrepreneurial activity as a basic economic right and a legitimate form of freedom in economic relations (Ishchuk, 2014, c. 35).

C. V. Reznik defines the constitutional right to entrepreneurial activity as the right of a person and a citizen approved by the Constitution of Ukraine to direct or indirect, independent, initiative, systematic, own-risk activities aimed at achieving economic and social results and generating profit (Riznyk, 2008, p. 5-6). The disadvantage of the above-mentioned definition is the limitation of the subject composition of the constitutional law under consideration, since a significant number of business entities – economic organizations – are left without attention.

A more successful definition is suggested by O.V. Bihnyak. The scholar defines the right to entrepreneurial activity as the right to pursue independent, initiative, innovative, professional and systematic activity with the aim of achieving economic and social results and generating profit under conditions of risk, observing the rights and legitimate interests of other individuals, and the responsibility for the results of such activity of its subjects (Bihnyak, 2007, p. 3).

The content of the mentioned right is not disclosed in Article 42 and other constitutional and legal norms as well. It seems reasonable to disclose the content of the constitutional right to entrepreneurial activity through its constituent elements, the unity and interrelation of which manifest the analyzed right.

The content of the constitutional right to entrepreneurial activity may be defined as a complex of entrepreneurial authorities that are necessary for an entrepreneur to achieve a certain goal – certain economic and social results and obtaining profit.

The right to entrepreneurial activity is characterized by the following scope of authorities: the right to action, the right to claim, the right to utilise. Each of these authorities may be disclosed based on the analysis of the current legislation.

The right to action includes an entrepreneur's ability to: independently produce and sell products, perform work or provide services; choose types of entrepreneurial activity, suppliers and consumers of products; freely hire employees to perform external economic activity independently; set prices for manufactured products, performed work and provided services in accordance with the law.

The right to claim extends to the entrepreneur's ability to claim: compensation for losses incurred by him/her as a result of violation of his/her property rights by citizens or legal entities, state authorities or local self-government bodies; commission by authorized bodies of actions stipulated by law (for example, state registration, issuance of a license); abstain from commission by authorized bodies of actions prohibited by law (for example, inducement by state bodies to boycott or discriminate against an entrepreneur, dissemination of misleading information, etc.).

The right to utilise includes the possibility for the entrepreneur to use material, technical,

financial, labour, information, natural and other resources for entrepreneurial activity.

2. Subjects of the constitutional right to entrepreneurial activity

It is essential from both theoretical and practical perspectives to elucidate precisely the subject of the constitutional right to entrepreneurial activity. The issue of the subject composition of the holders of the constitutional right to entrepreneurial activity has been a focus of lengthy scholarly discussions.

Nowadays, the legal basis for the ability of each individual to implement an entrepreneurial initiative is a body of normative and legal acts regulating various organizational and legal forms of entrepreneurial activity (Nikitenko, 2013, p. 120).

By using the term "each" in the Fundamental Law, the state grants this right to all individuals, regardless of whether they have Ukrainian citizenship.

Herewith, as D.V. Zadykhaylo rightly notes, the fixation of the right for entrepreneurial activity only in Section II of the Constitution of Ukraine "Rights, Freedoms and Duties of a Person and a Citizen" extremely restricts the sphere of its regulation, limiting its effect only to subjects – physical entities. Therefore, entrepreneurs – legal entities and entrepreneurship as an institution of market economic relations are virtually excluded from the direct constitutional and legal support under this approach. It should be added that according to the provisions of Article 13 of the Constitution of Ukraine, "the State ensures the protection of the rights of all subjects of the right of property and economic management", but at the same time the right to entrepreneurial activity of some subjects is enshrined at the level of constitutional and legal regulation, and another category of subjects is left to the current legislation, which in itself creates unequal opportunities for legal protection (Tatsii, at al. 2011, p. 313).

Further development of the constitutional provision on the subjects of entrepreneurial right finds its manifestation in the norms of the Economic (hereinafter – the EC of Ukraine) (Economic Code of Ukraine, 2003) and the Civil (hereinafter – the CC of Ukraine) Codes of Ukraine (Civil Code of Ukraine, 2003). This approach of the legislator is stipulated by the fact that the Constitution of Ukraine as the main source of the national legal system is also the basis of the current legislation; it provides an opportunity to regulate certain social relations at the level of laws that concretize the provisions enshrined in the Fundamental Law of Ukraine (paragraph 1, subparagraph 3.1, item 3 of the motivational part of the Constitutional Court of Ukraine Resolution dated 12 February 2002 No. 3-rp / 2002) (Constitutional Court of Ukraine, 2002).

Thus, Article 45 of the Economic Code of Ukraine stipulates that entrepreneurship in Ukraine shall be conducted in any organizational forms, envisaged by the law, at entrepreneur's discretion. The answer to the question concerning the legal form of organization is found in the Decree of the State Committee of Ukraine for Technical Regulation and Consumer Policy dated May 28, 2004 № 97, according to the provisions of which it is defined as a form of economic (in particular, entrepreneurial) activity with the appropriate legal basis, which determines the nature of relations between the founders (participants), the mode of property liability for the obligations of the enterprise (organization), the procedure for creation, reorganization, liquidation, management, distribution of received income, possible sources of financing of activity etc (Order on approval of national standards of Ukraine, state classifiers of Ukraine, national changes to interstate standards, amending the Order of the State Committee for Standardization of Ukraine dated March 31, 2004 No. 59 and the abolition of regulatory document, 2004).

The academic literature offers various approaches to the definition of legal form of entrepreneurship, in particular, this concept is considered as a complex of certain attributes or legal parameters, a set of legal rules, types of relations, a totality of methods for production organization. It appears that the most complete description of the legal form of management can be presented in its consideration as a certain legal model. Considering the philosophical and theoretical-legal provisions concerning the model and based on the definition of the legal model as an ideal image reproduced in the norms of law, represents a complete system of legal features and characteristics of a physical object or phenomenon, the legal form of organ-

ization acts as a legal model. Proceeding from this, N. H. Avetisyan suggested defining the legal and organizational form of entrepreneurship as a legal model of economic activity, the contents of which comprise interrelated organizational and property elements (Avetysian, 2019, c. 7).

Specific organizational-legal forms of management in which the entrepreneurial activity may be carried out, are disclosed in the provisions of the Economic Code of Ukraine.

The entrepreneur chooses the organizational form at his/her discretion. The basic organizational-legal forms of management include: enterprises, economic societies, cooperatives, associations of enterprises, physical person-entrepreneur etc. Enshrining the entrepreneur's right to choose the legal form of organization as the general principle, the legislator in some cases establishes restrictions associated with the need to adopt additional measures to protect the interests of participants in the economic activity (Bobkova at al., 2008).

3. The object of the constitutional right to entrepreneurial activity

The object of Article 42 of the Constitution of Ukraine is entrepreneurial activity. The legal definition of "entrepreneurial activity", or rather its synonym "entrepreneurship" is provided in Article 42 of the Economic Code of Ukraine.

Entrepreneurship, to be understood as a separate, initiative, systematic, own-risk economic activity, carried out by business entities (entrepreneurs) with the purpose of achieving economic and social results, and generating profit.

The analysis of the presented normative definition enables distinguishing normative features of entrepreneurial activity.

The first feature of entrepreneurial activity is the entrepreneur's independence, which accompanies this activity. An entrepreneur must organize his/her entrepreneurial activity independently of other individuals.

The legal literature classifies the independence of business entities into proprietary and economic ones. Proprietary independence is the presence of certain property of subjects, which forms the economic basis of their activity (Laptev , 1997, p.19). Economic independence entails the ability to make independent decisions in the course of entrepreneurial activity. The scope of this independence is also related to the form of ownership on the basis of which the business entity operates. Thus, private entrepreneurs enjoy greater independence in comparison with state enterprises (Lyamceva, 2000, p.62-63). At the same time, independence as an underlying feature of entrepreneurial activity should not be understood in a simplified manner. There is no absolute freedom of manufacturers in the economics. The entrepreneur is absolutely free in the sense that there is no authority over him/her, which determines what he/she should do or produce and to what extent. However, he/she is not able to dissociate themselves from the tough market conditions and impose their own conditions. Therefore, it is possible to consider independence only to some extent (Kashanina, 1999, p.75).

An inseparable feature of entrepreneurial activity is initiative.

In connection with the constitutional enshrinement of the right to entrepreneurial activity, an individual has a real opportunity to ensure a decent life. However, under the market economy conditions, the well-being of an entrepreneur is largely determined by how socially active he/she will be, showing initiative in the sphere of entrepreneurship.

Entrepreneur's initiative as a feature of entrepreneurship may be characterized as entrepreneurial attitude, the ability to undertake independent active measures. Only by displaying initiative in the process of entrepreneurial activity the entrepreneur is able to achieve the intended results, ensure competitiveness in the market of products, works or services.

A proactive life position, creativity in the process of conducting business activities, development of skills to generate original and new approaches to decision making as a result form the entrepreneur's specific type of entrepreneurial thinking.

The next feature of entrepreneurial activity is consistency.

Consistency in the legal literature is associated with the idea of regularity, repeatability of any actions (Popov, 1997, p.5). At the same time, when defining consistency as a feature of entrepreneurial activity, it is impossible to proceed only from the time criterion of continuous

performance of a certain activity, but also from other circumstances (Suchoža, 1998, p.116). The prevailing view is that the main feature of consistency is a certain maintenance of the professional level of this activity, which has the character of vocation and is tied to long-term ownership of entrepreneurship and compliance with certain material and qualification conditions for this type of activity. Therefore, speaking of consistency, it is not necessarily a matter of continuous and long-term activity.

Thus, the entrepreneurial activity may be exercised seasonally (e.g., sugar production activity), at certain events (e.g., fairs, exhibitions, sports events) or with certain breaks (e.g., the entrepreneur will go for an internship for two months and will continue his/her activity upon return). However, in any case, entrepreneurial activity is not considered to be a non-recurring activity, performed in exceptional cases.

The next conceptual feature of entrepreneurial activity is risk-taking.

Risk constantly accompanies entrepreneurship and forms a special way of thinking and behavior, the psychology of the entrepreneur. Entrepreneurial risk is considered in the academic literature as possible adverse property consequences of the enterprise's activity, not caused by any missed opportunities on its part. An entrepreneur is responsible for the results of entrepreneurial activity by his/her property. But not only property. There may be additional losses affecting his/her status on the labor and capital markets, including competitiveness, professional reputation, psychological assessment, etc (Kashanina, 1999, p.76; Siryi & Farenyk, 2000, p.69-76).

One of the main features is the achievement of economic and social results and profit generation, which are regarded as the purpose of conducting entrepreneurial activity. Profit is a product of a specific human resource – entrepreneurial skills. Accordingly, the profit earned by an entrepreneur can essentially be regarded as a payment for labor in business management. This work is not easy and includes, firstly, the manifestation of an initiative to unite material and human factors for the production of goods and services, secondly, the adoption of extraordinary decisions on business management, labor organization, and thirdly, the introduction of innovations by producing a new type of product or a radical change in the production process. All this provides the grounds for regarding economic commercial activity as a professional activity aimed at generating profit. However, profit only for the sake of maximum possible profit is the purpose of entrepreneurial activity only in conditions of an underdeveloped market. Therefore, when considering profit generation as the main motive for entrepreneurial activity, it is necessary to highlight the achievement of social effect and certain economic and social results as one of its directions. The principle of personal economic interest is in close unity with the purpose of entrepreneurship – gaining profit. Personal gain is a leading factor in entrepreneurship. In the conditions of commodity manufacture the subject of management, pursuing his/her own interests, at the same time works for the society (Kashanina, 1999, p.75).

At the same time, it is necessary for Ukrainians to understand entrepreneurial activity as the main source of material wealth of the country, and therefore it should be treated as a public value, which deserves respect and support, except for cases when this activity is illegal and is detrimental to the interests of people and society. The state should comprehensively develop the entrepreneurial activities of citizens in order to increase the prosperity of the country and to ensure their welfare (Kampo, 2020).

In other words, there should be a unity of two goals in entrepreneurial activity, whereby the first goal is not to generate profit, but rather to create a product capable of meeting the economic and social needs of society, and only on this basis to obtain profit.

The mentioned normative feature of entrepreneurial activity corresponds with such feature as a socially responsible character. Taking into account the social orientation of the economy proclaimed in the Constitution of Ukraine (Article 13) and the Economic Code of Ukraine, entrepreneurial activity is characterized by social responsibility. Social responsibility is understood as public responsibility, i.e. the expectation that entrepreneurs should act in the public interest and contribute to resolving public and social issues (Harahonych & Bysaha, 2005, p. 76).

A feature that is not enshrined in the legislation, but is essential, has recently acquired

special significance. It is the professional nature of conducting entrepreneurial activity.

The entrepreneur's professionalism involves: conducting these activities by people who have certain qualifications or information necessary for the adoption and implementation of decisions. At the same time, in one case the availability of professional training is considered as a necessary condition for carrying out activities (e.g., medical, banking, audit), otherwise there is no need for a certain entrepreneur's professional level, but he/she must have the information necessary for conducting entrepreneurial commercial activities; conducting commercial activities according to certain rules and methods, which are most often stipulated in the form of the rules for providing services, trade, performance of work or customary business practices; compliance of the activity results with certain requirements that have a regulatory nature, such as certification and standardization of goods, works and services; accountability of activity to the state bodies authorized to perform socially necessary functions in the interests of consumers, persons engaged in the process of production, entrepreneurs themselves, society as a whole; availability of state guarantees of activity (Harahonych, 2007, p. 259).

Summing up the consideration of the features of entrepreneurial activity, it should be noted that when considering any activity to be recognized as an entrepreneurial one, one should bear in mind that none of the features analyzed above can be absolutized. Only their totality allows considering a certain activity as an entrepreneurial one.

4. Implementation of the constitutional right to entrepreneurial activity

The right to entrepreneurial activity, as well as any other right, is exercised through legally significant actions of empowered entities – owners of this right, but the choice of methods and conditions for the exercise of the right depends not only on the subject but also on the specific content of the right, which is stipulated by the state (Nikitenko, 2011, p. 559).

The legislator's mission is to guarantee the implementation of certain rights and freedoms in the Constitution of Ukraine, having enshrined them. However, the implementation of the constitutional right to entrepreneurial activity is characterized by certain features, which are determined both by the legal nature of entrepreneurship and its socio-economic component.

The implementation of the constitutional right to entrepreneurial activity consists in the exercise of powers (capabilities) by the authorized person, which are covered by the content of such right.

At the same time, whereas the implementation of certain constitutional rights (to life, to personal inviolability, to confidentiality of correspondence, etc.), does not require a person's entering any legal relations, the right to entrepreneurial activity may be implemented only by entering into specific legal relations.

It should also be remembered that the existence of a constitutional right to entrepreneurial activity does not depend on the exercise or non-realization of this right by a person. This constitutional right shall not disappear also in case of making an entry in the Unified State Register on the termination of entrepreneurial activity. The preservation of constitutional rights and freedoms, including the right to entrepreneurial activity, is intended to ensure the stability of its legal status.

The legislator, enshrining the right to entrepreneurial activity for each individual in the Constitution of Ukraine, also establishes appropriate conditions, the so-called obligations with the observance of which the said right may be exercised.

For instance, in accordance with Art. 50 of the Civil Code of Ukraine, a natural person with full legal capability shall have the right to the entrepreneurial activity not prohibited by the law. The restriction of a natural person's right to the entrepreneurial activity shall be established by the Constitution of Ukraine and the law.

In its turn, in accordance with Part 6 of Art. 128 of the Economic Code of Ukraine, a citizen-entrepreneur is obliged: to obtain the license for performing certain types of economic activity in cases and according to the procedure established by the law; to inform state registration authorities of a change of address indicated in the registration documents, subject of activity, other essential terms of his/her entrepreneurial activity subject to specification in the registration documents; to

comply with rights and lawful interests of consumers, secure proper quality of products (works, services) manufactured by him/her, observe the rules of mandatory product certification established by the law; not to allow unfair competition, other violations of antimonopoly and competition legislation; to keep records of the results of entrepreneurial activity in compliance with legislative requirements; to provide to tax authorities in timely manner income statements, other required documents for charging taxes and other obligatory payments; pay taxes and other obligatory payments in keeping with the procedure and in sizes established by the law.

In addition to stipulating in the legislation the conditions under which the constitutional right to entrepreneurial activity is exercised, the very individual should be ready for such realization. Unfortunately, it must be stated that despite the 24-year period of the constitutional enshrinement of the right to entrepreneurial activity, the level of citizens' preparation for the professional implementation of entrepreneurship in Ukraine remains extremely low.

In such conditions, in addition to the active participation of the entrepreneur's personality in the implementation of the right to entrepreneurial activity, it is necessary to have a purposeful state influence on the sphere of entrepreneurship through the formation of legal and economic conditions that provide an opportunity for such activity.

Previously, I. M. Plotnikova noted that to ensure the effective implementation of the right to entrepreneurial activity, it is necessary to create a relationship in which the state is not a passive observer, indifferent to the actual situation of citizens who have entered the free market and are engaged in entrepreneurship. The issue at stake should not be state interference in economic processes (since there is a large number of claims related to unreasonable administrative pressure in entrepreneurship in general, and in small businesses in particular), but rather state assistance in the development of entrepreneurship and market relations, the optimal normative regulation of entrepreneurs' rights, their provision and protection (Plotnikova, 2002, c. 11).

As practice demonstrates, the modern system of formation and planning of entrepreneurship development in Ukraine does not meet public needs. The matter here is not only the need to reduce administrative pressure on entrepreneurs, although it is important. This system provides very few economic incentives for the effective development of the institution of entrepreneurship and many administrative and bureaucratic levers of influencing it.

Given such difficult conditions, it is necessary to search for new ways to develop the institution of entrepreneurship, rather than solve purely economic problems. One of the least involved areas in its development is education, which has significant potential for the formation of a young entrepreneurial class. The basis for the formation of this class exists already in secondary schools as well as in higher education institutions. As it is well-known, the right to engage in entrepreneurial activity is a natural human right, which is also enshrined in the legislature and means not only starting a private business at one's own risk, but also includes, in particular, the right to public educational services on the fundamentals of entrepreneurship, as well as access to other human rights, which are essential or relevant to entrepreneurship. Entrepreneurship and IT technologies should be taught to students starting from the first grade to the last one in the secondary school. Why shouldn't the Ukrainian secondary school attempt to do this? The IT sector could help to provide personnel for training students in the basics of IT technologies, and the government could provide textbooks etc. It will be necessary to involve banks, financial and other institutions and organizations in the implementation of school entrepreneurship programs. Special attention should be paid to the formation of an entrepreneurial class in higher education institutions. In order to bring the entrepreneurial spirit to these institutions, the lectures on fundamentals of entrepreneurship should be delivered at all non-economic specialties without exception (Kampo, 2020).

Reducing excessive interference of authorities in the entrepreneurs' activity together with active participation of the education system in the formation of a young entrepreneurial class could give a powerful impetus to the development of entrepreneurship and attraction of significant strata of the population into this sphere.

5. Guarantees of the constitutional right to entrepreneurial activity

The indications on legal possibilities of a human being are necessary in the constitutional text not only for informing citizens about the existence of such rights, but also for granting such rights the force of being generally mandatory for the state prescriptions, reveals the circle of possible requirements of a person to the state as to the subject obliged to guarantee their realization in life (Afanaseva at al., 2017, p. 125).

Separate guarantees of the constitutional right to entrepreneurial activity are stipulated in the Constitution of Ukraine, which envisages that:

- the legal principles and guarantees of entrepreneurship are determined exclusively by the laws of Ukraine (p. 8, part 1, Art. 92);

- constitutional human and citizens' rights and freedoms shall not be restricted, except in cases envisaged by the Constitution of Ukraine (part 1, Art. 64).

- all people are free and equal in their dignity and rights (Art. 21);

- constitutional rights and freedoms are guaranteed and shall not be abolished (part 2, Art. 22);

- the content and scope of existing rights and freedoms shall not be diminished in the adoption of new laws or in the amendment of laws that are in force (part 3, Art. 22);

- citizens have equal constitutional rights and freedoms and are equal before the law. There shall be no privileges or restrictions based on race, colour of skin, political, religious and other beliefs, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics (Art. 24).

An important role in ensuring the implementation of the right to entrepreneurial activity is assigned to the legal positions of the Constitutional Court of Ukraine, among which the following should be specifically emphasized:

- the constitutional principle of a state governed by the rule of law stipulates that it must refrain from restricting the universally recognized rights and freedoms of a human being and a citizen, and also envisages the establishment of the rule of law, which must guarantee each individual the assertion and enforcement of rights and freedoms. The constitutional principles of equality and fairness require certainty, clarity and unambiguity of legal norm, since otherwise cannot ensure its uniform application, does not exclude unlimited interpretation of law enforcement practice and inevitably leads to arbitrariness (para. 1 p. 5.3, para. 1 and para. 2 p. 5.4 part 5 of the motivational part of the Constitutional Court of Ukraine Resolution dated 22 September 2005 No. 5-rp / 2005) (Constitutional Court of Ukraine, 2005);

- the imposition of restrictions on human and civil rights and freedoms is permissible only if such restriction is commensurate (proportionate) and socially necessary (para. 6 p. 3.3 part 3 of the motivational part of the Constitutional Court of Ukraine Resolution dated October 19, 2009 № 26-rp / 2009) (Constitutional Court of Ukraine, 2009);

- one of the elements of the rule of law is the principle of legal certainty, which states that restrictions on fundamental human and civil rights and the implementation of such restrictions in practice are only permissible if the predictability of the legal norms established by such restrictions is ensured. In other words, the restriction of any right should be based on the criteria that will allow a person to separate the lawful from the unlawful behavior, to foresee the legal consequences of his or her behavior (para. 3 p. 3.1 part 3 of the motivational part of the Constitutional Court of Ukraine Resolution dated October 29, 2010 № 17-rp/2010) (Constitutional Court of Ukraine, 2010);

- restrictions on the exercise of constitutional rights and freedoms shall not be arbitrary and unfair, they shall be established exclusively by the Constitution and laws of Ukraine, to pursue a legitimate goal, to be conditioned by the public need to achieve this goal, proportional and justified, in case of limitation of a constitutional right or freedom, a legislator is obliged to introduce such legal regulation that shall enable the optimal achievement of a legitimate goal with minimal interference with the realization of that right or freedom and shall not violate the essence of such right (para. 3 p. 2.1 part 2 of the motivational part of the Constitutional Court of Ukraine Resolution dated June 1, 2016 № 2-rp/2016) (Constitutional Court of Ukraine, 2016).

Provisions on guarantees of the constitutional right to entrepreneurial activity are gaining considerable development in the industry legislation, first of all in the economic sphere, which is rapidly developing nowadays.

Thus, general guarantees of entrepreneurs' rights are defined by Art. 47 of the Economic Code of Ukraine, which stipulates that the state shall guarantee to all entrepreneurs irrespective of their organizational forms of entrepreneurial activity, equal rights and opportunities for attraction and use of material and technical, financial, labor, informational, natural and other resources; the inviolability of property and ensure protection of property rights of the entrepreneur; losses suffered by the entrepreneur in the result of violation by individuals or legal entities, state authorities or local governments of his/her property rights, shall be reimbursed to the entrepreneur pursuant to the present Code and other laws etc.

In addition, the Economic Code of Ukraine envisages that restrictions to carrying out entrepreneurial activity, as well as the list of types of activities, wherein entrepreneurship is banned shall be established by the Constitution of Ukraine and the law (p. 4 Art. 12).

The issue of guaranteeing the right to entrepreneurial activity in Ukraine is particularly acute in connection with the establishment and implementation of restrictions as part of preventing the spread of COVID-19.

The establishment and implementation of restrictions on fundamental human rights in a democratic, social, legal state and civil society within the framework of preventing the spread of COVID-19 must meet the criteria of legitimacy (compliance of the content and procedure of restrictive measures with the Constitution and laws of Ukraine, international human rights standards), feasibility (real antiepidemic goals), proportionality (prevalence of the interests of national health protection over the rights of a particular person) and time limits (enforcement for the minimum required period of time). Balancing the interests of national health with respect for civil and political human rights requires the establishment of additional effective guarantees for their realization in the context of the COVID-19 pandemic and the measures introduced to prevent its spread (Zozulia, 2020, p. 16).

6. Conclusions

It appears unreasonable and premature to discuss amendments to the Constitution of Ukraine regarding the right to entrepreneurial activity in the present conditions. In fact, the legislative methods of developing legal support for the implementation of the constitutional right to entrepreneurial activity in Ukraine have not yet exhausted their potential. To ensure the stability of the legal status of the entrepreneur instead of updating the constitutional regulations should improve the practical guarantees, methods and mechanisms for the implementation of the right to entrepreneurial activity within the Economic Code of Ukraine. The recodification of Ukrainian legislation could contribute to the effective exercise of entrepreneurial authorities.

An important role in ensuring understanding of the content and peculiarities of implementing the constitutional right to entrepreneurial activity and further development of legislative regulation in accordance with constitutional principles should be performed by the Constitutional Court of Ukraine.

The main factors that hinder the development of entrepreneurship in Ukraine in the current circumstances are the following:

- violation by state and local authorities of the guarantees of the constitutional right to entrepreneurial activity stipulated in the Constitution of Ukraine and the laws;

- excessive administrative pressure on business entities;

- low level of economic incentives for effective development of the institution of entrepreneurship;

- insufficient attention to the issues of training in educational institutions for engaging in entrepreneurial activity.

Further scientific research should be performed in the direction of minimizing the harmful impact of these factors on the development of national entrepreneurship.

Bibliography:

1. **Кампо, В.** (2020). Конституція України та формування нації підприємців. *Юридична газета.* № 5 (711). URL: https://yur-gazeta.com/publications/practice/konstytutsiine-pravo/konstituciya-ukrayini-ta-formuvannya-naciyi-pidpriemciv.html

2. *Конституція України* (1996). URL: https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text
3. **Тацій, В. Я., Петришин, О. В., Барабаш, Ю. Г., Битяк, Ю. П., Гетьман, А. П., Головін, А. С. at al.** (2011). *Конституція України. Науково-практичний коментар.* Харків: Право, 1128 с.
4. **Бігняк, О. В.** (2007). *Підприємництво як предмет правового регулювання в Україні* (автореф. дис … канд. юрид. наук : 12.00.04 – господарське право; господарське процесуальне право). Донецьк. 17 с.
5. **Іщук, С. І. (**2014). Право на підприємницьку діяльність у структурі економічних засад громадянського суспільства в Україні. *Наукові праці МАУП*, 1, 34-40.
6. **Павлов, Е. А.** (2013). Конституционное право на предпринимательскую деятельность. Понятие и содержание. *Актуальные проблемы конституционного права,* 2, 88-91.
7. **Нікітенко, Л. О. (**2013). Конституційно-правове регулювання права на підприємницьку діяльність: історико-правові передумови та сучасний стан. *Бюлетень Міністерства юстиції України*, 1, 116-123.
8. *Господарський кодекс України* (2003): Закон України № 436-IV. URL: https://zakon.rada.gov.ua/laws/show/436-15#Text
9. *Цивільний кодекс України* (2003): Закон України № 435-IV. URL: https://zakon.rada.gov.ua/laws/show/435-15#Text
10. *Рішення Конституційного Суду України* (2002). 3-рп/2002. URL: https://zakon.rada.gov.ua/laws/show/v003p710-02#Text
11. *Про затвердження національних стандартів України, державних класифікаторів України, національних змін до міждержавних стандартів, внесення зміни до наказу Держспоживстандарту України від 31 березня 2004 р. № 59 та скасування нормативних документів* (2004): наказ Державного комітету України з питань технічного регулювання та споживчої політики № 97. URL: https://zakon.rada.gov.ua/rada/show/v0097609-04#Text
12. **Аветисян, М. Р.** (2019). *Організаційно-правова форма господарювання* (автореф. дис … канд. юрид. наук : 12.00.04 – господарське право; господарське процесуальне право) Вінниця. 18 с.
13. **Бобкова, А. Г., Атаманова, Ю. Е., Бисага, Ю. М., Вихров, А. П., Грудницкая, С. Н., Гарагонич, А. В. at al.** (2008). *Хозяйственный кодекс Украины: Научно-практический комментарий*. Харьков: Изд-во ФЛ-П Вапнярчук Н.Н., 1296 с.
14. **Лаптев, В. В.** (1997). *Предпринимательское право: понятие и субъекты.* Москва: Юрист, 139 с.
15. **Лямцева, Т.** (2000). Особенности предпринимательской деятельности государственных сельськохозяйственных предприятий. *Предпринимательство, хозяйство и право*. 1. С. 62-64.
16. **Кашанина, Т. В.** (1999). *Корпоративное право (Право хозяйственных товариществ и обществ). Учебник для вузов*. Москва: Издательская группа НОРМА–ИНФРА, 815 с.
17. **Попов, А. А.** (1997). *Лекции по правовым основам предпринимательской деятельности в Украине*. Х.: Фирма «КОНСУМ», 104 с.
18. **Suchoža, J.** (1998). *Slovenské obchodné právo*. Banska Bystica, 1. 167 p.
19. **Сірий, В. Є. & Фарени, С. А.** (2000). *Соціологія підприємництва*. Київ: Укр. центр духовної культури, 258 с.
20. **Гарагонич, О. В. & Бисага, Ю. М.** (2005). *Правове регулювання підприємницької діяльності в Чеській та Словацькій республіках*. Ужгород: Ліра, 176 с.
21. **Гарагонич, О. В.** (2007). Господарська комерційна діяльність: поняття та правові ознаки. *Науковий вісник Ужгородського національного університету. Серія «Право»*. 7. С. 257-260.
22. **Нікітенко, Л. О.** (2011). Умови реалізації конституційного права на підприємницьку діяльність. *Форум права*. 3. С. 559-564.
23. **Плотникова, И. Н.** (2002). *Конституционное право человека и гражданина на предпринимательскую деятельность в России*: (дис. … канд. юрид. наук : 12.00.02 – конституционное право; муниципальное право) Саратов, 251 с.
24. **АфанасьеваЮ М. Б., Бальцій, Ю. Ю., Батан, Ю. Д., Бондаренко, І. О., Болкова, Д. Є., Грабова, Я. О. at al.** (2017). *Конституційне право України: прагматичний курс : навч. посіб.* Одеса : Юридична література, 2017. 256 с.
25. *Рішення Конституційного Суду України* (2005). 5-рп/2005. URL: https://zakon.rada.gov.ua/laws/show/v005p710-05#Text
26. *Рішення Конституційного Суду України* (2009). 26-рп/2009. URL: https://zakon.rada.gov.ua/laws/show/v026p710-09#Text
27. *Рішення Конституційного Суду України* (2010). 17-рп/2010. URL: https://zakon.rada.gov.ua/laws/show/v017p710-10#Text
28. *Рішення Конституційного Суду України* (2016). 2-рп/2016. URL: https://zakon.rada.gov.ua/laws/show/v002p710-16#Text
29. **Зозуля, О. І.** (2020). Громадянські та політичні права людини в умовах запобігання поширенню COVID-19 в Україні. *Форум права*. 2. С. 6-22.

References:

1. **Kampo, V.** (2020). Konstytutsiia Ukrainy ta formuvannia natsii pidpryiemtsiv. [Constitution of Ukraine and the formation of the nation of entrepreneurs]. *Yurydychna hazeta*. № 5 (711). URL: https://yur-gazeta.com/publications/practice/konstytutsiine-pravo/konstituciya-ukrayini-ta-formuvannya-naciyi-pidpriemciv.html [in Ukrainian].
2. Konstytutsiia Ukrainy (1996). [The Constitution of Ukraine]. URL: https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text [in Ukrainian].
3. **Tatsii, V. Ya., Petryshyn, O. V., Barabash, Yu. H., Bytiak, Yu. P., Hetman, A. P., Holovin, A. S. at al.** (2011). Konstytutsiia Ukrainy. Naukovo-praktychnyi komentar. [The Constitution of Ukraine. Scientific and practical commentary]. Kharkiv: Pravo. [in Ukrainian].
4. **Bihniak, O. V.** (2007). Pidpryiemnytstvo yak predmet pravovoho rehuliuvannia v Ukraini [Entrepreneurship as a subject of legal regulation in Ukraine]. (avtoref. dys … kand. yuryd. nauk : 12.00.04 – hospodarske pravo; hospodarske protsesualne pravo). Donetsk. [in Ukrainian].
5. **Ishchuk, S. I.** (2014). Pravo na pidpryiemnytsku diialnist u strukturi ekonomichnykh zasad hromadianskoho suspilstva v Ukraini. [The right to entrepreneurial activity in the structure of economic foundations of civil society in Ukraine]. *Naukovi pratsi MAUP*, 1, 34-40. [in Ukrainian].
6. **Pavlov, E. A. (**2013). Konstitucionnoe pravo na predprinimatelskuyu deyatelnost. Ponyatie i soderzhanie. [Constitutional right to entrepreneurial activity. Concept and content]. *Aktualnye problemy konstitucionnogo prava,* 2, 88-91. [in Russian].
7. **Nikitenko, L. O.** (2013). Konstytutsiino-pravove rehuliuvannia prava na pidpryiemnytsku diialnist: istoryko-pravovi peredumovy ta suchasnyi stan. [Constitutional and legal regulation of the right to entrepreneurial activity: historical and legal background and current status]. *Biuleten Ministerstva yustytsii Ukrainy*, 1, 116-123. [in Ukrainian].
8. *Hospodarskyi kodeks Ukrainy [Economic Code of Ukraine*] (2003): Zakon Ukrainy № 436-IV. URL: https://zakon.rada.gov.ua/laws/show/436-15#Text [in Ukrainian].
9. *Tsyvilnyi kodeks Ukrainy [Civil Code of Ukraine]* (2003): Zakon Ukrainy № 435-IV. URL: https://zakon.rada.gov.ua/laws/show/435-15#Text [in Ukrainian].
10. *Rishennia Konstytutsiinoho Sudu Ukrainy [Resolution of the Constitutional Court of Ukraine]* (2002). 3-rp/2002. URL: https://zakon.rada.gov.ua/laws/show/v003p710-02#Text [in Ukrainian].
11. *Pro zatverdzhennia natsionalnykh standartiv Ukrainy, derzhavnykh klasyfikatoriv Ukrainy, natsionalnykh zmin do mizhderzhavnykh standartiv, vnesennia zminy do nakazu Derzhspozhyvstandartu Ukrainy vid 31 bereznia 2004 r. № 59 ta skasuvannia normatyvnykh dokumentiv [Order on approval of national standards of Ukraine, state classifiers of Ukraine, national changes to interstate standards, amending the Order of the State Committee for Standardization of Ukraine dated March 31, 2004 No. 59 and the abolition of regulatory documents*] (2004): nakaz Derzhavnoho komitetu Ukrainy z pytan tekhnichnoho rehuliuvannia ta spozhyvchoi polityky № 97. URL: https://zakon.rada.gov.ua/rada/show/v0097609-04#Text [in Ukrainian].
12. **Avetysian, M. R.** (2019). Orhanizatsiino-pravova forma hospodariuvannia. [Organizational and legal form of management]. (avtoref. dys … kand. yuryd. nauk: 12.00.04 – hospodarske pravo; hospodarske protsesualne pravo) Vinnytsia. [in Ukrainian].
13. **Bobkova, A. G., Atamanova, Yu. E., Bisaga, Yu. M., Vixrov, A. P., Grudnickaya, S. N., Harahonych, A. V. at al.** (2008). Xozyajstvennyj kodeks Ukrainy: Nauchno-prakticheskij kommentarij. [Economic Code of Ukraine: Scientific and practical commentary]. Xarkov: Izd-vo FL-P Vapnyarchuk N.N. [in Russian].
14. **Laptev ,V. V.** (1997). Predprinimatelskoe pravo: ponyatie i subekty. [The entrepreneurial law: concept and subjects]. Moskva: Yurist. [in Russian].
15. **Lyamceva, T.** (2000). Osobennosti predprinimatelskoj deyatelnosti gosudarstvennyx selskoxozyajstvennyx predpriyatij. [Features of entrepreneurial activity of state agricultural enterprises]. *Predprinimatelstvo, xozyajstvo i pravo,* 1, 62-64. [in Russian].
16. **Kashanina, T. V.** (1999). *Korporativnoe pravo (Pravo xozyajstvennyx tovarishhestv i obshhestv). Uchebnik dlya vuzov. [Corporate law (Law of business partnerships and societies). The textbook for higher educational institutions]*. Moskva: Izdatelskaya gruppa NORMA–INFRA. [in Russian].
17. **Popov, A. A.** (1997*). Lekcii po pravovym osnovam predprinimatelskoj deyatelnosti v Ukraine. [Lectures on legal foundations of entrepreneurial activity in Ukraine]*. X.: Firma «KONSUM», [in Russian].
18. **Suchoža, J.** (1998). *Slovenské obchodné právo. [Slovak Commercial Law]*. Banska Bystica, 1. 167 s. [in Slovak].
19. **Siryi, V. Ye. & Farenyk, S. A.** (2000). *Sotsiolohiia pidpryiemnytstva. [Sociology of entrepreneurship]*. Kyiv: Ukr. tsentr dukhovnoi kultury. [in Ukrainian].
20. **Harahonych, O. V. & Bysaha, Yu. M.** (2005). *Pravove rehuliuvannia pidpryiemnytskoi diialnosti v Cheskii ta Slovatskii respublikakh. [Legal regulation of entrepreneurial activity in the Czech and Slovak Republics]*. Uzhhorod: Lira. [in Ukrainian].

21. **Harahonych, O. V.** (2007). Hospodarska komertsiina dialnist: poniattia ta pravovi oznaky. [Commercial activity: concept and legal attributes]. *Naukovyi visnyk Uzhhorodskoho natsionalnoho universytetu. Seriia «Pravo»,* 7, 257-260. [in Ukrainian].
22. **Nikitenko, L. O.** (2011). Umovy realizatsii konstytutsiinoho prava na pidpryiemnytsku diialnist. [Conditions for implementing the constitutional right to entrepreneurial activity]. *Forum prava.* 3, 559-564. [in Ukrainian].
23. **Plotnikova, I. N.** (2002). *Konstitucionnoe pravo cheloveka i grazhdanina na predprinimatelskuyu deyatelnost v Rossii [Constitutional right of an individual and a citizen to entrepreneurial activity in Russia]:* (dis. … kand. yurid. nauk : 12.00.02 – konstitucionnoe pravo; municipalnoe pravo) Saratov. [in Russian].
24. **Afanaseva, M. B., Baltsii, Yu. Yu., Batan, Yu. D., Bondarenko, I. O., Bolkova, D. Ye., Hrabova, Ya. O. at al.** (2017). *Konstytutsiine pravo Ukrainy: prahmatychnyi kurs. [Constitutional Law of Ukraine: a pragmatic course]*: navch. posib. Odesa : Yurydychna literatura, 2017. [in Ukrainian].
25. *Rishennia Konstytutsiinoho Sudu Ukrainy [Resolution of the Constitutional Court of Ukraine]* (2005). 5-rp/2005. URL: https://zakon.rada.gov.ua/laws/show/v005p710-05#Text [in Ukrainian].
26. *Rishennia Konstytutsiinoho Sudu Ukrainy [Resolution of the Constitutional Court of Ukraine]* (2009). 26-rp/2009. URL: https://zakon.rada.gov.ua/laws/show/v026p710-09#Text [in Ukrainian].
27. *Rishennia Konstytutsiinoho Sudu Ukrainy [Resolution of the Constitutional Court of Ukraine]* (2010). 17-rp/2010. URL: https://zakon.rada.gov.ua/laws/show/v017p710-10#Text [in Ukrainian].
28. *Rishennia Konstytutsiinoho Sudu Ukrainy [Resolution of the Constitutional Court of Ukraine]* (2016). 2-rp/2016. URL: https://zakon.rada.gov.ua/laws/show/v002p710-16#Text [in Ukrainian].
29. **Zozulia, O. I.** (2020). Hromadianski ta politychni prava liudyny v umovakh zapobihannia poshyrenniu COVID-19 v Ukraini. [Civil and political human rights in the context of preventing the spread of COVID-19 in Ukraine]. *Forum prava*, 2, 6-22. [in Ukrainian].

КОНСТИТУЦІЙНЕ ПРАВО НА ПІДПРИЄМНИЦЬКУ ДІЯЛЬНІСТЬ: ТЕОРЕТИКО-ПРАВОВИЙ АСПЕКТ

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Анотація

Мета статті. Теоретико-правове дослідження конституційного права на підприємницьку діяльність для з'ясування його сутності, суб'єктного та об'єктного складу, виявлення особливостей реалізації та гарантій такого права.

Методи. Для досягнення мети дослідження використані діалектичний, формально-юридичний, порівняльно-правовий, системно-структурний, логіко-семантичний та інші методи наукового пізнання.

Результати. Проаналізовано сутність та зміст конституційного права на підприємницьку діяльність. Зміст такого права визначено як сукупність правомочностей підприємця, які йому необхідні для досягнення визначеної ним мети – певних економічних і соціальних результатів та одержання прибутку.

Досліджено суб'єктний склад конституційного права на підприємницьку діяльність. Виявлені недоліки фіксації такого права у розділі II Конституції України. Наголошено на доцільності подальшого розвитку конституційного положення щодо суб'єктів права на підприємництво у рамках Господарського кодексу України.

З'ясовано поняття та ознаки підприємництва як об'єкта права на підприємницьку діяльність.

Запропоновані нові шляхи розвитку інституту підприємництва та засоби ефективного забезпечення реалізації конституційного права на підприємницьку діяльність.

Досліджено роль гарантій конституційного права на підприємницьку діяльність для забезпечення ефективної його реалізації.

Висновки. Обґрунтовано недоцільність внесення змін до Конституції України щодо права на підприємницьку діяльність. Запропоновано для забезпечення стабільності правового статусу підприємця замість оновлення конституційної регламентації вдосконалювати практичні гарантії, способи і механізми реалізації права на підприємницьку діяльність у рамках Господарського кодексу України.

Аргументовано важливість Конституційного Суду України для забезпечення розуміння змісту та особливостей реалізації конституційного права на підприємницьку діяльність і подальшого розвитку законодавчого регулювання відповідно до конституційних принципів.

Виділено головні чинники, які заважають розвитку підприємництва в Україні в сучасних умовах, а саме:

- порушення органами державної влади та місцевого самоврядування гарантій конституційного права на підприємницьку діяльність, закладених в Конституції України і законах;

- надмірний адміністративний тиск на суб'єктів господарювання;

- низький рівень економічних стимулів для ефективного розвитку інституту підприємництва;

- недостатня увага до питань підготовки у закладах освіти до зайняття підприємницькою діяльністю.

Обґрунтовано необхідність здійснення подальших наукових досліджень у напрямку мінімізації шкідливого впливу зазначених чинників на розвиток підприємництва в Україні.

Ключові слова: *Конституція України, підприємець, підприємництво, організаційно правова форма, Конституційний Суд України, Господарський кодекс України.*

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CONSTITUTIONAL RIGHT TO OWN, USE AND DISPOSE THE RESULTS OF INTELLECTUAL AND CREATIVE ACTIVITY: «JUSTIFIED EXPECTATION» FOR OBTAINING PROPERTY SUBJECT TO LEGAL PROTECTION

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Summary

In the science regarding Constitutional Law, the issue for restriction of intellectual property rights provokes lively discussions. When registration of trademarks, there increasingly raises a number of theoretical and practical questions: can the state "destroy" the legitimate expectations of the subjects of intellectual property rights by adopting certain legislative acts in order to fulfill its international obligations? Is the decision to apply the provisions of a bilateral agreement to the application for trademark registration, which came into force after the subject was filed into trademark application process, considered as interference into the peaceful use of property? Does the constitutional and legal mechanism for regulating public relations in the field of intellectual property on "expectativa jurídica" issue the need to be improved?

The purpose of this article is to identify the conditions under which the applicant who has applied for registration of a trademark has the right to claim in respect of which he has a "justified expectation" of its implementation, as well as to identify conditions that allow national law or there is insufficient evidence in the settled case-law practice of National Courts to state that an applicant who has applied for registration of a trademark has a "justified expectation" protected by the provisions of the Article 1 of Protocol No. 1 to the Convention. Research methods is the general methods of scientific cognitivism as well as concerning those used in legal science: methods of analysis and synthesis, formal logic, comparative law etc.

In order to benefit from the protection of Article 1 of Protocol No. 1 to the Convention, an applicant who has applied for registration of a trademark must be entitled to claim in respect of which he may affirm that he had at least a "justified expectation" for its implementation. The grounds for concluding that such a "justified expectation" is as follows: the availability of grounds for such a requirement within national law and the consistent practice of National Courts, which shows that the applicant does have sufficient grounds to obtain this very justified expectation. 2. The mentioned reasons allow to affirm about the lack of reasonable grounds within national law or in the settled case-law practice of National Courts that are to state that an applicant who has applied for registration of a trademark has "justified expectation" protected by provisions of the Article 1 of Protocol No. 1 to the Convention: 1) the applicant company had a right that is subject to a certain condition, which was terminated retroactively due to non-compliance with this condition,

namely that it did not violate rights of the third parties; 2) there is a dispute/disputes about the registration of a trademark, which being taken into the Court processing in different countries; 3) the applicable rule of national law is sufficiently accessible, accurate and predictable; 4) the criteria for trademark registration are unclear, there are doubts about their proper interpretation, as well as the difficulties associated with the need to analyze various international instruments.

Violation of the Article 1 of Protocol 1 is a retrospective interference by the legislator. The current legislation of Ukraine in the field of intellectual property on "expectativa jurídica" issues when filing an application for trademark registration, as well as on state interference regarding the "justified expectation" of the applicant companies needs to be improved in the light of the case-law practice of the European Court of Human Rights.

Key words: constitutional right to own, use and dispose the results of intellectual and creative activity; intellectual property rights; justified expectation; restriction of intellectual property rights; the right of private property; the registration of a trademark; expectativa jurídica; international obligation; the constitutional and legal mechanism for regulating public relations in the field of intellectual property; the balance of interests.

1. Introduction

Technological development has multiplied and diversified some directions for establishment, manufacture and use of epy final production result. When registration of trademarks, there increasingly raises a number of theoretical and practical questions: can the state "destroy" the legitimate expectations of the subjects of intellectual property rights by adopting certain legislative acts in order to fulfill its international obligations? Is the decision to apply the provisions of a bilateral agreement to the application for trademark registration, which came into force after the subject was filed into trademark application process, considered as interference into the peaceful use of property? Does the constitutional and legal mechanism for regulating public relations in the field of intellectual property on "expectativa jurídica" issue the need to be improved?

In the science regarding Constitutional Law, the issue for restriction of intellectual property rights provokes lively discussions. These discussions deepened the research of scientists like N. Blazhivska and O. Chepis. Thus, N. Blazhivska considers restrictions on intellectual property rights as an example of the collision of intellectual property rights with the right for information. The scholar concludes in her study that "intellectual property rights, being not absolute, may be subject to restriction in cases of conflict with other subjective rights", which is considered debatable, because such a conflict is not to be condition for restricting intellectual property rights, as evidenced by the practice of the European Court on Human Rights (Smith Klein and French Laboratories Ltd. vs. the Netherlands (№12633 / 87, October 4, 1990, Anheuser-Bush Inc. v. Portugal, etc.)). She also concludes that "mostly often, intellectual property rights conflict with the right for information is due to their legal nature, object and content. At the same time, the restrictions on intellectual property rights provided by current legislation should be interpreted broadly in cases where it is necessary to ensure the balance with the right for information".

It is clear that the right for intellectual property and the right for information are not in conflict, because the right for information is a structural element of intellectual property rights. Accordingly, it should be about the relationship between these rights and the guarantee of their realization, but neither about the existence of conflicts between them, and moreover nor about the conflict between them as the grounds for restricting property rights. O. Chepis in his research study considers the balance of interests of the subjects of intellectual property rights through the prism of principles on proportionality and justice. The scientist concludes that "compliance with the balance of interests of intellectual property rights subjects is ensured by giving them equal opportunities to realize these interests". It is clear that such

opportunities already follow up from the principle of equality. At the same time, there are no comprehensive scientific studies for conditions, under which the applicant who applied for the registration of a trademark, which is being the right to claim for "justified expectation", i. e. to exercise this very right.

The above-mentioned indicates the relevance of the chosen topic for this scientific article, its theoretical demand and practical conditionality.

The purpose of this article is to identify the conditions under which the applicant who has applied for registration of a trademark has the right to claim in respect of which he has a "justified expectation" of its implementation, as well as to identify conditions that allow national law or there is insufficient evidence in the settled case-law practice of National Courts to state that an applicant who has applied for registration of a trademark has a "justified expectation" protected by the provisions of the Article 1 of Protocol No. 1 to the Convention.

2. Provisions of Article 41 of the Constitution of Ukraine and provisions of Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950

The Constitution of Ukraine stipulates that the state provides protection of the rights of all subjects of property rights that are equal before the Law (Part 4 of Article 13); everyone has the right to own, use and dispose their property, the results of their intellectual, creative activities; the right of private property is acquired in the manner prescribed by law; no one may be unlawfully deprived of property; the right of private property is inviolable (Part 1. 2. 4 Article 41).

The Constitutional Court of Ukraine noted that the legal essence of Article 13 and Article 41 of the Constitution of Ukraine is to declare equal opportunities for possession, use and disposal of property and state guarantees to ensure the protection of these rights (paragraph 13 of subparagraph 3.1 of paragraph 3 of the motivating part of the Decision dated 12, February, 2002 № 3-rp / 2002); the legal status of various forms of ownership subjects of law is based on common constitutional principles; however, the legal status of each of them has features that characterize subject of property rights as they are; the state ensures the protection of the rights for all subjects of property both in what is common to them and in its features in accordance with the laws that apply to them (the third paragraph of subparagraph 3.3 of paragraph 3 of the reasoning part of the Decision of 10, June, 2003 № 11-rp / 2003).

Provisions of Article 41 of the Constitution of Ukraine correspond to the relevant provisions of Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (hereinafter – the First Protocol), under which every natural or legal person is entitled to the peaceful enjoyment of his possessions; no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

3. Article 1 of Protocol No. 1 to the Convention can be applied to intellectual property in general and to incorporated trademark. But can it be applied to the trademark application?

The judges of the European Court of Human Rights, L. Kaflish and I. Cabral Barretto, rightly point out in their personal opinions that in order to answer this question, it is necessary to decide whether the person presenting the trademark for registration being the "property" within the meaning of Article 1 Protocol № 1 to the Convention. In order to benefit from the protection of Article 1 of Protocol No. 1 to the Convention, the applicant must be entitled to a claim in respect of which he may affirm that he had at least a "justified expectation" of its implementation. This expectation must be more concrete than just hope, and it should be based on the provision of law or legal act, such as the Court decision. "The Decision of the European Court of Human Rights as for the case Kopecki vs. Slovakia contains the following legal position: "in those cases where the nature of the claim presupposes pecuniary interest, it can be considered as "property" only when there is sufficient grounds in national law for that claim, for example, when there is a well-established practice of National Courts confirming it".

In a personal opinion as for the case of Anheuser-Busch Inc. v. Portugal the Judges of the European Court of Human Rights E. Steiner and H. Gadjiev rightly emphasize that the European Court of Human Rights "refuses to recognize as "property" the right for claiming, that is subject to a certain condition, which has ceased as a result of non-fulfillment of this condition. It should be noted that not every trademark application ends with its registration and that many applications are likely never to lead to the registration of the respective trademarks. In other words, it is quite clear that filing an application for trademark registration is the right that is subject to a certain condition; this condition should satisfy the terms of registration."

Thus, the mere existence of the applicant's right for trademark incorporation, subject to a certain condition which was terminated retroactively due to non-compliance with that condition, and it was not sufficient enough to establish that the applicant who applied for trademark registration was entitled to claim to which he might affirm that he had at least a "justified expectation" of its implementation.

Judges of the European Court of Human Rights E. Steiner and H. Gadjiev also draw attention to the fact that when "Anheuser-Bush" applied for trademark registration, it was aware that "Budejowicki Budvar" would probably object to this application, even without intrusion into the case of a latter factor like the 1986 Agreement between Portugal and Czechoslovakia. At the time of filing the trademark application in 1981, the applicant company and "Budejowicki Budvar" were already in dispute all around the world over the right to use the Budweiser trademark. With those circumstances, there could be convincingly argued that the claimant's right to claim was far from being property in respect of which it could be affirmed that it had a "justified expectation" of the claim.

Thus, the existence of a trademark registration dispute, which is pending before the courts of different countries, is the foundation for the assertion that the applicant has no "justified expectation".

The requirements of Article 1 of Protocol No. 1 to the Convention are not infringed, if the applicable rule of national law is sufficiently accessible, accurate and predictable. In particular, with regard to the registration of a trademark in the case, the Portuguese legislation provided for a certain period of three months during which any third party could raise objections to the registration of the trademark. Thus, the national legislation was clear, precise and reasonable.

Also judges of the European Court of Human Rights E. Steiner and H. Gadjiev emphasize that in the case "…" the trademark registration criteria referred to by Anheuser-Bush were, on the contrary, unclear. Doubts about the proper interpretation of the trademark registration criteria and the complexity of the need to analyze various international instruments at issue meant that it was never known for sure whether the trademark application filed by Anheuser-Bush would be granted.

According to the Article 9 of the Constitution of Ukraine, valid international treaties, the binding nature of which has been approved by the Verkhovna Rada of Ukraine (the Parliament of Ukraine) are the part of national legislation of Ukraine. At the same time, even when fulfilling its international obligations, the state cannot "destroy" the justified expectation by adopting certain legislative acts. Within the Decision on the case of "Anheuser-Busch Inc. v. Portugal" the European Court of Human Rights stated that as to whether the decision to apply provisions of the bilateral agreement to the application for trademark registration submitted before its entry into force was an interference with the peaceful use of property; the Court noted that the main complaint the applicant concerned was the way the National Courts had interpreted and applied the domestic law. In that connection, the Court reiterated that its jurisdiction to verify that national law had been correctly interpreted and applied was limited and that its functions were not to replace by National Courts, but to ensure that the decisions of those Courts were not based on arbitrariness or not were otherwise clearly unfounded, especially when, as it is here, the case concerned complex issues of Interpretation of National Law. The case of the applicant company differed from those in which the Court found retrospective interference by the legislature, like, for instance, in this case where the question of whether the legislation had been applied retrospectively was questionable within itself,

whereas in earlier cases the application of the reverse force of law was undoubtful and quite intentional. The only valid registration existing at that time when bilateral agreement entered into force was the appellation of origin of the registered trademark named after some Czech company, and although this registration was subsequently revoked, the Court could not examine the consequences of such a revocation on the right of priority assigned to the trademark. In the absence of any arbitrariness or manifest unfoundedness, the Court cannot call into question the Supreme Court's conclusions or its interpretation of the bilateral agreement. Possessing two contradictory arguments before them, private parties concerning the right to use the name of company, the Supreme Court made its decision on the basis of materials which it considered appropriate and sufficient to resolve the dispute, after hearings on the arguments of the parties concerned. Thus, the Supreme Court's decision did not interfere within the applicant company's right to peaceful possession of its property.

4. Results

Provisions of Article 41 of the Constitution of Ukraine correspond to the relevant provisions of Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. Article 1 of Protocol No. 1 to the Convention can be applied to intellectual property in general and to incorporated trademark. The mere existence of the applicant's right for trademark incorporation, subject to a certain condition which was terminated retroactively due to non-compliance with that condition, and it was not sufficient enough to establish that the applicant who applied for trademark registration was entitled to claim to which he might affirm that he had at least a "justified expectation" of its implementation. The existence of a trademark registration dispute, which is pending before the courts of different countries, is the foundation for the assertion that the applicant has no "justified expectation". In the absence of any arbitrariness or manifest unfoundedness, the European Court of Human Rights cannot call into question the Supreme Court's conclusions or its interpretation of the bilateral agreement.

5. Conclusions

1. In order to benefit from the protection of Article 1 of Protocol No. 1 to the Convention, an applicant who has applied for registration of a trademark must be entitled to claim in respect of which he may affirm that he had at least a "justified expectation" for its implementation. The grounds for concluding that such a "justified expectation" is as follows: the availability of grounds for such a requirement within national law and the consistent practice of National Courts, which shows that the applicant does have sufficient grounds to obtain this very justified expectation.

2. The mentioned reasons allow to affirm about the lack of reasonable grounds within national law or in the settled case-law practice of National Courts that are to state that an applicant who has applied for registration of a trademark has "justified expectation" protected by provisions of the Article 1 of Protocol No. 1 to the Convention: 1) the applicant company had a right that is subject to a certain condition, which was terminated retroactively due to non-compliance with this condition, namely that it did not violate rights of the third parties; 2) there is a dispute/disputes about the registration of a trademark, which being taken into the Court processing in different countries; 3) the applicable rule of national law is sufficiently accessible, accurate and predictable; 4) the criteria for trademark registration are unclear, there are doubts about their proper interpretation, as well as the difficulties associated with the need to analyze various international instruments.

3. Violation of the Article 1 of Protocol 1 is a retrospective interference by the legislator.

4. The current legislation of Ukraine in the field of intellectual property on "expectativa jurídica" issues when filing an application for trademark registration, as well as on state interference regarding the "justified expectation" of the applicant companies needs to be improved in the light of the case-law practice of the European Court of Human Rights.

Bibliography:

1. **Блажівська, Н. Є.** (2018). Загальна характеристика захисту прав інтелектуальної власності в практиці Європейського суду з прав людини. *Теорія і прак-*

тика інтелектуальної власності, 5, С. 83-92. URL: http://nbuv.gov.ua/UJRN/Tpiv_2018_5_11/

2. **Волков, В. & Дешко, Л.** (2007). Медичне право – реальність сьогодення. *Інформаційний правовий простір*, 18, С. 45 – 48.
3. **Волков, В. & Дешко, Л.** На захист медичного права. *Юридичний Вісник України*, 2006, 8. С. 8.
4. **Дешко, Л.** (2007). Правове регулювання господарювання в сфері охорони здоров'я: проблеми вдосконалення спеціального законодавства. Підприємництво, господарство і право, 5, С. 57-62.
5. **Дешко, Л.** (2018). Restitutio in integrum: підходи Європейського суду з прав людини. *Порівняльно-аналітичне право*. 2018. 5. С. 365-368.
6. *Конституція України* (1996) URL: https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text
7. **Нечипорук, Г. Ю., Бисага, Ю. М. , Берч, В. В., Дешко, Л. М., Бисага, Ю. Ю., Нечипорук, К. О.** (2020) *Конституційне право на звернення до Європейського суду з прав людини та механізм реалізації права на виконання його рішень*. Ужгород, ТОВ «РІК-У», 2020.
8. *Право інтелектуальної власності. Підручник*. (2019). За заг. ред. С.Б. Булеци, О.І. Чепис. Ужгород: РІК-У, 488 с.
9. *Рішення Конституційного Суду України у справі за конституційним поданням 45 народних депутатів України щодо відповідності Конституції України (конституційності) Закону України «Про внесення змін до Закону України «Про електроенергетику» (справа про електроенергетику)*. (2002). URL: www.rada.gov.ua/laws/show/v003p710-02#Text
10. *Рішення Конституційного Суду України у справі за конституційним поданням 47 народних депутатів України щодо відповідності Конституції України (конституційності) Закону України «Про введення мораторію на примусову реалізацію майна» (справа про мораторій на примусову реалізацію майна)*. (2003). URL: www.rada.gov.ua/laws/show/v011p710-03#Text
11. Anheuser-Busch Inc.v. Portugal, 73049/01 (ECHR, 2007). URL: https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-1891266-1986242&filename=003-1891266-1986242.pdf&TID=thkbhnilzk.
12. **Buletsa, S., Deshko, L. & Zaborovskyy, V.** (2019). The peculiarities of changing health care system in Ukraine. *Medicine and Law*, 2019, 38. №3, P. 427-442.
13. **Deshko L. M., Bysaga Y.M. & Zaborovskyy V.V.** (2019). Protection of human rights by the Constitutional Court of Ukraine in the field of health care. *Georgian Medical News*, 7, P. 160-166.
14. **Deshko L., Bysaga Y., Vasylchenko O., Nechyporuk A., Pifko O. & Berch V.** (2020). Medicines: technology transfer to production, cession of ownership rights for registration certificates and transfer of production in conditions of modern challenges to international and national security. *Georgian Medical News*, 10, P. 180-184.
15. **Deshko, L.** (2013). The Subjective Legal Right Structure to Apply to the International Judicial Institutions or to the Relevant Bodies of International Organizations. Ценности и интересы современного общества: материалы Международной научно-практической конференции. URL: http://www.mesi.ru/our/ events/detail/124931/.
16. **Deshko, L.** (2018). Patenting of medicinal products: the experience of implementation of the flexible provisions of the TRIPS-plus Agreement by foreign countries and the fundamental patent reform in Ukraine. *Georgian Medical News*, 9, P. 161-164.
17. **Deshko, L**. The principle of «de minimis non curat praetor» in International Law. *Зовнішня торгівля: економіка, фінанси, право*. 2018, 4, С. 5-15.
18. **Deshko, L., Bysaga, Y. & Bysaga, Y.** (2019). Public procurement in the healthcare sector: adaptation of the administrative legislation of Ukraine to the EU legislation. *Georgian Medical News*, 6, P. 126-130.
19. **Deshko, L., Bysaga, Y., Kalyniuk, S. & Bysaga, Y**. (2020). State Obligations on Provision the Right of Primary Healthcare Doctor for Medical Practice as Entrepreneurship in the Light of Transformation of the Health Care System of Ukraine. *Georgian Medical News*. 2020, 6 (303), P. 194-199.
20. **Ezer T., Deshko L., Clark N. G. et al.** (2010). Promoting public health through clinical legal education: Initiatives in South Africa, Thailand, and Ukraine. *Human Rights Brief.* 2010, 17/27, P. 32. URL: http://www.wcl.american.edu/ hrbrief/17/2ezer.pdf.

References.

1. **Blazhivska, N. Ye.** (2018). Zahalna kharakterystyka zakhystu prav intelektualnoi vlasnosti v praktytsi Yevropeiskoho sudu z prav liudyny [General characteristics of protection of intellectual property rights in the case law of the European Court of Human Rights]. *Teoriia i praktyka intelektualnoi vlasnosti*, 5, 83-92. URL: http://nbuv.gov.ua/UJRN/Tpiv_2018_5_11/ [in Ukrainian].
2. **Volkov, V. & Deshko, L.** (2007). Medychne pravo – realnist sohodennia [Medical law is a reality of today] *Informatsiinyi pravovyi prostir*, 18, S. 45-48. [in Ukrainian].
3. **Volkov, V. & Deshko, L.** (2006). Na zakhyst medychnoho prava [In defense of medical law]. *Yurydychnyi Visnyk Ukrainy*, 8, 8. [in Ukrainian].
4. **Deshko, L.** (2007). Pravove rehuliuvannia hospodariuvannia v sferi okhorony zdorovia: problemy vdoskonalennia spetsialnoho zakonodavstva [Legal regulation

of health care: problems of improving special legislation]. *Pidpryiemnytstvo, hospodarstvo i pravo*, 5, 57-62. [in Ukrainian].

5. **Дешко, Л.** (2018). Restitutio in integrum: pidkhody Yevropeys'koho sudu z prav lyudyny [Restitutio in integrum: approaches of the European Court of Human Rights]. *Porivnyal'no-analitychne pravo*, 5, 365-368. [in Ukrainian].
6. *Konstytutsiia Ukrainy [Constitution of Ukraine*] (1996). URL: https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text. [in Ukrainian].
7. **Nechyporuk, H. Iu, Bysaha Yu. M., Berch, V. V., Deshko, L. M., Bysaha Yu. Iu. & Nechyporuk, K. O.** *Konstytutsiine pravo na zvernennia do Yevropeiskoho sudu z prav liudyny ta mekhanizm realizatsii prava na vykonannia yoho rishen [The constitutional right to appeal to the European Court of Human Rights and the mechanism for exercising the right to enforce its decisions]*. Uzhhorod, TOV «RIK-U», 2020. [in Ukrainian].
8. *Pravo intelektualnoi vlasnosti. Pidruchnyk [Intellectual property law. Textbook]*. (2019). Za zah. red. S.B. Buletsy, O.I. Chepys. Uzhhorod: RIK-U. [in Ukrainian].
9. *Rishennia Konstytutsiinoho Sudu Ukrainy u spravi za konstytutsiinym podanniam 45 narodnykh deputativ Ukrainy shchodo vidpovidnosti Konstytutsii Ukrainy (konstytutsiinosti) Zakonu Ukrainy «Pro vnesennia zmin do Zakonu Ukrainy «Pro elektroenerhetyku» (sprava pro elektroenerhetyku) [Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of 45 people's deputies of Ukraine on compliance of the Constitution of Ukraine (constitutionality) with the Law of Ukraine «On Amendments to the Law of Ukraine» On Electricity «(case on electric power)]* (2002). URL: www.rada.gov.ua/laws/show/v003p710-02#Text [in Ukrainian]
10. *Rishennia Konstytutsiinoho Sudu Ukrainy u spravi za konstytutsiinym podanniam 47 narodnykh deputativ Ukrainy shchodo vidpovidnosti Konstytutsii Ukrainy (konstytutsiinosti) Zakonu Ukrainy «Pro vvedennia moratoriiu na prymusovu realizatsiiu maina» (sprava pro moratorii na prymusovu realizatsiiu maina) [Judgment of the Constitutional Court of Ukraine in the case on the constitutional petition of 47 people's deputies of Ukraine on the compliance of the Constitution of Ukraine (constitutionality) of the Law of Ukraine «On the introduction of a moratorium on forced sale of property» (case on a moratorium on forced sale of property)]* (2003). URL: www.rada.gov.ua/laws/show/v011p710-03#Text [in Ukrainian]

КОНСТИТУЦІЙНЕ ПРАВО ВОЛОДІТИ, КОРИСТУВАТИСЯ І РОЗПОРЯДЖАТИСЯ РЕЗУЛЬТАТАМИ СВОЄЇ ІНТЕЛЕКТУАЛЬНОЇ, ТВОРЧОЇ ДІЯЛЬНОСТІ: «ВИПРАВДАНЕ ОЧІКУВАННЯ» ОТРИМАННЯ МАЙНА, ЩО ПІДЛЯГАЄ ПРАВОВІЙ ОХОРОНІ

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Анотація

В науці конституційного права жваві дискусії викликає питання обмеження прав інтелектуальної власності. При реєстрації торгових знаків все частіше постає ряд питань теоретичного та практичного характеру: чи може держава на виконання взятих на себе міжнародних зобов'язань «знищити» виправдане очікування суб'єктів права інтелектуальної власності шляхом прийняття певних законодавчих актів? Чи є втручанням у мирне користування майном рішення про застосування до заяви про реєстрацію торгової марки положень двосторонньої угоди, яка набула чинності після подання суб'єктом заяви про реєстрацію торгової марки? Чи

потребує вдосконалення в Україні конституційно-правовий механізм регулювання суспільних відносин у сфері інтелектуальної власності щодо питань «expectativa jurídica»?

Мета статті – виявити умови, за наявності яких у заявника, який подав заявку на реєстрацію торгового знаку, є право вимоги щодо якого у нього є «виправдане очікування» його здійснення, та виявити умови, які дозволяють стверджувати, що в національному законодавстві або в усталеній практиці національних судів відсутні достатні підстави, що дозволяють стверджувати, що у заявника, який подав заяву на реєстрацію товарного знаку, є «виправдане очікування», що знаходиться під охороною положень статті 1 Протоколу № 1 до Конвенції. Методологічною основою проведеного дослідження є загальні та спеціальні методи наукового пізнання (формально-логічний метод, порівняльно-правовий, структурно-логічний).

Встановлено, що для того, щоб скористатися захистом статті 1 Протоколу № 1 до Конвенції про захист прав людини і основоположних свобод, заявник, який подав заявку на реєстрацію товарного знаку, повинен мати право вимоги, щодо якого він може стверджувати, що у нього було, зокрема, «виправдане очікування» його здійснення. Підставами висновку про таке «виправдане очікування» є: наявність підстав для такої вимоги в національному законодавстві та усталеність практики національних судів, яка свідчить, що дійсно у заявника достатньо підстав мати таке виправдане очікування.

Виявлено такі підстави, які дозволяють стверджувати, що в національному законодавстві або в усталеній практиці національних судів відсутні достатні підстави, які дозволяють стверджувати, що у заявника, який подав заяву про реєстрацію товарного знаку, є «виправдане очікування», що охороняється положеннями статті 1 Протоколу № 1 до Конвенції: у компанії-заявника було право, підпорядковане певній умові, що припинилося заднім числом через невиконання цієї умови, а саме що вона не порушувала прав третіх осіб; 2) існує суперечка / суперечки про реєстрацію торгової марки, які знаходяться в провадженні судів різних країн; 3) норма національного права, яка підлягає застосуванню, досить доступна, точна і передбачувана; 4) критерії реєстрації товарного знака є не ясними, є сумніви в належному їх тлумаченні, а також складності, пов'язані з необхідністю аналізу різних міжнародних актів.

Додатково аргументовано, що порушенням ст. 1 Протоколу 1 є ретроспективне втручання з боку законодавця. Обгрунтовано, що чинне законодавство України у сфері інтелектуальної власності щодо питань «expectativa jurídica» при подачі заявки на реєєстрацію товарного знаку, а також щодо втручання держави відносно «правомірного очікування» компаній-заявників потребує вдосконалення в світлі практики Європейського суду з прав людини.

Ключові слова: *конституційне право володіти, користуватися і розпоряджатися результатами своєї інтелектуальної, творчої діяльності; право інтелектуальної власності; виправдане очікування; обмеження права інтелектуальної власності; право приватної власності; реєстрація торгової марки; expectativa jurídica; міжнародне зобов'язання; конституційно-правовий механізм регулювання суспільних відносин у сфері інтелектуальної власності; баланс інтересів.*

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«SUCCESS FEE» AS AN IMPORTANT COMPONENT OF ENSURING THE CONSTITUTIONAL RIGHT OF A PERSON TO PROFESSIONAL LEGAL ASSISTANCE

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Summary

The purpose of this article is to study the legal essence of such a method of calculating the lawyer's fee as «success fee», disclosing its positive and negative features, as well as the experience of the European Court of Human Rights and the experience of foreign countries in its application.

In the context of disclosing the subject of research, both to achieve the goal of scientific work and to ensure the completeness, objectivity, reliability and persuasiveness of the results, the author used a set of general and special methods that are characteristic of legal science. In particular, the origin and long historical path of development of this legal institution were studied with the help of the historical method. The system-structural method made it possible to formulate the general structure of the study, and the dialectical one – to analyze first of all legislative provisions and jurisprudence on the possibility of using the «success fee» as a way to calculate the lawyer's fee. Using a comparative legal method, the legislation of foreign countries was analyzed, which provided an opportunity to use their positive experience in terms of calculating the amount of attorney's fees.

This article discloses the scientific approaches of researchers to determine the nature of the expenses on legal assistance primarily concerning the nature of the «success fee», its positive and negative features, as well as analyzes the provisions of domestic and foreign legislators on the possibility of consolidating in the contract for legal assistance a condition that indicates such a way of calculating the amount of wages of a lawyer as a «fee for success». Significant part of the work is devoted to the analysis of the law enforcement practice of Ukrainian courts and the European Court of Human Rights, both in general as to the possibility and expediency of the existence of certain criteria for limiting its size.

It is noted that a significant number of foreign countries do not prohibit the possibility of using the «success fee», taking into account the existence of certain restrictions concerning the categories of cases, or the perception of it as an additional reward.

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Key words: advocacy; attorney's fees; expenses on professional legal assistance; ways to calculate the amount of expenses.

1. Introduction

In accordance with Part 1 of Art. 26 of the Law of Ukraine «On the Bar and Advocacy» advocacy is carried out on the basis of an agreement on legal assistance. In this agreement, the lawyer and the client independently determine the procedure for calculating and paying the fee (hourly payment; sturdy (fixed) amount of money; «success fee»; customer service; combined system, etc.).

Therefore, one of the ways to calculate the amount of a lawyer's fee is the so-called «success fee». «Success fee» implies an agreement between a lawyer and a client, when the amount of remuneration depends on the result that the client is trying to achieve by resorting to professional help (Knyazev, 2005, p. 103). In the legal literature, it is also called «conditional fee» (Sarksyan, 2015, p. 99), «victory fee» (Melnychenko, 2006, p. 23). The following principle of «no win no fee» applies to this method of calculating the amount of the fee (Vityuk, 2018).

Analysis of scientific publications. Theoretical applied problems related to the calculation of the amount of attorney's fees have been the subject of research of a number of scientists, namely: D. Azarov, R.F. Asanov, R. Vityuk, O.A. Vishnevskaya, N.S. Yermakova, D.D. Luspenik, A.N. Knyazev, A.A. Maslov, R.G. Melnychenko, C.M. Sarksyan, T.O. Papii and others.

The purpose of this article is to explore the legal nature of the «success fee» as one of the ways to calculate the amount of a lawyer's fee. The main tasks that the author sets are to disclose the theoretical approaches concerning the determining of the essence of the «success fee», its positive and negative features; to explore the provisions of Ukrainian and foreign legislators, as well as the law enforcement practice of judges (including the European Court of Human Rights) concerning the possibility of using such a method of calculating the amount of attorney's fees.

2. Origin and historical development of «success fee»

As for the success fee, it should be perceived as a legal institution that has existed for a long time. In general, exploring the essence of the institution of remuneration for legal assistance of a lawyer (fee), it is necessary to proceed from the fact that it originated in ancient Greece and Rome, and went from perceiving it as an honorary gift for a noble deed («charity work») and regulation at the level of customary law to the appropriate normative consolidation and perception of the fee as an proper fee for advocacy with the establishment of appropriate restrictions (in particular, on the maximum size) and the criteria for determining its size (Zaborovskyy, Manzyuk & Stoyka. 2020).

In fact, the first act concerning the remuneration of a lawyer was the law of Cintius (in honor of the people's tribune who initiated it), which is also known as «On gifts and presents». The need for the adoption of this law, according to Cornelius Tacitus, was caused by the intemperance of speakers in accepting gifts (Cornelius Tacitus. Annals. Book XV.20). One of the main restrictions was the ban on receiving remuneration until the end of the defense. Thus, in the Digests of Justinian (Book 17.1.1,6) it was noted, in addition to this restriction, that after providing protection, the lawyer had the opportunity to enter into appropriate agreements and demand remuneration (fees) through the court (Monuments of Roman law, 1997, p. 420). Although initially lawyers were not prohibited from charging an additional fee in the form of a bonus (provided that the entire amount did not exceed the established fee), but later during the reign of Emperor Marcus Aurelius Severus Alexander the possibility of interest on the successful case was banned (societatem future emolumenti) (Vishnevskaya, 2010, p. 43). The need for such a ban was that in the system of relations between

clients and lawyers, which developed in the Roman Republic, the conditional remuneration, which is the fee for success, did not fit into the system of moral norms governing respect as well as to the relationship between the client and patron, from which the development of the Roman Advocacy took place (Maslov, 2013, p. 49).

Later, this way of calculating the amount of remuneration as a «success fee» was banned in the legislation of many European countries. Thus, in his work «Rules of the legal profession in France» (1842) M. Mollo noted that strict ban was implemented on any kind of contract under which the lawyer claims as a fee the part of the object which is the subject of dispute or its equivalent (this is a treaty Quota litis – a shameful treaty, punishable by law everywhere and always) (Mollo, 1894, p. 65).

Somewhat different situation was in Russian Empire. D. Azarov points out the fact that some boards of jurors proceeded from the fact that the lawyer's fee is often determined not only by the time spent and the work done, but also by the degree of success, that is the result of the case; such fragmentation of the fee seems to be natural because for the client the time spent and the work done are not as important as the result of the petition or defense and thus, they saw nothing bad in the consolidation of an additional fee in case of acquittal or reduction of punishment (Azarov, 2009, p. 212).

3. Theoretical and applied problems of using the «success fee» as a way to calculate the amount of attorney's fees

The problem of the possibility of using the «success fee» as a way to calculate the amount of a lawyer's fee has existed for a long time, and unfortunately, is still debatable in Ukraine today. Thus, the possibility of «success fee» collection from the client of a lawyer was the subject of the Civil Court of Cassation in the Supreme Court (case № 462/9002/14-ts), which motivated its decision by the fact that by implementing the principle of freedom of contract, the parties are not entitled to change the imperative requirement of the law on the subject of the contract for the provision of legal services by determining in direct or veiled form the outcome of the case by the court as part of the subject of the contract for the provision of legal services. In its decision, the Court of Cassation noted that the additional remuneration of a lawyer determined by the contract for achieving a positive decision in the case in its content and legal nature is not the price of the contract (payment for services rendered) within the meaning of Art. 632, 903 of the Civil Code of Ukraine and Art. 30 of the Law of Ukraine «On the Bar and Advocacy», but is a payment for the result itself (positive decision), the achievement of which in accordance with the terms of the contract is not dependent on the services actually provided, and therefore contradicts the basic principles of justice in Ukraine and acts of civil legislation.

A completely different view is reproduced in the decree of the Grand Chamber of the Supreme Court (case № 904/4507/18), which is motivated by the fact that the arrangements for the payment of legal assistance fees are those between a lawyer and a client, and the question of the binding nature of such an obligation may be considered within the legal relationship between the lawyer and the client. The Grand Chamber assumes that in determining the amount of compensation the court must adhere to the criterion of the reality of the costs of legal assistance, as well as the reasonableness of their amount, taking into account both whether they were actually incurred and assess their necessity.

Regarding Ukrainian legislation, the above-mentioned Art. 30 of the Law contains only the provision according to which the procedure for calculating the fee (fixed amount, hourly rate), the procedure for its payment, etc. are determined in the contract for legal assistance. In turn, Art. 30 of the Lawyer's Code of Ethics stipulates that a lawyer's right to receive unpaid fee does not depend on the result of the order, unless otherwise provided by the legal aid agreement and indicates the possibility of the lawyer applying the «success fee». The position of the Council of Advocates of Ukraine on this issue is manifested in the fact that on one hand, the lawyer has the right to receive a fee for legal assistance, the amount of which is not limited by current legislation and is determined by the agreement on legal assistance between lawyer and client and on the other hand, a lawyer is not recommended to file a claim in court for reimbursement of the success fee paid to him for the

provided legal assistance (Decision of the Bar Council of Ukraine of April 12, 2019).

To determine our attitude to this method of calculating the lawyer's fee, we consider it necessary to disclose its positive and negative features, the legal nature of the «success fee», as well as the experience of foreign countries in its application.

The main social value of the «success fee», as noted by R.G. Melnychenko, is that it makes qualified legal aid more affordable, as there are often cases where a person is forced to waive the protection of his right only on the basis of lack of funds to pay for a lawyer. At the same time, the social significance of the fee for success, according to him, disappears when a person needs a lawyer in a criminal case, because if a person does not have the funds to pay for a lawyer, the latter will be paid by the state (Melnychenko, 2006, p. 24). V. Gvozdiy notes that in many cases, when a lawyer takes a case, he understands that it can take a lot of hours, and in complex cases it is about the work of an entire law firm. At the same time, not all customers are ready to pay such a fee at the start, which would cover the time actually lost. And here the success fee is exactly the tool that allows you to take a risk, for example, a law firm, having spent a certain amount of time, to get a reward as a result of winning, and in such cases, the success fee is just a tool to protect the rights of the client (Gvozdiy, 2018).

A similar position is held by R.F. Asanov and S.F. Akhmetov, who point out that in many cases, when the plaintiffs do not have significant savings, but at the same time are victims in a contractual, tortious or property relationship, they are faced with a dilemma: either to be without qualified protection, or to enter into a contract, under which part of the awarded amount will be available to the lawyer as his fee. In addition, the undoubted advantage of the «success fee», according to them, is its focus on a specific result, because such an approach stimulates the lawyer and improves the quality of services he provides, directs his efforts to achieve a specific goal, obtaining the appropriate result, which makes it possible to build a competent strategy for going to court and increase the likelihood of resolving the issue in favor of the client (Asanov & Akhmetov 2007, p. 49). Any participant in the litigation, according to R.A. Chepkasova, is interested in its positive result, and hence in the effective work of its representative, and therefore many clients are ready to create material incentives for their lawyer in the hope of great interest and efficiency (Chepkasova, 2015, p. 50). Of course, this fact, as rightly noted by N.S. Yermakova, in itself should not be an argument, because a conscientious lawyer or law firm should always try to protect the interests of the wards, but to deny the objective intensification of efforts and the desire to win the case would be inappropriate (Yermakova, 2017, p. 126).

Along with the mentioned above advantages of this method of calculating the lawyer's fee D. Azarov points out that the «success fee» will contribute to the fact that lawyers will not take instructions to conduct cases which would clearly result in failure (Azarov, 2009, p. 212), thus protecting the interests of a potential client's lawyer from incurring unnecessary costs (for example, for hourly pay), in cases where the legislation and judicial practice on the legal situation of the client «clearly» not in his favor.

A number of scholars, studying the legal nature of the «success fee», point to the possibility of its use, but still proceed from the appropriate existence of certain limitations in its application. Thus, in addition to the mentioned above restriction, R.G. Melnychenko (concerning criminal cases), K.I. Gorodnikov and D.V. Vorobyov proceed from the need to perceive the «success fee» as a subsidiary condition (the contract for legal aid cannot contain only the condition of «success fee» as a condition for payment for services, because then there is a possibility that the lawyer will not be paid at all, which is inadmissible) (Gorodnikov & Vorobyova, 2018).

At the same time, some scholars point to certain negative aspects in the use of the «success fee» as a way to calculate the amount of a lawyer's fee. In particular, O.O. Kiyashko opposes the possibility of collecting a «success fee» from the losing party because the imposition of these costs on the other party, according to her, is unfair, because such a party does not risk their money in any way (in case of losing the case the party should not pay these funds to the defense counsel, and therefore does not actually bear the court expenses on the case, and in the case of a positive court decision, the party will

not only win the dispute, but also «earn» these funds from the losing party) (Kiyashko, 2019, p. 168). In turn, O. Vereshchagin notes that the disadvantage of such a system is the «unhealthy excitement» that it brings to court due to the tendency to increase the amount of claims in the hope of obtaining a larger amount, as well as the fact that the costs of the winning party may lay a heavy burden on the losing side (Vereshchagin, 2007, p. 175).

According to O.M. Knyazev, the disadvantage of the «success fee» is that under such conditions, the lawyer becomes a participant in a risky operation, which only partially depends on the professionalism of the lawyer, and to a greater extent depends on other circumstances, and in fact, gets involved in business, which is incompatible with his special human rights status (Knyazev, 2005, p. 106). The view of D. Azarov is also worth mentioning – he points out that this method of determining the fees may cause the situation that can exclude public trust in advocacy, namely, increasing the number of lawsuits of lawyers to their clients concerning the collection of «fee for success» (in case of including in the agreement with the lawyer the condition of «success fee» the client more easily agrees to its size, compared to what he would have to pay immediately, and when it's time to pay the fee after the case the client is tempted to evade his part of the obligation), which can lead to a negative public opinion not only in relation to a particular lawyer, but also in relation to the entire legal community (Azarov, 2009, p. 212).

4. Experience of foreign countries and the case law of the European Court of Human Rights on the application of the «success fee»

All this indicates the inconsistency of the positions of scholars on the feasibility of using the «success fee» as a way to calculate the amount of attorney's fees. The practice of foreign countries is just as inconsistent. First of all, it should be noted that some scholars point out the inexpediency of using the «lawyer's fee» in view of the provisions of the General Code of Rights for Lawyers of the European Communities of October 28, 1988. Yes, indeed, paragraph 3.3.1 of the Code states that a lawyer should not enter into a pactum de quota litis (an agreement under which the client undertakes to pay the lawyer a fee in the form of a sum of money or in any another form). However, there is an exception to this rule, according to which the agreement to pay a fee to a lawyer according to the value of the disputed property is not a pactum de quota litis, if the amount of the fee is determined according to the official fee scale or under the control of the competent authority the jurisdiction of which extends onto the lawyer (paragraph 3.3.3 of the Code).

As for the legislation of foreign countries, as D. Luspenik rightly points out, in some European countries such agreements have legal force (United Kingdom, Czech Republic, Slovakia, Poland, Hungary, Finland, Turkey and Greece), in others they are considered inadmissible (Germany and Ireland) (Luspenik, 2019). At the same time, in some countries there are restrictions on the use of the «success fee». In particular, in Germany there is a special law «On the remuneration of lawyers» («Rechtsanwaltsvergütungsgesetz»), Annex 1, which contains a large list of such remuneration depending on the type of advocacy. German law prohibits the «lawyer's fee» in its classical sense, but as noted by O.V. Nakushnova, in achieving an agreed result, the lawyer has the right to count on the statutory remuneration, and as a bonus may also claim an additional stipulated fee for success, while in the absence of a stipulated result it is impossible that the lawyer will not get a minimal amount of remuneration (Nakushnova, 2014, p. 82). A similar situation is typical of French law, according to which when determining the amount of attorney's fees one may take into account the result, if the contract with the client provided a condition of additional remuneration (extra amount) for a favorable outcome in the case (Petrachkov, 2010, p. 72). The Swiss legislature assumes that a lawyer cannot directly enter into a pactum quota litis agreement and refuse any payment in case of an unsatisfactory outcome of the case, but he is given the opportunity to stipulate an increase in his fee in case of winning the case – pactum de palmario (Art. 19 Swedish Code of Ethics).

The use of the «success fee» is common in the countries of the Anglo-Saxon legal system, which are primarily based on the freedom of contract, including the condition of the contract

for legal aid as a way to calculate the amount of attorney's fees. In the United States, the success fee is allowed by state law, each with its own code of professional liability. This code is based on standard rules developed by the American Lawyers Association. T.O. Papii notes that the US success fee is part of a contingent fee that clearly sets out the criteria for determining whether a result is successful for a client either winning a case or awarding a certain amount of damages), and if a party to the lawsuit has failed or received compensation, the amount of which is less than that stipulated in the contract, the lawyer's fee is not paid or is limited (depending on the terms of the contract) (Papii, 2019, p. 417). However, the use of this method of calculating the amount of attorney's fees in the United States has certain limitations. Thus, paragraph 1.5 (d) of the 1983 Standard Rules of Professional Conduct prohibits the application of a «success fee» concerning divorce, alimony, and criminal matters. Similar restrictions exist in English law, according to which conditional fee agreements may not apply to family relationships, as well as criminal cases, with certain exceptions (Article 27 of the Access to Justice Act 1999).

In addition to researching foreign law, it is important to clarify the ECHR's attitude to the possibility of applying a «success fee» in the relationship between a lawyer and his client. Exploring the case law of this Court, D. Luspenik draws attention to the fact that the ECHR in its practice distinguishes agreements on the payment of a share of the winnings (when the obligation to pay depends on the winnings of the case and the fee is determined as a percentage of the winnings) from other types of agreements on the «success fee» (when the obligation to pay the fee also depends on the winnings of the case, but its amount is determined in a fixed amount of money, or it is a bonus added to the main amount of the fee) (Luspenik, 2019). However, the ECHR does not aim at defining in general the possibility of consolidation of such a method of calculating a lawyer's fee as a «success fee» (regardless of its type), but passes it on to the national legislator at its own discretion. Thus, in particular in the cases «Iatridis v. Greece» (2010) and «Kamasinski v. Austria» (1989), the ECHR recognizes the «success fee» agreement as valid, taking into account, first of all, the relevant national legislation on their validity, whereas, for example, in «Dudgeon v. Ireland» (1983), the opposite is true.

A study of provisions of the legislation of foreign countries and ECHR practice allows us to conclude that a significant number of such countries do not prohibit the use of «success fee» (given certain restrictions on categories of cases, or its perception as an additional fee) as a way to calculate attorney's fees. The ECHR does not deny such a possibility as well.

5. Conclusions

One of the ways to calculate a lawyer's fee, along with an hourly fee, a fixed amount of money and others is the «success fee», which should be understood as an agreement between a lawyer and his client, which provides for the payment of fees (its amount) depending on achievement of a predetermined result, which is expected by the client and towards which the professional activity of the lawyer is directed.

A lawyer can only predict a certain outcome when providing legal assistance, but in no case is it possible to guarantee its occurrence, and therefore the lawyer's fee is based on his professional activity, not its result. Therefore, the subject of a contract for the provision of legal aid can only be the provision of certain types of legal aid, and not the result that his client expects (in particular, a certain positive decision in the case). At the same time, taking into account the principle of freedom of contract, the lawyer and the client have the opportunity to specify in the contract the condition of «success fee» as a way to calculate the lawyer's fee, according to which the achievement of a certain result should be perceived not as the subject of the contract, but as a legal fact (suspensive circumstance), with the occurrence of which the parties stipulate the need to pay the appropriate fee to the lawyer according to the level of quality of his activity.

One of the ways to calculate a lawyer's fee, along with an hourly fee, a fixed amount of money and others is the «success fee», which should be understood as an agreement between a lawyer and his client, which provides for the payment of fees (its amount) depending on achievement of a predetermined result, which is expected by the client and towards which the professional activity of the lawyer is directed.

The positive features of the «success fee» are the increased affordability of legal aid for the population and its focus on results, which in many cases can improve the quality of such assistance, as well as protect the interests of a potential client's lawyer from incurring unnecessary costs. A necessary condition for consolidation of the «success fee» in the contract for the provision of legal aid, regardless of its type (payment of a share of the winnings in a fixed amount, or as an additional fee added to the main amount of the fee) is to establish clear criteria for determining the result, which is the aim of the professional activity of a lawyer. Given the experience of foreign countries, we consider it necessary to have certain restrictions (or even prohibitions) on the possibility of applying a «success fee» for certain categories of cases, including criminal cases and family relationships (e.g., divorce, alimony, etc.).

Bibliography:

1. **Азаров, Д.** (2009). К вопросу о гонораре успеха. *Бизнес в законе*, 4, С. 211-212.
2. **Асанов, Р. Ф. & Ахметов, С. Ф.** (2007). «Гонорар успеха»: законность и целесообразность. *Юридическая наука и правоохранительная практика*, 1, С. 44-50.
3. **Верещагин, А.** (2007). «Гонорар успеха» перед лицом конституционного правосудия. *Сравнительное конституционное обозрение*. 1, С. 173-178.
4. **Вишневская, О. А.** (2010). Институт оплаты услуг адвоката в Древнем мире. *Адвокатская практика*, 1, С. 41- 44.
5. **Вітюк, Р.** (2018). Бонус для адвоката: стимул чи корупційна складова? *Закон і бізнес*, 31 (1381). URL: https://zib.com.ua/ua/133986-bonus_dlya_advokata_stimul_chi_korupciyna_skladova.html
6. **Гвоздій, В.** (2018). Чи має право на існування гонорар успіху? *Коментар для «Закон і Бізнес»*, 31 (1381). URL: https://zib.com.ua/ua/print/133986-bonus_dlya_advokata_stimul_chi_korupciyna_ skladova.html
7. **Городников, К. И. & Воробьева, Д. С.** (2018). «Гонорар успеха» в российской правовой системе. *Синергия наук*. URL: http://synergy-journal.ru/archive/article3827
8. **Ермакова, Н. С.** (2017). Гонорар успеха: взгляды за рубежом и в России. *Законность в современном обществе*: сборник статей Международной научно-практической конференции (с. 122-126). Уфа: АЭТЕРНА.
9. **Заборовський, В. В., Манзюк, В. В. & Стойка, А. В.** (2020). Правова природа винагороди за правову допомогу (гонорару) адвоката. *Науковий вісник Ужгородського національного університету. Серія: Право*, 61, Т. 2, С. 138-142.
10. *Загальний кодекс правил для адвокатів країн Європейського Співтовариства* (1988), прийнятий делегацією дванадцяти країн-учасниць на пленарному засіданні у Страсбурзі. URL: http://zakon2.rada.gov.ua/laws/show/994_343
11. **Кияшко, О. О.** (2019). Концепція «success fee» в межах проблематики відшкодування витрат на професійну правничу допомогу в цивільному процесі: судова практика. *Новели цивільного процесуального законодавства. Представництво*: матеріали Міжнар. наук.-практ. конф. до 150-ї річниці з дня відкриття першої судової палати у м. Одеса (с. 165-168). Одеса: Фенікс.
12. **Князев, А. Н.** (2005). Гонорар успеха в договоре оказания юридической помощи. *Корпоративное управление и инновационное развитие экономики Севера. Вестник Научно-исследовательского центра корпоративного права, управления и венчурного инвестирования Сыктывкарского государственного университета*, С. 103-109.
13. **Корнелий Тацит (**1993). *Сочинения в двух томах. Том I. «Анналы. Малые произведения»* / за ред. А.С. Бобович, Я.М. Боровский, М.Е. Сергеенко. М.: Науч.-изд. центр «Ладомир». URL: http://ancientrome.ru/antlitr/t.htm?a=1347015000
14. **Луспеник, Д. Д.** (2019). Гонорар успіху адвоката: практика Європейського суду з прав людини. *Судебно-юридическая газета*. URL: https://sud.ua/ru/news/publication/132954-gonorar-uspikhu-advokata-praktika-yevropeyskogo-sudu-z-prav-lyudini
15. **Маслов, А. А.** (2013). О гонораре адвокатов (honorarium) в Римской республике. *Юридическая наука: история и современность,* 11, С. 46-50.
16. **Мельниченко, Р. Г.** (2006). Достоинства и недостатки гонорара успеха. *Адвокат*, 10, С. 22-25.
17. **Молло, М.** (1894). Правила адвокатской профессии во Франции: пер. с франц. М.: Издание Н.П. Шубинского, 98 с.
18. **Накушнова, Е. В.** (2014). Вознаграждение исполнителя по договорам оказания правовых услуг (гонорар успеха). *Современное право*, 2, С. 79-84.
19. *Памятники Римского права. Законы XII таблиц. Институции Гая. Дигесты Юстиниана* (1997). М.: Зерцало. 608 с.
20. **Папій, Т. О.** (2019). Гонорар успіху адвоката: сучасний стан та перспективи розвитку в Україні. *Порівняльно-аналітичне право*, 4, С. 416-419. URL: http://pap.in.ua/4_2019/117.pdf

21. **Петрачков, С. С.** (2010). «Гонорар успеха»: анализ правового регулирования в России и зарубежных странах. *Вестник Московского государственного областного университета. Серия: Юриспруденция*, 3. С. 68-74.
22. *Постанова Великої Палати Верховного Суду* (2020). No 904/4507/18. URL: https://reyestr.court.gov.ua/Review/91572017
23. *Постанова Касаційного цивільного суду у складі Верховного Суду* (2018), No 462/9002/14-ц. URL: http://reyestr.court.gov.ua/Review/75003682
24. *Правила адвокатської етики* (2017), затверджені Звітно-виборним з'їздом адвокатів України. URL: http://vkdka.org/wp-content/uploads/ 2017/07/ PravilaAdvokatskojiEtiki2017.pdf
25. Про адвокатуру та адвокатську діяльність. (2012): Закон України No 5076-VI. URL: https://zakon.rada.gov.ua/ laws/show/5076-17#Text
26. *Про розгляд звернення адвоката Дроздова О.М. щодо гонорару успіху адвоката за надану правничу (правову) допомогу* (2019)*:* рішення Ради адвокатів України No 35. URL: search.ligazakon.ua/l_doc2.nsf/link1/MUS32051.html
27. **Саркисян, С. М.** (2017). Судьба «гонорара успеха» в судебной практике. *Актуальные вопросы развития правовой информатизации в условиях формирования информационного общества:* сборник статей Международной научно-практической конференции (с. 98-104). Стерлитамак: АМИ.
28. **Чепкасов, Р. А.** (2015). Понятие и правовая судьба «гонорара успеха». *Новая наука: стратегии и векторы развития* сборник Международной научно-практической конференции (с. 49-51). Стерлитамак: АМИ.
29. *Access to Justice Act* (1999). URL: www.legislation.gov.uk/ukpga/1999/22/section/27
30. *Code suisse de déontologie* (CSD) (2005), approuvé Fédération Suisse des Avocat. URL: https://www.oav.ch/wp-content/uploads/2016/06/code-suisse-deontologie.pdf
31. Dudgeon v. The United Kingdom, 7525/76 (ECHR, 1983). URL: http://hudoc.echr.coe.int/eng?i=001-57472
32. *Gesetz über die Vergütung der Rechtsanwältinnen und Rechtsanwälte* (2004). URL: https://www.gesetze-im-internet.de/rvg/
33. Iatridis v. Greece, 31107/96 (ECHR, 2000). URL: http://hudoc.echr.coe.int/rus?i=001-59087
34. Kamasinski v. Austria, 9783/82 (ECHR, 1989). URL: http://hudoc.echr.coe.int/eng?i=001-57614
35. *Model Rules of Professional Conduct* (1983), created by the American Bar Association. URL: https://www.americanbar.org/groups/professional_ responsibility/publications/model_rules_of_professional_conduct/rule_1_5_fees/

References:

1. **Azarov, D.** (2009). K voprosu o gonorare uspekha [On the question of the success fee]. *Biznes v zakone*, 4, 211-212. [in Russian].
2. **Asanov, R. F. & Akhmetov, S. F.** (2007). «Gonorar uspekha»: zakonnost' i tselesoobraznost' [Success Fee: Legality and Feasibility.]. *Yuridicheskaya nauka i pravookhranitel'naya praktika*, 1, 44-50. [in Russian].
3. **Vereshchagin, A.** (2007). «Gonorar uspekha» pered litsom konstitutsionnogo pravosudiya [«Success Fee» in the Face of Constitutional Justice]. *Sravnitel'noye konstitutsionnoye obozreniye*, 1, 173-178. [in Russian].
4. **Vishnevskaya, O. A.** (2010). Institut oplaty uslug advokata v Drevnem mire [Institute of Advocate Payment in the Ancient World]. *Advokatskaya praktika*, 1, 41- 44. [in Russian].
5. **Vityuk, R.** (2018). Bonus dlya advokata: stymul chy koruptsiyna skladova? [Bonus for a lawyer: an incentive or a corruption component?] *Zakon i biznes*, 31 (1381). Available from: https://zib.com.ua/ua/133986-bonus_dlya_advokata_stimul_chi_korupciyna_skladova.html [in Ukrainian].
6. **Gvozdiy, V.** (2018). Chy maye pravo na isnuvannya honorar uspikhu? [Is the success fee eligible for existence?] *Komentar dlya «Zakon i Biznes»*, 31 (1381). Available from: https://zib.com.ua/ua/print/133986-bonus_dlya_advokata_stimul_chi_korupciyna_skladova.html [in Ukrainian].
7. **Gorodnikov, K. I. & Vorobyova, D. S.** (2018). «Gonorar uspekha» v rossiyskoy pravovoy sisteme [«Success fee" in the Russian legal system]. *Sinergiya nauk.* Available from: http://synergy-journal.ru/archive/article3827 [in Russian].
8. **Yermakova, N. S.** (2017). Gonorar uspekha: vzglyady za rubezhom i v Rossii [Success fee: views abroad and in Russia]. *Zakonnost' v sovremennom obshchestve*: sbornik statey Mezhdunarodnoy nauchno-prakticheskoy konferentsii (pp. 122-126). Ufa: AETERNA. [in Russian].
9. **Zaborovskyy, V.V., Manzyuk, V.V. & Stoyka, A.V.** (2020). Pravova pryroda vynahorody za pravovu dopomohu (honoraru) advokata [The legal nature of the fee for legal assistance (fee) of a lawyer]. *Naukovyy visnyk Uzhhorods'koho natsional'noho universytetu. Seriya: Pravo*, 61, T. 2, 138-142. [in Ukrainian].
10. *Zagal`ny`j kodeks pravy`l dlya advokativ krayin Yevropejs`kogo Spivtovary`stva* [*General Code of Conduct for European Community Advocates*], pry`jnyaty`j delegaciyeyu dvanadcyaty` krayin-uchasny`cz` na plenarnomu

zasidanni u Strasburzi. Available from: http://zakon2.rada.gov.ua/ laws/show/994_343 [in Ukrainian].

11. **Kiyashko, O. O.** (2019). Kontseptsiya «success fee» v mezhakh problematyky vidshkoduvannya vytrat na profesiynu pravnychu dopomohu v tsyvil'nomu protsesi: sudova praktyka [The concept of «success fee» within the issue of reimbursement of professional legal assistance in civil proceedings: case law]. *Novely tsyvil'noho protsesual'noho zakonodavstva. Predstavnytstvo:* materialy Mizhnar. nauk.-prakt. konf. do 150-yi richnytsi z dnya vidkryttya pershoyi sudovoyi palaty u m. Odesa (pp. 165-168). Odesa: Feniks. [in Ukrainian].
12. **Knyazev, A. N.** (2005). Gonorar uspekha v dogovore okazaniya yuridicheskoy pomoshchi [Corporate governance and innovative development of the economy of the North]. *Korporativnoye upravleniye i innovatsionnoye razvitiye ekonomiki Severa. Vestnik Nauchno-issledovatel'skogo tsentra korporativnogo prava, upravleniya i venchurnogo investirovaniya Syktyvkarskogo gosudarstvennogo universiteta*, 103-109. [in Russian].
13. **Korneliy Tatsit** (1993). *Sochineniya v dvukh tomakh. Tom I. «Annaly. Malyye proizvedeniya» [Works in two volumes. Volume I. «Annals. Small works»]* / za red. A.S. Bobovich, YA.M. Borovskiy, M.Ye. Sergeyenko. M.: Nauch.-izd. tsentr «Ladomir». Available from: http://ancientrome.ru/antlitr/t.htm?a=1347015000 [in Russian].
14. **Luspenik, D. D.** (2019). Honorar uspikhu advokata: praktyka Yevropeys'koho sudu z prav lyudyny [Attorney's fee: the case law of the European Court of Human Rights]. *Sudebno-yurydycheskaya hazeta*. Available from: https://sud.ua/ru/news/publication/132954-gonorar-uspikhu-advokata-praktika-yevropeyskogo-sudu-z-prav-lyudini [in Ukrainian].
15. **Maslov, A. A.** (2013). O gonorare advokatov (honorarium) v Rimskoy respublike [On the honorarium in the Roman Republic]. *Yuridicheskaya nauka: istoriya i sovremennost'*, 11, 46-50. [in Russian].
16. **Melnychenko, R. G.** (2006). Dostoinstva i nedostatki gonorara uspekha [The pros and cons of the success fee]. *Advokat*, 10, 22-25. [in Russian].
17. **Mollo, M.** (1894). *Pravila advokatskoy professii vo Frantsii: per. s frants [Rules of the legal profession in France: trans. with French]*. M.: Izdaniye N.P. Shubinskogo. [in Russian].
18. **Nakushnova, Ye. V.** (2014). Voznagrazhdeniye ispolnitelya po dogovoram okazaniya pravovykh uslug (gonorar uspekha) [Remuneration to the performer under contracts for the provision of legal services (success fee)]. *Sovremennoye pravo*, 2, 79-84. [in Russian].
19. *Pamyatniki Rimskogo prava. Zakony XII tablits. Institutsii Gaya. Digesty Yustiniana [Monuments of Roman law. Laws of XII tables. Guy's Institutions. Digests of Justinian]*. (1997). M.: Zertsalo. [in Russian].
20. **Papii, T. O.** (2019). Honorar uspikhu advokata: suchasnyy stan ta perspektyvy rozvytku v Ukrayini [Attorney's fee: the current state and prospects of development in Ukraine]. *Porivnyal'no-analitychne pravo,* 4, 416-419. Available from: http://pap.in.ua/4_2019/117.pdf [in Ukrainian].
21. **Petrachkov, S. S.** (2010). «Gonorar uspekha»: analiz pravovogo regulirovaniya v Rossii i zarubezhnykh stranakh [Success Fee: Analysis of Legal Regulation in Russia and Foreign Countries]. *Vestnik Moskovskogo gosudarstvennogo oblastnogo universiteta. Seriya: Yurisprudentsiya*, 3, 68-74. [in Russian].
22. *Postanova Velykoyi Palaty Verkhovnoho Sudu [Resolution of the Grand Chamber of the Supreme Court]* (2020). No 904/4507/18. Available from: https://reyestr.court.gov.ua/Review/91572017 [in Ukrainian].
23. *Postanova Kasatsiynoho tsyvil'noho sudu u skladi Verkhovnoho Sudu [Resolution of the Civil Court of Cassation of the Supreme Court]* (2018), No 462/9002/14-ts. Available from: http://reyestr.court.gov.ua/Review/75003682 [in Ukrainian].
24. *Pravyla advokat·s'koyi etyky [Rules of Advocate Ethics]* (2017), zatverdzheni Zvitno-vybornym z"yizdom advokativ Ukrayiny. Available from: http://vkdka.org/wp-content/uploads/2017/07/PravilaAdvokatskojiEtiki2017.pdf [in Ukrainian].
25. *Pro advokaturu ta advokatsku diialnist [On the Bar and Advocacy]*. (2012). No 5076-VI. Available from: https://zakon.rada.gov.ua/laws/show/5076-17#Text [in Ukrainian].
26. *Pro rozhlyad zvernennya advokata Drozdova O.M. shchodo honoraru uspikhu advokata za nadanu pravnychu (pravovu) dopomohu [About consideration of the address of the lawyer Drozdov OM on the lawyer's fee for legal (legal) assistance]* (2019): rishennya Rady advokativ Ukrayiny No 35. Available from: search.ligazakon.ua/l_doc2.nsf/link1/MUS32051.html [in Ukrainian].
27. **Sarksyan, S. M.** (2017). *Sud'ba «gonorara uspekha» v sudebnoy praktike [The fate of the «success fee» in judicial practice]*. Aktual'nyye voprosy razvitiya pravovoy informatizatsii v usloviyakh formirovaniya informatsionnogo obshchestva: sbornik statey Mezhdunarodnoy nauchno-prakticheskoy konferentsii (pp. 98-104). Sterlitamak: AMI. [in Russian].
28. **Chepkasov, R. A.** (2015). *Ponyatiye i pravovaya sud'ba «gonorara uspekha» [The concept and legal fate of the «success fee»]*. Novaya nauka: strategii i vektory razvitiya sbornik Mezhdunarodnoy nauchno-prakticheskoy konferentsii (pp. 49-51). Sterlitamak: AMI. [in Russian].

«ГОНОРАР УСПІХУ» ЯК ВАЖЛИВА СКЛАДОВА ЗАБЕЗПЕЧЕННЯ КОНСТИТУЦІЙНОГО ПРАВА ОСОБИ НА ПРОФЕСІЙНУ ПРАВНИЧУ ДОПОМОГУ

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Анотація

Метою даної статті є дослідження правової сутності такого способу обчислення гонорару адвоката як «гонорар успіху», розкриття його позитивних та негативних рис, а також досвіду практики Європейського суду з прав людини та досвіду зарубіжних країн у його застосуванні.

У контексті розкриття предмета дослідження як для досягнення мети наукової роботи, так і забезпечення повноти, об'єктивності, достовірності та переконливості отриманих результатів автором було застосовано комплекс загальнонаукових і спеціальних методів, що є характерними для правової науки. Зокрема, за допомогою історичного методу було досліджено зародження та тривалий історичний шлях розвитку даного правового інституту. Системно-структурний метод надав змогу сформулювати загальну структуру дослідження, а діалектичний – проаналізувати насамперед положення законодавства та судової практики щодо можливості використання «гонорару успіху» як способу обчислення гонорару адвоката. За допомогою порівняльно-правового методу, було проаналізовано законодавство зарубіжних країн, що надало можливість використання їх позитивного досвіду в аспекті обчислення розміру гонорару адвоката.

В даній статті розкриваються наукові підходи дослідників щодо визначення сутності витрат на правову допомогу насамперед, що стосується природи «гонорару успіху», позитивних та негативних його рис, а також аналізуються положення вітчизняного та зарубіжного законодавців щодо можливості закріплення в договорі про надання правової допомоги умови, яка свідчить про такий спосіб обчислення розміру оплати праці адвоката як «гонорар успіху». Значна частина роботи присвячена аналізу правозастосовної практики українських судів та Європейського суду з прав людини, як взагалі щодо можливості, так і щодо доцільності існування певних критеріїв обмеження його розміру.

Звертається увага, що значна кількість зарубіжних країн не забороняють можливість використання «гонорару успіху», враховуючи насамперед наявність певних обмежень щодо категорій справ, або ж сприйняття його як додаткової винагороди.

На основі проведеного дослідження робиться висновок, згідно з яким враховуючи принцип свободи договору, адвокат і клієнт мають можливість зазначити у вказаному договорі умову щодо «гонорару успіху» як спосіб обчислення гонорару адвоката, за яким досягнення певного результату повинно сприйматись не як предмет договору, а саме як юридичний факт (відкладальна обставина), з настанням якого сторони обумовлюють необхідність здійснення оплати належної адвокату винагороди за досягнення ним відповідно рівня якості його діяльності. Аргументується, що позитивними рисами «гонорару успіху» є збільшення фінансової доступності надання правової допомоги для населення та його націленість на результат, що в багатьох випадках може покращити якість надання такої допомоги, а також захистити інтереси можливого клієнта адвоката від понесення ним зайвих витрат.

Ключові слова: *адвокатура; гонорар адвоката; витрати на професійну правничу допомогу; способи обчислення розміру витрат;*

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THE RIGHT TO GENDER IDENTITY: THE BASIC PRINCIPLES FOR UNDERSTANDING AND LEGAL ENFORCEMENT

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Summary

The purpose of the study lies in highlighting and analyzing the basic principles of understanding and legal support of gender identity as a special legal phenomenon.

Methodologically, this work is based on the system of methods, scientific approaches, techniques and principles with the help of which the realization of the research aim is carried out. There have been applied universal, general scientific and special legal methods.

The article reveals that one of the main characteristics of gender identity in the scientific literature is considered to be a person's acquisition of gender roles (that is, ways of behavior depending on people's positions in gender differentiation) and the development of gender self-awareness (id est, awareness of their similarities and differences with representatives of their gender, in contrast to the opposite). Exercising the right to gender identity, we can talk about both the possibility of changing the biological sex and (or) social gender, which is expressed in changing not only physical data, but also a person's consciousness, his or her worldview, social (in some cases – and legal) role in society, family … social manners of gender (name, appearance, behavior model, etcetera). In addition, based on the international documents, one can single out general principles related to human rights and gender identity: universality; non-discrimination; personal autonomy; respect for human dignity, regardless of sexual orientation and gender identification.

Based on the conducted scientific research the author has come to certain conclusions. 1. Gender identity presupposes certain models of social behavior of a person in view of gender, which is determined by nature. Consequently, we are talking, first of all, about accepting or not accepting this fact. Thus, gender identity demonstrates the behavior of an individual in society, which is based on self-identification according to this individual's gender. 2. The right to gender identity implies the ability of an individual to perform lawful actions that will serve for this person's self-identification on the basis of gender. In accordance with this, we talk about actions of a legal (the enforcement of the right and duties based on self-identification) and of a medical nature (the possibility of changing (correcting) gender). In other words, the right to gender identity means an individual's ability to freely act in society based on the social role with respect to which this individual identifies herself / himself on the basis of gender. 3. Despite the recommendatory nature of international legal acts in the field of ensuring the human right to gender identity, the international community is increasingly calling on states to take appropriate measures to properly comply with the principles of equality, non-discrimination, individual autonomy and respect for this individual dignity in realizing the right to gender identity and to ensure its proper legal regulation.

Key words: gender identity, the right to gender identity, gender change.

1. Introduction

The vision of an individual's identity has philosophical (J. Butler, W. James, P. Ricoeur, Z. Freud, M. Foucault, K. Jaspers, etc.), psychological (R. Burns, E. Erickson, M. Klee et al.) and sociological (P. Berger, T. Luckmann, T. Parsons, A. Schutz, etc.) foundation. The phenomenon of gender identity began to be actively studied later (T. Bendas, Sh. Burn, M. Cordwell, L. Ozhigova, R. Stoller, etc.). The contemporary socio-humanitarian research, which is strenuously devoted to the issue of gender identity, has permeated the field of law as well, due to which today everyone's right to gender identity is increasingly gaining a foothold in the public consciousness (especially in European countries).

The very term «gender identity» was formed in the mid-1960s to indicate a strong inner sense of belonging to a male or female gender category (Moleiro, Pinto). One of the main characteristics of gender identity in the scientific literature is viewed as an individual's acquiring of gender roles (that is, ways of behavior depending on people's positions with regard to gender differentiation) and the development of gender self-awareness (awareness of their similarities and dissimilarities with representatives of the sex they belong to, as distinct from the opposite) (Tkalych, M. H., Zinchenko, T. P. & Kasian A. P. 2020, p. 102).

The research in the field of psychology shows that there are the following approaches to understanding the grounds for the development of the phenomenon of gender identity: masculine / feminine attributes; gender-stereotyped personality traits; interests correlating with a person's gender; self-categorization of belonging to a particular gender (Wood, Eagly, 2015, p. 461-473). Notwithstanding these different approaches, the phenomenon of gender identity is becoming increasingly urgent both in terms of research as well as society's demand, including the need to improve national legislation in line with protecting the rights of individuals who are distinguished by gender.

2. The comprehension of the right to gender identity.

To define the notion of the right to gender identity, it is necessary first to directly provide a brief clarification with respect to the very understanding of gender identity as a phenomenon. According to L. Ozhigova, gender identity is defined as the result of a complex interaction of organismic, social and psychological (personal per se) factors, in which with the formation and realization of gender identity, the regulating and sense-making role of the personality is enhanced (Ozhigova, 2006, p. 14).

M. V. Yusupova states that gender is the relationship, which was formed in a particular society, between the anatomy of an individual and the set of social roles, offered to him, that are associated with this arrangement. Gender identity reflects the individual's ability to limit himself / herself to the framework of the models which are offered to him / her for self-identification, it is also a constant process of identification that directly depends on the expectations which connect the individual with the social environment as well as with the interpretation of his / her behaviour provided by others (Yusupova, 2011, p. 9).

Gender identity, according to O. O. Voronina, is one of the types of social identity of the individual and the group. Based on congenital sexual characteristics, it is still not congenital. It is a process of realizing and accepting the definitions of masculinity and femininity that exist within the culture in which a person is born and grows up; it is the categorization of oneself as a representative of a male or female group, the learning and reproducing of gender-based roles, positions and representations (Voronina, 2012, p. 21-22).

T. V. Kubrychenko emphasizes that currently the phenomenon of gender identity is a complex, multilevel, multicomponent and integrative formation. Based on the analysis of various approaches to determining the components of gender identity, the researcher points out the following ones: cognitive, affective and conative (behavioural) components; biological sex, masculinity / femininity / androgyny as psychological characteristics of a person; the hierarchy of life values, goals and views; gender, gender-role and sexual identity; different kinds of gender characteristics (gender stereotypes, sexual preferences, sexual orientation, social experience and upbringing, etc.) (Kubrychenko, 2012, p. 327).

For instance, if we take into account the three-component approach to the phenomenon

of gender identity (cognitive, affective and conative (behavioural)), it will include these: the cognitive component presents the awareness of belonging to a certain gender and the determination of an individual in the categories of masculinity / femininity, the degree of his / her compliance with the characteristics of a gender group; the affective component contains an assessment of psychological traits and peculiarities of the role behaviour and their compliance with the reference models of masculinity / femininity. The conative (behavioural) component reflects the presentation of a person as a representative of a gender group, and also reflects the means of solving identity crises based on the choice of means of behaviour in certain situations, depending on personally meaningful goals and values (Kletsina, 2004, p. 408).

Thus, based on the biological affiliation of a person to a certain sex (male or female), gender identity, nevertheless, shows the social side of the development of such a basis, not being limited to it. Gender identity includes certain models of social behavior in relation with the gender determined by nature. Accordingly, we are dealing with either acceptance or non-acceptance of it. Hence, gender identity demonstrates an individual's behavior in society which rests on self-identification based on gender.

Having briefly clarified the nature of gender identity, we can proceed with the analysis of the right to gender identity. According to L. Strus, the right to gender identity is individuals' ability, which is enshrined in the norms of law, to independently determine which gender they belong to (male, female, or a gender persons), and if necessary, take legal and medical actions to balance their self-identity (Strus, 2019, p. 55).

Therefore, A. S. Shalyhanova considers the right to gender identity as a measure of the person's probable behavior which consists in the possibility of self-determination with regard to belonging to the particular gender, performing certain actions in accordance with their own gender identity concerning changing the biological and (or) social gender, as well as the ability to require others to refrain from actions that violate this right. In the structure of this right the researcher distinguishes, respectively, the right to the biological gender change (correction) (the natural existence of an individual) and the right to the social gender change (the social being of a person). Thus, the right to gender identity is viewed as a personal non-property right of an individual (Shalyhanova, 2011, p. 276-277).

V. S. Herbut, within the framework of his thesis research, comes to the conclusion that in the field of sexual orientation and gender identity, it is not «the right to ...» that is more successful, but «the right to freedom ...», because we are talking about the exclusive authority and competence of a person on their sexual orientation and gender identity, autonomy and self-determination in this area, and the fundamental nature of this right. The researcher determines the scope of this right as «the ability of a person to define themselves in relation to any types of sexual orientation and gender identity, meeting the needs related to this on the basis of the principles of equality and non-discrimination» (Herbut, 2018, p. 92-93).

Consequently, the right to gender identity entails the possibility to undertake lawful actions which serve for self-identification based on gender. In other words, the right to gender identity means a person's ability to freely act in society on the basis of the social role by which she identifies herself on the basis of gender. Accordingly, the point is about actions of a legal (the implementation of rights and obligations based on self-identification, the social gender change) and medical nature (the possibility of changing (correcting) the biological gender). In other words, the right to gender identity means an individual's ability to freely act in society on the basis of the social role he / she identifies himself / herself with in view of gender.

3. The legal enforcement of the right to gender identity: international and national aspects

Currently in the field of international legal enforcement of the right to gender identity, there are a number of international legal documents at the level of the UN and the Council of Europe, which, although are of a recommendatory nature, still play an important role serving as a kind of guidelines on establishing the legislative bases and practice of states' activities in the direction of enforcing the corresponding right, non-discrimination on the grounds of gender,

etc. Among the above-mentioned documents there are, in particular: the Yogyakarta Principles (the Principles for applying the International Human Rights Law on Sexual Orientation and Gender Identity), developed by a group of international human rights experts and promulgated in March 2007 at the meeting of the UN Human Rights Council; Resolution of the Parliamentary Assembly of the Council of Europe «Discrimination on the grounds of sexual orientation and gender identity» of 2010; Recommendation of the Committee of Ministers of the Council of Europe «On measures to combat discrimination on grounds of sexual orientation or gender identity» of 2010. In addition, we are talking about a number of documents at the level of the UNO (Human Rights Resolutions, Reports of the High Commissioner for Human Rights) and the Council of Europe (Reports of the Commissioner for Human Rights), which are periodically published as a reaction to discrimination on the basis of sexual orientation and gender identity in different regions of the world, as well as a call to states to take appropriate measures to prevent this discrimination. The practice of the European Court of Human Rights in the field of protecting individuals' gender identity rights is also significant because it serves as a guideline towards understanding the development and strengthening of the participation of the member states of the Council of Europe in this area of social relations.

So for example, the Yogyakarta Principles contain a wide range of human rights standards in terms of their applicability to issues of sexual orientation and gender identity. Each of the principles (29) includes, inter alia, recommendations to states on how to ensure these rights. Gender identity according to this international document is defined as «a person's deep awareness of the internal and individual characteristics of gender, which may or may not coincide with birth gender, including the individual sense of their body (may be accompanied by changing appearance or physiological functions by medical, surgical or other means) and other manifestations such as clothing, speech and behavior» (Yogyakarta Principles, 2007).

I. Ya. Seniuta believes that, based on international documents, it is possible to identify general principles related to human rights and gender identity: 1) universality – it provides for the right of individuals of any sexual orientation and gender identity to possess the whole spectrum of rights and obligations on a full-scale basis; 2) equality – it involves the formulation of equality of rights and freedoms of individuals of any sexual orientation and gender identification, their equality before the law, providing them with equal opportunities; 3) non-discrimination – it envisages the right of everyone to exercise their rights and freedoms without discrimination on the grounds of sexual orientation and gender identification; 4) an individual's autonomy – it presupposes everyone's right to independently determine their sexual orientation and gender identity; 5) respect for human dignity regardless of sexual orientation and gender identification (Seniuta, 2015, p. 285).

Hence, despite the recommendatory nature of international legal acts in the field of ensuring the human right to gender identity, it should nevertheless be noted that the international community is increasingly calling on states to take appropriate measures on the proper observation of the principles of equality, non-discrimination, individuals' autonomy and respect for their dignity while implementing gender identity right and provide its proper legal regulation.

As for the Ukrainian experience of normative provision of the human right to gender identity, we are talking primarily of the provisions of the Fundamental Law of the state, which, in particular, in Art. 24 enshrines the principle of non-discrimination on various grounds (The Constitution of Ukraine, 1996). And, although the Constitution in this norm does not clearly indicate the attributes of sexual orientation and gender identification, nevertheless the wording «or other attributes» may mean, inter alia, the indicated attributes. Similar to these constitutional provisions, the Law of Ukraine «On principles of preventing and combating discrimination in Ukraine» does not specify attributes of sexual orientation and gender identification in defining the notion of «discrimination», fixing only «other attributes that were, are and can be valid or presumed» (On the principles of preventing and combating discrimination in Ukraine, 2012). However, we emphasize the admissibility of including also attributes of sexual orientation and gender identity to «other attributes».

It should be added here that a significant number of states, like Ukraine with its experience in the field of non-discrimination, do not enshrine clearly the attributes of sexual orientation and gender identity as attributes of discrimination in their respective legal acts. With regard to the above mentioned such «gaps» are bridged by the practice of the European Court of Human Rights and the Inter-American Court of Human Rights, from whose point of view the indicated attributes at the regional international level are recognized as the protected categories in the sense of understanding discrimination (Lau, 2018, p. 18).

Additionally, Art. 51 of the Fundamentals of the Legislation of Ukraine on Health Care provides the right of the patient, subject to compliance with the established medico-biological and socio-psychological indications, to access health care facilities for medical intervention in order to change (correct) this patient's gender. In this case, a person, subject to gender change, is issued a medical certificate, on the basis of which the issue of changes in this person's legal status is further resolved (Fundamentals of the legislation of Ukraine on health care, 1992).

In pursuance to the provision of Art. 51 of the Fundamentals of the Legislation of Ukraine on Health Care in Ukraine, the Ministry of Health of Ukraine adopted initially the Decree «On providing medical care to persons who need gender change (correction)» dated March 15, 1996 (On the provision of medical care to persons in need of gender reassignment, 1996). Later the Decree «On the improvement of medical care provided to persons who need gender change (correction)» dated February 03, 2011 was adopted by the Ministry of Health of Ukraine (On improving the provision of medical care to persons in need of gender reassignment, 2011). Currently the Decree of the Ministry of Health of Ukraine «On the establishment of medical, biological and socio-psychological indications for gender change (correction) and approval of the form of supporting documentation and instructions for its completion» dated October 05, 2016 (About establishment of medico-biological and social-psychological indications for change (correction) of sexuality and the statement of the form of the primary accounting documentation and the instruction on its filling, 2016). A number of adopted acts, which are further improved by the Ministry of Health Care of Ukraine, aim at determining the procedure for medical care provided to persons who need gender change (correction), show the importance of this sphere of social relations for the state and the need to determine its key aspects in order to avoid possible abuses because human health and life (physical and psychological) are at stake.

4.Conclusions

Therefore, based on the conducted research we can state at least the following. 1. Gender identity includes certain models of social behavior in relation with the gender determined by nature. Accordingly, we are dealing with either acceptance or non-acceptance of it. Hence, gender identity demonstrates an individual's behavior in society which rests on self-identification based on gender. 2. The right to gender identity entails the possibility to undertake lawful actions which serve for self-identification based on gender. In other words, the right to gender identity means a person's ability to freely act in society on the basis of the social role by which she identifies herself on the basis of gender. Accordingly, the point is about actions of a legal (the implementation of rights and obligations based on self-identification, the social gender change) and medical nature (the possibility of changing (correcting) the biological gender). In other words, the right to gender identity means an individual's ability to freely act in society on the basis of the social role he / she identifies himself / herself with in view of gender. 3. Despite the recommendatory nature of international legal acts in the field of ensuring the human right to gender identity, it should nevertheless be noted that the international community is increasingly calling on states to take appropriate measures on the proper observation of the principles of equality, non-discrimination, individuals' autonomy and respect for their dignity while implementing gender identity right and provide its proper legal regulation.

Bibliography:

1. **Воронина, О. А.** (2012) Гендерные аспекты идентичности. *Человек*, 6, С. 15-31.
2. **Гербут, В. С.** (2018) *Право на сексуальну орієнтацію та гендерну ідентичність: сутнісний зміст та гарантії*

захисту (дис. … канд. юрид. наук: 12.00.02 - конституційне право; муніципальне право). Ужгород, 266 с.

3. *Джок'якартські принципи (Принципи застосування міжнародно-правових норм про права людини щодо сексуальної орієнтації та гендерної ідентичності)* (2007). URL: https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=48244e952 (дата звернення: 23.10.2020 року).
4. **Клёцина, И. С.** (2004) *Психология гендерных отношений: Теория и практика*. СПб.: Алетейя, 408 с.
5. *Конституція України* (1996): Закон України № 254к/96-ВР. *Відомості Верховної Ради України*. 1996, № 30, Ст. 141.
6. **Кубриченко, Т. В.** (2012) Ідентичність особистості в гендерному вимірі. *Науковий вісник Львівського державного університету внутрішніх справ. Серія психологічна*, 2, 323-331.
7. **Ожигова, Л. Н.** (2006) Гендерная идентичность личности и смысловые механизмы ее реализации (автореф. дисс. … д-ра психол. наук: спец. 19.00.01). Краснодар, 46 с.
8. Основи законодавства України про охорону здоров'я (1992): Закон України № 2801-XII. *Відомості Верховної Ради України*. 1993, 4, Ст. 19.
9. *Про встановлення медико-біологічних та соціально-психологічних показань для зміни (корекції) статевої належності та затвердження форми первинної облікової документації й інструкції щодо її заповнення* (2016): Наказ Міністерства охорони здоров'я України № 1041. URL: https://zakon.rada.gov.ua/laws/show/z1589-16#Text (дата звернення: 23.10.2020 року).
10. Про засади запобігання та протидії дискримінації в Україні» не уточнює при визначенні поняття «дискримінації (2012): Закон України № 5207-VI. *Відомості Верховної Ради України*. 2013, 32, Ст. 412.
11. *Про надання медичної допомоги особам, що потребують зміни (корекції) статевої належності* (1996): Наказ Міністерства охорони здоров'я України № 57. URL: https://zakon.rada.gov.ua/laws/show/z0279-96#Text (дата звернення: 23.10.2020 року).
12. *Про удосконалення надання медичної допомоги особам, що потребують зміни (корекції) статевої належності* (2011): Наказ Міністерства охорони здоров'я України № 60. URL: https://zakon.rada.gov.ua/laws/show/z0239-11#Text (дата звернення: 23.10.2020 року).
13. **Сенюта, И. Я.** (2015) Право на гендерную идентичность: этико-правовые аспекты. *Биомедицинское право в России и за рубежом*: монография / Г.Б. Романовский, Н.Н. Тарусина, А.А. Мохов и др. М.: Проспект. С. 283-304.
14. **Струс, Л.** (2019) Гендерна ідентичність особи. *European political and law discourse*, 6, 51-55.
15. **Ткалич, М. Г., Зінченко, Т. П. & Касьян, А. П.** (2020) Гендерна ідентичність особистості: зміст, структура, гендерно-рольова диференціація. *Psychological journal*, 6, 101-109.
16. **Шалиганова, А. С.** (2011) Щодо правової природи та змісту права на гендерну ідентичність. *Право і безпека*, 3, 274-279
17. **Юсупова, М. В.** (2011) *Социально-философские основания конструирования гендерной идентичности* (автореф. дисс. … канд. филос. наук: спец. 09.00.11). Чебоксары, 24 с.
18. **Lau, H.** (2018) Sexual orientation and gender identity discrimination. *Comparative discrimination law*, 2, 1-52.
19. Moleiro, C. & Pinto, N. *Sexual orientation and gender identity: review of concepts, controversies and their relation to psychopathology classification systems*. URL: https://www.frontiersin.org/articles/10.3389/fpsyg.2015.01511/full (дата звернення: 27.10.2020 року).
20. **Wood, W. & Eagly, A.** (2015) Two traditions of research on gender identity. *Sex Roles*, 73, 461-473.

References:

1. **Voronina, O. A.** (2012). *Gendernye aspekty identichnosti [Gender aspects of identity]*. Chelovek, 6, 15-31. [in Russian].
2. **Herbut, V. S.** (2018). *Pravo na seksualnu oriientatsiiu ta hendernu identychnist: sutnisnyi zmist ta harantii zakhystu [The right to sexual orientation and gender identity: substantive content and guarantees of protection]* (Doctor's thesis). Uzhhorod. [in Ukrainian].
3. *Dzhok'iakartski pryntsypy (Pryntsypy zastosuvannia mizhnarodno-pravovykh norm pro prava liudyny shchodo seksualnoi oriientatsii ta hendernoi identychnosti) [Yogyakarta Principles (Principles for the Application of International Human Rights Law on Sexual Orientation and Gender Identity)]*. (2007). Available from: https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc= y&docid=48244e952. [in Ukrainian].
4. **Kletsina, I. S.** (2004). *Psikhologiya gendernykh otnosheniy: Teoriya i praktika [Psychology of Gender Relations: Theory and Practice]*. SPb.: Aleteyya. [in Russian].
5. *Konstytutsiia Ukrainy [The Constitution of Ukraine]* (1996) № 254k/96-VR. Vidomosti Verkhovnoi Rady Ukrainy, 30,141.
6. **Kubrychenko, T. V.** (2012). Identychnist osobystosti v hendernomu vymiri [Personality identity in the gender dimension]. *Naukovyi visnyk Lvivskoho derzhavnoho universytetu vnutrishnikh sprav. Seriia psykholohichna*, 2, 323-331.
7. **Ozhigova, L. N.** (2006). *Gender identity of the person and semantic mechanisms of its realization [Gender identity*

of a person and semantic mechanisms of its implementation] (Doctor's thesis). Krasnodar. [in Russian].

8. Osnovy zakonodavstva Ukrainy pro okhoronu zdorov'ia [Fundamentals of the legislation of Ukraine on health care] (1992) № 2801-KhII. *Vidomosti Verkhovnoi Rady Ukrainy*, 4, 19.
9. *Pro vstanovlennia medyko-biolohichnykh ta sotsialno-psykholohichnykh pokazan dlia zminy (korektsii) statevoi nalezhnosti ta zatverdzhennia formy pervynnoi oblikovoi dokumentatsii y instruktsii shchodo yii zapovnennia [About establishment of medico-biological and social-psychological indications for change (correction) of sexuality and the statement of the form of the primary accounting documentation and the instruction on its filling]* (2016). Available from: https://zakon.rada.gov.ua/laws/show/z1589-16#Text
10. Pro zasady zapobihannia ta protydii dyskryminatsii v Ukraini [On the principles of preventing and combating discrimination in Ukraine] (2012). № 5207-VI. *Vidomosti Verkhovnoi Rady Ukrainy*, 2013, 32, 412.
11. *Pro nadannia medychnoi dopomohy osobam, shcho potrebuiut zminy (korektsii) statevoi nalezhnosti [On the provision of medical care to persons in need of gender reassignment]* (1996). № 57. Available from: https://zakon.rada.gov.ua/laws/show/z0279-96#Text
12. *Pro udoskonalennia nadannia medychnoi dopomohy osobam, shcho potrebuiut zminy (korektsii) statevoi nalezhnosti [On improving the provision of medical care to persons in need of gender reassignment]* (2011). № 60. Available from: https://zakon.rada.gov.ua/laws/show/z0239-11#Text
13. **Senyuta, I. Ya.** (2015) *Pravo na gendernuyu identichnost: etiko-pravovye aspekty [The right to gender identity: ethical and legal aspects]. Biomeditsinskoe pravo v Rossii i za rubezhom: monografiya* / G.B. Romanovskiy, N.N. Tarusina, A.A. Mokhov i dr. M.: Prospekt [in Russian].
14. **Strus, L.** (2019) Henderna identychnist osoby [Gender identity of a person]. *European political and law discourse,* 6, 51-55. [in Ukrainian].
15. **Tkalych, M. H., Zinchenko, T. P. & Kasian A. P.** (2020) Henderna identychnist osobystosti: zmist, struktura, henderno-rolova dyferentsiatsiia [Gender identity of the individual: content, structure, gender-role differentiation]. *Psychological journal*, 6, 101-109. [in Ukrainian].
16. **Shalyhanova, A. S.** (2011) Shchodo pravovoi pryrody ta zmistu prava na hendernu identychnist [Regarding the legal nature and content of the right to gender identity]. *Pravo i bezpeka*, 3, 274-279. [in Ukrainian].
17. **Yusupova, M. V.** (2011) *Sotsialno-filosofskie osnovaniya konstruirovaniya gendernoy identichnosti [Socio-philosophical foundations for the construction of gender identity]* (Doctor's thesis). Cheboksary. [in Russian].

ПРАВО НА ГЕНДЕРНУ ІДЕНТИЧНІСТЬ: ОСНОВНІ ЗАСАДИ РОЗУМІННЯ ТА ПРАВОВОГО ЗАБЕЗПЕЧЕННЯ

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Анотація

Мета дослідження полягає у висвітленні та аналізі основних засад розуміння та правового забезпечення гендерної ідентичності як особливого правового феномену.

Методологічну основу даного дослідження складає система методів, наукових підходів, прийомів та принципів, котрі були спрямовані для реалізації цілей дослідження. Застосовувались універсальні, загальнонаукові та спеціально-юридичні методи.

У статті досліджено, що однією з основних характеристик гендерної ідентичності в науковій літературі визнається засвоєння особистістю гендерних ролей (тобто способів поведінки залежно від позицій людей у статевій диференціації) і розвиток гендерної самосвідомості (тобто усвідомлення своєї схожості й відмінності з представниками своєї статі, на відміну від протилежної). Реалізовуючи право на гендерну ідентичність, може йти мова як про можливість зміни біологічної статті, так і (або) соціальної, що виражається у зміні не лише фізичних даних, але й свідомості людини, її світогляду, соціальної (у деяких випадках – і юридичної) ролі у суспільстві, сім'ї ... соціальних манер статі (імені, зовнішності, моделі поведінки тощо). Окрім цього, виходячи з міжнародних документів, можливо виділити загальні принципи, пов'язані з правами людини та гендерною ідентичністю: універсальність; недискримінація; автономія особи; повага до гідності людини незалежно від її сексуальної орієнтації та гендерної ідентифікації.

На підставі проведеної наукової розвідки автор прийшов до певних висновків. 1. Гендерна ідентичність передбачає ті чи інші моделі соціальної поведінки особи щодо статевої належності, яка їй природно дана. Тобто передусім мова йде про прийняття чи неприйняття такої природності. Таким чином, гендерна ідентичність демонструє поведінку особи в суспільстві, в основі якої лежить самоідентифікація за її статевою належністю. 2. Право на гендерну ідентичність передбачає можливість особи вчиняти правомірні дії, які слугуватимуть для її самоідентифікації на основі статевої приналежності. Відповідно до цього йдеться про дії юридичного (реалізація відповідних прав та обов'язків) та медичного характеру (можливість зміни (корекції) біологічної статі). Іншими словами, право на гендерну ідентичність означає можливість особи вільно діяти в суспільстві на основі тієї соціальної ролі, з якою вона себе ідентифікує. 3. Незважаючи на рекомендаційний характер міжнародно-правових актів у сфері забезпечення права особи на гендерну ідентичність, міжнародне співтовариство все частіше закликає держави вживати відповідних заходів щодо належного дотримання принципів рівності, недискримінації, автономії особи та поваги до її гідності при реалізації права на гендерну ідентичність та надавати йому належну правову регламентацію.

Ключові слова: *гендерна ідентичність, право на гендерну ідентичність, зміна статі.*

SECTION 2
CONSTITUTIONALISM AS MODERN SCIENCE

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CONSTITUTIONALIZATION OF THE ASSOCIATION PROCESS BETWEEN UKRAINE AND EUROPEAN UNION: MEANINGFUL AND IMPLEMENTATING ASPECTS

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Summary

The purpose of the article is to research the process of constitutionalization of associative relations between Ukraine and European Union. The authors distinguish and reveal two significant aspects of this process: meaningful and implementing.

It is determined that the meaningful constitutionalization by its essence is the constitutional modernization, where the meaningful updation of the Constitutional provisions is being made in order to form the constitutional pillars for further democratization of social and political life in Ukraine, the approximation of the national political and legal system in accordance with the European values and principles, the improvement of the internal legal framework. The implementing aspect of constitutionalization means the purposeful formation of constitutional preconditions for the implementation of Association Agreement's provisions to the national legal system. The authors stipulate that the fulfillment of both meaningful and implementing constitutionalization of Ukraine's association with EU shall be implemented mainly by incorporating of this process directly into the context of the constitutional reform in Ukraine.

The article analyzes the organizational and legal measures aimed at the realization by Ukraine of its European integration purpose and determines that such measures should be carried out by three fundamental directions. Such tendencies include: 1) reformation of the meaningful and implementing principles of the Fundamental Law of Ukraine in order to ensure the constitutional support of this process; 2) concretization and detalization of the constitutional norms and principles in legislation (primarily, in those legislative and bylaws that

refer to the harmonization of national law with EU law); 3) legal and law enforcement activity of national public authorities, and especially judicial bodies of constitutional and general jurisdiction, in order to ensure the implementation of Association Agreement's provisions.

The special attention is paid to certain problems of the reformation of Constitution of Ukraine ensuring the European integration. The authors express the critical reservations related to the amendments to the Constitution with the provisions of strategic orientation of Ukraine for the long term perspective.

The authors conclude that the implementation of constitutional reform and the establishment of associative relations with the EU are two interrelated processes. Therefore, only a high-level synchronization of measures carried out within these areas, the determination of their priorities, the coordination and concordance of current tasks will allow to develop a comprehensive strategy of a constitutional reform and provide a holistic nature to constitutional transformations.

Key words: Constitution of Ukraine, Constitutional Reform, Constitutionalization, European Union, Association Agreement between Ukraine and the EU.

1. Introduction

While signing the Association Agreement with the European Union (hereinafter – the EU), Ukraine has undertaken the commitments to improve its domestic legal framework in conformity with European standards. In this context, the particular attention should be paid to the provisions of the Fundamental Law of the State – the Constitution.

It is clear as the Constitution reflects the state's approaches to international cooperation. The Constitution is the element of the legal system that effectively regulates the activity both in the internal and foreign policy spheres, promotes the appropriate protection of national interests.

On the other hand, the problems related to the Fundamental Law amendments, cancellation of current or including of new provisions that regulate issues bounded with international relations are actualized taking into consideration the constitutional reform's processes, in particular, with the amendments to the Constitution of Ukraine in February 2019. Such changes determined the state's strategic orientation of Ukraine to acquire the full membership in the EU.

The issue of constitutional changes is not new for Ukraine and has repeatedly become both the subject of political discussions and the object of scientific research. The characteristics of certain aspects of this process were researched by such domestic scientists as Y. Barabash, Y. Voloshyn, V. Campo, A. Krusyan, M. Orzikh, N. Parkhomenko, S. Pogrebniak, T. Dorozhna, A. Skrypnyuk, V. Shamray, Ja. Chernopyshchuk and others. However, such process has not received the expanded theoretical interpretation yet. The confirmation of this thesis is the fragmentation and contradiction of approaches in regard of the constitutionalization process of Ukraine-EU association. These facts are confirmed in legal literature, as well as some differences in understanding of its essence and meaningful content.

At the same time, the development of associative relations with the EU causes the necessity for a detailed analysis of the implemented and planned constitutional changes in order to bring into correlation with the declared European integration aspirations of our state. The Ukrainian scientist O. Zadorozhnyi emphasized that the separation of the constitutional process and various aspects of international law is false and wrong, because only their integrated consideration will allow to develop a holistic strategy of the constitutional reform in Ukraine (Zadorozhnyi, 2014, p. 29).

2. Constitutional Factors of Implementation of Ukraine's European Integration Aspirations

Obviously, the success of the Ukrainian constitutional process of reformation is directly proportional to its compliance with a set of conditions. Such conditions are: the conceptual

validity; the systemicity; the transparability; the national peculiarities of constitutional and legal development and the formation of a constitutional tradition; compliance with formal procedural requirements (legality); public recognition and support for the constitutional transformations (legitimacy); internal and external factors of political, social and economic nature to minimize their impact on the constitutional and legal processes.

At the same time, the implementation of any constitutional transformations primarily requires the determination of two crucial positions. These viewpoints cover the following issues: who is, inter alia, the "customer" of the implemented and systematic constitutional changes, and what is the pursued goal? It seems that the "customer" of the constitutional reform in our country is the people of Ukraine who seek to change the approaches to the organization of the state, the functioning of its apparatus, its mutual interaction with society. According to A. Lotyuk, the driving force for the constitutional and other current reforms within the state is the initiative of Ukrainian citizens, unprecedented activity of civil society and its institutions related to the modernization of the Constitution of Ukraine and the renewal of the Ukrainian state (Lotyuk, 2015, p. 110).

Taking into consideration these requirements of the Ukrainian people, the purpose of the constitutional reform should be considered the creation of a constitutional system of the limited governance as a practical embodiment of the constitutionalism doctrine. Consequently, Ukraine shall become the constitutional state (Boryslavska, 2016, p. 48).

It is believed that the achievement of this goal is logically correlated with the implementation of the goals and objectives of the Association Agreement between Ukraine and the EU. In particular, Art. 4 of the Association Agreement establishes that one of the purposes of the political dialogue between the Parties is "strengthen respect for democratic principles, the rule of law and good governance, human rights and fundamental freedoms, … and contribution to the consolidating domestic political reforms" (Association Agreement, 2017).

In our opinion, the successful fulfillment of the tasks defined by the Association Agreement requires the directing of the constitutionalization processes directly into the regulation area of these relations. It causes an objective necessity to regulate and confirm them at the highest - constitutional and legal level. Other words, obviously, that the constitutional formalization of the European orientation for further development of the country is not enough to implement the integration aspirations of Ukraine. This is possible only in case of creation of political, legal and economic systems compatible with European ones. In its turn, it requires the unification of constitutional approaches to the regulation of the prioritized constitutional institutions – human rights and freedoms, civil society, justice, mechanisms of power decentralization, parliamentary system of government market economy etc. On the other hand, the constitutionalization process directly depends on the consistent expression of the normative content of the Constitution of Ukraine in the current legislation detailing and developing its prescriptions (Marceliak, 2016. p. 72), as well as on the creation of appropriate organizational principles necessary for the effective lawmaking and law enforcement measures. Because of this, the Association Agreement acquis should become a particular guideline of the state's legal policy, and all national legal acts should be interpreted and applied in maximum conformity with its provisions.

In this context, the constitutionalization of Ukrainian association with the EU is a multicomponent process, the implementation of which should in one way or another cover all levels of the legal system. The practical aspect of constitutionalization process of association between Ukraine and the EU is revealed through the dynamic set of organizational and legal nature measures. They are aimed at the implementation by Ukraine of its European integration purpose. Such measures should be carried out in three important directions at the regulatory level of the legal system.

Firstly, the fundamental precondition for the constitutionalization of associative relations between Ukraine and the EU is to reform the meaningful and implementing principles of the Fundamental Law of Ukraine to ensure the constitutional support of this process.

Secondly, an important element of the constitutionalization of the associative relations

between Ukraine and the EU is the concretization and itemization of constitutional norms and principles in the positive law systems and legislation (primarily in those legislative and bylaws aimed at harmonizing national law with EU law).

Thirdly, in the process of implementation of the Association Agreement's provisions, the legal and law enforcement activities of national public authorities, and especially the judicial bodies of constitutional and general jurisdiction, become crucial.

Therefore, the national constitutionalization of the association process is mediated by all types of state legal activity (law-making, law-based and law enforcement), which is connected with the necessity to provide individuals (individuals and entities) with the legal means and measures of direct application of the Association Agreement acquis. All these areas of constitutionalization are interconnected and complementary, but this relationship is hierarchical. It turns out that in any democratic, legal state the constitution is an act of higher legal force, its norms occupy the main priority with respect to the norms of other legal acts, and their action is determined by the principle of supremacy in the legal system, which provides for the implementation of law-making and law enforcement activities in the state on the basis and in accordance with its provisions (Terletsky, 2007, p. 69-70).

At the same time, no one constitution, no matter how it regulates the social relations, is unable to cover the full range of such relations, because, on the one hand, the constitution has a sustainable character, and social relations have a dynamic nature, and on the other hand, the range of these relations is extremely enormous. Therefore, a certain part of them is regulated by the legislative power through laws that must comply with the constitutional principles, purposes, declarations, i.e. its spirit (Baymuratov, 2008, p. 545-546). Also legal and law enforcement decisions of constitutional and general jurisdiction courts derive from the norms and principles of the Constitution of Ukraine.

Therefore, in our opinion, the first of the directions of constitutionalization process of the association, i.e. at the level of the Fundamental Law, is mainly the paramount one, since the Constitution of Ukraine, being empowered within the national legal system by the rule and the highest legal force, determines the basis of associative relations' legal regulation and thereby gives the impulsion and directs the relevant processes at other levels, which should be considered as secondary constitutionalization. At the same time, the primary constitutionalization process of association between Ukraine and the EU has two aspects: meaningful and implementing.

3. Meaningful Constitutionalization of the Association Process between Ukraine and EU

The meaningful constitutionalization is a constitutional modernization with the meaningful updating of the Fundamental Law provisions in order to form the constitutional principles for further democratization of social and political life in Ukraine, approximation of the national political and legal system to European values and principles, improvement of the internal legislative framework. These are the changes that have been on the agenda for a long time in the context of the constitutional reform in Ukraine. But at the same time, these are the constitutional transformations on which the EU insists, considering them as a necessary condition for further development of associative relations with our state and the implementation of its European integration aspirations.

The relevant approach is directly reflected in the text of the Association Agreement between Ukraine and the EU. For instance, Art. 3 and Art. 6 of the Association Agreement define the desire both of Ukraine and the EU to cooperate in order to ensure that their internal policy is based on common principles, in particular, such as stability and effectiveness of democratic institutions, the rule of law and respect for human rights and fundamental freedoms, proper governance, market economy, balanced development, etc.

These provisions are stipulated in Art. 14 Chapter III "Justice, Freedom and Security" of the Assocation Agreement. This article provides that within the cooperation framework in the sphere of justice, freedom and security, the Parties pay special attaention and importance to the establishment of the rule of law and strengthen-

ing of institutions of all levels in the governance field and law enforcement and judicial bodies. The article emphasizes that the cooperation between Parties will be aimed at the strengthening of the judiciary, improving its efficiency, guaranteeing its independence and impartiality and fighting corruption (On ratification of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand, 2014).

The constitutional reform is crucial for all other measures, including sectoral reforms. They should be based on the principle of constitutionalization. At the current stage one of the priorities of the constitutional reform is to establish such a mechanism of state power, which would make it impossible to usurp power by any of the highest state officials, and at the same time would ensure the unity of state policy (Nikitenko & Magda 2015). The reform was supposed to guarantee the fair justice, as well as lay down the foundations for local self-government reform and power decentralization.

Taking into consideration these principles, the reform of judicial system and decentralization of power (the reform of local self-government) have become the crucial priorities of the meaningful constitutionalization during the association process between Ukraine and the EU. In general, the Ukrainian external obligations have entirely been coincided with domestic interests mainly in these two spheres. Perhaps, we suppose, the further steps in the implementation of constitutional transformations in Ukraine were carried out quite quickly by developing proposals for the Basic Law reformation and their partial implementation.

Based on the external obligations and internal priorities, the main issue of the meaningful constitutionalization in the aspect of association process between Ukraine and the EU was the reform of the Constitution of Ukraine in respect of justice. In June, 2016 the Basic Law was amended by the relevant and additional provisions thereto. They cover all components of the judicial system, thereby ensuring a comprehensive update of its constitutional principles (Prylutsky & Streltsova, 2016, p. 9-17). The main purpose of these transformations was to optimize the judiciary system in Ukraine, guarantee fair justice, independence and professionalism of judges, promote the status of contiguous institutions (High Council of Justice, prosecutor's office and advocacy) in conformity with the European standards, as well as to ensure the independence of the Constitutional Court of Ukraine and its ability to protect the Basic Law through the resolution of political conflicts in legal manner.

At the same time, the text changes to the Constitution of Ukraine, being the basic factor of constitutionalization process of association between Ukraine and the EU, does not mean mainly to the formal constitutional legalization. Moreover, such changes do not lead to the judicial system's exhaustion (in particular, the issue of the constitutional reform in respect of power decentralization and reorganization of local self-government in Ukraine are still on the agenda). Therefore, the further constitutionalization of the Ukrainian legal system is a complicated process. Its effectiveness will be determined by increasing of the constitutional quality and the level of regulation of social relations in the state.

4. The Implementing Constitutionalization of the Association Process between Ukraine and the EU

The second, i.e. the implementing aspect of constitutionalization, is aimed at the purposeful formation of constitutional preconditions for the implementation of the Association Agreement's provisions to the national legal system. The implementing constitutionalization predicts the entire set of measures to reform the constitutional legislation in order to create appropriate constitutional principles for the implementation of the Association Agreement's provisions to the national legal order of Ukraine. In fact, the implementing aspect of the constitutionalization of the associative relations between Ukraine and the EU means the ensuring of the implementation of the Association Agreement's provisions within the framework of the Ukrainian national legal order. There are certain important indicators of the implementing constitutionalization of the associative relations between Ukraine and the EU. Firstly, the consolidation within the Basic Law's principles of foreign policy activities of Ukraine (in particular, the European foreign policy orientation of the state), which is a pre-

requisite and a kind of constitutional and legal guarantee of succession and consistency in implementating measures within the associative relations between Ukraine and the EU. Secondly, the improvement of constitutional provisions in respect of national and international law interaction, in particular, those that regulate the implementation of international treaties into the national legal system (first of all, Article 9 of the Constitution of Ukraine).

5. Key Problems of Transformation of the Constitution of Ukraine in respect of the European Integration Direction.

In regard of the determination in the Constitution of Ukraine of the strategic orientation of the state to acquire the full membership of Ukraine in the EU, it should be noted that the debates in respect of the necessity for consolidation in the preamble or in Chapter I of the Basic Law of the provisions related to the European vector of Ukraine are discussed in national scientific scholars before the official amendments to the Constitution of Ukraine enter into force. The experts, referring to the Declaration on State Sovereignty of Ukraine in 1990, pointed out that it contains a provision that "The Ukrainian SSR acts as an equal participant in international communication, actively promotes the strengthening of universal peace and international security, directly participates in the European process and European structures" (our italics. – O.S.) (Declaration on State Sovereignty of Ukraine, 1990). Thus, it was noted that the Declaration, although in general form, establishes certain principles of European orientation of Ukrainian foreign policy and emphasized that the current version of the Basic Law immediately requires them.

On the one hand, this approach had an objective basis, because the change of political power forces (and especially in respect of the President of Ukraine) on the regular basis caused certain adjustments in the foreign policy orientation and development strategy of our state. Thus, during the presidency of L. Kuchma the so-called policy of "multiverse balancing" was laid down in the Ukrainian foreign policy activity. On the one hand, the priority direction of foreign policy activity of our state was the European integration, and on the other, Ukraine took part in some integration projects throughout the CIS and built the bilateral relations with Russia and other Soviet Union's former republics on the basis of good faith, cooperation and partnership. After the Orange Revolution, the newly elected President V. Yushchenko preferred the Western vector of Ukrainian cooperation in the foreign sphere. Instead, his opponent and the following head of the state, V. Yanukovych, radically changed Ukraine's external priorities from the western to the eastern vector. As a result, new tendencies of Ukraine's movement to Eurasian integration structures got the ooportunity to exist. Consequently, these circumstances ultimately led to the refusal to sign the Association Agreement between Ukraine and the EU and was one of the factors of the Revolution of Dignity in 2014. Analyzing these events, V. Muraviov noted that the inclusion of the "European integration article" into the Constitution of Ukraine would contribute to its succession in internal and foreign policy, regardless of the change of political power forces, and consistency in the progressive development of our state (Muraviov, 2015, p. 29).

In addition, if we analyze the obligations in the political, economic and legal spheres undertaken by Ukraine under the Association Agreement, and especially the wide-ranging and scope of measures to be taken, including the adaptation of national legislative regulation to EU acquis, it becomes clear that this approach is designed for the long term and requires a phased, stability and predictability of the Ukrainian foreign policy vector.

Simultaneously, it is necessary to make some assumptions in respect of certain amendments to the Constitutional provisions related to the strategic orientation of Ukraine for the long period of time.

Firstly, it should be stated that the fixation in the text of the Basic Law of European integration aspirations of our state has an exceptionally internal, unilateral nature, since the Association Agreement between Ukraine and the EU does not currently provide Ukraine with any prospects of membership in this international association. It only emphasizes the Union's recognition of European choice and aspirations of Ukraine as a European state that shares with the EU a common history and values. It also determines that the political association and economic integra-

tion of Ukraine with the EU will depend on progress in the implementation of this Agreement and on Ukraine's achievements in respect of common values and approximation to the EU in the political, economic and legal spheres. These provisions reflect the principles of conditionality and evolution. They are often used by the Union's practice in respect of associative relations' regulation, but at the same time they indicate that unlike the Agreements on stabilization and association with the Balkan countries or even former European agreements with the Central and Eastern Europe countries, the Association Agreement with Ukraine does not aim to prepare it for accession to the EU.

Based on these suggestions, we consider that the consolidation in the Basic Law of Ukraine of provisions in respect of its strategic movement to acquire the full membership in the EU should primarily be caused by the bilateral nature of such movement, which is currently absent.

Secondly, despite the fact that the Basic Law in a democratic society should be characterized by an increased degree of stability, it should be stated that in the current domestic realities, certain political interests have often been amended to the text of the Constitution of Ukraine. Therefore, even the including of these provisions in the text of the Constitution of Ukraine does not guarantee the full invariability of state's foreign policy priorities in the future.

Thirdly, we consider that the definition and consolidation of the strategic foreign policy of Ukraine in the Basic Law should primarily rely on the will of the Ukrainian people. Therefore, this issue should be brought to the general discussion through the national referendum. But taking into account that the part of the state's territory is annexed and occupied by the Russian Federation, the involvement of all Ukrainian citizens is almost impossible. Thus, even the referendum will be hold, its results cannot be considered completely positive and exact (Streltsova, 2019, p. 305-308).

Therefore, the entry into force of amendments to the Constitution of Ukraine (in respect of the definition of the European vector of state development) is only a small part of a much more global process. It should be supported mainly by the successful and constitutional maintanance that will be the key to the Ukrainian gradual transformation into a democratic and legal state.

6. Conclusions

Thus, the implementation of both meaningful and implementing constitutionalization of association between Ukraine and the EU can be implemented only by incorporation of this process directly into the context of constitutional reform in Ukraine. It is important to realize that the implementation of constitutional reform and the establishment of associative relations with the EU should not be considered as two parallel directions of work holding in different coordinate systems. On the contrary, only maximum synchronization of measures carried out within these areas, determination on both bases of their priorities, coordination and confirmation of current tasks will allow to develop a comprehensive strategy of constitutional reform and provide constitutional transformations of a holistic nature. In our opinion, the instrumentarium laid down in the political and economic parts of the Association Agreement, under the conditions of its consistent and pragmatic application, can ensure the reformation of national political, legal, social and economic institutions in Ukraine, taking into account its national interests.

Bibliography

1. **Баймуратов, М. О., Батанов, О. В., Сліденко, І. Д., Куранін, В.О. & Педько, Ю. С.** (2008). *Вступ до конституційного права України. Том 1. Загальні аспекти: Основи теорії конституційного права.* Харків: Одіссей, 672 с.
2. **Бориславська, О. М.** (2014) Конституційна реформа як шлях формуванняв Україні конституційної системи обмеженого правління (на основі досвіду європейської моделі конституціоналізму). *Право України*, 2014, 7, С. 47-54.
3. *Декларація про державний суверенітет України* (1990). URL: https://zakon.rada.gov.ua/laws/show/55-12#Text
4. **Задорожній, О.** (2014). Проекти реформування Конституції України і міжнародне право. *Український часопис міжнародного права,* 3, С. 29-41.
5. **Лотюк, О. С.** (2015). *Конституційні засади розвитку та функціонування громадянського суспільства в Україні.* Київ: Ліра-К, 356 с.

6. **Марцеляк, О. В.** (2016). Конституційна реформа в Україні і конституціоналізація національної правової системи. *Конституційно-правове будівництво та зламі епох: пошук оптимальних моделей:* матеріали Міжнародної науково-практичної конференції (с. 71-73). Ужгород: Ужгородський національний університет.
7. **Муравйов, В. І.** (2015) Організаційно-правовий механізм реалізації Угоди про асоціацію між Україною та Європейським Союзом. *Право України*, 8, С. 17-32.
8. **Прилуцький С. В. & Стрєльцова, О. В.** Модернізація статусу суддів: концепт взаємодії громадянського суспільства та держави в умовах конституційної реформи 2016. *Публічне право*, 4 (24), С. 9-17.
9. *Про ратифікацію Угоди про асоціацію між Україною, з однієї сторони, та Європейським Союзом, Європейським співтовариством з атомної енергії і їхніми державами-членами, з іншої сторони.* (2014). Закон України No 1678-VII. URL: https://zakon.rada.gov.ua/laws/show/1678-18#Text
10. **Стрєльцова, О. В.** (2019) Проблеми реформування Конституції України в контексті забезпечення європейської інтеграції. *Конституційно-правове будівництво на рубежі епох: пошук оптимальних моделей:* матеріали Міжнародної науково-практичної конференції (с. 305-308). Ужгород: Ужгородський національний університет.
11. **Терлецький, Д. С.** (2007). Конституційно-правове регулювання дії міжнародних договорів в Україні (дис. … канд. юрид. наук: 12.00.02 – конституційне право; муніципальне право). Одеса, 234 с.
12. *Угода про асоціацію між Україною, з однієї сторони, та Європейським Союзом, Європейським співтовариством з атомної енергії і їхніми державами-членами, з іншої сторони.* URL: https://zakon.rada.gov.ua/laws/show/984_011#Text
13. **Нікітенко, С. & Магда, М**. (2015) Чи виконує Київ вимоги ЄС? Частина 7: Конституційна реформа. *Європейська правда.* URL: https://www.eurointegration.com.ua/articles/2015/02/4/7030422/

References:

1. **Baimuratov, M. A., Batanov, A. V., Slydenko, Y. D., Kuranyn, V. A. & Pedko, Yu. S.** (2008). Kurs konstytutsyonnoho prava Ukraynы. Tom 1. Obshchaia chast: Osnovы teoryy konstytutsyonnoho prava. [Introduction in Constitutional Law of Ukraine. Volume 1. *General Aspects: Foundations of Constitutional Law Theories*] Kharkov: Odyssei. [in Ukrainian].
2. **Boryslavska, O.** (2016) Konstytutsiina reforma yak shliakh formuvannia v Ukraini konstytutsiinoi systemy obmezhenoho pravlinnia (na osnovi dosvidu yevropeiskoi modeli konstytutsionalizmu). [Constitutional Reform as a Formation Direction of a Constitutional System of Limited Power in Ukraine (based on the experience of the European model of constitutionalism)] *Pravo Ukrainy, 7*, 47-54. [in Ukrainian].
3. *Deklaratsiia pro derzhavnyi suverenitet Ukrainy [Declaration of State Sovereignty of Ukraine] (*1990). Available from: https://zakon.rada.gov.ua/laws/show/55-12#Text [in Ukrainian].
4. **Zadorozhnii, O. V.** (2014) Proekty reformuvannia konstytutsii Ukrainy i mizhnarodne pravo. [Projects of Reformation of the Constitution of Ukraine and International Law]. *Ukrainskyi chasopys mizhnarodnoho prava, 3*, 29-41. [in Ukrainian].
5. **Lotiuk, O. S.** (2015) *Konstytutsiini zasady rozvytku ta funktsionuvannia hromadianskoho suspilstva v Ukraini*. [Constitutional Principles of the Development and Functioning of Civil Society in Ukraine]. Kyiv: Vyd-vo Lira-K. [in Ukrainian].
6. **Martseliak, O. V.** (2016). Konstytutsiina reforma v Ukraini i konstytutsionalizatsiia vitchyznianoi pravovoi systemy [Constitutional Reform in Ukraine and Constitutionalization of the National Legal System]. *Konstytutsiino-pravove budivnytstvo na zlami epokh: poshuky optymalnykh modelei* (pp. 71-73). Uzhhorod: Uzhhorodskyi natsionalnyi universytet [in Ukrainian].
7. **Muraviov, V.** (2015) Orhanizatsiino-pravovyi mekhanizm realizatsii Uhody pro asotsiatsiiu mizh Ukrainoiu ta Yevropeiskym Soiuzom [Organizational and Legal mechanism for the Implementation of the Association Agreement between Ukraine and the European Union]. *Pravo Ukrainy, 8*, 17-31. [in Ukrainian].
8. **Prylutskyi, S. V. & Strieltsova, O. V.** (2016) Modernizatsiia statusu suddiv: kontsept vzaiemodii hromadianskoho suspilstva ta derzhavy v umovakh konstytutsiinoi reformy 2016 roku [Modernization of the Status of Judges: a Concept of Interaction between Civil Society and the State in the Conditions of Constitutional Reform in 2016]. *Publichne pravo, 4 (24)*, 9-17. [in Ukrainian].
9. *Pro ratyfikatsiiu Uhody pro asotsiatsiiu mizh Ukrainoiu, z odniiei storony, ta Yevropeiskym Soiuzom, Yevropeiskym spivtovarystvom z atomnoi enerhii i yikhnimy derzhavamy-chlenamy, z inshoi storony [Ratification of the Association Agreement between Ukraine, of the one part, and the European Union, the European Atomic Energy Community and their Member States, of the other part]* (2014): Zakon Ukrainy No 1678-VII. Available from: https://zakon.rada.gov.ua/laws/show/1678-18#Text [in Ukrainian].

10. **Strieltsova, O. V.** (2019) Problemy reformuvannia Konstytutsii Ukrainy v konteksti zabezpechennia yevropeiskoi intehratsii [Problems of the Reformation of the Constitution of Ukraine in the Context of European Integration Ensurance] *Konstytutsiino-pravove budivnytstvo na zlami epokh: poshuky optymalnykh modelei* (pp. 305-308). Uzhhorod: Uzhhorodskyi natsionalnyi universytet. [in Ukrainian].
11. **Terletskyi, D. S.** (2007) *Konstytutsiino-pravove rehuliuvannia dii mizhnarodnykh dohovoriv v Ukraini* [Constitutional and Legal Regulation of International Treaties in Ukraine] (*Doctor's thesis*). Odesa. [in Ukrainian].
12. *Uhoda pro asotsiatsiiu mizh Ukrainoiu, z odniiei storony, ta Yevropeiskym Soiuzom, Yevropeiskym spivtovarystvom z atomnoi enerhii i yikhnimy derzhavamy-chlenamy, z inshoi storony [Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part]*. Available from: https://zakon.rada.gov.ua/laws/show/984_011#Text [in Ukrainian].
13. **Nikitenko, S. & Mahda, M.** (2015) Chy vykonuie Kyiv vymohy YeS? Chastyna 7: Konstytutsiina reforma [Does Kyiv Fulfill the EU Requirements? Part 7: Constitutional Reform]. *Yevropeiska pravda*. Available from: https://www.eurointegration.com.ua/articles/2015/02/4/7030422/ [in Ukrainian].

КОНСТИТУЦІОНАЛІЗАЦІЯ ПРОЦЕСУ АСОЦІАЦІЇ УКРАЇНИ З ЄС: ЗМІСТОВНИЙ ТА ІМПЛЕМЕНТАЦІЙНИЙ АСПЕКТИ

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Анотація

Метою даної статті є дослідження процесу конституціоналізації асоціативних відносин між Україною та Європейським Союзом. Автори виокремлюють та розкривають два основні аспекти цього процесу: змістовний та імплементаційний. Визначається, що змістовна конституціоналізація по своїй суті є конституційною модернізацією, у ході якої відбувається змістовне оновлення положень Конституції з метою формування конституційних засад для подальшої демократизації суспільно-політичного життя в Україні, наближення національної політико-правової системи до європейських цінностей та принципів, удосконалення внутрішньодержавної законодавчої бази. Імплементаційний аспект конституціоналізації полягає у цілеспрямованому формуванні конституційних передумов для імплементації положень Угоди про асоціацію до національної системи права. Автори вважають, що здійснення як змістовної, так і імплементаційної конституціоналізації асоціації України з ЄС можна реалізувати лише шляхом включення даного процесу безпосередньо у контексті конституційної реформи в Україні.

У статті проаналізовано заходи організаційно-правового характеру, спрямовані на реалізацію мети європейської інтеграції України і визначено, що такі заходи мають здійснюватися за трьома основними напрямами: 1) реформування змістовних та імплементаційних засад Основного закону України для забезпечення конституційного супроводу цього процесу; 2) конкретизація та деталізація конституційних норм і принципів у законодавстві (передусім у тих законодавчих та підзаконних нормативно-правових актах, які спрямовані на гармонізацію національного права з правом ЄС); 3) правотлумачна та правозастосовна діяльність національ-

них органів державної влади, і особливо судових органів конституційної та загальної юрисдикції, для забезпечення реалізації положень Угоди про асоціацію.

Звертається увага на певні проблеми реформування Конституції України у зв'язку із забезпеченням європейської інтеграції та висловлюються критичні застереження, пов'язані з доповненням Конституції положеннями щодо стратегічного курсу України на довготривалу перспективу.

Автори роблять висновок про те, що проведення конституційної реформи та встановлення асоціативних відносин із ЄС є двома взаємопов'язаними процесами і тому лише максимальна синхронізація здійснюваних у межах цих напрямків заходів, визначення їх пріоритетів, координація та узгодження поточних завдань дозволять розробити комплексну стратегію конституційного реформування та нададуть конституційним перетворенням цілісного характеру.

Ключові слова: *Конституція України, конституційна реформа, конституціоналізація, Європейський Союз, Угода про асоціацію між Україною та ЄС.*

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CONSTITUTIONAL IDENTITY IN THE ARGUMENTATION OF DECISIONS OF CONSTITUTIONAL COURTS

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Summary

The latest trend in modern European constitutionalism is the issue of constitutional identity. Constitutional courts, which are the embodiment not only of the protection of the Constitution, but also of the limitation of power, are influential subjects of assessing the country's international obligations and their implementation in national legislation. The purpose of the article is to analyze the constitutional identity in the argumentation of decisions of constitutional courts.

The research method is a comparative legal analysis of the practice of constitutional review bodies in order to assess the expression of the concept of respect for national identity, which has become a condition and principle of legal integration in the European region. In addition, empirical analysis of decisions of constitutional courts was used. Using the system-structural method, the doctrine of «constitutional boundaries» as a component of constitutional identity is analyzed.

It is justified that the concept of «identity» appeared and began to be actively used by European constitutional courts to justify decisions related to the processes of European integration and the expansion of the influence of supranational institutions of international organizations, including the European Union. It is proved that the decisions of constitutional courts should be based on national legal values, taking into account international practice and the principle of the supremacy of the Constitution. At the same time, national courts must take into account the country's international obligations when making decisions. In today's world, constitutional courts cooperate with the courts of international organizations, which form a common case law in the member states, in particular on the interpretation of human rights. This is manifested in the citation by constitutional courts in their acts of decisions of supranational judicial bodies. It should also be noted that the constitutional court may be guided by the positions of international courts in forming its legal position, but according to the doctrine of judicial discretion, the national court is free to assess the circumstances of the case and it is best acquainted with national features and specifics of national law.

The analysis of the decisions of the bodies of constitutional proceedings, which used the concept of constitutional identity, gave grounds to claim that the courts in their practice in their interpretation appealed to different arguments depending on the specifics of the case. For example, in formulating the doctrine of constitutional boundaries, the Constitutional Court of Italy, in substantiating its decision, used at the same time an argument by analogy, an argument of agreement, an argument of general principles. The Federal Constitutional Court of Germany in its decision in the case of the Maastricht Treaty resorted to naturalistic and systemic arguments.

It is concluded that constitutional identity is a system of interpretive arguments used by constitutional courts to substantiate decisions that verify compliance with the national specifics of constitutional norms. Of course, this applies to the categories of so-called «difficult cases», for the argumentation of which requires a system of strong arguments.

Key words: constitutional proceedings; constitutional argumentation; national identity; interpretive argument; constitutionalism.

1. Introduction.

Constitutional identity is a relatively new concept in the theory of constitutional law, which appeared in the motivating part of the decisions of constitutional courts in the second half of the twentieth century in connection with the cases related to the process of European integration.

Over the last few years, national constitutional identity has become a new trend in European constitutionalism. The concept of national identity is welcomed by some authors, others demonize its implications for the EU, and others discuss important decisions of the constitutional courts. In modern conditions, scholars and judges have made the concept of constitutional identity so fashionable and yet so ambiguous that an in-depth analysis of constitutional identity is necessary.

The European Constitutional Courts have begun to use this concept as a legal counterargument against the influence of the European Court on the national legal systems of the Member States.

At the theoretical level, the use of this new concept has provoked much criticism from legal scholars because, in their view, its non-legal and non-scientific nature. At the same time, there were many supporters of this concept, who are representatives of civilizational and socio-cultural approaches to law. One way or another, this concept has attracted the attention of constitutional scholars who have not yet developed a common understanding of the concept. Some of them suggest defining constitutional identity as a method of legal argumentation.

The doctrine of constitutional identity was formed on the basis of judicial practice, including national constitutional courts (which implement the function of constitutional interpretation). At the same time, it was often seen as a kind of reflection of the concept of respect for national identity, which became a condition and principle of legal integration in the European region.

2. Constitutional identity as a constitutional argument in the decisions of the Federal Constitutional Court of Germany

«Constitutional identity» is little studied in legal doctrine (Rosenfeld, 1994; Jacobsohn, 2006, p. 361; Arnaiz & Llivina, 2013) And constitutional jurisprudence. As noted in the legal literature, from a doctrinal point of view, the concept of «identity» has been mainly studied in social research (Śledzińska-Simon, 2015, p. 124-155) and only recently began to attract the attention of legal scholars studying international law. and constitutional scholars. The reason for the increased attention to this topic in legal science is that the concept of «identity» has emerged and is actively used by European constitutional courts to justify decisions related to European integration and expanding the influence of supranational institutions of international organizations, including the European Union. However, it is the consistent ratification of international treaties concerning the establishment and empowerment of the institutions of the European Union, in particular the Maastricht and Lisbon Treaties, that has led to the emergence of modern research on constitutional identity (Martí, 2013, p. 17-36; Kucherenko, Klochko, 2019, p. 99-124).

The judgment of the Federal Constitutional Court of Germany in the Gorgul case of 14 October 2004 opened a new stage in the relations between the European Court of Human Rights and national constitutional justice bodies, setting a precedent for «principled resistance» to the legal positions of the European Court of Human Rights. Of particular interest is the argument used by the German Federal Constitutional Court to justify non-compliance with the judg-

ment of the European Court of Human Rights, in particular the interpretation of acts of the European Court of Human Rights as «ultra vires» (illegal acts beyond jurisdiction). To begin with, it is necessary to consider the constitutional and legal significance of an international legal treaty in the German legal system. Gorgül v. Germany is also interesting in that it has identified this fundamental issue for the German legal order. Of course, the Federal Constitutional Court of Germany could avoid considering it only on the basis of national law. However, the body of constitutional proceedings directly raised the question of the status of the legal positions of the European Court of Human Rights.

Having examined the provisions of Art. 23, 24, 25 and Art. 59 of the Basic Law of Germany, the Federal Constitutional Court came to the following conclusions:

- firstly, despite the commitment and openness of the German legal order to international law, judgments based on the law of the European Convention for the Protection of Human Rights and Fundamental Freedoms are an order of magnitude lower than German constitutional law;

- secondly, «the legal force of judgments of the European Court of Human Rights extends in accordance with international legal principles, first of all, to the member states themselves as such» and cannot oblige public authorities to take certain actions, as this would be interference. In the domestic sphere of regulation. The Federal Constitutional Court of Germany noted that only the constitutional review body has such powers (according to § 31 para. 1 of the FCC Act);

- thirdly, under the obligations arising from Art. 52 of the European Convention for the Protection of Human Rights and Fundamental Freedoms («effective enforcement of any provision»), the Federal Constitutional Court of Germany understands above all the obligation to take these provisions into account, but this does not mean that they must be followed in all cases. National courts cannot mechanically comply with the position of the European Court of Human Rights, especially in cases where there are «various legal relationships related to the exercise of constitutional rights, for example, in private law»;

- fourthly, even if a judgment of the European Court of Human Rights finds that a national court's decision is contrary to the Convention, it does not «affect the legal force of that decision» because it is not provided for in either the Convention or the Constitution (BVerfG, Order of the Second Senate of 14 October 2004 – 2 BvR 1481/04).

In this case, the Federal Constitutional Court of Germany separated its jurisdiction from that of the European Court of Human Rights. It was determined that the European Convention for the Protection of Human Rights and Fundamental Freedoms has the status of a federal law, i.e. the Federal Constitutional Court of Germany has not made the provisions of the European Convention and the case law of the European Court of Human Rights constitutional. However, he noted that the Convention is important in the case law of the Federal Constitutional Court of Germany and in the implementation of international principles in the German legal system.

Thus, the Federal Constitutional Court of Germany has stated that national courts are not obliged to review their decisions on the basis of the rulings of the European Court of Human Rights. However, the Federal Constitutional Court of Germany has made an important caveat - in some cases, German courts may review the case and take into account the position of the European Court of Human Rights, but this is not a general rule of interaction between these jurisdictions, as there must be real procedural possibilities.

Such a possibility is provided only in the Criminal Procedure Code of Germany in paragraph 6 of § 359 of the CPC «Restoration in favor of the convict», i.e. review is possible only in criminal cases. The German Federal Constitutional Court also ruled that civil proceedings had a different specificity, and that the position of the European Court of Human Rights in this area could not reflect a real balance of rights and interests «alongside the applicant and the Court. Only the State Party concerned; the possibility of third parties participating in the complaint proceedings (Article 36 § 2 of the ECHR) is not the institutional equivalent of the rights and obligations of a party to the proceedings or other persons admitted to the national proceedings» (BVerfG, Order of the Second Senate of 14 October 2004 - 2 BvR 1481/04).

Thus, the Federal Constitutional Court of Germany has established a clear framework

for cooperation between the two jurisdictions, based on the recognition of the limited legal impact of the Convention on the national legal system. The Federal Constitutional Court has ruled that «the law of the Convention does not take precedence over federal law, especially if it has not previously been the subject of a judgment of the European Court of Human Rights». Elements of the dualistic approach can be traced in this position.

The Federal Constitutional Court sees the legal impact of the rulings of the European Court of Human Rights in the use of these acts as «ancillary to the interpretation» of German constitutional rights and freedoms. Cases of misapplication or non-compliance with international legal obligations by German courts are the exclusive jurisdiction of the Federal Constitutional Court of Germany. This competence is exercised by the Federal Constitutional Court, resolving disputes taking into account the position of the European Court of Human Rights.

In this regard, it is pertinent to recall the history of relations between the Federal Constitutional Court of Germany and another supranational body, the European Court of Justice, which also claimed the role of «supreme arbiter» in an attempt to invade constitutional regulation (ECJ, Case 11-70). The Federal Constitutional Court responded with a ruling by Solange I, in which (as in the Gorgul case) it refused to recognize the primacy of supranational regulation (ECJ, Case 11-70).

The model of judicial cooperation proposed in the Solange I case provided that a supranational body has the exclusive right to interpret at its level, and a national court has the competence to determine the limits of integration of supranational norms (the doctrine of constitutional limits).

A similar position is taken by the Italian Constitutional Court, declaring its right to constitutional review of those acts of the European Union in the adoption of which the Union acted within its competence (ultra vires) (Sentenza 183/1973. Deposito del 27/12/1973). Thus, there is a certain continuity of the positions of the Federal Constitutional Court of Germany on the protection of its constitutional identity (Sentenza 183/1973. Deposito del 27/12/1973). A similar approach was used by the FCC in the case of Görgülü v. Germany of 14 October 2014. According to this judgment of the Federal Constitutional Court of Germany, «The Basic Law aims to integrate Germany into the legal community of peaceful free states, but it does not provide for the renunciation of sovereignty enshrined, above all, in the German Constitution. Thus, this does not violate the aim of adhering to international law if the legislator, as an exception, does not respect the law of international treaties, provided that this is the only possible way to avoid violating fundamental constitutional principles» (BVerfG, Order of the Second Senate of 14 October 2004 BvR 1481/04).

3. The doctrine of «constitutional boundaries» and constitutional identity.

In the legal positions analyzed above, the Federal Constitutional Court of Germany develops and formalizes the doctrine of constitutional boundaries and allocates a special area of legal regulation that has «immunity» from decisions of international justice bodies, which the Court calls the «constitutional core».

In this regard, the doctrine of constitutional boundaries and the related concept of «constitutional identity» need to be examined in more detail. The concept of counter-boundaries or constitutional boundaries originated in Italian legal doctrine, and its author is Paolo Barile. According to his approach, there is limited legal influence of European Union and UN law in the national legal system, and the degree of integration of supranational norms is based on their compliance with the general principles of the constitutional order of the country. These principles are recognized as a barrier (counter-limit), a kind of limit for the action of community norms. Since its inception, this doctrine has received formal support in the relevant decisions of the constitutional courts of Italy and Germany. The Italian Constitutional Court's judgment of 27 December 1973 № 183/73, the Frontini case and the German Federal Constitutional Court's judgment of 25 May 1974 (Solange I) set out the main provisions of this doctrine.

The national constitutional justice authorities reach similar conclusions in these decisions: despite the recognition of the rule of law of the European Union, if these norms contradict the

«basic principles of the constitutional order» or «fundamental constitutional rights» they cannot be applied in domestic law.

It should be noted that the doctrine of constitutional boundaries has been used in assessing the constitutionality of not only international obligations arising from European Union law. The most significant here is the Judgment of the Italian Constitutional Court of 22 October 2014 № 238, in which the doctrine of constitutional boundaries applies to obligations arising from the UN Charter (Article 94 of the International Court of Justice) (Sentenza 238/2014). Deposit of 22/10/2014). The Court of Florence considered the constitutionality of the first paragraph of Article 10 of the Italian Constitution, in so far as it obliges a national judge to abide by a ruling of the UN International Court of Justice when it established an Italian judge's obligation to deny him jurisdiction. Against humanity committed by the Third Reich in Italy. This is a conflict between the Italian Constitutional Court and the UN International Court of Justice. Italy lost the case to Germany in a UN court and undertook to comply with a number of regulations to improve its legislation. The Constitutional Court of Italy, assessing the decision, pointed out that the implementation of the norm of international law is possible only if it complies with the Constitution of Italy and constitutional human rights and freedoms. Exercising its competence to assess the norms of international law on their constitutionality, the Constitutional Court of Italy did not allow the implementation of the decision of the International Court of Justice in Italy, citing the constitutional barrier and protection of human rights and freedoms in its territory. Thus, the prototype of the concept of constitutional identity in Italian constitutional jurisprudence was the doctrine of constitutional boundaries, which the Italian Constitutional Court defined as the basis of constitutional principles and fundamental rights guaranteed by the Constitution.

The broad wording of the concept of «national identity» in the Lisbon Treaty suggests that the new norm's focus on the functional features of the state shifts the emphasis from national to constitutional identity, as a result of which European constitutional courts have developed their own concepts of constitutional state identity. The practice of cooperation between the European Court of Human Rights and the Constitutional Court of Bosnia and Herzegovina is quite interesting. The peculiarity of their relationship is that the European Court of Human Rights, as a court of an international organization and a supranational body, participates in the formation of the judiciary of the Constitutional Court of Bosnia and Herzegovina, and the President of the European Court of Human Rights has the right to appoint 3 judges.

4. Relationship between constitutional courts and courts of international organizations: cooperation or autonomy?

The emergence of a supranational legal order causes a change in the relationship between the constitutional courts and the courts of international organizations. What can be their forms of interaction? Cooperation, confrontation, autonomy? National constitutional courts do not procedurally interact with each other, have different legal principles of formation and organization, competence. However, their tasks and functions for the protection of the constitution are common. In today's world, constitutional courts cooperate with the courts of international organizations, which form a common case law in the member states, in particular on the interpretation of human rights. This is manifested in the citation by constitutional courts in their acts of decisions of supranational judicial bodies. It should also be noted that the constitutional court may be guided by the positions of international courts in forming its legal position, but according to the doctrine of judicial discretion, the national court is free to assess the circumstances of the case and it is best acquainted with national features and specifics of national law.

In our opinion, the decision of the constitutional courts should be based on national legal values, taking into account international practice and the principle of the supremacy of the Constitution. At the same time, national courts must take into account the country's international obligations when making decisions.

The issue of constitutional identity in American doctrine and constitutional law enforcement practice should be considered through the prism of problems of interpretation and use of constitutional borrowings, which emphasizes the fact

that the concept of constitutional identity is not least related to constitutional interpretation.

According to M. Savenko: «References to the provisions of the Constitution or international acts, decisions of the European Court of Human Rights, and unsubstantiated statements in one's own decisions cannot be regarded as an argument. A simple set of such references or extraction of certain provisions of a court's reasoning does not meet the requirements for the content of the motivating part of the decision, they do not create a belief in the validity of the arguments of the Court's position, and therefore unmotivated decision cannot be considered legitimate. It is inadmissible to use in the argumentation of such a technical and legal technique as legal fiction, as well as shuffling, manipulation of the statements of the European Court of Human Rights and its own decisions, arguments in order to create the illusion of persuasiveness of the position of the Court.

Such actions have signs of argumentative fraud, and with such «arguments» the decision of the Court cannot be considered fair with the corresponding consequences for the judges who voted for it» (Savenko, 2012, p.14).

Also in the context of our study, it should be noted that «constitutional identity» is a set of «interpretive arguments». According to A. Reiner, «constitutional identity is a conceptual tool for protection against supranationalization of legal orders, protection of material and functional existence of the state, expressed in the main political decisions and basic elements of its legal culture, which are the value basis of the Constitution» (Rainer, 2019).

5.Conclusions.

Without entering into a discussion on the fairness of the use of the concept of constitutional identity, it is possible to raise the question of the correctness of the characterization of this phenomenon as an independent legal argument.

The analysis of the decisions of the bodies of constitutional proceedings, in which this concept was used, gives grounds to assert that the courts in their practice in their interpretation appealed to different arguments depending on the specifics of a particular case.

For example, in formulating the doctrine of constitutional boundaries, the Constitutional Court of Italy, in substantiating its decision, used at the same time an argument by analogy, an argument of agreement, an argument of general principles. The Federal Constitutional Court of Germany in its decision in the case of the Maastricht Treaty resorted to naturalistic and systemic arguments.

That is, constitutional identity is a system of interpretive arguments used by constitutional courts to substantiate decisions that verify compliance with the national specifics of constitutional norms. Of course, this applies to the categories of so-called «difficult cases», for the argumentation of which requires a system of strong arguments.

References

1. **Arnaiz, Alejandro Saiz & Llivina, Carina Alcoberro.** (2013) *National Constitutional Identity and European Integration*. Cambridge [etc.]: Intersentia,] cop. 2013. 326 p. Available from: https://dialnet.unirioja.es/servlet/libro?codigo=713790 [in English].
2. Judgment of the Court of 17 December 1970. Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel. Reference for a preliminary ruling: Verwaltungsgericht Frankfurt am Main-Germany. Case 11-70. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX-%3A61970CJ0011 **[**in English]
3. **Faraguna, Pietro**. (2016). Taking Constitutional Identities Away from the Courts. *Brooklyn Journal of International Law. Vol. 41:2. 490-578*. Available from: https://core.ac.uk/download/pdf/54549653.pdf **[**in English].
4. **Jacobsohn, G**. (2006). Constitutional Identity. *The Review of Politics*, 68(3), 361-397.DOI: 10.1017/S0034670506000192 **[**in English].
5. **Kucherenko, P., Klochko, E.** (2019) The Concept of Constitutional Identity as a Legal Argument in Constitutional Judicial Practice. *Russian Law Journal. 2019;7(4):99-124*. DOI: 10.17589/2309-8678-2019-7-4-99-124 **[**in English].
6. **Marti, Jose Luis**. (2013). *Two Different Ideas of Constitutional Identity: Identity of the Constitution v. Identity of the People. In National Constitutional Identity and European Integration*, edited by Alejandro Saiz Arnaiz and Carina Alcoberro Llivina, 17-36. Antwerp: Intersentia. **[**in English].
7. **Rainer, Arnold.** (2014). Constitutional Identity in European Constitutionalism. *International conference «The role of constitutional justice in protecting the values of the rule of law»* (8-9 September 2014, Chisinau). Available from: http://www.constcourt.md/public/files/file/

conferinta_20ani/programul_conferintei/rainer_Arnold.pdf. **[**in English].

8. **Finn, J.** (1996). Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives. *Edited by Michel Rosenfeld. Durham: Duke University Press*, 1994. 434p. American Political Science Review, 90(1), 224-225. doi:10.2307/2082866. **[**in English].
9. **Savenko, M. D.** (2012). *Yurydychna arhumentatsiia v konstytutsiinomu sudovomu protsesi: metodolohichnyi aspekt.* NAUKOVI ZAPYSKY NaUKMA. Tom 129. Yurydychni nauky. 11-15. **[**in Ukrainian].
10. **Śledzińska-Simon, Anna.** (2015). Constitutional identity in 3D: A model of individual, relational, and collective self and its application in Poland. International Journal of Constitutional Law, *Volume 13, Issue 1, January.* 124-155, DOI: 10.1093/icon/mov007 [in English].
11. Sentenza la Corte Constituzionale Italian 183/1973. (1973) *Deposito del **27/12/1973. Pubblicazione in «Gazz. Uff.» n. 2 del 2 gennaio 1974***. Available from: https://www.cortecostituzionale.it/actionRicercaSemantica.do **[**in English].
12. BVerfGE 37, 271 2 BvL 52/71 Solange I-Beschluß 29 May 1974. Available from: https://law.utexas.edu/transnational/foreign-lawtranslations/german/case.php?id=588https://law.utexas.edu/transnational/foreignlawtranslations/german/case.php?id=58 8 **[**in English].
13. BVerfG, Order of the Second Senate of 14 October 2004 - 2 BvR 1481/04-, paras. 1-72. Available from: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2004/10/rs20041014_2bvr148104en.html **[**in English].

КОНСТИТУЦІЙНА ІДЕНТИЧНІСТЬ В АРГУМЕНТАЦІЇ РІШЕНЬ КОНСТИТУЦІЙНИХ СУДІВ

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Анотація

Сучасним напрямком сучасного європейського конституціоналізму є питання конституційної ідентичності. Конституційні суди, які є втіленням не лише захисту Конституції, але й обмеження влади, є впливовими суб'єктами оцінки міжнародних зобов'язань країни та їх реалізації у національному законодавстві. Метою статті є аналіз конституційної ідентичності в аргументації рішень конституційних судів. Метод дослідження – порівняльно-правовий аналіз практики органів конституційного контролю з метою оцінки вираження концепції поваги національної ідентичності, яка стала умовою та принципом правової інтеграції в європейському регіоні. Крім того, використовувався емпіричний аналіз рішень конституційних судів. За допомогою системно-структурного методу проаналізована доктрина про «конституційні межі» як складова конституційної ідентичності.

Відзначається, що поняття «ідентичність» з'явилось і стало активно використовуватися європейськими конституційними судами для обґрунтування рішень, пов'язаних із процесами європейської інтеграції та розширенням впливу наднаціональних інституцій міжнародних організацій, зокрема Європейського Союзу. Доведено, що рішення конституційних судів повинні базуватися на національних правових цінностях з урахуванням міжнародної практики та принципу верховенства Конституції. У той же час національні суди повинні враховувати міжнародні зобов'язання країни при прийнятті рішень. У сучасному світі конституційні суди співпрацюють із судами міжнародних організацій, які формують загальну прецедентну практику в державах-членах, зокрема щодо тлумачення прав людини. Це виявляється у цитуванні конституційними судами своїх актів рішень наднаціональних судових органів. Слід також зазначити, що при формуванні своєї правової позиції конституційний суд може керуватися позиціями міжнародних судів, але згідно з доктриною судового

розсуду національний суд може вільно оцінювати обставини справи, і його найкраще знати з національними особливостями та специфікою національного законодавства.

Аналіз рішень органів конституційного судочинства, які використовували поняття конституційної ідентичності, дав підставу стверджувати, що суди у своїй практиці в своїй інтерпретації апелювали до різних аргументів в залежності від особливостей справи. Наприклад, формулюючи доктрину конституційних кордонів, Конституційний Суд Італії, обґрунтовуючи своє рішення, використовував одночасно аргумент за аналогією, аргумент згоди, аргумент загальних принципів. Федеральний конституційний суд Німеччини у своєму рішенні у справі про Маастрихтський договір вдався до натуралістичних та системних аргументів.

Зроблено висновок, що конституційна ідентичність - це система інтерпретаційних аргументів, що використовуються конституційними судами для обґрунтування рішень, що перевіряють відповідність національній специфіці конституційних норм. Звичайно, це стосується категорій так званих «складних справ», для аргументації яких потрібна система вагомих аргументів.

Ключові слов*а: конституційне провадження; конституційна аргументація; національна ідентичність; інтерпретаційний аргумент; конституціоналізм.*

SECTION 3

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

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UKRAINIAN MUNICIPAL REFORM: CONSTITUTIONAL BASIS

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Summary

The purpose of the article is a teleological and formal analysis of the related to municipal reform constitutional-conceptual documents approved by public authorities. This topic is relevant to the contemporary urgent constitutional problems, because at the beginning of 2020 President of Ukraine announced his plans to initiate changes to the Constitution 1996 about the local government.

The main methods of the research include classical legal science methods. The author uses formal analysis, synthase, inductive and deductive approach to the problems, covered by the article. While looking at the text of Ukrainian Basic Law 1996 and other documents, the author uses the most common methods of legal interpretation (original intention method, purposivism and other).

Results. The author analyzes the constitutional basis of the ongoing Ukrainian municipal reform, that was launched in 1998. Since that time, the Head of the Ukrainian state (President), the Parliament of Ukraine (Verkhovna Rada of Ukraine) and the Government of Ukraine (Cabinet of Ministers of Ukraine) participated in the regulation of this reform. Their actions can't be characterized as concerted, that is why the biggest part of the documents aim the same results (efficient local self-government according to the European municipal standard and best foreign practices). But the ways of reaching this result differs a lot – it might be revision of the administrative-territorial division, it might be decentralization of the public power, it might be deconcentrating of the local self-government bodies' competence.

Conclusion. The author recommends, firstly, to revise the concepts of the local self-government reform in Ukraine – as some of the documents, that are really out-of-the-date, should be cancelled. Secondly, all of the existed documents should be analyzed, and in case if there is some interesting and perspective proposal – it can be included to the last version of the Municipal Reform Concept. Thirdly, like the last Concept, they should include not only actions, but actions accompanied by the timeline.

Key words: local government reform, local self-government, municipal government, municipal government, public authority.

1. Introduction

Municipal reform (reform of local self-government) in Ukraine has been going on for a long time, but it is still relevant - perhaps because none of its stages have been completed yet, showing such significant successes that would provide grounds for its completion. The concepts of this reform approved by the state authorities play an important role in the municipal reform, therefore the doctrinal analysis of these documents is an important scientific task.

Problems related to municipal reform in Ukraine were studied from the constitutional point of view by many national scientists including M. Baimuratov, O. Batanov, B. Kalinovsky, P. Lubchenko and others. The doctrinal support of local self-government reform in Ukraine can be considered appropriate, but so far its regulatory support remains very weak, including when it comes to the concepts of this reform approved by public authorities. The study of the constitutional-conceptual documents from a formal and substantive point of view is not yet common in the national legal literature.

The purpose of the article is a teleological and formal analysis of the related to municipal reform constitutional-conceptual documents approved by public authorities. This topic is relevant to the contemporary urgent constitutional problems, because at the beginning of 2020 President of Ukraine announced his plans to initiate changes to the Constitution 1996 about the local government.

The main methods of the research include classical legal science methods. The author uses formal analysis, synthase, inductive and deductive approach to the problems, covered by the article. While looking at the text of Ukrainian Basic Law 1996 and other documents, the author uses the most common methods of legal interpretation (original intention method, purposivism and other).

2. Ukrainian Municipal Reform: Overview of the Current Constitutional Problems

Recourse to Government-approved concepts of most of the stages of municipal reform draws attention to the fact that this reform has never been carried out (and therefore not regulated) «independently", without combining it with reforms of other public authorities or other areas of state and public life. Since the declaration of independence of Ukraine, the state authorities have approved five documents entitled "Concept", mostly or partially devoted to municipal reform. In addition to these five Concepts, there are a number of programs of state support for the development of local self-government, but their authors did not focus exclusively on municipal issues.

For example, the purpose of the Program of State Support for the Development of Local Self-Government in Ukraine (approved by the Decree of the President of Ukraine of August 30, 2001) was strengthening the foundations of civil society, the development of democracy; improving the legal framework of local self-government; strengthening the material and financial basis of local self-government; improving the conditions for ensuring the livelihood and social protection of the population, providing it with social services at the appropriate level; developing the initiative of the population in the decision of questions of local value. The program provided for the urgency of making proposals for measures aimed at further administrative reform in Ukraine at the local level, implementation of state regional policy, strengthening the economic base of territorial communities, improving the provision of administrative and public services to the population (Program of state support for the development of local self-government in Ukraine, 2001).

3. Municipal Reform's Conceptual Documents in 1998 – 2001

Chronologically, the first conceptual document in which the main attention was paid to solving the problems of local self-government by reforming the territorial organization and the scope of powers of the relevant bodies is the Concept of Administrative Reform in Ukraine (approved by the Presidential Decree on July, 22, 1998). According to its norms, "in order to achieve the goal of administrative reform, a number of tasks must be solved during its implementation:

a) the formation of an effective organization of executive power at both central and local levels of government;

b) formation of a modern system of local self-government;

c) introduction of a new ideology of the functioning of the executive power and local self-government as activities to ensure the realization of the rights and freedoms of citizens, the provision of state and public services;

d) organization on new principles of civil service and service in local self-government bodies;

e) creation of a modern system of training and retraining of managerial staff;

f) introduction of a rational administrative-territorial system' (Concept of administrative reform in Ukraine, 1998).

Thus, a review of the system of public authorities at the central and local levels was envisaged. It should be emphasized that even the title of the normative legal act and its part I «General principles of administrative reform» did not refer to municipal reform, although given the purpose of the reform defined in the Concept, the title «administrative and municipal reform» would be more accurate.

From the point of view of reflecting the content, the chronologically following document is the Concept of Amendments to the Laws of Ukraine «On Local Self-Government in Ukraine" and "On Local State Administrations» (approved by the order of the Cabinet of Ministers of Ukraine, 2001, March 1). The Concept emphasizes that the amendments to the Laws "On Local Self-Government in Ukraine" and "On Local State Administrations" are caused by the need to increase the role of local executive bodies and local governments in implementing the strategy of economic and social development of Ukraine for 2000-2004, defined in the Address of the President of Ukraine to the Verkhovna Rada of Ukraine "Ukraine: Progress in the XXI Century. Strategy of Economic and Social Development for 2000-2004", and one of the main reasons for "joint" reform of local governments and local executive bodies is that that "the imperfection of legal norms creates excessive tension in the relations between the heads of regional and district state administrations and the heads of regional and district councils, as well as between them and the mayors" (Concept for Amendments to the Laws of Ukraine "On Local Self-Government in Ukraine" and "On Local State Administrations", 2001).

On May 25, 2001, the Concept of State Regional Policy was approved by the Decree of the President of Ukraine. According to its provisions, "the main goal of the state regional policy is to create conditions for dynamic, balanced socio-economic development of Ukraine and its regions, improve living standards, ensure compliance with state-guaranteed social standards for each of its citizens regardless of residence, and deepen processes of market transformation on the basis of increasing the efficiency of using the potential of the regions, increasing the effectiveness of management decisions, improving the work of public authorities and local governments (Concept of state regional policy, 2001). It is worth mentioning that, despite the name, it is one of the few normative legal acts of conceptual and programmatic nature, which is devoted mostly (though not completely) to the reform of local governments.

4. Municipal Reform's Conceptual Documents since 2001

Chronologically, the next document was the Concept of Local Self-Government Reform, approved by the Cabinet of Ministers of Ukraine on July 29, 2009 (Concept of local self-government reform, 2009). Based on the title, the Concept covered only the problems of local self-government reform in Ukraine implementation, indicates that these documents also concerned the reform of public authorities at the local level as a whole. For example, the Action Plan provided for the development not only of such draft laws of Ukraine as "On the city with a special status Sevastopol", "On communal property", but also "On local state administrations" (new version), on amendments to the Constitution of Ukraine bodies of district and regional councils and changes in the functions of local state administrations (On approval of the action plan for the implementation of the Concept of Local Self-Government Reform, 2009).

A similar approach was used in the Concept of Local Government Reform, Self-Government and Territorial Power Organization in Ukraine, approved by the Cabinet of Ministers of Ukraine on April 1, 2014. Interestingly, this Concept does not provide a goal of reform (only tasks), but contains provisions on the purpose of the Concept: "Determination of directions, mechanisms and terms of formation of effective local self-government and territorial organization of power

to create and maintain a full living environment for citizens, provision of high quality and affordable public services, establishment of direct democracy, satisfaction of citizens' interests in all spheres of life, coordination of interests state and territorial communities" (Mishyna, 2020; Mishyna, 2017). Like previous Concepts, this document focuses not only on municipal, but also on administrative reform.

An analysis of the norms of the five mentioned Concepts shows the following.

First, public authorities are rather inconsistent and insufficiently careful about terminating those conceptual documents that have lost their relevance or have been replaced by newer ones or simply become obsolete. Among the *de jure* concepts analyzed, the Concept of Administrative Reform in Ukraine of 1998, the Concept of Amendments to the Laws of Ukraine "On Local Self-Government in Ukraine" and "On Local State Administrations" of 2001, the Concept of State Regional Policy of 2001 remain valid, along with the Concept of Local Government Reform, Self-Government and Territorial Power Organization in Ukraine of 2014. *De facto*, only the last document is currently relevant. And only the Concept of Local Self-Government Reform of 2009, after the change of priorities at the next stage of municipal reform, was abolished on the basis of Government Order № 567-r of August 15, 2012.

Secondly, there is still no certainty with those entities whose powers include the adoption of conceptual acts on local government reform in Ukraine. The President approved the Concept of Administrative Reform in Ukraine in 1998 and the Concept of State Regional Policy in 2001, the Government - the Concept of Amendments to the Laws of Ukraine "On Local Self-Government in Ukraine" and "On Local State Administrations" in 2001, the Concept of Local Self-Government Reform of 2009 and the Concept of Local Government Reform, Self-Government and Territorial Power Organization in Ukraine of 2014. It is worth mentioning the role of Parliament, because the laws of Ukraine are often the normative basis for the next stage of municipal reform.

Thirdly, the generic titles of documents containing concepts of stages of municipal reforms are not unified, and individual names lack accuracy. In general, each of the documents is devoted to the reform of public authorities at the local level (one - also to the reform of the of civil society's institutions). But the titles of none of the five concepts are the same. The narrowest in terms of public relations belongs to the Concept of Amendments to the Laws of Ukraine "On Local Self-Government in Ukraine" and "On Local State Administrations" of 2001. It should be followed by the Concept of Local Self-Government Reform of 2009 and then the Concept of Local Government Reform, Self-Government and Territorial Power Organization in Ukraine of 2014. As for the Concept of Administrative Reform in Ukraine of 1998 and the Concept of State Regional Policy of 2001, they do not contain in their names references to their separate provisions concerning the reform of local self-government.

5. Proposals On Concept-Making Improvements

The main advantage of the approach to give the normative basis formed only for municipal reform, is as follows. The Constitution of Ukraine of 1996, unlike the Basic Laws of some foreign countries, does not contain a section on the organization of public power at the local level. Instead, local authorities are mentioned in Section VI "Cabinet of Ministers of Ukraine. Other executive bodies", and local self-government bodies - in Section XI "Local self-government". Another argument in support of the thesis is that paying attention at the level of concepts exclusively to municipal reform will correspond to the essence of the civic theory of local self-government, on which the norms of Chapter XI "Local self-government" of the Constitution of Ukraine are based (see Mishyna, 2020).

Such an approach would be appropriate not only in relation to the conceptual regulations on municipal reform, but also to other regulations relating to local self-government. For example, the Electoral Code of Ukraine in the chapter on local elections, the Law "On Service in Local Self-Government Bodies" have a significant level of politicization. Indirect evidence of this is the fact that the conceptual changes and additions to the provisions on local elections take place, as a rule, almost simultaneously with the introduction of similar changes and additions to the provisions on elections of MPs of Ukraine,

the President of Ukraine); similarly, conceptual changes and additions to the laws on service in local self-government bodies occur, as a rule, almost simultaneously with the introduction of similar changes and additions to the Law of Ukraine "On Civil Service"). Legal unification is important in the context of increasing the legal array, but it should not become an end in itself, which affects the practical implementation at the local level of such a constitutional value as democracy. It should be noted that the decision of members of the territorial community on issues of local importance, directly or indirectly, is just a manifestation of democracy. And attempts to "strengthen" the executive branch at the local level rather meet the requirements for the effective exercise of public power. Thus, we get a conflict between democracy and the effectiveness of the exercise of public power, which constantly arises in Ukraine in the implementation of legal regulations for local government.

In addition, the significant level of politicization of local self-government does not always meet European municipal standards. Thus, in a number of member states of the European Union, local self-government is currently quite depoliticized due to both the deepening of integration processes and the conscious adherence to the idea of depoliticization in the implementation of legal regulations of local self-government.

The "authorship" of the concepts related to municipal reform indicates significant rule-making activity in this area by the executive authorities and the head of state. Paying tribute to the high professionalism of the apparatus of these bodies, their rule-making activity in all spheres of state and public life, the question arises - are they really interested in independent local self-government? It should be noted that the affiliation of local state administrations to the executive branch, headed by the Cabinet of Ministers of Ukraine, makes very doubtful the political will of the Government in the formation and further development of local governments in a democratic direction as depoliticized public authorities. from local state administrations, the implementation of which is of some interest to them, and is not a "burden" due to lack of financial or other resources.

Thus, the conceptual regulation of local self-government reform in Ukraine should be carried out by the Parliament of Ukraine, taking into account the representative nature of this body and the desire to put into practice in local self-government such a constitutional principle as democracy.

6. Conclusion

Most of the shortcomings identified in the analysis of the concepts related to municipal reform approved by various public authorities at different times can be remedied fairly quickly – for example, the repeal of three outdated municipal reform concepts that still remain in force. despite the loss of relevance, or revise them in order to exclude from their composition the rules of municipal reform (Concept of administrative reform in Ukraine in 1998, the Concept of State Regional Policy of 2001, the Concept of amendments to the Laws of Ukraine "On Local Self-Government in Ukraine" and "On local state administrations" in 2001). Accordingly, only the Concept of Local Government Reform, Self-Government and Territorial Power Organization in Ukraine of 2014 will remain valid (the Concept of Local Self-Government Reform in 2009 was abolished in 2012). It is substantiated that, despite the significant rule-making activity in this area of executive bodies and the head of state, it would be expedient for the Parliament of Ukraine to carry out the conceptual regulation of local self-government reform in Ukraine.

Bibliography

1. *Концепція адміністративної реформи в Україні* (1998): затверджена Указом Президента України від 22 липня 1998 р. URL: http://zakon3.rada.gov.ua/laws/show/810/98
2. *Концепція державної регіональної політики* (2001): затверджена Указом Президента України від 25 травня 2001 р. URL: http://zakon0.rada.gov.ua/laws/show/341/2001
3. *Концепція реформи місцевого самоврядування* (2009): схвалена розпорядженням Кабінету Міністрів України від 29 липня 2009 р. URL: http://zakon0.rada.gov.ua/laws/show/401/2009
4. *Концепція реформування місцевого самоврядування та територіальної організації влади в Україні* (2014): схвалена розпорядженням Кабінету Міністрів України від 1 квітня 2014 р. URL: http://zakon3.rada.gov.ua/laws/show/333-2014-р

5. *Концепція щодо внесення змін до Законів України "Про місцеве самоврядування в Україні" та "Про місцеві державні адміністрації"* (2001): схвалена розпорядженням Кабінету Міністрів України від 1 березня 2001 р. URL: http://zakon0.rada.gov.ua/laws/show/69-2001-р
6. **Мішина, Н. В.** (2017). Гарантії місцевого самоврядування в Україні, *Вісник Південного регіонального центру Національної академії правових наук України*, 10, 81-89.
7. **Мішина, Н. В.** (2020). Органи самоорганізації населення в Україні: типологія та класифікація, *Наукові праці Національного університету «Одеська юридична академія»,* XXVI, 81-89. DOI: https://doi.org/10.32837/npnuola.v26i0.664
8. *Про затвердження плану заходів щодо реалізації Концепції реформи місцевого самоврядування* (2009): Розпорядження Кабінету Міністрів України від 2 грудня 2009 р. URL: http://zakon3.rada.gov.ua/laws/show/1456-2009-р
9. *Програма державної підтримки розвитку місцевого самоврядування в Україні* (2001): затверджена Указом Президента України від 30 серпня 2001 р. URL: http://zakon3.rada.gov.ua/laws/show/749/2001

References:

1. *Kontseptsiya administratyvnoyi reformy v Ukrayini [Concept of administrative reform in Ukraine]* (1998): zatverdzhena Ukazom Prezydenta Ukrayiny vid 22 lypnya 1998 [approved by the Decree of the President of Ukraine of July 22, 1998]. Available from: http://zakon3.rada.gov.ua/laws/show/810/98 [in Ukrainian]
2. *Kontseptsiya derzhavnoyi rehional'noyi polityky [Concept of state regional policy]* (2001): zatverdzhena Ukazom Prezydenta Ukrayiny vid 25 travnya 2001 [approved by the Decree of the President of Ukraine of May 25, 2001]. Available from: http://zakon0.rada.gov.ua/laws/show/341/2001 [in Ukrainian].
3. *Kontseptsiya reformy mistsevoho samovryaduvannya [Concept of local self-government reform] (2009*): skhvalena rozporyadzhennyam Kabinetu Ministriv Ukrayiny vid 29 lypnya 2009 [approved by the order of the Cabinet of Ministers of Ukraine of July 29, 2009]. Available from: http://zakon0.rada.gov.ua/laws/show/401/2009 [in Ukrainian].
4. *Kontseptsiya reformuvannya mistsevoho samovryaduvannya ta terytorial'noyi orhanizatsiyi vlady v Ukrayini [The concept of reforming local self-government and territorial organization of power in Ukraine]* (2014): skhvalena rozporyadzhennyam Kabinetu Ministriv Ukrayiny vid 1 kvitnya 2014 [approved by the order of the Cabinet of Ministers of Ukraine dated April 1, 2014]. Available from: http://zakon3.rada.gov.ua/laws/show/333-2014-r [in Ukrainian].
5. *Kontseptsiya shchodo vnesennya zmin do Zakoniv Ukrayiny "Pro mistseve samovryaduvannya v Ukrayini" ta "Pro mistsevi derzhavni administratsiyi" [Concept for Amendments to the Laws of Ukraine "On Local Self-Government in Ukraine" and "On Local State Administrations"]* (2001): skhvalena rozporyadzhennyam Kabinetu Ministriv Ukrayiny vid 1 bereznya 2001 [approved by the order of the Cabinet of Ministers of Ukraine of March 1, 2001]. Available from: http://zakon0.rada.gov.ua/laws/show/69-2001-r [in Ukrainian].
6. **Mishyna, N. V.** (2017). Harantiyi mistsevoho samovryaduvannya v Ukrayini. [Guarantees of local self-government in Ukraine]. *Visnyk Pivdennoho rehional'noho tsentru Natsional'noyi akademiyi pravovykh nauk Ukrayiny - Bulletin of the Southern Regional Center of the National Academy of Legal Sciences of Ukraine*, 10, 81-89. [in Ukrainian].
7. **Mishyna, N. V.** (2020). Orhany samoorhanizatsiyi naselennya v Ukrayini: typolohiya ta klasyfikatsiya [Bodies of self-organization of the population in Ukraine: typology and classification]. *Naukovi pratsi Natsional'noho universytetu «Odes'ka yurydychna akademiya» - Scientific works of the National University "Odessa Law Academy",* XXVI, 81-89. DOI: https://doi.org/10.32837/npnuola.v26i0.664
8. *Pro zatverdzhennya planu zakhodiv shchodo realizatsiyi Kontseptsiyi reformy mistsevoho samovryaduvannya [On approval of the action plan for the implementation of the Concept of Local Self-Government Reform]* (2009): Rozporyadzhennya Kabinetu Ministriv Ukrayiny vid 2 hrudnya 2009 [Order of the Cabinet of Ministers of Ukraine of December 2, 2009]. Available from: http://zakon3.rada.gov.ua/laws/show/1456-2009-r [in Ukrainian].
9. *Prohrama derzhavnoyi pidtrymky rozvytku mistsevoho samovryaduvannya v Ukrayini [Program of state support for the development of local self-government in Ukraine]* (2001): zatverdzhena Ukazom Prezydenta Ukrayiny vid 30 serpnya 2001 [approved by the Decree of the President of Ukraine of August 30, 2001]. Available from: http://zakon3.rada.gov.ua/laws/show/749/2001 [in Ukrainian].

МУНІЦИПАЛЬНА РЕФОРМА В УКРАЇНІ: КОНСТИТУЦІЙНІ ОСНОВИ

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Анотація.

Метою статті є телеологічний та формальний аналіз конституційно-концептуальних документів, пов'язаних з муніципальною реформою, затверджених державними органами. Ця тема актуальна для сучасних нагальних конституційних проблем, оскільки на початку 2020 року Президент України оголосив про свої плани ініціювати зміни до Конституції 1996 року щодо місцевого самоврядування.

До основних методів дослідження належать класичні методи юридичної науки. Автор використовує формальний аналіз, синтез, індуктивний та дедуктивний методи, підходячи до вирішенняпроблем, висвітлених у статті. Переглядаючи текст Основного Закону України 1996 року та інші документи, автор використовує найпоширеніші методи юридичного тлумачення (метод оригінального наміру, цілеспрямованості та інші).

Результати. Автор аналізує конституційну основу української муніципальної реформи, яка розпочалася у 1998 році. З цього часу участь у регулюванні цієї реформи брали Глава Української держави (Президент), Парламент України (Верховна Рада України) та Уряд України (Кабінет Міністрів України). Їхні дії не можна охарактеризувати як узгоджені, тому більша частина документів націлена на однакові результати (ефективне місцеве самоврядування відповідно до європейських муніципальних стандартів та найкращих закордонних практик). Але шляхи досягнення цього результату значно різняться - це може бути перегляд адміністративно-територіального поділу, це може бути децентралізація публічної влади, це може бути деконцентрація компетенції органів місцевого самоврядування.

Висновок. Автор рекомендує, по-перше, переглянути концепції реформи місцевого самоврядування в Україні – оскільки деякі документи, які вже застаріли, слід скасувати. По-друге, слід проаналізувати всі існуючі документи, і якщо є якась цікава та перспективна пропозиція – її можна включити до останньої версії Концепції муніципальної реформи. По-третє, як і остання Концепція, вони повинні включати не лише дії, але й дії, що супроводжуються часовою шкалою.

Ключові слова: *реформа місцевого самоврядування, місцеве самоврядування, муніципальне управління, муніципальна влада, публічна влада.*

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GENERAL SCIENTIFIC APPROACHES TO DEFINING THE FUNCTIONS OF THE CONSTITUTIONAL MECHANISM OF STATE POWER

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Summary

The purpose of this work is to define the concept of functions of the state power constitutional mechanism through the study of doctrinal positions of function in various branches of social sciences.

Methodology for the functions' study of the state power constitutional mechanism consists of the methods of cognition, discovered and developed by philosophy, history, sociology, theory of law and state, specialized legal sciences and approved by legal practice. Thus, the role of the historical method in the analysis of the functions of the constitutional mechanism of state power, in addition to explaining the nature of origin and development, is to ensure a systematic study of the evolution of this category. The semantic method was used to clarify the meaning of the term "function", its scientific and practical meaning, the possibility of using it in constitutional law to refer to such legal categories as "constitutional mechanism of state power". The comparative method was applied to reveal the general in such terms as "functions", "goals" and "tasks".

The results of the study show that the function is a kind of "a pattern", "a standard", "an ideal model" of the system's work, in particular, of the constitutional mechanism of state power, and therefore, it must be, on the one hand, differentiated from the goals and tasks that face the system, and on the other hand – from the real, actual activity of its institutions (competences). When determining the functions of the constitutional mechanism of state power, it must be assumed that, firstly, the functions are the directions of influence of a certain socially significant phenomenon or circumstance on certain legal relations, and secondly, the functions are the activity of certain subjects of the constitutional mechanism of state power within the limits of the powers specified in the Constitution and laws; thirdly, functions reflect the essence of the phenomenon, its purpose and patterns of development. The theory of functions of the constitutional mechanism of state power should proceed from the social purpose of the state, its tasks and goals, the legislation of Ukraine, as well as the experience of practical activity of the state apparatus and the achievement of scientific opinion in the field of constitutional law and a number of theoretical and applied legal sciences. Actually the system of functions of the state determines the need to study the functions of the constitutional mechanism of state power, but if the functions of the state are the directions of influence on public relations, then the functions of the constitutional mechanism of state power are the directions of the state functions within the competence of individual institutions that make up the structure of the constitutional mechanism of the state power.

On the basis of this research, the author comes to the conclusion that the functions of the constitutional mechanism of state power should be defined as the directions of activity of the subjects of the constitutional mechanism of state power within the competence defined in the Constitution and laws aimed at achieving the goals and tasks of the state.

Key words: function; mechanism of state power; functions of the state; goals; tasks; activities of the state.

1. Introduction

Contemporary understanding of functions is an important component of the study of the constitutional mechanism of state power. It is obvious that functionality is the most essential aspect of any organization (Setrov, 1972), because in the general theory of systems of function they are one of the main characteristics of the essence of the object under consideration (Afanasiev, 1981). Namely in the functions the essential properties of the constitutional mechanism of state power as the centralizing power of society and the macro-regulator of social relations are reflected. It expresses the will of the vast majority of the population, while being realized through a legal system that exerts significant regulatory and ordering influence on political, economic and social life of society, social groups and individuals.

An analysis of the source base of the study revealed the existence of a significant scientific heritage, based on the work of both classics and modern researchers of problems of state power and statehood not only in the field of law, but also of political science, philosophy, history, sociology, as well as practitioners who have been working on this issue in different times. The first most complete and consistent conceptual justification and expression of the idea of state power and the evolution of statehood were presented in the works of such bright thinkers as Shang Yang, Confucius, Aristotle, Democritus, Plato, Cicero, Socrates, supplemented by such representatives of the Renaissance, like N. Machiavelli, J.-J. Rousseau, T. Hobbes, J. Locke, I. Kant, J.-G. Fichte, G. Hegel, T. Campanella, C.-L. Montesquieu, T. More, A. Schopenhauer, V. Pareto, R. Michels, F. Nietzsche, G. Mosca, G. Jellinek, R. Dahl, L. Duguit, K. Marx, F. Engels, V. Lenin, M. Weber, B. Russell, T. Parsons, M. Foucault and others, whose theories and conceptual approaches were later formed into separate specific scientific schools and research approaches.

So, since the 50s of the twentieth century the amount of literature on state power and the institutions of statehood is growing sharply. Substantial contributions to the development of concepts of power have been made by R. Berstedt, P. Blau, D. Cartwright, S. Clegg, N. Luhmann, F. Oppenheimer, D. Wrong and others. The problems of organization and functioning of state power and its institutions, its unity and division are presented in the works of many authoritative domestic researchers of the early twentieth century and scientists of pre-revolutionary Russia, in particular A. S. Alekseev, O. O. Alekseev, V. M. Hessen, V. F. Deriuzhynskyi, A. I. Yelistratov, V. V. Ivanovskyi, I. A. Ilin, M. M. Kovalevskyi, F. F. Kokoshkin, M. M. Korkunov, S. A. Kotliarevskyi, M. I. Lazarevskyi, S. A. Muromtsev, M. I. Palienko, I. T. Tarasov, B. M. Chycherin, G. F. Shershenevych, A. S. Yashchenko and others. Soviet science has also accumulated considerable conceptual experience in the study of state power and problems of statehood. In particular, it is possible to distinguish the works of R. P. Aleksiuk, V. M. Amelin, M. Yo. Baitin, M. M. Keizerov, A. J. Kim, V. G. Lediaiev, O. O. Luzan, V. B. Pastukhov, M. M. Stepanov, Yu. O. Tykhomyrov, V. L. Usachev, Ye. I. Farber, V. V. Tsvietkov, V. Ye. Chyrkin, L. P. Yuzkov and others.

In the last decade, interest to the study of problems of state power, its types, forms, functions and mechanism of implementation in the context of modern transformation processes has increased significantly in both domestic and foreign science. In particular, crucial are the achievements of such national scientists as V. B. Averianov, O. F. Andriiko, V. D. Babkin, M. O. Baimuratov, V. P. Horbatenko, A. P. Zaiets, O. V. Zaichuk, A. A. Kovalenko, O. L. Kopylenko, L. T. Kryvenko, N. M. Onishchenko, M. P. Orzikh, O. V. Petryshyn, V. F. Pogorilko, A. O. Selivanov, V. M. Selivanov, V. M. Skrypniuk, O. V. Skrypniuk, M. O. Tepliuk, O. Yu. Todyk, Yu. M. Todyk, O. F. Frytskyi, Yu. O. Frytskyi, V. M. Shapoval, V. O. Shevchuk, S. V. Shevchuk, Yu. S. Shemshuchenko, O. I. Yushchik, O. N. Yarmysh and others.

2. Retrospective of function in various fields of social sciences

In modern constitutional law science there is a theoretical connection between the existing concepts of state genesis and the so-called classical concepts of state, state power, constitutional mechanism of state power, which have been elaborated in the theory of law and other specialized studies. A brief overview of the relevant literary sources makes it clear that the relevant legal literature on this issue provides a synthesis

of positivist and Marxist ideas, reflecting both basic ideas about the structure, attributes and functions, and the types and kinds of state. Generally presented concepts in the theory of the state and law represent a paradigm of understanding state power, based on three sources of its constitution: social and public (sociologism); institutional and legal (normativism and etatism) and moral value (ethical axiologism – ethicism). The problem is the theoretical and cognitive necessity to establish the relation between sociologism, etatism and ethicism in different state scientific concepts.

In order to study and define the system of functions of the constitutional mechanism of state power, it is first and foremost necessary to consider the semantics of this legal category.

The study of scientific literature convincingly shows that the term "function" is multidimensional; it is suitable for characterization of any dynamic structures (Onischenko, 2002). This is due to the specific cognitive tasks of those sciences where it is applied. Like many other concepts in social science, the concept of "function" is not purely a legal or political notion while being used in various fields of knowledge and being characterized by the coverage of properties that are selected depending on the specifics of the field of science.

In the process of development of the theory of functions and the process of systems' functioning in different branches of social sciences, there is a search for new concepts and qualitatively updated models of organization, which require appropriate analysis and synthesis of knowledge, achievements and integration of socio-humanitarian knowledge, use of a wide factual base of relevant specialized legal researches, etc.

For the first time, the concept of "function" was put into use in mathematics (Vynogradov, 1985) and was interpreted as implementation of actions over quantities. The evolution of the concept of "function", namely the basic stages of the formation of the idea of function, coincides with the periodization in mathematics and science in general. Natural and scientific basis of the concept of "function" goes back to antiquity, is developing during the Renaissance, and in the XVII century the concept of function in science is first brought into use in the writings of Descartes and Fermat. The term "function" was first presented in scientific meaning by the German mathematician and philosopher G. Leibnitz, who used the term to name various parameters related to the position of a point on a plane; the term was introduced into everyday language by the Swiss mathematician I. Bernoulli (Prokhorov, 1987).

Subsequently, the concept of "function" became part of the conceptual apparatus of many social sciences, physics (Prokhorov, 1983), medicine (Prokhorov, 1996), psychology (Platonov, 1982) and others. Borrowing categorical concepts in a particular scientific field is an objective phenomenon. In addition, the meaning of such a term can be significantly different from the original and have a different content load in a specific field of scientific knowledge.

The term "function" comes from Lat. *functio* and means realization, execution, accomplishment – a way of doing a thing or an element of the system, aimed at achieving a certain effect (Shynkaruk, 1986). In an explanatory dictionary, the term "function" is defined, firstly, as the work performed by an organ or organism; secondly, as a duty, the scope of activities, the purpose, the role (Lopatina, 1990). Thus, the term "function" means not merely the execution or realization (Kubko, 1997), not only the "internal capacity for certain actions" or "the work of someone, something, the scope of activity of someone, something" (Busel, 2001), but also the fact that this process is always considered in terms of the external manifestation of the qualities of the object under study within a certain system of relations (Skrypniuk, 2005).

In the specialized literature, function means "the external manifestation of the qualities of any object in the system of relations"; "certain processes carried out by the system as a whole"; "the result of any social action and process"; "directions of influence of the system on the reality, which reflects its (system's) essence, role, patterns of development and social purpose"; "the role played by a particular object" (Kartashov, 2009); social purpose ("proper") and practical activities for the implementation of social purpose ("essence") (Hlebov, 1999). However, these opinions are not exhaustive, as other views on the concept of "function" are analyzed in detail in the literature.

Some researchers define functions as goals and tasks (Hurnei, 1969; Kutsenko, 1972). Thus, these concepts cannot be considered identical, although they are closely related. So, the goal is what you want to accomplish, something you need to conmplete. In philosophy, this concept is defined as "the ideal image of the desired result, which is constructed by consciousness and is a prerequisite for real operations to achieve the intended" (Momdzhian, 1997). In turn, the task needs execution, solution. Goals and tasks determine the presence and existence of certain functions, their specific content.

L. R. Nalyvaiko (2009) points to the ambiguity of the category "function" and emphasizes that it can be applied to any system: social, technical, biological, etc. The structure of any system is determined by its functions. Irrelatively to functions, it is impossible to talk about the expediency and effectiveness of the structure of an object. Change of functions leads to a change in structure that is why the functional method of cognition is always primary compared to the structural method. There is an optimal structure for a certain set of functions, so the effectiveness, for example, of any social organization depends directly on the clarity and accuracy of the detection of its functions.

Considering different views on the meaning of the concept of the category "function", it is possible to conclude that "function" is a kind of "a pattern", "standard", "ideal model" of the system (in this case, the constitutional mechanism of state power), and therefore it should be distinguished, on the one hand, from the goals and tasks that the system faces and, on the other hand, from the real, actual activity of its institutions (competences). However, in practice, systems often deviate from their functions for one reason or another. Therefore, when defining the functions of the constitutional mechanism of state power, it must be assumed that, firstly, the functions are the directions of influence of a certain socially significant phenomenon or circumstance on certain legal relationships, and secondly, the functions are the activity of certain subjects of the constitutional mechanism of the state authorities within the powers specified in the Constitution and laws; thirdly, functions reflect the essence of the phenomenon, its purpose and patterns of development.

3. Definition of the concept of functions of the constitutional mechanism of state power

In jurisprudence, the term "functions" is used to refer to various spheres of legal organization and activity (for example, such as "functions of law", "functions of state", "functions of state power", "functions of constitution", "functions of parliament", "functions of the judiciary" etc.). Investigation of the functions of the constitutional mechanism of state power must be carried out through the prism of defining "functions of the state", "functions of state power" and "functions of law", because in many ways there are similarities in their definition, but there are nevertheless some differences.

In our opinion, the theory of functions of the constitutional mechanism of state power should proceed from the social purpose of the state, its tasks and goals, the legislation of Ukraine, and also the experience of practical activity of the state apparatus and the achievement of scientific opinion in the field of constitutional law and a number of theoretical and applied legal sciences.

In ancient times, two functions of the state were distinguished – provision of the common weal and exercising organized coercion. Specific historical circumstances of the development of society determined domination of the particular approach in the political thought (Chyrkin, 1994). It is natural, therefore, that at the stage of development of capitalism, when society had a distinct class structure, when antagonistic class contradictions existed in it, the doctrine of class struggle was formed as the basis of ideas about the state and law. Under such conditions, it was historically justified. But it is unlikely that this doctrine can be the basis for the study and construction of modern state and law, when new conditions in society emerged, in particular:

a) society is devoid of clearly defined classes, and a complex and branched social structure exists;

b) social contradictions are no longer antagonistic, and therefore organized by the state violence against large social groups loses its relevance;

c) the level of material prosperity provides an opportunity for the wider population to live a standard of living consistent with modern ideas about human dignity.

Thus, such studies require an analysis of historical conditions, trends and dynamics of their development. The modern period of human development is characterized by the fact that its purpose is comprehensive development of a man, provision of conditions for his life, rights and freedoms. Reality is imbued with ideas of humanism, the priority of universal values. All this is reflected in modern most developed countries – legal, democratic, socially oriented.

The state does not fully merge with society, does not dissolve in it, it is an organization that is in a way separated, institutionalized in the form of a mechanism of the state (state system), has its own laws of formation, functioning and development, special needs and interests. Therefore, the study of the characteristics of the state must be carried out both in terms of the unity of the state and society, and their separation. A methodological approach to such an analysis of the concept, essence and purpose of the state is the interpretation of the state as a particular form of organization of society; the form which is its internal organization, the structure of social relations, the means of ordering them and ensuring their smooth existence. And in the external aspect, it unites society in the form of territory, individuals and their associations, state officials and bodies, laws and other legal documents (Kovalenko, 1994).

In understanding the essence, attributes, functions of the state and the mechanism of state power in the legal literature, there are three paradigms: sociologism, normativism (etatism) and axiologism (ethicism).

In the modern domestic legal literature, there are no complete studies of the phenomenon of the mechanism of state power, and the question of the definition and classification of its functions is poorly understood. This state of affairs is conditioned by the formation of a model of Ukrainian constitutionalism and determines the particular relevance of this problem. The theory of the functions of the constitutional mechanism of state power should proceed from the social purpose of the state, its goals and tasks, legislation, as well as the experience of practical activity of the state apparatus and the achievement of scientific opinion in the field of constitutional law and a number of theoretical and applied legal sciences. Actually the system of functions of the state determines the necessity to study the functions of the constitutional mechanism of state power, but if the functions of the state are the directions of influence on public relations, then the functions of the constitutional mechanism of state power are namely the directions of the state functions within the competence of individual institutions that make up the structure of the constitutional mechanism of state power.

V. B. Averianov (2004), relying on the methodology of general systems theory, stated the polysemanticity of the concept of "function", which in Latin means "fulfillment". However, the researcher did not consider such a definition trivial, and we completely support this idea. The researcher considered function as a way of manifesting the activity of the system, stable active relationships in which changes of some objects lead to changes of others, which, according to the researcher, could mean "ability to activity and the activity itself, role, quality, meaning, task, dependence of one value on another, etc. ". V. B. Averianov (2004) thus distinguishes two characteristic dimensions of functions of state power – the potential and the real. A potential dimension of a function refers to the ability to implement a particular activity, whereas a real dimension refers to the direct implementation of that activity.

One of the representatives of social systemology Yu.P. Surmin (2003), who, in his research, uses the concept of function, draws attention to the polysemantic nature of the concept, understanding the function as a direction of the activity of the system and relates to it "firstly, the effect of the system and its response to the environment; secondly, the multiple states of the outputs of the system, therefore, explicit manifestations of its activity; thirdly, in a descriptive approach to a function, it acts as a property of a system that is expanding in dynamics; fourthly, as a process of achieving the goal by the system; fifthly, as concerted between the elements actions in terms of realization of the system as a whole; sixthly, as a trajectory of a system's motion, which can be described by mathematical dependence, by a formula that binds dependent and independent variables of the system".

In his dissertation O. V. Batanov (2011) also states the reasonableness to apply the analysis

of the state's functions in the context of system-functional approach, which should be supported in the aspect of the fact that conceptual analysis of constitutional and legal phenomena would be incomplete, static without clarifying the functional aspects of the state power. Systematic and structural analysis, while being universal in nature, does not cover all the general scientific methods of the cognition of the state power and the constitutional mechanism, which also require functional characterization, "since the immanent quality of any system along with its origin and development is its functioning".

Most scientists propose to understand the function of the state not only as a direction, but also as a "aspect of activity". Thus, M. V. Chornoholovkin (1970) combines in the concept of functions both the direction and the "aspect of activity" of the state to solve the historical problems that appear at the basic stages of development. According to M. V. Chornoholovkin (1970), the positive of this definition is that it delimits the ability and possibility of the state to certain activities, which is objectively necessary direction of activity and active implementation of this ability, in other words – parties in practical activity.

This approach, for all its methodological value, has given rise to a new flaw in the scientific understanding of the category of "function of the state". Trying to define the functions of the state through the concept of "ability for activity" is unlikely to be productive, although in this approach, as in all others, there is some rational grain. The fact is that some scientists, such as L. I. Zahainov (1968) and M. V. Chornoholovkin (1970), considered that it is possible to solve the problem of defining the concept of "function of the state" taking into account the dualistic character of its nature: on the one hand, it is the ability for certain activity (potential), and on the other hand it is the realization of this ability (realization of potential). This solution enables to combine in the concept of "function of the state" the potential moment and the real activity of the state. Such dualism, in their view, should be reflected in the definition of this concept. Formulating it, L.I. Zahainov (1968) and M.V. Chornoholovkin (1970) reflect both points, defining the function of the state both as a direction and as an aspect of the state activity.

According to current researchers, this approach raises some serious observations. On the one hand, it is not clear what the fundamental difference between the directions and aspects of the state's activity is, and on the other hand there is a dispute in the legal literature about which of these concepts makes it possible to differentiate the functions of the state from its activity. Thus, approving that the function of the state has a dual nature, M. V. Zhyhulenkov (2002) reflects this point in defining state functions in a different way, treating them as "the ability for activity implemented by the state".

According to V.V. Zatonskyi (2006) such decision does not solve the problem. After all, if we consider the function of its ability for activity (especially the one that is only being realized), the question naturally arises: what to do with the situations when we evaluate the state as weak, inefficient, unable to solve the essential tasks of society's development? Does such a state have no functions? It gives the impression that the ability to act is a qualitative characteristic of the state, but not its function. This may be a condition for effective implementation of the function, but not the function itself.

In modern domestic legal science we can find definitions of the functions of the state as the main (general) and permanent directions (types) of its activities, which are implemented in certain forms, by means of special methods, are of complex (synthesizing), subject-political and objective character, with clearly defined content and its object of influence, they reflect and specify the essence, tasks, social purpose and goals of the state (Bermicheva, 2002).

M. Yo. Baitin (1979) defines the functions of the state as "directions (and parties) of its activity, in which its class essence, official role, tasks, goals, regularities of development are expressed and specified". The author emphasized that this definition of the functions of the state has received the greatest recognition in science. In general, it does not contradict the generally accepted understanding of the functions of the state, although it contains a lot of new things. It draws attention to the understanding of the functions of the state as the directions of its activity, rather than the main directions, what is difficult to agree with. After all, certain phenomena, such as goals, tasks of the state, are also directions of

its activity, which are "expressed and specified" in its functions. So, as V. F. Pohorilko (1986) rightly considered that the functions of the state are the main directions in all its activities.

Another scientist, M. V. Novikov (2008), in defining the notion of the functions of law, notes that they characterize both the purpose of law and the direction of its influence on social relations; and at the same time considers that the function in its essence is the specification of tasks and the manifestation of the role of law in a certain period.

Given that the state is a social organization of the people living on its territory, united by state power, P. V. Onopenko (2005) also tries to give his own definition of the functions of the state. In his opinion, they are homogeneous, stable directions of the state's activity which purpose is to meet the needs objectively conditioned by the state and the essence of state power.

The scientist S. K. Mohil (2003) proceeds from the conceptual idea that the main tasks and goals of the state at different stages of its development are stipulated by the economic, political, social and other conditions of its existence and determine the main directions of its activity that is the functions of the state. The exercise of the state functions, as the researcher notes, occurs constantly, systematically, throughout the entire existence of the state. In doing so, the functions of the state emerge, are exercised and evolve according to the tasks that should be solved by the state in specific historical conditions.

Rather original is the position of V. M. Temchenko (2003), who believes that the functions of the state should be understood as the historically predetermined basic directions of its activity in ensuring the fundamental rights, freedoms, conditions of fulfillment of the duties of a person and citizen, in which the subject and content of the activity of the state are reflected and specified, its essence and social purpose are revealed.

A. M. Loshchykhin (2010) insists on the social nature of the state, he proposes to define the functions of the state as cardinal, permanent directions and types (aspects) of the state's activity, determined by the objective needs of social development in terms of its internal and external tasks, in which its essence and social purpose are expressed and specified.

L. A. Morozova's (2002) position is also worth paying attention to. She treats the functions of the state as "a special mechanism of state influence on social processes and relations that determine (the mechanism) the main directions and content of its activities in the management of society". She substantiates her position by the fact that, while performing certain functions in certain spheres of society, the state simultaneously, through reforms, various transformations, legal regulation of social relations influences the condition of social processes. Exercising specific functions can stabilize the conditions of social development, creatively influence it, and exacerbate its crisis (Morozova, 2002). We believe that to define the functions of the state as "a special mechanism of state influence on social processes and relations" is not quite correct; it is more peculiar to characterizing the functions of the constitutional mechanism of state power. But despite the debatable character of the inclusion to the concept of the functions of the state mechanism for their implementation, we note that such point of view exists in modern legal science.

N. Pelykh (2005) defines the functions of the state due to the activity of the state apparatus. She thinks them to be the main directions of its activity; they determine the work of the entire state apparatus and each of its separate bodies.

V. Ya. Liubashyts (2002) describes the functions of the state as the main directions of its activity in the management of society, including the mechanism of state influence on the development of social processes in which its essence and social purpose are expressed.

In contrast to the stated positions O. M. Loschykhin (2010) believes that the function of the state is neither the process, nor the activity, it is the basis, the nature of state activity. A strong effective state is rigidly functional, that is, its entire activity is the practical realization of its functions (only its own, state ones and not others). The scientist notes that "the state has never undertaken, does not undertake, cannot and should not undertake full duties for solving all the tasks facing the society and its political system at every specific historical moment, and, of course, be responsible for all functions performed by society and its political system. The state is one of the elements (subjects, constitu-

ents) of the political system of society, and its functions are an integral part of the functioning of the political system and society as a whole". Such a statement is highly controversial, since if the state cannot assume the tasks that society faces, then who has to fulfill them and what the state's mission is? But if to treat the functions as an ideal model of the system, then we can say that the state should seek to implement them fully.

Further research also requires a distinction between notions "function" and "functioning". Although the terms are closely related semantically (therefore often used as synonyms), these categories reflect different legal phenomena. The concept of "function" expresses the main directions of influence of a certain phenomenon, impact of the system on social relations, characterizing the social role, realization of certain tasks in accordance with social purpose.

The position expressed by N. M. Onishchenko (2002) can be completely concurred with. She states that "the system of functions is always connected with the system of tasks that are assigned to the investigated phenomenon, and the function is the evolutionary ability of the system to certain activity, whereas functioning is a sign of the activity itself, the process of realization of this ability in a particular environment".

If "function" is a complex concept in the sense that it reflects not only the present but also the future (purpose, task, target), then "functioning" reflects the action of law only in the context of modern conditions, the present time period, unless otherwise specified.

4. Conclusions

Summarizing the stated scientific and theoretical positions of scientists, we believe that in order to characterize the analyzed legal phenomenon, we should use an activity approach to understanding the functions. Thus, we propose to define the functions of the constitutional mechanism of state power as the directions of activity of subjects of the constitutional mechanism of state power within the competence determined in the Constitution and laws aimed at achieving the goals and tasks of the state. This particular approach is able to reflect the specifics of the functioning of the constitutional mechanism of state power as a whole.

Bibliography:

1. **Сетров, М. И.** (1972). Основы функциональной теории организации. Философский очерк. Ленинград: Наука, 164 с.
2. **Афанасьев, В. Г.** (1981). Общество: системность, познание и управление. Москва: Политиздат, 432 с.
3. **Оніщенко, Н. М.** (2002). Правова система: проблеми теорії: монографія. Київ: Ін-т держави і права ім. В.М. Корецького НАН України, 352 с.
4. **Виноградов, И. М.** (1985). Математическая энциклопедия: в 5 т. Москва: Сов. энцикл., 1977-1985. Т. 5., 623 с.
5. **Прохоров, Ю. В.** (1987). Математический энциклопедический словарь. Москва: Сов. энцикл., 847 с.
6. **Прохоров, А. М.** (1983). Физический энциклопедический словарь. Москва: Сов. энцикл., 928 с.
7. **Покровский, В. И.** (1996). Малая медицинская энциклопедия: в 6 т. Москва: Сов. энцикл., 1991-1996. Т. 6: Токсины – Ящур, 544 с.
8. **Платонов, К. К.** (1982). Система психологии и теория отражения. Москва: Наука, 309 с.
9. **Шинкарук, В. І.** (1986). Філософський словник. 2-ге вид., перероб. і доп. Київ: Гол. ред. УРЕ, 800 с.
10. **Лопатин, В. В., Лопатина, Л. Е.** (1990). Малый толковый словарь русского языка. Москва: Русс. яз., 704 с.
11. **Кубко, Е. Б.** (1997). Введение в теорию государственно-правовой организации социальных систем. Київ: ЮрінкомІнтер, 192 с.
12. **Бусел, В. Т.** (2001). Великий тлумачний словник української мови. Київ; Ірпінь: ВТФ «Перун», 1440 с.
13. **Скрипнюк, О. В.** (2005). Конституція України та її функції: проблеми теорії та практики реалізації (до 10-ї річниці прийняття Конституції України): монографія. Київ: Академія правових наук України, 168 с.
14. **Карташов, В. Н.** (2009). Функции правовой системы общества: определения и классификации. *Вестник Ярославского государственного университета им. П. Г. Демидова: Серия «Гуманитарные науки»,* 4, С. 29.
15. **Глебов, А. П.** (1999). Сущностно-субстанциональный и функциональный подход в исследовании государственно-правовых явлений. *Проблемы теории государства и права*: учеб. пособ. / под. ред. М. Н., Марченко. Москва: Проспект, 504 с.
16. **Гурней, Б.** (1969). Введение в науку управления / вступ. ст. М. И., Пискотин; пер. с франц. Г. С., Яковлев. Москва: Прогресс, 430с.
17. **Куценко, В. И.** (1972). Социальная задача как категория исторического материализма. Киев: Наук. думка, 371 с.
18. **Момджян, К. Х.** (1997). Введение в социальную философию. Учебноепособие. Москва: Высшаяшкола, 448 с.

19. **Наливайко, Л. Р.** (2009). Державний лад України: теоретико-правова модель: монографія. Харків : Право, 598 с.
20. **Чиркин, В. Е.** (1994). Элементы сравнительного государствоведения. Москва: РАН, Ин-т гос-ва и права, 151 с.
21. **Коваленко, А. И.** (1994). Теория государства и права (в вопросах и ответах) : учебник. Москва : [б.и.], 152 с.
22. **Авер'янов, В. Б.** (2004). Адміністративне право України. Академічний курс: підруч.: у 2-х т.: Т. 1: Загальна частина. Київ: Вид-во «Юрид. думка», 584 с.
23. **Сурмин, Ю. П.** (2003). Теория систем и системный анализ: учеб. пособ. Киев: МАУП, 368 с.
24. **Батанов, О. В.** (2011). Муніципальна влада в Україні: конституційно-правові проблеми організації та функціонування: дис. … докт. юрид. наук: 12.00.02. Київ, 478 с.
25. **Черноголовкин, Н. В.** (1970). Теория функций социалистического государства. Москва: Юрид. лит., 215 с.
26. **Загайнов, Л. И.** (1968). Экономические функции советского государства. Москва: Юрид. лит., 263 с.
27. **Черноголовкин, Н. В.** (1970). Теория функций социалистического государства. Москва: Юрид. лит., 215 с.
28. **Жигуленков, М. В.** (2002). К вопросу о классификации функций государства. *Право и политика*, 8, С. 16-20.
29. **Затонский, В. А.** (2006). Эффективная государственность: монография / под ред. А. В., Малько. Москва: Юристъ, 286 с.
30. **Бермічева, О. В.** (2002). Соціальна функція держави в Україні: автореф. дис. … канд. юрид. наук: 12.00.01. Харків, 18 с.
31. **Байтин, М. И.** (1979). Сущность и основные функции социалистического государства. Саратов: Изд-во Сарат. ун-та, 301 с.
32. **Погорелко, В. Ф.** (1986). Местные Советы в механизме осуществления функций советского общенародного государства: монография. Киев: Наукова думка, 234 с.
33. **Новиков, М. В.** (2008). Понятие функций права как отражение его сущности на различных этапах развития общества. *Вестник Владимирского юридического института*, 2, С. 183.
34. **Онопенко, П. В.** (2005). Правоохоронні функції української держави: зміст і реалізація: автореф. дис. … канд. юрид. наук: 12.00.01. Київ, 16 с.
35. **Могил, С. К.** (2003). Сучасна держава в екстремальних ситуаціях: нормативи, органи, функції: автореф. дис. … канд. юрид. наук: 12.00.01. Одеса, 19 с.
36. **Темченко, В. М.** (2003). Функції держави із забезпечення прав людини у ринковій економіці. *Право України*, 5, С. 47-51.
37. **Лощихін, О. М.** (2010). Теоретико-правові характеристики економічної функції сучасної держави: дис. … докт. юрид. наук: 12.00.01. Київ, 453 с.
38. **Морозова, Л. А.** (2002). Теория государства и права: учебник. Москва: Юристъ, 414 с.
39. **Морозова, Л. А.** (1993). Функции российского государства на современном этапе. *Государство и право*, 6, С. 98-108.
40. **Пелих, Н.** (2005). Функції української держави. *Підприємництво, господарство і право*, 1, С. 3-6.
41. **Любашиц, В. Я., Мордовцев, А. Ю., Тимошенко, И. В.** (2002). Теория государства и права: учеб. пос. Ростов н/Д: Изд. центр «МарТ», 512 с.
42. **Лощихін, О. М.** (2010). Теоретико-правові характеристики економічної функції сучасної держави: дис. … докт. юрид. наук: 12.00.01. Київ, 453 с.
43. **Оніщенко, Н. М.** (2002). Правова система:проблеми-теорії: монографія.Київ: Ін - т держави і права ім. В.М. Корецького НАН України, 352 с.

References

1. **Setrov, M. I.** (1972). Osnovy funktsional'noy teorii organizatsii. Filosofskiy ocherk [Fundamentals of a functional theory of organization. Philosophical essay]. Leningrad: Nauka. [in Russian].
2. **Afanas'yev, V. G.** (1981). Obshchestvo: sistemnost', poznaniye i upravleniye [Society: systematic, cognition and management]. Moscow: Politizdat. [in Russian].
3. **Onishchenko, N. M.** (2002). Pravova systema: problem teoriyi: monohrafiya [Legal system: problems of theory: monograph]. Kiev: In-t derzhavy i pravaim. V.M. Korets'koho NAN Ukrayiny. [in Ukrainian].
4. **Vinogradov, I. M.** (1985). Matematicheskay entsiklopediya: v 5 tomakh [Mathematical Encyclopedia: in 5 volumes]. Moscow: Sovetskaya entsiklopediya. Volume 5. [in Russian].
5. **Prokhorov, Yu. V.** (1987). Matematicheskiy entsiklopedicheskiy slovar' [Mathematical Encyclopedic Dictionary]. Moscow: Sovetskaya entsiklopediya. [in Russian].
6. **Prokhorov, A. M.** (1983). Fizicheskiy entsiklopedicheskiy slovar' [Physical Encyclopedic Dictionary]. Moscow: Sovetskaya entsiklopediya. [in Russian].
7. **Pokrovskiy, V. I.** (1996). Malaya meditsinskay aentsiklopediya: v 6 tomakh [Small medical encyclopedia: in 6 volumes]. Moscow: Sovetskaya entsiklopediya. [in Russian].
8. **Platonov, K. K.** (1982). Sistema psikhologii i teoriya otrazheniya [Psychology system and theory of reflection]. Moscow: Nauka. [in Russian].
9. **Shynkaruk, V. I.** (1986). Filosofs'kyy slovnyk. 2-he vyd., pereroblene i dopovnene [Philosophical Dictionary.

2nd ed., Revised and Supplemented]. Kiev: Holovna redaktsiya URE. [in Ukrainian].

10. **Lopatin, V. V., Lopatina, L. Ye.** (1990). Malyy tolkovyy slovar' russkogo yazyka [Small explanatory dictionary of the Russian language]. Moscow: Russkiy yazyk. [in Russian].
11. **Kubko, Ye. B.** (1997). Vvedeniye v teoriyu gosudarstvenno-pravovoy organizatsii sotsial'nykh system [Introduction to the theory of state-legal organization of social systems]. Kiev: YurínkomÍnter. [in Russian].
12. **Busel, V. T.** (2001). Velykyy tlumachnyy slovnyk ukrayins'koyi movy [Large Interpretative Dictionary of the Ukrainian Language]. Kiev, Irpin': VTFPerun, [in Ukrainian].
13. **Skrypniuk, O. V.** (2005). Konstytutsiya Ukrayiny ta yiyi funktsiyi: problem teoriyi ta praktyky realizatsiyi (do 10-yi richnytsi pryynyattya Konstytutsiyi Ukrayiny): monohrafiya [Constitution of Ukraine and its functions: problems of theory and practice of implementation (to the 10th anniversary of the adoption of the Constitution of Ukraine): monograph]. Kiev: Akademiya pravovykh nauk Ukrainy. [in Ukrainian].
14. **Kartashov, V. N.** (2009). Funktsii pravovoy sistemy obshchestva: opredeleniya i klassifikatsii [The functions of the legal system of society: definitions and classifications]. Vestnik Yaroslavskogo gosudarstvennogo universiteta imeni P. G. Demidova: Seriya Gumanitarnye nauki, 4, [in Russian].
15. **Glebov, A. P.** (1999). Sushchnostno-substantsional'nyy i funktsional'nyy podkhod v issledovanii gosudarstvenno-pravovykh yavleniy [Substantive and functional approach in the study of state-legal phenomena] / pod red. M. N. Marchenko. Moskva: Prospekt. [in Russian].
16. **Gurney, B.** (1969). Vvedeniye v naukuupravleniya [Introduction to the science of management]. Moscow: Progress. [in Russian].
17. **Kutsenko, V. I.** (1972). Sotsial'naya zadacha kak kategoriya istoricheskogo materializma [The social task as a category of historical materialism]. Kiev: Naukova dumka. [in Russian].
18. **Momdzhian, K. K.** (1997). Vvedeniye v sotsial'nuyu filosofiyu. Uchebnoye posobiye [Introduction to social philosophy. Tutorial]. Moscow: Vysshayashkola. [in Russian].
19. **Nalyvaiko, L. R.** (2009). Derzhavnyy lad Ukrayiny: teoretyko-pravova model': monohrafiya [State system of Ukraine: theoretical and legal model: monograph]. Kharkiv: Pravo. [in Ukrainian].
20. **Chirkin, V. Ye.** (1994). Elementy sravnitel'nogo gosudarstvovedeniya [Elements of comparative state science]. Moscow: RAN, Institut gosudarstva i prava. [in Russian].
21. **Kovalenko, A. I.** (1994). Teoriya gosudarstva i prava (v voprosakh i otvetakh): uchebnik [The theory of state and law (in questions and answers): a textbook]. Moscow (without a publishing house). [in Russian].
22. **Averianov, V. B.** (2004). Administratyvne pravo Ukrayiny. Akademichnyy kurs: pidruch.: u 2-kh tomakh: Tom 1: Zahal'na chastyna [Administrative law of Ukraine. Academic course: textbook: in 2 volumes: Volume 1]. Kiev: Yurydychna dumka. [in Ukrainian].
23. **Surmin, Yu. P.** (2003). Teoriya sistem i sistemnyy analiz: uchebnoye posobiye [Theory of systems and systems analysis: a training manual]. Kiev: MAUP. [in Russian].
24. **Batanov, O. V.** (2011). Munitsypal'na vlada v Ukrayini: konstytutsiyno-pravovi problem orhanizatsiyi ta funktsionuvannya [Municipal Government in Ukraine: Constitutional and Legal Problems of Organization and Functioning]. Disertatsiya doktora yurydychnykh nauk: 12.00.02 [Dr. Sc. thesis]. Kiev. [in Ukrainian].
25. **Chernogolovkin, N. V.** (1970). Teoriya funktsiy sotsialisticheskogo gosudarstva [The theory of the functions of a socialist state]. Moscow: Yuridicheskaya literatura. [in Russian].
26. **Zagaynov, L. I.** (1968). Ekonomicheskiye funktsii sovetskogo gosudarstva [The economic functions of the Soviet state]. Moscow: Yuridicheskaya literatura. [in Russian].
27. **Chernogolovkin, N. V.** (1970). Teoriya funktsiy sotsialisticheskogo gosudarstva [The theory of the functions of a socialist state]. Moscow: Yuridicheskaya literatura. [in Russian].
28. **Zhihulenkov, M. V.** (2002). K voprosu o klassifikatsii funktsiy gosudarstva [On the classification of state functions]. Pravo i polityka, 8, pp. 16-20. [in Ukrainian].
29. **Zatonskiy, V. A.** (2006). Effektivnaya gosudarstvennost': monografiya [Effective Statehood: monograph]. Moscow: Yurist. [in Russian].
30. **Bermicheva, O. V.** (2002). Sotsial'na funktsiya derzhavy v Ukrayini [The social function of the state in Ukraine]. Avtoreferat disertatsiyi kandidata yurydychnykh nauk: 12.00.01 [Ph. D. thesis]. Kharkiv. [in Ukrainian].
31. **Baytin, M. I.** (1979). Sushchnost' i osnovnyye funktsii sotsialisticheskogo gosudarstva [The essence and basic functions of a socialist state]. Saratov: Izdatel'stvo Saratovskogo universitetata. [in Russian].
32. **Pogorelko, V. F.** (1986). Mestnyye Sovety v mekhanizme osushchestvleniya funktsiy sovetskogo obshchenarodnogo gosudarstva: monografiya [Local Councils in the mechanism for the implementation of the functions of the Soviet nation-wide state: monograph]. Kiev: Naukova dumka. [in Russian].

33. **Novikov, M. V.** (2008). Ponyatiye funktsiy prava kak otrazheniye yego sushchnosti na razlichnykh etapakh razvitiya obshchestva [The concept of the functions of law as a reflection of its essence at various stages of development of society]. Vestnik Vladimirskogo yuridicheskogo instituta, 2, [in Russian].

34. **Onopenko, P. V.** (2005). Pravookhoronni funktsiyi ukrayins'koyi derzhavy: zmist i realizatsiya [Law enforcement functions of the Ukrainian state: content and implementation]. Avtoreferat disertatsiyi kandidata yurydychnykh nauk: 12.00.01 [PhD thesis]. Kiev. [in Ukrainian].

35. **Mohyl, S. K.** (2003). Suchasna derzhava v ekstremal'nykh sytuatsiyakh: normatyvy, orhany, funktsiyi [The modern state in extreme situations: standards, bodies, functions]. Avtoreferat disertatsiyi kandidata yurydychnykh nauk: 12.00.01 [PhD thesis]. Odessa. [in Ukrainian].

36. **Temchenko, V. M.** (2003). Funktsiyi derzhavy iz zabezpechennya prav liudyny u rynkovii ekonomitsi [The functions of the state to ensure human rights in a market economy]. Pravo Ukraiiny, 5, pp. 47-51. [in Ukrainian].

37. **Loshchykhin, O. M.** (2010). Teoretyko-pravovi kharakterystyky ekonomichnoyi funktsiyi suchasnoyi derzhavy [Theoretical and legal characteristics of the economic function of the modern state. Disertatsiya doktora yurydychnykh nauk: 12.00.01 [Dr. Sc. thesis]. Kiev. [in Ukrainian].

38. **Morozova, L. A.** (2002). Teoriya gosudarstva I prava: uchebnik [Theory of state and law: a text book]. Moscow: Yurist. [in Russian].

39. **Morozova, L. A.** (1993). Funktsii rossiyskogo gosudarstva na sovremennom etape [The functions of the Russian state at the present stage]. Gosudarstvo i pravo, 6, pp. 98-108. [in Russian].

40. **Pelykh, N.** (2005). Funktsiyi ukrayins'koyi derzhavy [Functions of the Ukrainian state]. Pidpryyemnytstvo, hospodarstvo i pravo, 1, pp. 3-6. [in Ukrainian].

41. **Lyubashits, V. Ya., Mordovtsev, A. Yu., Timoshenko, I. V.** (2002). Teoriya gosudarstva i prava: uchebnoye posobiye [Theory of state and law: a training manual]. Rostov-on-Don: Izdatel'skiy tsentr «MarT» [in Russian].

42. **Loshchykhin, O. M.** (2010). Teoretyko-pravovi kharakterystyky ekonomichnoyi funktsiyi suchasnoyi derzhavy [Theoretical and legal characteristics of the economic function of the modern state]. Disertatsiya doktora yurydychnykh nauk: 12.00.01 [Dr. Sc. thesis]. Kiev. 453 s. [in Ukrainian].

43. **Onishchenko, N. M.** (2002). Pravova systema: problem teorii: monohrafiya [Legal system: problems of theory: monograph]. Kiev: Instytut derzhavy i prava imeni V. M. Korets'koho NAN Ukraiiny. [in Ukrainian].

ЗАГАЛЬНОНАУКОВІ ПІДХОДИ ДО ВИЗНАЧЕННЯ ФУНКЦІЙ КОНСТИТУЦІЙНОГО МЕХАНІЗМУ ДЕРЖАВНОЇ ВЛАДИ

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Анотація

Метою *даної роботи є визначення поняття функцій конституційного механізму державної влади через дослідження доктринальних позицій функції у різних галузях суспільних наук.*

Методологію *дослідження функцій конституційного механізму державної влади складають методи пізнання, виявлені та розроблені філософією, історією, соціологією, теорією права і держави, галузевими юридичними науками та апробовані юридичною практикою. Так, роль історичного методу у дослідженні функцій конституційного механізму державної влади, окрім з'ясування природи виникнення і розвитку, полягає у забезпеченні систематичного вивчення еволюції даної категорії. Семантичний метод було застосовано для з'ясування змісту терміну «функція», її наукового та практичного значення, можливості застосування в конституційному праві для позначення таких правових категорій як «конституційний механізм державної влади».*

Метод порівняльного аналізу застосовувався для розкриття загального в таких поняттях як «функції», «цілі» та «завдання».

Результати *дослідження показують, що функцією є своєрідний «взірець», «еталон», «ідеальна модель» роботи системи, зокрема конституційного механізму державної влади, а отже, її необхідно, з одного боку, відрізняти від цілей і завдань, які постають перед системою, а з іншого – від реальної, фактичної діяльності її інститутів (компетенції). При визначенні функцій конституційного механізму державної влади слід виходити з того, що, по-перше, функції – це напрями впливу певного соціально значущого явища чи обставини на певні правовідносини, по-друге, функції – це діяльність окремих суб'єктів конституційного механізму державної влади в межах повноважень, визначених у Конституції та законах; по-третє, функції відображають сутність явища, його призначення та закономірності розвитку. Теорія функцій конституційного механізму державної влади має виходити з соціального призначення держави, її завдань та цілей, законодавства України, а також враховувати досвід практичної діяльності державного апарату та досягнення наукової думки у галузі конституційного права та низки теоретичних та прикладних юридичних наук. Саме система функцій держави детермінує необхідність дослідження функцій конституційного механізму державної влади, але якщо функції держави є напрямами впливу на суспільні відносини, то функції конституційного механізму державної влади є фактично напрямами реалізації функцій держави в межах компетенції окремих інститутів, що складають структуру конституційного механізму державної влади.*

На підставі даного дослідження, автор доходить до **висновків***, що функції конституційного механізму державної влади визначати як напрями діяльності суб'єктів конституційного механізму державної влади в межах компетенції визначеної в Конституції та законах, що спрямовані на досягнення цілей і завдань держави.*

Ключові слова: *функція; механізм державної влади; функції держави; цілі; завдання; діяльність держави.*

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