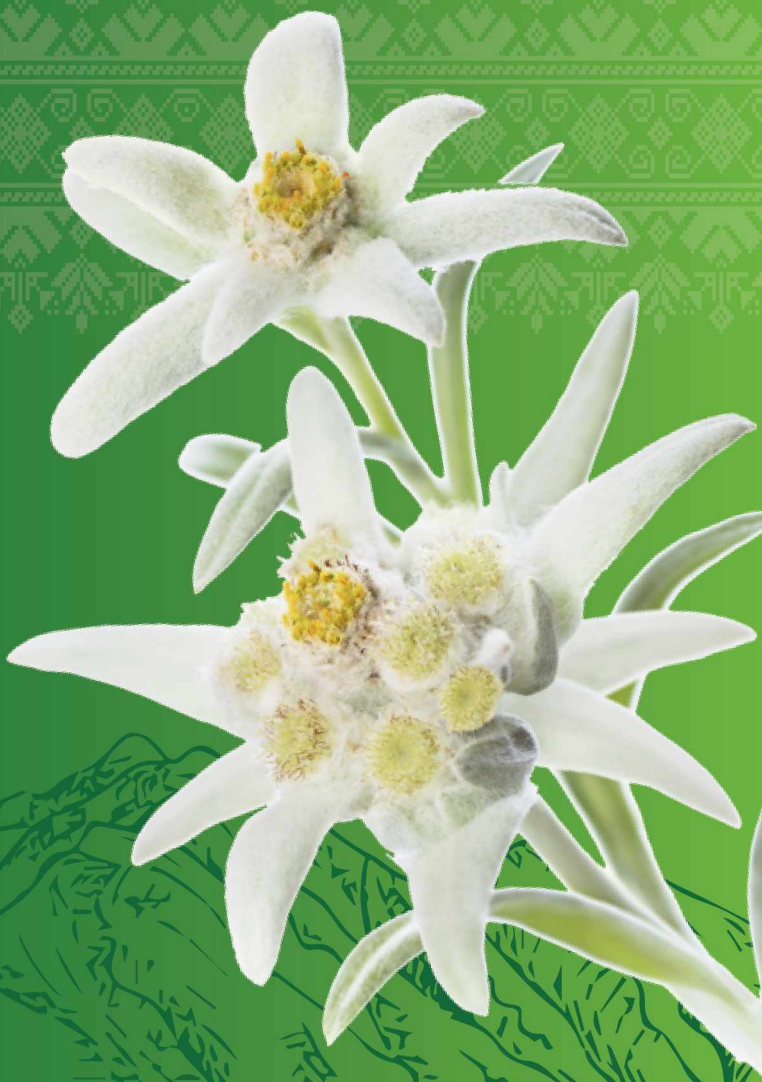
ISSN: 2663-5399 (PRINT)
ISSN: 2663-5402 (ONLINE)

КОНСТИТУЦІЙНО-ПРАВОВІ АКАДЕМІЧНІ СТУДІЇ



№ 2 2020 р.

МІНІСТЕРСТВО ОСВІТИ І НАУКИ УКРАЇНИ
ДЕРЖАВНИЙ ВИЩИЙ НАВЧАЛЬНИЙ ЗАКЛАД
«УЖГОРОДСЬКИЙ НАЦІОНАЛЬНИЙ УНІВЕРСИТЕТ»
ЮРИДИЧНИЙ ФАКУЛЬТЕТ

ISSN 2663-5399 (Print)
ISSN 2663-5402 (Online)

КОНСТИТУЦІЙНО-ПРАВОВІ АКАДЕМІЧНІ СТУДІЇ

CONSTITUTIONAL AND LEGAL ACADEMIC STUDIES

Випуск 2 • Issue 2

Ужгород, 2020

Журнал «Конституційно-правові академічні студії» є фаховим виданням на підставі Наказу Міністерства освіти і науки України № 409 від 17.03.2020 р. (додаток 1) та внесений до Переліку наукових фахових видань України (категорія «Б») у галузі юридичних наук (081 – Право, 293 – Міжнародне право)

Журнал «Конституційно-правові академічні студії» включений до міжнародної наукометричної бази Index Copernicus International (Республіка Польща)

Журнал розрахований на науковців, практикуючих юристів, адвокатів, суддів, нотаріусів, прокурорів та інших правників, а також усіх, хто цікавиться науковими дослідженнями з актуальних проблем конституціоналізму, конституційного будівництва, розвитку конституційного права та процесу в Україні та зарубіжних країнах.

Рекомендовано до друку та поширення через мережу Internet
Вченою радою Державного вищого навчального закладу
«Ужгородський національний університет», протокол № 6 від 17.09.2020 року

Свідоцтво про державну реєстрацію друкованого засобу масової інформації
серія КВ № 21083-10883 Р, видане Державною реєстраційною службою України 24.11.2014 р.

Засновник: ДВНЗ «Ужгородський національний університет»
Видавець: ТОВ «РІК-У»

Офіційний сайт: http://konstlegalstudies.com.ua/

ISSN 2663-5399 (Print)
ISSN 2663-5402 (Online)

The journal «Constitutional and legal academic studies» is a professional publication under the Order of the Ministry of Education and Science of Ukraine № 409 on 17.03.2020 (Annex 1) and included in the List of scientific professional publications of Ukraine (category «B») in the field of legal sciences (081 – Law, 293 – International Law).

The collection is indexed in the international databases: Index Copernicus International (Republic of Poland)

The journal is meant for scholars, practicing lawyers, attorneys, judges, notaries, prosecutors and other lawyers, as well as anyone interested in research on current issues of constitutionalism, constitutional construction, development of constitutional law and process in Ukraine and abroad.

Recommended for printing and distribution via the Internet
by the Academic Council of the State Higher Educational Institution
«Uzhhorod National University» (order dd. September 17 2020, № 6)

Print media registration certificate: KV № 21083-10883 P dd. November 24 2014,
issued by the State Registration Service of Ukraine.

Founder: State Higher Educational Institution «Uzhhorod National University»
Publisher: RIK-U

ISSN 2663-5399 (Print)
ISSN 2663-5402 (Online)

ЗМІСТ

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SECTION 1

CURRENT ISSUES OF CONSTITUTIONAL AND LEGAL STATUS OF HUMAN AND CITIZEN

UDC 342.7 + 341

CONSTITUTIONALLY LEGAL MECHANISM FOR ENSURING RIGHTS AND FREEDOMS OF A HUMAN AND A CITIZEN: CONCEPTS AND DIRECTIONS TO ACT

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Summary

One of the indicators of the fulfillment of international obligations by the state in the field of human rights is the perfect definition of the mechanism for ensuring the rights and freedoms of a person and a citizen. The purpose of this article is to clarify the concepts and directions of the constitutional and legal mechanism for ensuring the rights and freedoms of a person and a citizen.

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.

The rights and freedoms of a person are complex. Structural elements of the human rights protection mechanism are the mechanism of legal influence in the field of human rights, the mechanism of legal regulation in the field of human rights, the legal framework of human rights, the system of human rights guarantees, and the system of human rights protection. Such legal phenomena as the mechanism of guaranteeing the fundamental rights and freedoms of citizens and the constitutional and legal mechanism of ensuring the fundamental rights and freedoms of citizens are not identical. Only the mechanism of guaranteeing the fundamental rights and freedoms of citizens contains both social and legal conditions and means that ensure the realization, protection and security of citizens' rights and freedoms.

The definition of the concept of constitutional and legal mechanism for ensuring the rights and freedoms of a person and a citizen has been clarified: this is the system of organizational and legal and legal means of influence, through which opportunities for the implementation of rights and freedoms of a person and a citizen are created, and in case of violation or threat of violation, their protection is exercised by the bodies which are not vested with jurisdiction and the protection of bodies vested with jurisdiction. The main activities of this mechanism are embodied into the forms of ensuring the constitutional rights and freedoms of a person and a citizen: ensuring the implementation, protection and security of these rights and freedoms.

Key words: the mechanism of legal influence in the field of human rights; the mechanism of legal regulation in the field of human rights; the legal framework of human rights; the system of human rights guarantees; the system of human rights protection.

1. Introduction

The preamble to the Constitution of Ukraine has been amended recently in its normative content: the irreversibility (inability to develop in a reverse way) of the European and Euro-Atlantic course of Ukraine has been fixed in it. The validity of democratic values and the rule of law creates a space in which only human rights are eventual and ultimate in modern world. The assertion and protection of human rights and freedoms is the main duty of the state (Part 2 of Article 3 of the Constitution of Ukraine). It is well-known that the fundamental right established by the Basic Law seems illusory unless effective Constitutional and Legal mechanism for its ensuring is applied (Buletsa, 2019; Deshko, 2018). In order of full implementation of the constitutionally determined rights and freedoms of a person and a citizen, the newly-established mechanism of their provision is to be necessarily introduced. As the researchers rightly point out, the state of human rights protection is an important indicator of the society's stability, and its democratic way of development (Buletsa, 2018; Deshko, 2014).

The questions of the constitutional and legal mechanism of ensuring the rights and freedoms of a person and a citizen were explored in scientific works by domestic and foreign scholars. At the same time, there is no unanimity among scientists about either defining its concept or direction of evolvement. At the same time, one of the indicators of the fulfillment of international obligations by the state in the field of human rights is the perfect definition of the mechanism for ensuring the rights and freedoms of a person and a citizen.

The purpose of this article is to clarify the concepts and directions of the constitutional and legal mechanism for ensuring the rights and freedoms of a person and a citizen.

2. The concepts of "mechanism", "provision of rights and freedoms for the person", "mechanism for ensuring rights and freedoms of the person"

M. Marchenko rightly states that "… in jurisdictional literature the word "mechanism" is used to refer to various general theoretical categories verbally in the following phrases: "mechanism of legal regulation", "mechanism of law-making", "mechanism for formation of lawful behavior", "general mechanism of action of law" (Alston, 2000). L. Tigunova emphasizes that "… any mechanism is a highly organized system. The system is the unity of the elements, which are in certain connections and relations between each other; they characterize the essence of the object, constitute the whole and relatively independent phenomenon from the outside" (Alston, 2000).

As the protection of constitutional rights and freedoms the well-known scientist M. Vitruk understands as the prevention of violations, and the scientist I. Rostovschikov, analyzing the problem of protection and ensure of human rights by law enforcement agencies, does not make a clear distinction between these concepts (Buletsa, 2018; Deshko, 2019). Other scholars like I. Amelchakov and S. Prudnikova define the term "provision" as the system of special measures of legal, political, economic, social and other kind that induce the subjects of law to exact and impartial implementation of legal regulations established by the state (Volynka, 2000). A. Oliynyk and V. Zayets regard provision of right as "… conditions stipulating the performance of rights; protection of the rights against their violations by anyone; the process of their realization and protection of rights from the actual violation; restoration of violated rights at all stages of the right-performing process" (Deshko, 2018). K. Volynka formulates the following authorial definition of the mechanism for ensuring the rights and freedoms of person as the set of interrelated and interacting legal preconditions, legal means and common national conditions, which create a complex of possibilities for the full realization of rights and freedoms, their protection against potential violations of rights, ensuring rights and freedoms that have been violated (Volynka, 2000). At the same time, structural elements are, first of all, the normative and legal prerequisites for ensuring the rights and freedoms of a person (legal status of a person); secondly, legal and regulatory means of ensuring rights and freedoms (legal guarantees); third, the general social conditions for the realization, protection and safe of the rights and freedoms of person (the actual social macro-environment for the protection of rights and freedoms). Thus, the constituents of the mechanism for securing the rights and freedoms of the person are the same guarantees of securing the rights and freedoms

of the person" (Volynka, 2000). A. Mordovtsev, L. Silantyev affirm that justice consciousness can be included into the constituent elements of the human rights protection mechanism (Mordovtsev, 1999). However, justice consciousness is a subjective part of the mechanism for legal regulation (together with the legal culture). It is a form of social consciousness that introduces a set of views, representations, experiences, feelings, and that characterize the attitude of society to a desired and/or valid right.

The rights and freedoms of a person and a citizen are complex. It seems erroneous to confine their provision solely to legal influence in the field of human rights, or to legal regulation or protection of human rights. Structural elements of the human rights protection mechanism are the mechanism of legal influence in the field of human rights, the mechanism of legal regulation in the field of human rights, the legal framework of human rights, the system of human rights guarantees, and the system of human rights protection.

3. Mechanism for guaranteeing fundamental rights and freedoms of citizens and constitutionally legal mechanism for securing fundamental rights and freedoms of citizens

O. Pushkina defines the protection of the constitutional rights and freedoms of a person and a citizen as "… the mechanism that is a system of means and factors which provide necessary conditions for respect for all fundamental human rights and freedoms; his task defines the protection, secure and restoration of violated rights, the formation of general and legal culture of the population" (Pushkina, 2006). According to the scientist's opinion, its constituent elements are the mechanism of realization, the mechanism of protection, the mechanism of security (Pushkina, 2006). Scientists like A. Kolodiy and A. Oliynyk emphasize on such legal components of the mechanism of realization of personal and citizen rights and duties through the legal norms and normative legal acts, individual legal documents, legal facts, legal relations, subjective rights, freedoms and duties, forms and methods of organizing the implementation of rights and duties (Gyrenko, 2001). V. Boniak notes that "… it follows from the Constitution of Ukraine (Article 92) that rights, freedoms, obligations, their guarantees are regulated by constitutional and other norms of laws. And by-laws can only establish the mechanism for the performance of individual rights, freedoms and obligations. It is known that, depending on the nature of the disposition of a legal provision, they distinguish between authorizing, prohibiting or binding" (Gyrenko, 2001). The scholar concludes that "… the mechanism of realization of the constitutional right of a person and a citizen… is characterized by: a) authorizing, binding and prohibiting legal norms, the leading role among which is precisely put onto empowered officials, enabling a person to exercise the right… without violating the rights and freedoms of other individuals and legal entities; b) the constitutional definition (Article 92) that the rights, freedoms of a person and a citizen, including the law under study, in particular, are determined exclusively by the laws of Ukraine; c) detailing of certain provisions in the by-laws, which establish the mechanism of realization of the constitutional right of a person and a citizen… and its guarantees within the limits of the Constitution and the Laws of Ukraine. Legal facts are important for the legal mechanism for the implementation… of law (specific circumstances of life, which are stipulated by the norms of law, which determine the origin, change and termination of legal relations). … As A. Kolodiy and A. Oliynyk point out, they are formulated in the hypothesis of a legal norm and, depending on the volitional criterion are divided into actions and events…. Misconduct on the constitutional right of a person and a citizen … are life circumstances that are contrary to the current norms of law … They are the basis for the protection and restoration of the violated right. … The next element of the legal mechanism for the realization of the constitutional right of a person and a citizen… is legal relations. They arise on the basis of the rules of law, where their participants are the bearers of subjective rights and legal obligations. Within the investigated mechanism the legal relations are characterized by specific subjects, objects, and content" (Gyrenko, 2001).

We may agree with V. Boniak sharing the opinion that "… legal forms of ensuring the constitutional right of a person and a citizen… should define law-making, law-establishing, law-en-

forcement, law-security, controlling-supervisory, law-interpreting ones" (Gyrenko, 2001).

E. Gorian rightly states that the mechanism of ensuring the fundamental rights and freedoms of citizens and the constitutional and legal mechanism of ensuring the fundamental rights and freedoms of citizens are different legal phenomena. The first contains all (both social and legal) conditions and means ensuring their realization, protection and secure of citizens' rights (Gorian, 2005).

Y. Todyka and O. Martseliak point out that the constitutional and legal mechanism for ensuring the fundamental rights and freedoms of Ukrainian citizens is considered as it is determined in the Constitution and laws of Ukraine, united by the system of fundamental rights and freedoms of Ukrainian citizens, their guarantees, as well as state authorities, local self-government and other institutions of the state and society, where their activity is aimed at the proper realization of the rights and freedoms of the citizens of Ukraine, and in necessary cases – to their protection and secure (Todyka, 1998).

In its turn, the constitutional and legal mechanism of ensuring the fundamental rights and freedoms of citizens consists of the elements guaranteed by the Constitution and the constitutional and legal laws of Ukraine. The Basic Law of Ukraine does not separate any constitutional, organic or ordinary laws, as it is done in the constitutions of other countries. However, this is the practice that generally accepted to use the term "constitutional law" to define normative legal act that contains the rules of constitutional law. Therefore, it is worth emphasizing the peculiarity of elements of the constitutional and legal mechanism for ensuring the rights and freedoms of citizens, which are determined in the Basic Law and the Constitutional Rights Laws of Ukraine. These include the institutions empowered in the field of ensuring the rights and freedoms of citizens, fundamental rights and freedoms, as well as the constitutional and legal guarantees of these rights and freedoms enshrined in the Constitution of Ukraine and other legislative acts of Ukraine (Volynka, 2000).

Some scholars include the legal status of a person, legal guarantees of rights and freedoms and general social conditions to constituent elements of this mechanism, which exist in not just simple unilateral relations, but their interconnections are common elements of the constitutional and legal mechanism for ensuring human rights, and they mutually affect each other (Glyshchenko, 1997). Thus, in fact, the scientist considers the system of interdependent social factors that mediate the translation of the requirements of legal rules and principles into legal behavior of subjects as the structural element of the constitutional and legal mechanism for ensuring human rights within social mechanism of law. At the same time, the social mechanism of law functioning is one of the three elements of the mechanism of law action (the legal mechanism of action of law (mechanism of legal regulation), the psychological mechanism of law functioning, the social mechanism of law functioning), but not the mechanism for ensuring the right.

O. Pushkina distinguishes the following two mechanisms for the protection of human rights like the national constitutional mechanism and the international one. Applying the concept of international human rights mechanism, the scientist implies a set of principles, rules, regulations and procedures that are established at the level of international law and adhered to by the countries in the process of their internal and external activities in the field of human rights, as well as the system of international institutions designed to facilitate the control of human rights, respect for human rights, their protection and secure. At the same time, the scientist emphasizes on the issue of the interaction of these mechanisms: a number of norms of international law in the field of human rights, as well as the system of institutions established on the intergovernmental level in the form of international authorities, commissions, organizations, etc. While such a formalized approach can be fruitfully applied to analyzing the substantive content of international human rights law, it does have a number of significant drawbacks when we examine specific mechanisms (especially when it comes to a constitutional mechanism) to ensure human rights, since the very existence of international norms and human rights standards do not mean that they are being implemented into national legal systems. If this does not happen, then we are witnessing the emergence of such a phenomenon as institutional gap between the mechanism of international security and protec-

tion of human rights and the corresponding national mechanism" (Pushkina, 2006). This situation was observed, for example, after Ukraine's accession to the Council of Europe.

5. Conclusions

Such legal phenomena as the mechanism of guaranteeing the fundamental rights and freedoms of citizens and the constitutional and legal mechanism of ensuring the fundamental rights and freedoms of citizens are not identical. Only the mechanism of guaranteeing the fundamental rights and freedoms of citizens contains both social and legal conditions and means that ensure the realization, protection and security of citizens' rights and freedoms.

6. Results

The definition of the concept of constitutional and legal mechanism for ensuring the rights and freedoms of a person and a citizen has been clarified: this is the system of organizational and legal and legal means of influence, through which opportunities for the implementation of rights and freedoms of a person and a citizen are created, and in case of violation or threat of violation, their protection is exercised by the bodies which are not vested with jurisdiction and the protection of bodies vested with jurisdiction. The main activities of this mechanism are embodied into the forms of ensuring the constitutional rights and freedoms of a person and a citizen: ensuring the implementation, protection and security of these rights and freedoms.

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КОНСТИТУЦІЙНО-ПРАВОВИЙ МЕХАНІЗМ ЗАБЕЗПЕЧЕННЯ ПРАВ І СВОБОД ЛЮДИНИ І ГРОМАДЯНИНА: ПОНЯТТЯ ТА НАПРЯМИ ДІЇ

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Анотація

Одним із показників виконання державою міжнародних зобов'язань у галузі прав людини є досконале визначення механізму забезпечення прав і свобод людини та громадянина. Метою даної статті є уточнення

поняття та напрямів дії конституційно-правового механізму забезпечення прав і свобод людини і громадянина. Методологічною основою цього дослідження є загальні та спеціальні методи наукового пізнання: формально-логічний метод, порівняльно-правовий, структурно-логічний, інші.

Акцентовано увагу на тому, що права і свободи людини і громадянина є складним явищем. Структурними елементами механізму забезпечення прав і свобод людини і громадянина є механізм правового впливу в сфері прав і свобод людини і громадянина, механізм правового регулювання у сфері прав і свобод людини і громадянина, нормативно-правова основа прав і свобод людини і громадянина, система гарантій прав і свобод людини і громадянина, система захисту прав і свобод людини і громадянина, які у сукупності характеризують його як цілісний.

Додатково аргументовано, що не є тотожніми такі правові явища як механізм забезпечення основних прав і свобод людини і громадянина та конституційно-правовий механізм забезпечення основних прав і свобод людини і громадянина. Лише механізм забезпечення основних прав і свобод людини і громадянина вміщує ті елементи, які забезпечують реалізацію, охорону та захист прав і свобод людини і громадянина.

Уточнено визначення поняття конституційно-правового механізму забезпечення прав і свобод людини і громадянина: це система організаційно-правових і нормативно-правових засобів впливу, за допомогою яких державою створюються можливості для реалізації прав і свобод людини і громадянина, а в разі порушення чи загрози порушення здійснюється їх охорона органами, які не наділені юрисдикційними повноваженнями, та захист органам, які наділені юрисдикційними повноваженнями. Забезпечення реалізації, забезпечення охорони, забезпечення захисту цих прав і свобод є формами забезпечення конституційних прав і свобод людини і громадянина, в яких втілюються основні напрями дії цього механізму.

Ключові слова: *механізм правового впливу в сфері прав і свобод людини і громадянина; механізм правового регулювання у сфері прав і свобод людини і громадянина; нормативно-правова основа прав і свобод людини і громадянина; система гарантій прав і свобод людини і громадянина; система захисту прав і свобод людини і громадянина.*

UDC 347.13 (477): 614.2

PLACE OF INFORMATION TECHNOLOGY IN THE PERFORMANCE OF MEDICAL ACTIVITIES

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Summary

The state's policy is to integrate information systems into a single information space within the electronic health care system. The state plans and coordinates information systems that are implemented at the expense of the state or local budgets in order to rationalize the use of available resources and to avoid duplication of information systems functionality. With regard to information systems implemented through private funds, the function of the state is to build infrastructure (standardization, certification, market surveillance) for quality management in the market. The state provides single entry of information and its further processing in many information systems, storage of basic patient information within the central component of the WHO, and expanded information (eg data in clinical registers) in decentralized specialized information systems.

The purpose of this study is to study the place of information technology in the implementation of medical activities. I would point out that medical activity is a set of actions of medical and pharmaceutical workers in providing medical care or service to a patient within the legal (subject to obtaining a license) and ethical (oath of Hippocrates) norms, ie compliance with the stages of treatment in accordance with the established standards of the Ministry of Health. We used in research scientific methods to analise in an objective and systematic way the information technology in the performance of medical activities, describe it with empirical. formal-logical, comparative-legal methods.

It should be noted that e-Health is an electronic system that helps patients to receive and to doctors to provide quality medical services. All medical records throughout 2019 will be transmitted electronically. The main purpose of implementing an electronic healthcare system is to minimize fraud and corruption. In the future, e-Health will enable everyone to get their medical information quickly and doctors will be able to diagnose correctly with a holistic picture of the patient's health. The aim of the MoH is to launch a full-fledged eHealth by 2020, which would not only reflect the relationship between the hospital and the state but also be a register of medical records of all Ukrainians.

Results. Thus, with the advancement of information technology, the growing share of medical research that relies on mathematical (computer) modelling has become commonplace in clinical practice, making it clear that IT capabilities are becoming a major contributor to medicine and health care. To date, many serious studies and projects are being implemented in the world to implement IT in the medical field. Due to medical reform, continuous computerization necessitated the need for medical staff to have computer skills. Today, in the medical field, services such as electronic medical record, electronic prescription, electronic referral, etc. are included in daily life. Electronic automated preparation of appointments, prescriptions, statements, hospital letters and other standardized documents

for patients. In particular, there are automated databases of medical, pharmaceutical and scientific-pedagogical staff of the Ministry of Health of Ukraine.

Conclusion. The impact of IT on health care plays an extremely important role, as with the implementation of health care reform in Ukraine there is complete computerization of all branches of the medical field.

Key words: healthcare; patient; doctor; medicine; reforms; computer.

1. Introduction

Article 49 of the Constitution of Ukraine provides that everyone has the right to health care, medical assistance and health insurance. Health care is provided by state funding for relevant socio-economic, health and wellness programs. It should be emphasized that all medical activity is carried out in the field of medicine, that is, as noted by S.P. Botkin is a field of human knowledge that studies the person and nature that surrounds them, in their interaction to prevent disease, cure or alleviate the patient's condition.

However, it should be borne in mind that if F. Bacon set only three tasks for medicine: maintaining health, treating diseases, prolonging life, then in the modern literature indicates the five main directions of development of medicine: maintaining and maintaining the state of health, correction of normal and pathological life, regulation of life processes, management of human life and to some extent its design. Thus, a tendency is formed when the content of medical activity goes beyond the attainment of the highest level of physical and mental health (Solov'yev, 1999).

Medicine is a system of scientific knowledge aimed at disease prevention, treatment of patients, preservation and promotion of human health, life extension. The state and level of development of medicine the content and methods of medical activity depend on the material conditions of life, the general level of culture (Vasilenko, 1967). Therefore, medicine is a system of scientific knowledge and practical activity aimed at promoting and preserving health, extending human life, preventing and treating disease (Buletsa, 2015). The purpose of this study is to study the place of information technology in health care and to perform comparative analysis with individual countries.

It should be noted that medical activity can be governed by both private and public law. In particular, public law rules regulate organizational issues of medical activity, vertical relations with the participation of public health authorities, and state involvement in these relations also plays a lasting role, such as the procedure for licensing economic and legal entities in the field of health care or issues of epidemics, epizootics and more. It is noted that social relations in the private sphere (civil relations) are primary in relation to legal relations, as they may arise on the basis of the agreement of the parties, due to the actual actions of the participants in such relations, etc. The existence or absence of acts of civil law is not affected by the existence of civil relations (Kharytonov and Kharytonova, 2008).

Definition of the term medical activity in the legislation is regulated by the Fundamentals of the legislation of Ukraine on health care, other acts of the legislation on health care, normative-legal acts of the Ministry of Health of Ukraine (hereinafter – the Ministry of Health of Ukraine) activity on providing citizens with preventive care (Order of the Ministry of Health of Ukraine «On granting special permission for medical activity in the field of folk and non-traditional medicine», 2000). A necessary element of medical activity is admission to the exercise of medical activity. It is the object of the permit system. Such a right is granted by the state on the basis of a permit (license) and legal relations of public law arise.

Thus, medical activity is the set of actions of medical and pharmaceutical workers to provide medical care or services to a patient within the legal (subject to licensing) and ethical (Hippocratic oath) norms, ie compliance with the stages of treatment in accordance with the established standards of the Ministry of Health. paid or free (Buletsa, 2015).

I note that modern information technology is increasingly used in medicine in connection with the implementation of medical reform. The level of informatization of the activity of public health institutions in Ukraine is increasing. Current trends in the global healthcare market are closely linked to the emerging capabilities of information technology. Today, there is an increasing number of healthcare facilities or medical centres that use medical information systems, electronic medical records, and generally electronic document circulation.

E-health is a term that, in the broadest sense, means the use of computer information technology for the purpose of improving the level of health, including the way in which health processes are thought and organized and related fields, including science, education, research. E-health is an industry and environment that includes not only information and telecommunication systems but also components such as governance, regulatory framework, standards and compliance control, human resources, infrastructure, strategy and investment model. It should be noted that e-Health is an electronic system that helps patients to receive and to doctors to provide quality medical services. e-Health enables everyone to get their medical information quickly, and for doctors to diagnose correctly with a holistic picture of the patient's health. The purpose of the MoH is to launch a full-fledged e-Health by the end of 2020, which would not only reflect the relationship between the hospital and the state but also be a register of medical records of all Ukrainians (Kolisnyk, 2017). eZdorovya is the main developer of eHealth technical core in Ukraine. eHealth is an electronic health care system that enables the exchange of health information and the implementation of the public health guarantee program. The eHealth system consists of: Central database – CBD (administrator of SE «EHealth») and electronic medical information systems – MIS (systems that allow automating the work of medical facilities with CBD). If in 2018, doctors signed declarations with patients through eHalth and patients signed up for admission, then in 2019, doctors would issue electronic hospital letters. The Cabinet of Ministers Resolution No. 328 (Resolution of the Cabinet of Ministers of Ukraine «Some Issues of Organizing the Electronic Register of Disability Letters and Information Provision from it», 2019) of 17.04.2019 approved the Procedure for organizing the Electronic Register of Disability Sheets and provision of information. The purpose of the Registry is to ensure the accumulation, storage and use of information on issued, extended and accounted inoperative sheets, as well as to verify the validity of the issuance and continuation of incapacity sheets. The Register will be formed and maintained by the Pension Fund of Ukraine – the holder of the Register's data. MOH, NHS, PFU, FSF are subjects of information exchange. Information interaction will be conducted electronically in compliance with the requirements of the Laws of Ukraine (Law of Ukraine «On electronic trust services», 2017; «On the protection of information in information and telecommunication systems», 1994; «On protection of personal data», 2010). In the Registry, information about the insured person can be found by name, patronymic (if any) and date of birth of the insured person, his or her taxpayer's registration card registration number according to the principle of complete coincidence of all specified search identifiers and/or each of the specified search identifiers. Some of the information in the Register will be freely available. You will not need to be authenticated or authenticated to receive it. This is information about: number of the incapacity leaflet, date of its opening, continuation, closure, information on checking the validity of its issuance (if held); number, reasons, average duration of disability registered registers per month, quarter, year, by region, health care institutions, persons who have temporary disability; the number of unjustifiably issued and prolonged sheets of disability per month, quarter, year, by region, health care institutions, persons who have temporary disability; number of days of temporary disability per month, quarter, year, by region, insurer; amounts of allowances paid on the basis of disability sheets, per month, quarter, year, by insurers. This information will be impersonated. In this case, the employer will immediately receive information about the employee who went to the hospital. Instead of paper cards, there will be electronic cards to which doctors will enter all information about human health and the intended treatment. Also available in the electronic format will be prescriptions for the program «Available medicines». If a doctor prescribes a drug that is

part of a state program, it will be given free of charge by electronic prescription at the pharmacy. Doctors will use electronic referrals to refer patients for additional examinations and to narrow specialists.

Thus, eHealth's electronic healthcare system involves working with patients: creating electronic medical records, recording a doctor's appointment, seeking free medical supplies at health facilities.

Health information systems. In Ukraine, there are, will be, improved and created various health information systems for different categories of users, which can be implemented in the state, communal or private ownership, have a centralized or decentralized structure. An example of such information systems is:

- information systems in health care facilities (dispensaries, hospitals, diagnostic centres, drugstores, etc.), which include – medical, hospital information systems, laboratory information systems, radiological, pharmacy information systems, teleconferencing systems, telemonitoring, planning systems and managing the resources of healthcare organizations;
- patient systems that provide access and management of medical data (patients' electronic offices, web portals, mobile applications, systems that carry medical data from wearables, etc.);
- emergency information systems;
- information systems for logistics management, inventory management of medicines and medical devices;
- information systems in the field of public health and epidemiological surveillance;
- registries and information systems in the field of transplantation;
- registries and systems related to the issuance of disability emails and certificates;
- clinical and population registers containing information on individual nosologies (for example, the National Cancer Registry, the register of patients requiring insulin therapy, etc.) (The concept of health informatization of Ukraine).

It is worth noting that the legal relations in this area are regulated by the Fundamentals of the legislation of Ukraine on health care, the Laws of Ukraine «On State Financial Guarantees of Medical Services for the Population» and «On Electronic Trust Services», by Decree of the Cabinet of Ministers of Ukraine dated 27.12.2017 No. 1101 «On the establishment of the National Health Service of Ukraine» and from 25.04.2018 №411 «Some Issues of the Electronic Health Care System», other normative legal acts.

It is the Decree of the Cabinet of Ministers of Ukraine dated April 25, 2018 No. 411 that approved the Procedure of functioning of the electronic health care system, which details the mechanism of functioning of the electronic health care system and its components, registration of users, entry and exchange of information and documents in electronic the health care system in accordance with the Law of Ukraine «On State Financial Guarantees of Public Health Services».

The functionality of the electronic healthcare system is very wide. In particular, patients will be able to register users in a central database, including the use of electronic identification; delineating the rights of users to make and view information in the central database, to make changes and additions to it; the ability to create, file, view and exchange medical selection declarations that provide primary care, prescriptions, referrals, medical records, other information and documents via electronic cabinets in accordance with user access rights; the possibility of concluding, amending and terminating contracts on public health services and contracts on reimbursement under the program of medical guarantees; creation and submission of electronic reports, primary, settlement and other contract documents through the central database, etc.

The electronic health system assumes the existence of a central database within which the following registers are maintained:

- Patient registry containing information about individuals who are entitled to guarantees under the Law of Ukraine «On State Financial Guarantees of Public Health Services»;
- Register of declarations of choice of the doctor providing primary care;
- Register of health business entities containing information on health care institutions, entrepreneurs licensed for medical practice, and laboratories that

have concluded or intend to apply for health care contracting under a medical guarantee program or involving medical providers in the provision of medical services;
- A register of medical specialists containing information on persons who have received education in the field of health care;
- A register of health workers containing information on persons in employment with healthcare entities;
- Register of contracts on public health services, containing information on contracts on public health services under the program of medical guarantees, concluded with the NHSU;
- Register of reimbursement agreements containing information on reimbursement contracts under the medical guarantee program concluded with the NAAS.

Also, the electronic health system provides for compatibility and electronic interaction of the central database with other information systems and state information resources:

- Unified State Demographic Register;
- Unified State Register of Legal Entities, Individual Entrepreneurs and Public Formations;
- the State Register of Civil Status Acts;
- Unified state electronic database on education;
- the Unified State Register of the Ministry of Internal Affairs;
- other resources specified in the legal acts regulating the interaction of state electronic information resources (Dukhovna, 2019).

Specialists enter medical data, telemetry, and related information directly from medical equipment into computer databases during a real-time examination to further process, analyze, store, and maintain their access history. Electronic automated preparation of appointments, prescriptions, statements, hospital letters and other standardized documents for patients. In particular, there are automated databases of medical, pharmaceutical and scientific-pedagogical staff of the Ministry of Health of Ukraine (Order of the Ministry of Health of Ukraine «About formation of the automated database of medical, pharmaceutical and scientific-pedagogical workers of the sphere of management of the Ministry of Health of Ukraine», 2006).

The policy of the state is to integrate these information systems into a single information space within the framework of the WHO. The state plans and coordinates information systems that are implemented at the expense of the state or local budgets in order to rationalize the use of available resources and to avoid duplication of information systems functionality. With regard to information systems implemented through private funds, the function of the state is to build infrastructure (standardization, certification, market surveillance) for quality management in the market.

In Ukraine, the electronic health care system (hereinafter referred to as the ESOP) is a formulation of which is provided in the Law of Ukraine «On State Financial Guarantees of Public Health Services» (Law of Ukraine «On State Financial Guarantees of Public Health Services», 2017): an information and telecommunication system that provides automation of accounting of medical services and management of medical information through the creation, placement, publication and exchange of information, data and documents in electronic form, comprising a central database and electronic medical information systems, between which there is a matic exchange of information, data and documents through an open API. The electronic health care system includes a central database and electronic medical information systems, which provide for the automatic exchange of information, data and documents through an open software interface (API). The National Health Service of Ukraine (hereinafter referred to as NSAU) provides the functioning of the electronic health care system and the website containing information on the electronic health care system (hereinafter – the system website). The owner of the central database, including proprietary rights to the central database software, is the state represented by the NSA. The Ministry of Health is the manager of the Registry of Medical Specialists and the Register of Health Entities. The registry of other registers and the holder of their information and other information in the central database is the NSAU, unless otherwise specified by law.

The central database is managed by the state-owned eHealth Enterprise (Resolution of the Cabinet of Ministers of Ukraine «Some Issues of the Electronic Healthcare System», 2018).

Advances in information, medical technology, clinical practice will inevitably lead to the development of new components and services, so the technical architecture of the POPs will not be static. Given the complexity of e-Health implementation and the speed of technological advancement, an important requirement for an architecture is its modularity and ability to flexibly respond to changing needs in the development of the EHP, and to scale it rapidly. Increasing cyber threats in the world, possible attacks on objects of information infrastructure of Ukraine, require special attention to the security, integrity and availability of data in the WHO.

When designing the structure, the POPs should take into account the autonomy of information systems in healthcare facilities, giving priority to continuous ways of exchanging data between systems. Electronic medical information systems may have the functionality of separate elements of the central component (registers, databases), to improve the stability of the system, provide access to data in the regions in conditions of insufficient speed of communication channels, reducing the risks of a single point of failure in the ESOP.

The principle of technological neutrality and independence from decision-makers should be taken into account in the development of the POPs. Existing communication channels (including wireless carriers) must be used to communicate. The exchange of data between ESOPs and other state information resources should be carried out mainly through the system of interaction of public electronic resources of Trembita, as well as other technical ways of interaction (Notification to the draft decree of the Cabinet of Ministers of Ukraine «On approval of the Health Informatization Concept of Ukraine», 2019).

The current level of development of specialized software for the work of physicians meets the highest standards of data security, located on the World Wide Web, which allows for on-line access to databases. Developments for patients were equally significant. Yes, today subscribers to speciality medical systems are able to get the help of a qualified health care practitioner practically 24 hours a day without leaving their homes. Since 2013, applications have been launched to ensure the seamless exchange of information between patients and physicians. The remote control technology provided to patients goes from experimentation and testing to implementation. This will allow hospitals to provide care by reducing the cost of rehospitalization, which often occurs in chronic conditions. The question of using popular mobile devices and mobile diagnostic devices is still relevant. Recent studies have shown that 91% of doctors are interested in using electronic medical records. In 2013, patients were given the opportunity to download vital monitoring applications such as heart rate and access to healthcare information applications on smartphones and tablets. In the near future, doctors and patients are considering using diagnostic devices on smartphones and tablets. Doctors will be able to provide assistance using their mobile devices, viewing cardio or encephalograms of the patient, laboratory test results, accepting documents, ordering the necessary medicines by e-prescription. The possibility of developing a number of medical programs for unhindered access to medical electronic cards is being actively considered. Mobile devices will be able to access data previously available only in clinics. Based on the results of research conducted by medical organizations, the following positive trends in the implementation of information technology in health care have been identified: improved treatment attitudes (the proportion of patients who actively use home self-control has increased); reducing the frequency of hospitalization of patients; reduction of mortality among patients compared to routine medical care technology; improving the quality of life, psychological and social status of patients; improving the level of satisfaction with the quality of medical services; raising patients' awareness of their disease; improvement of quality of service, timely correction of drug therapy, high efficiency of drug treatment; improving the cost-effectiveness of medical care. Today, to create the information technology of medicine, the future efforts of leading research teams are united and focused on developing new software architectures and programming languages; theoretical and methodological models of information processing; mathemat-

ical methods for modelling complex biological systems; techniques for predicting a patient's possible response to a combination of drugs; algorithms for finding the optimal combination of therapies. This year, the healthcare IT market has reached $ 80 billion, delivering an average annual 5% growth rate over the next 5 years. Without a doubt, IT is a useful tool for improving the quality and effectiveness of care. However, their use requires a thorough approach to the training, management and management of medical personnel.

In order to remain competitive, IT companies need to be aware of government health information initiatives and the latest developments in the field of medicine, to take into account the requirements of electronic medical records, and to pay attention to the rapidly growing markets Asia and other developing regions.

The most relevant and popular technologies in the field of health care are electronic medical card, use of robotics in surgery, application of RFID technology.

Medical information system in Ukraine. In Ukraine, the healthcare system consists of a central component – it is responsible for the centralized storage and processing of information – and medical information systems (MIS) that hospitals and clinics can choose and market.

It should be noted that the Medical Information System (MIS) is a special type of software that aims at informing healthcare facilities and automating healthcare workflows. It creates a single information field for different levels of care delivery, from primary to tertiary level. In the latter case, all participants – primary care physicians, specialists, diagnosticians, inpatients, pharmacists, laboratory assistants and managers – work in a common information field, which enables to obtain all necessary information about the patient's health from one standardized source of information.

The components of the medical information system are («Computerization does not stop», 2018):

1) an electronic medical record of the patient, or a special section on the patient, which stores personal, demographic and other useful information. In addition, all medical electronic records (doctor's findings, laboratory test results, diagnostic results, and other medical records) are «attached» to the patient in the system through an electronic medical card;

2) accounting of the patient's requests for medical help to the medical-preventive institution. Usually, such records are implemented through the establishment of patient visit schedules, physicians' schedules and other medical resources of the medical facility. There are special sections of MIS, such as «Registry» or «Polyclinic», to deal with the patient's appeals. It should be noted that the movement of patients depends on the profile of the medical institution. Thus, if a doctor needs to arrange an outpatient clinic for patients, then the module «Registry» should be used, and if the institution has an inpatient type of medical care, then the module «Reception unit» or «inpatient» is required. Accordingly, each module or section of the IIA performs certain tasks that are specific to the organization of outpatient and inpatient care;

3) medical records in MIS – is a key section that documents electronically all the actions of medical professionals, the results of diagnostics, laboratory tests, internal medical records and other documents. MIS should be adapted to the regulatory and accounting policies of the Ministry of Health of Ukraine and directly to the medical institution where the information system is applied;

4) records of medicines and medical supplies – this section of the IIA provides an opportunity to account for the movement and use of medicinal products and medical supplies through appropriate medical documents: doctor's recommendations for treatment (in case of outpatient admission) and prescription (including electronic) and a letter of medical prescriptions (in the case of inpatient treatment);

5) directories and registers. Modern MIS is a tool for standardizing and collecting information on the quality of care. Accordingly, standardization, as a task that MIS helps to perform to healthcare professionals, is an important feature of modern MIS. Yes, the MIS should include key directories: MKH-10, medicines directory, patient status guides, temporary industry classifier of medical procedures (services) and surgeries. And now for the primary care doctors and guide ICPC-2 Ukraine.

Experience of European countries in the introduction of IT in medicine. It should be not-

ed that IT has already been deployed in Europe since 2009, for example, over 600 terminals with 17 monitors have appeared at the Annecy central hospital in eastern France, allowing hospital staff to view electronic medical records. about patients is done with the help of personal badges. After identification, doctors can familiarize themselves with appointments, make adjustments in them. The prescribed medication immediately passes a test for compatibility with already prescribed drugs and on the answer, The prescribed medication data are automatically sent to the pharmacy from where the drugs are delivered to the patient's ward while being one of the largest in France's Le Mans central hospital (more than 1600 beds, 60,000 patients per year, 400 doctors and more 4,000 other health care providers) implemented a medical information system and switched to electronic patient medical records.

The UK has launched one of the largest IT industries in the history of creating a network of 30,000 computers installed in 300 medical facilities in the country, with hard drives containing information about 50 million patients.

A new Stobhill hospital has been opened in Scotland, capable of serving more than 400,000 patients a year. The peculiarity of this hospital is that it is absolutely paperless – it incorporates a system of electronic medical records and uses portal technologies that allow doctors to access patient data at any time.

An electronic medical history has been implemented at the emergency rooms of Lisboa Norte Hospital Complex, a medical centre serving the St. Mary's Hospital in Lisbon and the Hospital of the district of Sant Antonio du Cavaleiro, which is located in the municipality of Loures, near the capital of Portugal. The St. Mary's Hospital has been using electronic case histories for three years, and the hospital in Loures moved to them only in November 2009.

Hospital de Denia in Spain (Valencia) in 2009 switched to the industrial operation of the medical information system, the implementation of which took almost a year and a half. At the moment, the hospital automates the activities of the departments of ambulance, surgery and radiology, patient flow management, processing of information about the results of analyzes, ordering medicines, scheduling work of doctors and nurses, maintaining medical records. Hospital doctors work with electronic medical records and from their workplace receive information from devices near the patient's bed – monitors, fans, etc. The hospital's medical information system is linked to the information systems of the regional government and other health care institutions.

At the same time, telemedicine services have become available throughout Andalusia. In Malaga and Seville, there are 99 and 55 operator stations respectively. The total number of user calls received in 2009 exceeded 3 million. The topics of these calls range from general medical information and pharmacy information to remote consultation with a specialist.

For example, the goals of the Chinese government's policy at the National Health Summit in January 2019 are realistic and commendable. They focus on such important areas as the promotion of integrated delivery systems, including enhancing the capacity of public hospitals at county level to facilitate care coordination and referral, primary care for family physicians, telemedicine, central procurement of essential medicines to increase cost efficiency, and review of prices for medical services and fees, etc. These reforms, if successfully implemented in close collaboration with stakeholders, including the private sector, will pave the way for a sustainable health care system for China in the coming years (Cheng, 2019).

The Hungarian Government Decree «Government Decree 1798/2019 (XII. 23.) on certain health issues» was adopted on 23 December 2019 and was issued on 25 December, which prepares for major changes in the health sector by 2020 (Sandor, 2020). The government's decision made it clear that the system would be new. The goal is to start off real costs. So far, government decisions have only set goals and timelines for restructuring by 2020, or at least start the work needed to fund health care. The overriding objective is to restructure the financing system and the supply structure, «which leads to a sustainable functioning and prevents debt rebirth». There are eight points of health care reform and two points to address the serious debt of healthcare facilities. Mention has been made of the development of telemedicine and the increased use of innovative technologies to simplify the organization of care (Gergely, 2019).

Conclusions

Therefore, due to medical reform, continuous computerization has necessitated the need for medical staff to have computer skills. Today, in the medical field, services such as electronic medical record, electronic prescription, electronic referral, etc. are included in daily life. Thus, the impact of IT on health care plays an extremely important role, as with the implementation of health care reform in Ukraine there is complete computerization of all branches of the medical field.

Thus, the impact of IT on health care plays an extremely important role, since with the implementation of health care reform in Ukraine there is a complete computerization of all branches of the medical field, the issue of financing health care institutions for the introduction of new technologies remains unresolved. With the advancement of information technology, the growing share of medical research that relies on mathematical (computer) modelling has become commonplace in clinical practice, making it clear that IT capabilities are becoming a major contributor to medicine and healthcare. To date, many serious studies and projects are being implemented in the world to implement IT in the medical field. Financing of health informatization begins. By turning digital data into knowledge, doctors can more reasonably apply it. Health information technology is a vital industry that needs to provide effective, safe and reliable healthcare. And this industry is developing most dynamically. IT is now being used at all stages of health care, from basic research to healthcare delivery, and includes a number of specializations, such as bioinformatics, clinical informatics and biomedical informatics. The electronic medical card is in full swing, SMS – informing about the results of the tests taken in the laboratory with their subsequent review in the laboratory information system, remote fixation and translation of physiological parameters, computer simulation of complex biological processes, 3-D modelling of tissues and organs, objective evaluation in solving problems of diagnostics, interpretation of data, prediction of the course of diseases and complications, monitoring of the course of diseases and planning of medical diagnostics ary process. Automated workplaces of doctors allow optimizing various processes of medical activity, making it more efficient. With the help of the Internet, health care providers have access to the latest up-to-date health care information and can establish professional relationships with foreign colleagues to share experiences. An important positive trend in the introduction of information technology into medicine is the ability to interact with external sources of information through on-line conferences, which allows leaving the patient to solve complex issues with the help of more experienced colleagues.

Due to medical reform, continuous computerization necessitated the need for medical staff to have computer skills. Today, in the medical field, services such as electronic medical record, electronic prescription, electronic referral, etc. are included in daily life. Specialists enter medical data, telemetry, and related information directly from medical equipment into computer databases during a real-time examination to further process, analyze, store, and maintain their access history. Electronic automated preparation of appointments, prescriptions, statements, hospital letters and other standardized documents for patients. In particular, there are automated databases of medical, pharmaceutical and scientific-pedagogical staff of the Ministry of Health of Ukraine.

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МІСЦЕ ІНФОРМАЦІЙНИХ ТЕХНОЛОГІЙ ПРИ ЗДІЙСНЕННІ МЕДИЧНОЇ ДІЯЛЬНОСТІ

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Резюме

Політика держави полягає у інтеграції інформаційних систем в єдиний інформаційний простір в рамках електронної системи охорони здоров'я. Держава планує та координує інформаційні системи, які впроваджуються за рахунок державного або місцевих бюджетів з метою раціоналізаторського використання наявних ресурсів та уникнення дублювання функціональності інформаційних систем. Стосовно інформаційних систем, що реалізуються за рахунок приватних фондів, функція держави полягає у побудові інфраструктури (стандартизація, сертифікація, нагляд за ринком) для управління якістю на ринку. Держава забезпечує одноразове введення інформації та її подальшу обробку у багатьох інформаційних системах, зберігання основної інформації про пацієнтів у центральній складовій частині ВООЗ та розширену інформацію (наприклад, дані у клінічних реєстрах) у децентралізованих спеціалізованих інформаційних системах.

Метою даного дослідження є дослідження місця інформаційних технологій при здійсненні медичної діяльності. Слід зазначити, що медична діяльність - це сукупність дій медичних та фармацевтичних працівників щодо надання медичної допомоги або послуги пацієнту в рамках правових (за умови отримання ліцензії) та етичних (клятва Гіппократа) норм, тобто дотримання етапів лікування відповідно до встановлених стандартів МОЗ.

В дослідженні використовувалися наукові методи для об'єктивного та систематичного аналізу інформаційних технологій при виконанні медичної діяльності, а саме емпіричний, формально-логічний, порівняльно-правовий методи.

Слід зазначити, що e-Health - це електронна система, яка допомагає отримувати пацієнтам, а лікарям надавати якісні медичні послуги. Усі медичні записи протягом 2019 року будуть передаватися в електронному вигляді. Основною метою впровадження електронної системи охорони здоров'я є мінімізація шахрайства та корупції. У майбутньому e-Health дозволить кожному швидко отримати свою медичну інформацію, а лікарі зможуть правильно поставити діагноз із цілісною картиною стану здоров'я пацієнта. Метою МОЗ є запуск повноцінного електронного охорони здоров'я до 2020 року, який не лише відображатиме стосунки між лікарнею та державою, а й буде реєстром медичних карток усіх українців.

Результати. *Таким чином, із розвитком інформаційних технологій, зростаюча частка медичних досліджень, що спираються на математичне (комп'ютерне) моделювання, стала звичним явищем у клінічній практиці, даючи зрозуміти, що ІТ-можливості стають основним фактором, що сприяє медицині та охороні здоров'я. На сьогоднішній день у світі впроваджується багато серйозних досліджень та проектів для впровадження ІТ у медичній галузі. Завдяки медичній реформі, безперервна комп'ютеризація викликала необхідність у медичному персоналі володіти комп'ютерними навичками. Сьогодні в медичній галузі такі послуги, як електронна медична карта, електронний рецепт, електронне направлення тощо, включені в повсякденне життя. Електронна автоматизована підготовка призначень, рецептів, заяв, листів до лікарні та інших стандартизованих документів для пацієнтів. Зокрема, існують автоматизовані бази даних медичних, фармацевтичних та науково-педагогічних працівників МОЗ України.*

Висновок. *Вплив ІТ на охорону здоров'я відіграє надзвичайно важливу роль, оскільки із впровадженням реформи охорони здоров'я в Україні відбувається повна комп'ютеризація всіх галузей медичної галузі.*

Ключові слова: *охорона здоров'я, пацієнт, лікар, медицина, реформи, комп'ютер, інформаційні технології.*

UDC 342.7 + 341

NATIONAL INSTITUTIONS ESTABLISHED IN ACCORDANCE WITH THE PARIS PRINCIPLES, ENGAGED INTO THE PROMOTION AND PROTECTION OF HUMAN RIGHTS IN THE SYSTEM OF INTERNAL MEANS OF SECURITY

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Summary

The purpose of the article is to clarify the place of national institutions engaged in the promotion and protection of human rights in the system of domestic means created in accordance with the Paris Principles. 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.

The concept of understanding of the organizational and legal guarantees of human and citizen's rights has been improved in the constitutional law science, namely: the classification criterion for division into groups is the possibility/non possibility of exercising any kind of state coercion in the course of jurisdictional/ non jurisdictional activity; representative body (body responsible for ensuring Ukraine's representation in the European Court of Human Rights and coordinating the implementation of its decisions), bodies of the state executive service, private executors are the elements of the system of organizational and legal guarantees of human and citizen's rights; by classification criterion – the protection of human rights and fundamental freedoms is the primary function of the authority-guarantor or similar body of some other kinds of functions – it is substantiated that national institutions engaged into the promotion and protection of human rights belong to the group of authority-guarantor of special competence established specifically to provide guarantees, human rights and fundamental freedoms.

It is proposed within the group of authority-guarantor of special competence established specifically to ensure the guarantees of human rights and fundamental freedoms, to distinguish a sub-group of national institutions engaged into the promotion and protection of human rights: 1) human rights commissions; 2) human rights ombudsmen; 3) anti-discrimination ombudsmen (commissions); 4) human rights institutes (centers); 5) human rights advisory committees; 6) comprehensive human rights institutes.

Key words: the legal means, the competence of national institutions; promotion and protection of human rights; international courts; European Court of Human Rights; an intrinsically effective measure that must be terminated when appealing to each of the relevant international courts or international bodies.

1. Introduction

The coordination of the state's guaranteeing functions with constitutional and international standards in the field of human rights determines the relevance and necessity of the improvement of the theory on guarantees of human rights and fundamental freedoms, as well as the related normative, law-enforcement and other kinds of practices.

For example, the Resolution of the UN General Assembly adopted on December, 18, 2013 called on member-states to establish effective, independent and pluralistic national institutions that promote and protect all human rights and fundamental freedoms for all; and there where they already exist – to strengthen them as provided for in the Vienna Declaration and Program of Action, and, if they are in accordance with the Paris Principles, that is to continue to participate in discussions in all relevant mechanisms contributing to these discussions in accordance with their respective mandates, including reviewing the development agenda for the period after 2015.

In the doctrine of international law, depending on the powers and functions, the following types of institutions are distinguished that promote and protect human rights: human rights commissions, human rights ombudsmen (ombudsmen institutions), and anti-discrimination ombudsmen/commissions, human rights advisory committees, comprehensive human rights institutes. However, specialized human rights institutions with a narrow area of competence (commissions/ombudsmen for the rights of children, women, and other persons) do not comply with the Paris Principles and are not considered a national institution that promotes and protects human rights (Chyksina, 2005; Buletsa, 2019).

The question of whether national institutions established in accordance with the Paris Principles, which promote and protect human rights, are intrinsically effective means that subject to the exhaustion of human rights when appealing of any person to the European Court, has become relevant issue in the science of constitutional and international law. This issue needs to be investigated in the context of the organizational guarantees on the implementation the right of everyone, after the use of all national means, to apply for the protection of their rights and freedoms onto the relevant international judicial institutions or to the relevant international bodies, where Ukraine is being a member of.

At the same time, the analysis of scientific researches testifies that at the top of scientific discussions in the legal literature there are questions of the types, powers and functions of national institutions engaged into the promotion and protection of human rights (e. g. works by D. Belov, Y. Bysaga, A. Wurf, L. Zaidenstiker, R. Karver, L. Rife, V. Chuksina, N. Mishyna and other authors). The question of the constitutionally legal status of certain types of such institutions (ombudsman, human rights commissions) before extending their powers in accordance with the aforementioned resolutions of the UN General Assembly and the UN Human Rights Council had been studied in detail in domestic and foreign countries scientific literature. However, the question of their place created in accordance with the Paris Principles of national institutions dealing with the promotion and protection of human rights in the system of domestic measures has not been the subject of scientific research in literature of judicial content.

The purpose of the article is to clarify the place of national institutions engaged in the promotion and protection of human rights in the system of domestic means created in accordance with the Paris Principles.

2. The Rule on termination of domestic means for legal protection

According to Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, everyone, whose rights and freedoms recognized in this Convention are violated, is entitled to an effective measure through the national authority, even if such violation was committed by persons acting as officials. The European Court of Human Rights can only bring the case only after that, when all domestic measures were applied, as provided for by generally recognized Rules of international law (Article 35 of the Convention for the Protection of Human Rights and Fundamental Freedoms) (Deshko, 2019).

The requirement that the applicant uses domestic measures before applying to the Court is an important aspect of the protection mechanism established by the Convention, which is subsidiary to the national system of human rights protection (paragraph 65 of ECHR in the case “Akdyvar and others vs. Turkey”, dated September, 16, 1996, and the resolution of the case “A, B and C vs. Ireland”, dated December, 16, 2010. For this purpose, the Article 35 of paragraph 1 of the Convention enables national

authorities to prevent or correct alleged violations of the Convention, first of all through judicial protection, before these applications are brought to the Court. However, only measures that are effective and available in theory, so in practice over the certain period of time considered, they must be tried. In particular, the funds must ensure that the applicant was compensated for the damage and had a reasonable chance for success (paragraph 71 of the Court resolution in the case of "Skoppol vs. Italy", dated September, 17, 2009).

In the case of "Kudla vs. Poland", dated October, 26, 2000, the European Court of Human Rights stated: "It is generally accepted that the protection given by the Article 13 of the Convention is not absolute. The context, in which the alleged infringement (or group of infringements) occurs, may limit the range of potential measures. In these circumstances, Article 13 of the Convention is not considered inappropriate and the requirement contained in for an "effective means of legal protection" should be interpreted as meaning that the responding State should create such means as effective as possible, taking into account the existing limitations at that period of time to access these tools". The European Court of Human Rights is competent enough in ancillary nature of its role, and also that the object and purpose underlying foundation of the Convention, which provided by Article 1 of the Convention ("The High Contracting Parties should ensure the rights and freedoms of everyone under their jurisdiction") are to be undermined by its own ability to function unless it encourages applicants to use available funds for compensations (Resolution of ECHR in the case of "B. L vs. The United Kingdom"). The Rule on usage of domestic measures referred to in paragraph 1 of Article 35 of the Convention, thus initially obliges the applicants to use measures normally available to them and sufficient in the domestic legal system, and to be able to obtain compensation for the alleged violations. The availability of such measures must be sufficiently precise, both in practice and in theory, but in their absence, they are to be rendered from necessarily accessibility and effectiveness (paragraphs 65-67 of the ECHR in the case of "Akdyvar and others vs. Turkey"; the Resolution on the case of "Aksa vs. Turkey").

3. Effectiveness of legal protection measures

Having used all national remedies, entrepreneurs, who consider themselves victims of an alleged violation of their rights by one of the State parties to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention"), appeal to the European Court of Human Rights (hereinafter referred to as "the Court") (Deshko, 2018). They appeal to the Court in order to restore their violated rights at the national level in accordance with the principle of subsidiarity (Deshko, 2018).

According to the content of Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the effectiveness of measures does not depend on the determination of the result favorable to the applicant. Similarly, the "authority" referred to in this provision needs not be judicial; however, if it is not judicial, its powers and guarantees given to it are essential in determining whether this measure is effective. Moreover, even if any measure does not meet the requirements of Article 13 of the Convention in full content, they may be matched by the totality of the costs provided for by national law (Resolution of the European Court of Human Rights in the case of "Silver and others vs. The United Kingdom", dated March, 25, 1983; "Chahal vs. The United Kingdom", dated November, 15, 1996).

In Resolution of the case "Sering vs. The United Kingdom" dated July, 7, 1989, the European Court of Human Rights emphasized that Article 13 of the Convention guarantees the right to obtain legal protection at the national level for the real protection of the rights and freedoms provided for by the Convention, regardless of the legal form in which they are secured in the national legal system. Therefore, Article 13 of the Convention requires that such internal measures be available to enable the competent "public authority" to consider a complaint on a certain violation of the Convention and to provide adequate protection.

In the Resolution of the case "Sering vs. The United Kingdom", dated March, 25, 1983, analyzing the Ombudsman's competences, the Court stated that this body was not empowered to take compulsory decisions on the purpose of

compensation (paragraphs 115, 54). In the Resolution of the case of "Oleksandr Makarov vs. Russia", dated March, 12, 2009, the ECtHR stated, first of all, that as a general rule, the appeal to the Ombudsman could not be considered as an effective measure as required by the norm of the Convention (Resolution of the European Court of Human Rights in the case of "Lentinen vs. Finland, dated October, 14, 1999, application no. 39076/97; with the necessary amendments – paragraphs 80 to 84 of the ECHR Resolution in the case of "Leander vs. Sweden" dated March, 26, 1987; Resolution of the Commission on Human Rights in the case of "Monsion vs. France, dated May, 14, 1987, complaint No. 11192/84). The European Court of Human Rights sees no reason to reach a different conclusion in this case. It recalls that in order of a measure to be considered effectively there it must be able to obtain compensation for the complaint. This means that in determining the effectiveness of measures, the authority and procedural safeguards of the authority is referred to by the authorities as the means of legal protection. The parties cannot dispute that the Human Rights Ombudsman did not have the authority to make a binding decision. Accordingly, the European Court of Human Rights considers that an appeal to a Commissioner for Human Rights, a body that could only monitor the management of detention facilities, could not constitute an effective measure, which is determined in the Article 35 of the Convention.

T. Pashuk emphasizes that Resolutions in the cases of "Egmez vs. Cyprus" and "The Denizes and others vs. Cyprus, the Court stated that, in the view of his case president right, the complaint to the Ombudsman could not be attributed to national measures at all; which should be tried out before appealing to the Court according to Article 35 of the Convention (Pashyk, 2007).

4. Criterion for distinguishing national institutions' activities engaged into the promotion and protection of human rights from other authorities - guarantors of human rights and fundamental freedoms of special competence

In accordance with the Paris Principles, the national institution engaged into the promotion and protection of human rights performs the following general functions: 1) Representation to the Government, the Parliament and any other competent authority on an advisory basis, at the request of the interested authorities or in order of its right for implementation of the consideration of issue without appealing to the higher authority, the opinion, the recommendation, the proposal and the report on the issues related to the promotion and protection of human rights; the national authority may decide to make these findings, recommendations, proposals and reports; 2) encouragement and insurance of the coordination of national legislation, rules and practices with international human rights instruments to which this State is a party, and also their effective implementation; 3) facilitation for the ratification of the abovementioned documents or accession to them, ensure of their implementation; 4) participation in the preparation of reports to be submitted by States to the organs and committees of the United Nations, as well as to regional agencies, in the fulfillment of their treaty obligations, where it is appropriate, to express their views on the matter as appropriate; 5) cooperation with the United Nations and other organizations related to the United Nations, regional and national institutions of other countries competent in the promotion and protection of human rights; 6) promotion of the development of human rights education and research programs and participation in their implementation in schools, universities and professional circles; 7) promulgation of the information on human rights situation in the sphere and efforts to combat all forms of discrimination, especially racial discrimination by raising public awareness, in particular through information and education, and through the usage of all means of printing authorities.

In the legal literature it is recognized that an important place in the mechanism of non-judicial protection of human and citizen rights and freedoms is parliamentary control over the executive power as a special form of external control. Renowned French scientist B. Chantebou believes that the controlling function of the English Parliament has historically served as the basis for the appearance of legislative function. V. Melekhin rightly points out that the parliament or its commissions, fulfilling

their controlling function, monitor the extent to which the executive branch complies with the laws relating to the rights of the individual, and how well the legislative goal has been achieved. In foreign practice, the interference of members of parliament as a means of protecting the rights and freedoms of a person and a citizen takes many forms, such as a parliamentary request, the creation of a permanent or temporary parliamentary commission, a parliamentary inquiry, debates on issues related to the provision of a certain right or connection with gross or mass violations of rights. However, the main function of parliament is lawmaking, which defines its role in the mechanism of non-judicial protection of human rights [Melekhin, 2002].

Thus, as V. Melekhin points out, although parliamentary control compensates to some extent for the shortcomings of administrative procedures and ways of protecting the rights of citizens, however, the possibilities of the parliament's human rights function are not absolute and limited by strict rules (control powers, rules for constructing laws and regulations, judicial activity, etc.), often reflected in the Constitution (Melekhin, 2002).

The Ombudsman can apply only those measures, which are aimed at speeding up, enhancing the efficiency of human rights activities of other bodies, whose competence is already a binding decision with the possibility of applying state coercion (Pashyk, 2006). The Ombudsman cannot consider the merits of the case and conclude it with a binding decision to implement an effective measure. An additional argument to support this is the decision of the European Court of Human Rights. Thus, in the Resolution case of "Silver and others vs. The United Kingdom dated March, 25, 1983, analyzing the Ombudsman's competence, the Court notes that this body was not empowered to make binding decisions on the compulsory compensation (paragraph 115, 54).

Thus, the Ombudsman, as a national institute engaged into the promotion and protection of human rights, established in accordance with the Paris Principles, applies forms of coercion such as warnings or terminations without jurisdiction activity.

Therefore, although the functioning of the Ombudsman Institute, established in accordance with the Paris Principles, is aimed at protecting human rights, it exercises the legal protection of the subjective rights of all and their fundamental freedoms.

The criterion for the distinguishing of the activities of national institutions engaged into the promotion and protection of human rights, from other bodies – guarantors of human rights and fundamental freedoms of special competence is not the stage of application of legal guarantees of rights, not the very fact of violation or non-violation of human rights or fundamental freedoms, but any kind of state coercion in the process of settling a legal dispute, that is being in the process of jurisdiction: restoration of already violated law, legal responsibility, warning, termination. In other words, the use of forms of state coercion constantly accompanies by jurisdictional activity. At the same time, the position, taken among the constitutionalist scholars, according to which the jurisdiction is a lawful activity, which is aimed at resolving not any legal issues, but only legal disputes in the sphere of private and public law.

5. Results

Established in accordance with the Paris Principles, national institutions engaged into the promotion and protection of human rights have no legal means that enable them to independently defend the subjective legal rights of human beings and their fundamental freedoms – to consider a person's complaint on the merits and to finish up it with a strong decision to use an effective measure. The competence of national institutions established under the Paris Principles dealing with the promotion and protection of human rights does not meet the criteria of European standards of measures on legal support subject to their termination at the time of appeal to each international court or regarded international court authorities. Appeal to national institutions established in accordance with the Paris Principles dealing with the promotion and protection of human rights is not an intrinsically effective measure that must be terminated when appealing to each of the relevant international courts or international bodies.

6. Conclusions

The concept of understanding of the organizational and legal guarantees of human and

citizen's rights has been improved in the constitutional law science, namely: the classification criterion for division into groups is the possibility/non possibility of exercising any kind of state coercion in the course of jurisdictional/ non jurisdictional activity; representative body (body responsible for ensuring Ukraine's representation in the European Court of Human Rights and coordinating the implementation of its decisions), bodies of the state executive service, private executors are the elements of the system of organizational and legal guarantees of human and citizen's rights; by classification criterion – the protection of human rights and fundamental freedoms is the primary function of the authority-guarantor or similar body of some other kinds of functions – it is substantiated that national institutions engaged into the promotion and protection of human rights belong to the group of authority-guarantor of special competence established specifically to provide guarantees, human rights and fundamental freedoms.

It is proposed within the group of authority-guarantor of special competence established specifically to ensure the guarantees of human rights and fundamental freedoms, to distinguish a sub-group of national institutions engaged into the promotion and protection of human rights: 1) human rights commissions; 2) human rights ombudsmen; 3) anti-discrimination ombudsmen (commissions); 4) human rights institutes (centers); 5) human rights advisory committees; 6) comprehensive human rights institutes.

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СТВОРЕНІ ВІДПОВІДНО ДО ПАРИЗЬКИХ ПРИНЦИПІВ НАЦІОНАЛЬНІ УСТАНОВИ, ЯКІ ЗАЙМАЮТЬСЯ ЗАОХОЧЕННЯМ І ЗАХИСТОМ ПРАВ ЛЮДИНИ, В СИСТЕМІ ВНУТРІШНІХ ЗАСОБІВ ПРАВОВОГО ЗАХИСТУ

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Анотація

Мета цієї статті – уточнити місце створених відповідно до Паризьких принципів національних установ, які займаються заохоченням і захистом прав людини, в системі внутрішніх засобів правового захисту. Методологічною основою проведеного дослідження є загальні та спеціальні методи наукового пізнання (формально-логічний метод, порівняльно-правовий, структурно-логічний).

В даній статті поглиблено наукову дискусію щодо відсутності у створених відповідно до Паризьких принципів національних установ, які займаються заохоченням і захистом прав людини, юридичних засобів, які б уможливлювали самостійне здійснення ними саме захисту суб'єктивних юридичних прав людини й основних свобод – розглянути скаргу особи по суті та закінчити такий розгляд прийняттям обов'язкового для виконання рішення про застосування ефективного засобу/засобів захисту. Дістало подальшого розвитку твердження щодо не відповідності компетенції національних установ, створених згідно з Паризькими принципами, які займаються заохоченням і захистом прав людини, критеріям європейських стандартів засобів правового захисту, що підлягають вичерпанню під час звернення кожного до міжнародних судових установ чи до відповідних органів міжнародних судових організацій. Додатково аргументовано, що не є внутрішнім ефективним засобом правового захисту, що підлягає вичерпанню при зверненні кожного до відповідних міжнародних судових установ або до відповідних органів міжнародних організацій, звернення до таких національних установ.

На основі проведеного дослідження удосконалено наявну в науці конституційного права концепцію щодо розуміння організаційно-правових гарантій прав і свобод людини і громадянина, а саме: класифікаційний критерій для поділу на групи – можливість/відсутність можливості здійснення будь-якого виду державного примусу в процесі юрисдикційної діяльності/не юрисдикційної діяльності; елементами системи організаційно-правових гарантій прав людини і громадянина є і орган представництва (орган, відповідальний за забезпечення представництва України в Європейському суді з прав людини та координацію виконання його рішень), і органи державної виконавчої служби, і приватні виконавці; за класифікаційним критерієм – забезпечення прав людини і основних свобод є основною функцією органу-гаранта чи однією з інших функцій – обґрунтовано, що до групи органів – гарантів спеціальної компетенції, створених спеціально для забезпечення гарантій прав людини і основоположних свобод, належать такі підгрупи: 1) комісії з прав людини; 2) омбудсмени з прав людини; 3) антидискримінаційні омбудсмени (комісії); 4) інститути (центри) з прав людини; 5) консультативні комісії з прав людини; 6) комплексні інститути з прав людини.

Ключові слова: *засоби юридичного захисту; компетенція національних установ; сприяння та захист прав людини; міжнародні суди; Європейський суд з прав людини; національний засіб юридичного захисту, який повинен бути використаний при зверненні кожного до відповідної міжнародної судової установи чи до відповідного органу міжнародної організації.*

UDC 347.965.6

INFORMATION SECURITY IN LAWYERS' PROFESSIONAL ACTIVITIES

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Summary

The purpose of this paper is to study the issues of ensuring information security in lawyers' activities, primarily in the context of revealing the theoretical and applied aspects of maintaining the legal professional privilege policy when an advocate uses information technologies.

In the process of studying the subject matter of this paper the authors applied a set of general scientific and specific methods being characteristic of legal science, both to achieve the aim of the work as well as to ensure the scientific objectivity, thoroughness, reliability and credibility of the obtained results. In particular, with the help of the system-structural method the general structure of the scientific research was formed, which enabled the authors to elaborate the issue in question and solve the set tasks profoundly. The dialectical method of cognizing legal reality has made it possible to analyze different types (classes) of threats to the information security of advocacy. The general scientific methods of analysis and synthesis have been extensively employed in this scientific paper.

This article reveals the theoretical approaches of scholars to determining the nature and types (classes) of threats to the information security of advocacy activity, as well as clarifies the provisions of the domestic legislator which are aimed at ensuring the protection of advocate secrecy (also know as attorney-client privilege). The major part of the work is devoted to the analysis of practical aspects related to the implementation of advocacy guarantees that aim to ensure information security, in particular, such as bans on interfering with communication between a lawyer and a client, the advocate's testimonial immunity, and guarantees in case of searching or inspecting the dwelling, the advocate's other possessions, premises where he conducts advocacy practices). Attention is drawn to the main shortcomings in the regulatory framework for the aforementioned guarantees and there have also been put forth the appropriate proposals to remedy them, taking into account, first of all, the experience of foreign countries and the case law of the European Court of Human Rights.

On the basis of the conducted research, it is concluded that ensuring the proper level of information security in a lawyer's activity depends not only on the quality of legal regulation, in particular, the guarantees of a lawyer's activity and their observance in practice, but also on the fact whether a lawyer himself takes into account the possible security threats to his information activity. (of all its classes).

The use of information technologies by a lawyer in his professional activity is aimed not only at improving the ability to obtain, process, store and transmit information of any kind, but also requires that an advocate should take more active steps to ensure its confidentiality (the adequate level of information security of advocacy).

Key words: advocacy; guarantees of lawyers' activities; legal assistance; legal professional privilige; information confidentiality.

1. Introduction

In their professional activities lawyers deal with a large amount of information, and this is connected with receiving, processing, storing and transmitting information of legal and non-legal nature. The topicality of the study is manifested through the fact that, on the one hand, the exchange of such information primarily between lawyers and their clients in many cases occurs by means of applying information technologies, and on the other hand, there is a need to ensure the confidentiality of such information, taking into consideration that legal professional privilege policy extends to it. This necessitates the coverage of the problematic issues related to ensuring information security in the professional activity of a lawyer, primarily in the context of enforcing guarantees of a lawyer's activity, as well as the practical aspects of maintaining legal professional privilege policy, in particular, when a lawyer makes use of information technologies.

The review of scientific publications. Theoretical and applied issues associated with ensuring information security in the professional activities of a lawyer have been the subject of research carried out by a number of scholars. Among those who investigated separate aspects of this issue there can be singled out the following ones: V. V. Borychevska, M. Yu. Barshchevskiy, S. K. Buraieva, E. Butovchenko, P. P. Gusyatnikov, P. P. Gusyatnikova, V. V. Naumova, V. Yu. Panchenko, M. A. Pohoretskiy, M. M. Pohoretskiy, H. I. Reznikova, Z. Romovska, K. M. Severyn, O. N. Skriabin, V. M. Trofymenko and others. Despite this today there still remain a number of discussion points in this area.

The article aims to investigate information security issues in lawyers' activities, primarily in the framework of revealing the theoretical and applied aspects of maintaining legal professional privilege policy as long as a lawyer uses information technologies. The main tasks set by the author are: to reveal scholars' theoretical approaches to determining the nature and types (classes) of threats to information security of lawyer's activities; to clarify the provisions of the domestic legislator aimed at ensuring the preservation of the lawyer's secrecy, as well as to identify the practical issues related to their implementation, including the security aspect of information infrastructure which is used by the lawyer.

2. Information security in lawyers' activity: the notion and essence

The multifaceted professional activity of a lawyer, which, on the one hand, is directly related to receiving, processing, storing and transmitting information, and on the other hand, is associated with the use of various types of information technologies, requires the ensurance of information security. Ensuring information security is primarily associated with maintaining the confidentiality of information received by a lawyer in the process of carrying out his activities.

The need to maintain confidentiality of information is directly linked to the existence of trusting relationship between a lawyer and his client. The presence of trust, in turn, is the foundation for relationship between a lawyer and his client, as the latter is «forced to inform a de facto stranger (a lawyer) about circumstances of his private life that are not always positive» (Severyn, 2014), and therefore he must be sure that the provided data «will remain confidential and cannot be used against him» (Panchenko, Mihaleva, 2014).

In Part 1, Article 10 of the Rules of Professional Conduct (2017) the preservation of the confidentiality of any information designated as a subject matter of a lawyer's secrecy is also regarded as a lawyer's right in dealing with all legal entities that may require the disclosure of such information, and as a duty in relation to the client and those who are concerned with this information. This norm is consistent, in particular, with the provisions of paragraph 2.3.1 of the Code of Conduct for Lawyers of the European Union (1988), according to which confidentiality is the paramount and fundamental right and duty of a lawyer, and trust to a lawyer can only arise under the condition that a lawyer strictly adheres to the confidentiality principle. In addition, trusting the lawyer with certain information, the client must be sure that «the lawyer will be responsible for any misuse of the received information» (Buraeva, 2014). In Ukrainian law, such liability is foreseen, particularly, in paragraph 2 of Part 2, Art. 32 of the Law of Ukraine «On the Bar and Advocacy» (2012) (if a lawyer

discloses the information that is viewed as confidential according to legal professional privilege and takes advantage of it or third parties take advantage of it due to him, this entails the imposition of a disciplinary measure in the form of deprivation of the right to practise law).

While revealing the essence of information security in the context of a lawyer's activities, V. V. Borychevska's definition is worth exemplifying. She views information security in a lawyer's activities as the protection of confidential information in its undistorted form, as well as secret information which is necessary for implementing activities by a lawyer (Borichevskaya, 2016). P. P. Gusyatnikov and P. P. Gusyatnikova conceive information security of a lawyer's activities in a broad way (the kind of protection of the rights and legitimate interests of a lawyer in the course of conducting his professional activity, as well as the rights and legitimate interests of his trustors, guaranteed by the Law on the Bar in the Informational Sphere) and in a narrow sense (confidentiality, integrity and accessibility, that is, the security of information owned by the lawyer – the security of the lawyer's personal information and information that is subject to lawyer-client confidentiality) (Gusyatnikov, Gusyatnikova 2016).

3. The maintaining of legal professional privilige policy as the basis of information security

Undoubtedly, the basis of information security is the confidential information obtained by the lawyer, and this fact necessitates the disclosure of information security issues in the lawyer's activity through the lens of exploring the theoretical and practical aspects of ensuring the preservation of such secrecy in the context of using information technologies by a lawyer.

Legal professional privilige should be virtually understood as any information possessed by a lawyer in connection with providing his client with professional legal assistance, the obligation of the preservation of which is not limited in time. In concurrence with this, the possibility of disclosing this information is, on the one hand, due to the client's interests (according to his written statement, the legal guarantee of keeping such secrecy is lost) and cannot be associated with the lawyer's obligation to report the crime of his client that has already been committed (but not known to law enforcement authorities), as well as the crime that he is only preparing to commit; on the other hand, the probability of revealing the kind of information mentioned is attributable to the lawyer's interests, because it is not allowed to misuse the client's rights (if he pursues claims against the lawyer in connection with his professional activity) (Zaborovs`ky`j, By`saga, Bulecza, 2019).

Securing the lawyer's duty of professional secrecy, taking into account the aspect of using information technologies, is possible in case of having the proper complex of rights and guarantees of a lawyer's activity (in particular, such guarantees as the ban on interfering with the lawyer's private communication with a client (Zaborovs`ky`j, 2017), a lawyer's testimonial immunity (Zaborovs`ky`j, 2017), as well as guarantees in case of conducting searches or inspection of the lawyer's dwelling, his other possessions, premises where he carries out his professional activity (Zaborovs`ky`j, 2018)).

There is no doubt that one of the most important stages of a lawyer's professional activity is the exchange of information between the lawyer and his client, which in many cases occurs with the help of information technologies. The sharing of this information requires the creation of conditions to safeguard its confidentiality.

The fundamental condition for maintaining a lawyer's secrecy is the prohibition to interfere with the private communication of a lawyer and a client (paragraph 9, Part 1, Article 23 of the Law of Ukraine «On the Bar and Advocacy»), which is viewed as one of the main standards of independence of the legal profession (in paragraph 13 of the UIA (the International Association of Lawyers) Standards for Independence of the Legal Profession (1990) it is stated that lawyers should be provided with such equipment and facilities as are necessary for the effective performance of their professional duties, in particular to ensure the confidentiality of relations between the lawyer and the client, including the protection of the ordinary and electronic systems of the lawyer's all correspondence and documents from seizure and inspections, as well as protection against the interference with the electronic means of communications and information systems which are used by the law-

yer). The content of such a ban is reflected in Part 5 of Principle I (The General Principles on the Freedom of Exercising the Legal Profession) of Recommendation No. 21 of the Committee of Ministers of the Council of Europe (2000) (lawyers should have access to their clients, including especially persons, deprived of liberty, to be able to consult them behind the closed doors and represent their clients' interests in accordance with the established professional standards). The similar position is reflected in paragraph 8 of the General Provisions on the Role of Lawyers (1990) (The Basic Principles on the Role of Lawyers (1990)

With regard to Ukrainian law, this guarantee is disclosed, in particular, in the aspect of prohibition and interference with the private communication of the defender with the suspect, the accused one, the convicted one, the acquitted one (part 5 of Article 258 of the Criminal Procedural Code of Ukraine) and the person taken into custody (part 5 of Article 12 of the Law of Ukraine «On Pre-trial Detention» (1993)), and access to things and documents that are correspondence or another form of exchanging information between a defense lawyer and his client (Article 161 of the Criminal Procedural Code of Ukraine), and the inspection of correspondence between the lawyer and the person, who is in custody – Part 9 of Art. 13 of the above-mentioned Law, and the convicted – Part 5 of Art. 113 of the Criminal Executive Code of Ukraine, which are generally in line with the international principles in this field and aimed at creating proper conditions for ensuring the maintenance of legal professional privilege policy.

To the means of ensuring the information security of a lawyer's activity belong the guarantees which indicate the presence of a lawyer's testimonial immunity. Thus, paragraph 2 of Part 1 of Art. 23 of the Law of Ukraine «On the Bar and Advocacy» states that it is forbidden to demand from a lawyer, his assistant, apprentice, a person who is in an employment relationship with a lawyer, a law firm, a law association, as well as from the person in respect of whom the right to practise law has been terminated or suspended, to provide information that is a lawyer's secret. These individuals may not be interrogateded on these matters unless the person who has entrusted the data has relieved them from the obligation to maintain secrecy under the procedure specified by law. The lawyer's testimonial immunity is also enshrined in the provisions of other procedural codes: the Civil Procedure Code of Ukraine (paragraph 3, Part 1, Article 70); the Economic Procedural Code of Ukraine (paragraph 3, Part 1, Art. 67), The Code of Administrative Legal Proceedings of Ukraine (paragraph 2, Part 1, Art. 66); the Criminal Procedural Code of Ukraine (paragraphs 1, 2, Part 1, Art. 65). A lawyer's testimonial immunity comes into effect from the moment the client set foot in the legal office, the law firm, bureau» (Barshevskij, 2000) and is not limited in time (Part 2, Article 10 of The Rules of Professional Conduct). Despite the enshrined provision on a lawyer's testimonial immunity and the establishment of criminal liability, in particular, and for breaccing the guarantees of professional secrecy (Article 397 of the Criminal Code of Ukraine), unfortunately, in practice there are cases of unlawful interrogations of lawyers as witnesses.

Paragraph 4, Part 1, Art. 23 of the Law of Ukraine «On the Bar and Advocacy» refers to the prohibition of inspecting, disclosing, demanding or seizing documents related to carrying out a lavyer's activities. The existence of such a guarantee does not indicate that it actually denies the possibility of performing searches of a lawyer's dwelling, of his other possessions, of premises where he conducts his professional activity, since, on the one hand, there may be the materials in these premises that are not related to pursuing a lawyer's professional activity (but are important for the case) and, on the other hand, imposing the absolute ban on the search of such premises has the chance to transform their objects», where there could be hidden «any information, including the information featuring the evidence of criminally punishable acts» that certain people to not wish to disclose (Romovs`ka, 2000). Without a doubt, this investigative action should be carried out in an exceptional case. The peculiarity of this action has been repeatedly the focus of attention on the part of the European Court of Human Rights, pointing out that the encroachment on a lawyer's professional secrecy could have consequences while administering justice and thus may violate the right to a fair trial (paragraph 37 of the judgement in the «Niemetz v. Germany» case (1992)); the search

of lawyers' premises should be scrutinized thoroughly (paragraph 62 of the Golovan v. Ukraine» judgment (2012)); such measures can be recognized as «necessary in a democratic society» only if there are effective safeguards against abuse and arbitrariness in national law, subject to compliance with them in a particular case (paragraph 31 of the «Kolesnichenko v. Russia» judgment (2009)), and, where there are no other ways to find evidence of this or that fact other than to search a lawyer (paragraph 56 of the judgement in the case of «Roemen and Schmidt v. Luxembourg» judgment (2003)).

The specifics of conducting a search in relation to a lawyer, determined in Part 2 Art. 23 of the Law of Ukraine «On the Bar and Advocacy», whose provisions contain the requirement that the investigating judge, court necessarily in his / its decision points to the fact of conducting such investigative actions, the list of things, documents to be found, identified or seized, is one of the guarantees of securing the maintenance of a lawyer's secrecy. One of the main guarantees of maintaining legal professional privilige while carrying out the indicated investigative actions in relation to the lawyer is the enshrining of the norm on the need for the presence of a representative of the council of advocates of the region, except in cases of his / her absence if the council of advocates of the region has not been notified in advance. In order to ensure the participation of such a representative, the official who is to carry out the appropriate investigative action, shall notify in advance the Council of Lawyers of the region at the place of its carrying out.

Disturbingly, the current legislation does not specify either the term or the procedure of such notification, as a result, the indicated official is exposed to «the practical opportunity to circumvent these guarantees of practicing law» (Skryabin, 2015). Unfortunately, there is a shortcoming in determining the powers of the mentioned representative of the Council of Advocates of the region, since most of them are not defined in the Law of Ukraine «On the Bar and Advocacy», but in the Procedure for ensuring guarantees of advocacy, protecting professional and social rights of lawyers (2013). As a result, there are frequent cases when investigators or other officials, as noted by scholars (Pogorecz`ky`j, 2015) do not always adequately respond to such a representative's remarks as to the lawfulness of the appropriate procedural action (in particular, the exercise of the power to seal the premises, things, including electronic media and / or computer equipment (portable computers), mobile phones, etc., access to which is prohibited in accordance with Article 161 of the Criminal Procedural Code of Ukraine). Therefore, there is an urgent need to include all the key powers of such a representative in the provisions of both the mentioned Law and the Criminal Procedural Code of Ukraine of Ukraine (Zaborovskij, 2017).

Unfortunately, the indicated guarantees are not always respected when conducting such an investigative action as search. There are cases in which a lawyer's mobile phone numbers are seized, yet they are listed as work phone numbers in the lawyer's profile (the phone book, in addition to the personal contacts, also contains the phone numbers of clients, which is a lawyer's secret in itself); and there are cases when in the investigating judge's decision on the seizure of things and documents during the search at the lawyer's office the presence of phrases like «other documents and drafts», «personal notebooks», «system units of personal computers, laptops, electronic tablets, magnetic hard disk drives placed in the system units of personal computers or external (removable), flash drives, mobile terminals and other electronic media …. SIM cards and mobile starter packages, money, values and other property…» contrary to the enumerated guarantees, groundlessly grants virtually to an unspecified circle of law enforcement officials the unlimited rights to seize from the lawyer's office any objects, things and documents, especially those that have nothing to do with the subject of investigation (On the State of Attorney's Safeguards in Ukraine, 2017).

Exploring the state of information security H. I. Reznikova emphasizes that there are three classes of threats to information security of a lawyer's activities, namely: internal (illegal activities of insiders – lawyers, their assistants, apprentices, individuals who are in labor relations with a lawyer, a law firm, a law association, as well as persons in relation to which the right to practise law has been terminated or suspended); external (viruses, network worms; fitting, vishing, hacking attacks, etc.); mixed (the combina-

tion of efforts of external and internal violators of information security) (Reznikova, 2017).

The researcher aptly notes that the shortcomings in ensuring the security of «information resources» of advocates' activites include miscalculations in the organization of confidential records management, human resources, information-analytical and logistical support for the security of information resources, among which the organizational measures ensuring information security are the most vulnerable (Reznikova, 2017). The absence of records management or its improper organization both in law firms and associations, and in self-employed lawyers' offices contribute to the disclosure of information that is confidential. In order to maintain a lawyer's secrecy, as V. M. Trofymenko admits, a lawyer must carry out the clerical work separately from the objects and documents belonging to his principal» (Trofy`menko, 2011). K. Butovchenko adheres to the same position. She underlines that among a number of useful recommendations for maintaining professional secrecy there is the formation of a lawyer's dossier, since usually the marking on the folder and the signed agreement on the provision of advocatory services on the first pages of the files is enough for law enforcement authorities to refrain from the further familiarization with it (Butovchenko, 2016).

The issue of keeping a lawyer's dossier is regulated primarily by the Decision of the Bar Council of Ukraine No. 169 (2017), which states that a lawyer's dossier is a collection of documents and information which are received, collected, created, stored, used by a lawyer (another person on his behalf) and / or are at his disposal (he possesses them, is in charge of managing them, etc.) and is covered by the notion of legal professional privilige, as well as separate (single) documents and any media that are covered by this notion, objects and the like. This Decision states that a lawyer's dossier can be kept fully or partially in an electronic form, especially when the case materials are large, which makes it impossible or problematic to keep all documents in a paper form; and it is also stressed that to a lawyer's dossier can belong different documents, as well as things that may or may not have the features of a document (for example, any magnetic or electronic media (including telephones, tablets, computer equipment, etc.) that play an important role in providing legal aid to a client.

Taking into consideration the fact that lawyers make use of a significant number of the latest information technologies in the course of conducting their activities the security of the information infrastructure is of great importance in ensuring the confidentiality of information which is referred to as legal professional privilege. Admittedly, the failures of ensuring the security of the information infrastructure are: the absence or unsatisfactory state of technical means of ensuring the security of the infrastructure; the fragmentation or malfunction of the protective equipment, technical and software environment; the lack of cryptographic protection of information during its processing in computer networks; the lack of the differential access to information for individuals; the lack of identification of a user and operations with the help of computers and their networks, telecommunication networks using special passwords, keys, magnetic cards, digital signatures in the process of accessing to information and telecommunication systems; the inappropriate level of registering actions with information (the date and time, the nature of actions), illegal access attempts, etc. (Reznikova, 2015).

4. Lawyers' information security on the Internet

Taking into account the modern lawyers' vigorous activity on the Internet, when using social networks, online forums and other forms of online communication, lawyers should not only observe the norms of legal ethics, but also think about the restrictions established for advocacy in terms of completeness and perception of information, ensuring its confidentiality and preservation. In addition, the lawyer must take into account the parameters of their confidentiality in order to responsibly use, monitor and regularly analyze their own social networks, online forums, other forms of communication on the Internet and the content posted on social networks, and in case any errors or confidentiality discrepancies are detected they are subject to immediate correction and / or deletion (Article 58 in the Rules of Legal Ethics).

A lawyer uses the Internet for storing the information he receives. According to V. V. Nau-

mov, while using virtual («cloud») servers, the lawyer should consider the following features of storing information on these servers: 1) the lawyer must determine the jurisdiction of the owner of such servers. In other words, the lawyer must make sure that the laws of the country of the actual location of the server sets high standards of confidentiality; 2) the liquidation of the enterprise owner of the servers will inevitably lead to the loss of information which is privileged legal information; 3) the provider (the technology intermediary for providing access to the Internet network), and therefore the subject that has got into the security system of the provider has the immediate access to the information at the moment of its transmission from the lawyer's device to the virtual server (Naumov, 2017).

In their activities advocates also use various programs for instant messaging through the Internet (Viber, WhatsApp, Telegram, Skype and others). Each of these programs, as H. I. Reznikova states, has its own information security features and confidentiality provisions, but all of these have been repeatedly subjected to hacking attacks, resulting in information leakage, and one should not forget about the possibility of the controlled exctraction of information from communication channels (Reznikova, 2017).

Hence, in all cases of exercising the protection, representation and providing other types of legal assistance to a client, advocates' activities are, in this way or another, related to receiving, processing, storing and transmitting information, both legal and illegal, a significant part of which is confidential and constitutes subject to advocate secrecy. Therefore, lawyers' (advocatory) professional activity is impossible without ensuring the appropriate level of information security of their activities.

5. Conclusions

Ensuring an adequate level of information security in lawyers' activity depends not only on the quality of legal regulation, in particular, the guarantees of lawyers' activity and their observance in practice, but also directly on the very lawyer's account of the possible security threats to his / her information activity (all its classes). The use of information technologies by lawyers in their professional activity is aimed not only at improving the ability to obtain, process, store and transmit information of any kind, but also requires from them more active steps to ensure its confidentiality (the appropriate level of information security of lawyers' activity).

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ІНФОРМАЦІЙНА БЕЗПЕКА В ПРОФЕСІЙНІЙ ДІЯЛЬНОСТІ АДВОКАТА

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Анотація

Метою даної статті є дослідження питань щодо забезпечення інформаційної безпеки в адвокатській діяльності насамперед в контексті розкриття теоретико-прикладних аспектів збереження режиму адвокатської таємниці за умов використання адвокатом інформаційних технологій.

У процесі розкриття предмета дослідження як для досягнення мети роботи, так і забезпечення наукової об'єктивності, повноти, достовірності та переконливості отриманих результатів авторами було застосовано комплекс загальнонаукових і спеціальних методів, що є характерними для правової науки. Зокрема, за допомогою системно-структурного методу було сформовано загальну структуру наукового дослідження, що забезпечило найповніше розкриття та вирішення поставлених перед авторами завдань. Діалектичний метод пізнання правової дійсності надав можливість проаналізувати різні види (класи) загроз інформаційній безпеці адвокатської діяльності. Загальнонаукові методи аналізу та синтезу були широко використані в науковій статті.

В даній статті розкриваються теоретичні підходи науковців щодо визначення сутності та видів (класів) загроз інформаційної безпеки адвокатської діяльності, а також з'ясувується положення вітчизняного законодавця, що спрямовані на забезпечення збереження адвокатської таємниці. Значна частина роботи присвячена аналізу практичних аспектів, що пов'язані із реалізацією гарантій адвокатської діяльності, які спрямовані забезпечення інформаційної безпеки, зокрема, таких гарантій як заборони втручатися у приватне спілкування адвоката з клієнтом, свідоцький імунітет адвоката, а також гарантій у разі проведення обшуку чи огляду житла, іншого володіння адвоката, приміщень, де він здійснює адвокатську діяльність). Звертається увага на основні недоліки нормативного регулювання вищевказаних гарантій, а також запропоновані відповідні пропозиції щодо їх усунення, враховуючи насамперед досвід зарубіжних країн та практику Європейського суду з прав людини.

На основі проведеного дослідження робиться висновок, згідно з яким забезпечення належного рівня інформаційної безпеки в діяльності адвоката залежить не тільки від якості правового регулювання, зокрема, гарантій адвокатської діяльності та їх дотримання на практиці, але безпосереднього й від врахування самим адвокатом можливих загроз безпеки його інформаційної діяльності (всіх її класів).

Застосування адвокатом інформаційних технологій в своїй професійній діяльності спрямоване не тільки на покращення можливостей отриманням, обробки, зберігання та передачі інформації різного роду, але й вимагає від адвоката більше активних дій щодо забезпечення її конфіденційності (належного рівня інформаційної безпеки адвокатської діяльності).

Ключові слова: *адвокатура; гарантії адвокатської діяльності; правнича допомога; адвокатська таємниця; конфіденційність інформації.*

UDC 396.6

PROBLEMS OF THE IMPLEMENTATION OF THE PRINCIPLE OF GENDER EQUALITY (COMPARATIVE LEGAL ASPECT)

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Summary

The purpose of the study is to identify the problems in the implementation of the principle of gender equality in Ukraine and European states.

This goal was achieved through the application of a system of methods, including comparative method, formal law method and statistical method.

The study has identified that the principle of gender equality prohibits discriminatory treatment on the basis of gender in different spheres of social relations. However, there is no single approach to understanding the concept of gender equality, which is described as: equality between the rights of men and women; fair treatment of men and women; equal access to resources and their fair distribution between men and women.

It is substantiated that the principle of gender equality is a sub-principle of the principle of equality and means guaranteeing equal rights and opportunities regardless of gender.

The principle of gender equality is examined in international law, including the provisions of the Council of Europe's Gender Equality Strategy for 2018-2023 and their implementation in Ukraine. The European Court of Human Rights' (ECtHR) practice of interpreting the content of the principle of gender equality and its scope is analyzed. The ECtHR has established that gender-based violence is the form of discrimination against women.

The Court of Justice of the European Union has established the elimination of discrimination on grounds of sex as a general principle of EU law which should be guaranteed by a court.

Family policy models in different states have been studied through the prism of gender equality, in particular: the pronatalist model (formed in France); the traditional model (historically originated in Germany); a pro-egalitarian model (Sweden is a typical representative); family model (mainly applied in the UK, the US and Canada). It is justified that nowadays, mixed models of family policy prevail, which combine traditional models in different proportions. In Ukraine, there is a similarly mixed model of family policy model that can be characterised as more pro-natalist model.

The study concludes that real gender equality can be achieved in the case of an effective gender-based public policy, which should: stimulate gender expertise; introduce quotas for representation of women in all areas of employment, except those that may harm their health; ensure that gender components are taken into account in all economic and social development programs; introduce a gender component through the educational process in the secondary, vocational and higher education system; ensure gender mainstreaming in teacher training programs and public officials; promote the elimination of gender stereotypes and counteract discrimination; contribute to reducing the remuneration gap; to promote the activities of public associations in the field of gender equality and combating domestic violence, etc.

Key words: equality; gender; men; women; non-discrimination; gender-based violence.

1. Introduction

The principle of gender equality has become quite widespread in recent years, which has already been analyzed not only by scientists and experts but also used by journalists, politicians and legislators. Undoubtedly, gender equality is an element of the principle of equality and provides for equality of person regardless of gender.

In 2019, the International Bank for Reconstruction and Development published the results of a study on gender equality, notably that significant progress has been made over the past decade on women's legal equality, including 274 legislative reforms in 131 countries aimed at ensuring gender equality. Eight indicators were taken into account in the study – place and start of work, remuneration, marriage, presence of children, business, asset management and retirement. For example, the presence of children indicator included laws regarding maternity, paternity and childcare leave. According to the study, Ukraine has a score of 78.75, the Russian Federation is 73.13, and six countries have a score of 100 – Belgium, Denmark, France, Latvia, Luxembourg and Sweden. The following countries are close to Ukraine: Armenia – 83.13, Tajikistan – 81.88, Georgia – 79.38, Azerbaijan – 78.75, Kyrgyz Republic – 76.88, Kazakhstan – 75.63, Uzbekistan – 70.63. The lowest rates of gender equality in Sudan (29.38), UAE (29.38) and Saudi Arabia (25.63) (Women, Business and the Law, 2019).

National surveys are also being conducted, in particular, in November 2018, a survey by the National Democratic Institute in Ukraine, «National Poll on Gender Equality», found that 81% of women and 73% of men in Ukraine believe that equality between men and women is an important issue for them (77% des personnes interrogées en Ukraine considèrent que les questions de genre sont importantes pour elles). For comparison, a gender equality survey was conducted in Kazakhstan, and the majority of respondents (37.1%) said that there were no problems and only 14.4% – stated that there were problems at ensuring a very high level of gender equality. Respondents noted that among the main problems faced by women: early pregnancy – 75.8%, unpaid housekeeping – 71.4%, work and homework – 68.6%. Quite indicative is the high rate of respondents who believe that women should not participate in politics (22.7%) and 19% do not comment on this issue (Usmembayeva, Rezvushkina, Beysenova, 2017).

These statistics confirm the relevance of the study on gender mainstreaming in all areas. In this study, the author analyzes some of the problematic aspects of the implementation of the principle of gender equality.

2. The concept of gender equality

The term «gender» is of English origin and gradually its concept included «socio-sex characteristics of sex, as opposed to purely biological characteristics» (Karbovs'ka, Lytvynova, Mahdyuk, 2010). The concept of gender equality is being interpreted as: equality between the rights of men and women (Zhaliy, 2013); fair treatment of men and women (Karbovs'ka, Lytvynova, Mahdyuk, 2010); equal rights for women and men, girls and boys, their equal importance, opportunities, responsibilities and participation in all spheres of public and private life, equal access to and distribution of resources (The Council of Europe's Gender Equality Strategy for 2018-2023); component of the principle of equality, covering equality of rights, opportunities, creating equal conditions for the exercise of rights, gender symmetry, as well as defining the same legal status, asserting the fundamental rights of both women and men (Krochuk, 2011).

The perception of gender equality as a feminism is widespread. As for the development of the feminist movement, scholars believe that in the first stage there was suffraism (late nineteenth century - early twentieth century. Movement for women's suffrage), in the second stage (early 60's - late 80 defending the actual equality of men and women, the third stage (since the beginning of the 90-ies of the twentieth century and up to now) was related to the combination of the movement against discrimination against women against sexual exploitation, violence in the family, human trafficking, etc. (Zhuravl'ova, 2017). In the late 1980s and early 1990s, the «feminist jurisprudence» movement and the legal theory of feminism emerged in the United States. According to one of the founders of this Anne Skiles movement, there is an equality scale: formal equality - substantive equality - absolute equality. The scholar notes that for-

mal equality is not enough, absolute equality is a «worthless tool of social policy» and optimal is the substantive equality most pronounced in Canada's positive practice. Anne Skiles also summarizes that «women are a class that is united in a common position and the fate of one woman is substantially linked to that of all women» (Skeylz, 2019). G. Khrystova believes that the idea of substantive equality encompasses the concepts of «equality of opportunity», «equality of access to opportunity» and «equal value of results» (Khrystova, 2013). Thus, equality is revealed through the main substantive elements of this concept (equality of opportunity, equality of access and equality of results).

Therefore, the principle of gender equality is a sub-principle of the principle of equality and means guaranteeing equal rights and opportunities regardless of gender.

3. Legal regulation of the principle of gender equality

The principle of equality between men and women (gender equality) is enshrined in the Constitution of Ukraine (Article 24), the Charter of the United Nations of 26 June 1945, and the International Covenant on Economic, Social and Cultural Rights of 16 December 1966 (Art. 3), the Convention on the Political Rights of Women of 7 July 1954, the Convention on the Elimination of Discrimination in Education of 14 December 1960, the United Nations Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979, the Optional Protocol to the Convention on the elimination of all forms of discrimination against women, ILO Conventions on Equal Remuneration of Men and Women for Work of Equal Value № 100 of June 29, 1951, «On Maternity Protection № 103» of June 28, 1952, «On Discrimination in Labor and Occupation № 111» June 24, 1975, On Equal Treatment and Equal Opportunities for Working Men and Women: Workers with Family Responsibilities № 156, Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence of 11 May 2011, The Mexican Declaration of 1975 on Equality for Women and their Contribution to Development and peace, the UN Declaration on the Right to Development on 4 December 1986, the Beijing Declaration of 15 September 1995, the UN Millennium Declaration of 8 September 2000, the Treaty establishing the European Community from 25 March 1957 (p. 2 and 3), Charter of Fundamental Rights of the European Union of 7 December 2000, Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, Recommendation № Rec (2003) 3 of the Committee of Ministers of the Council of Europe to the Member States representation of women and men in political and public decision-making of 12 March 2003, Declaration of the Committee of Ministers of the Council of Europe on gender equality in practice of 12 May 2009, etc.

A special Law on Equal Rights and Opportunities for Women and Men has been adopted to promote the principle of gender equality in Ukraine (Zakon Ukrayiny «Pro zabezpechennya rivnykh prav ta mozhlyvostey zhinok i cholovikiv») and the State Social Program for Equal Rights and Opportunities for Women and Men (Postanova Kabinetu Ministriv Ukrayiny «Pro zatverdzhennya Derzhavnoyi sotsial'noyi prohramy zabezpechennya rivnykh prav ta mozhlyvostey zhinok i cholovikiv na period do 2021 roku»).

Historically, in our society, there has been a stereotypical thinking that the primary purpose of a woman is to look after children and fulfill the responsibilities of providing conditions for the family. This position, unfortunately, is dominant in Ukrainian society, which leads to uneven distribution of unpaid household work, child-rearing, etc. The Council of Europe's Gender Equality Strategy for 2018-2023 promotes a balanced division of unpaid domestic duties and responsibilities for childcare, without which it is impossible to strike a balance between the professional and family life of women and men. Only when this balance is reached can real gender equality be approximated.

Concerning gender mainstreaming, paragraph 15 of the Beijing Declaration, adopted at the Fourth World Conference on Women on 15 September 1995, stressed that women's rights are not only important for the well-being of families and the promotion of democracy and men, but also opportunities and access to resources, equal sharing of family responsibilities, and a harmonious partnership between them.

Article 5 of Protocol № 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms of 22 November 1984 estab-

lishes equality between men and women in marital relations (in connection with forming of the marriage, during the marriage and during the divorce), as well as in relations with their children (Protokol № 7 do Konventsiyi pro zakhyst prav lyudyny i osnovopolozhnykh svobod).

The Law of Ukraine «On Equal Rights and Opportunities for Women and Men» states that state policy should be aimed at ensuring equal opportunities for women and men, including in the combination of professional and family responsibilities, family support, and support for responsible motherhood and paternity (Article 3); public authorities should take action to combat gender-based violence (Article 12); educational institutions should provide education of gender equality culture (Article 21) and others.

4. Implementation of the principle of gender equality

State policy, in accordance with the above law, in order to ensure equality of rights and opportunities for women and men, should: provide for the promotion of gender equality; not to discriminate on the grounds of gender; apply positive actions; to prevent and counteract violence; ensure equal participation of women and men in important decisions; ensure equal opportunities for combining professional and family responsibilities; provide for family support, responsible motherhood and parenthood; to guarantee the promotion of gender equality culture among the population of Ukraine; protect against gender-discriminatory information.

According to Art. 6 of the Law of Ukraine «On Equal Rights and Opportunities for Women and Men» is not recognized as discrimination: special protection of pregnant women, as well as their protection during childbirth and breastfeeding; mandatory military service for men; different retirement ages for women and men, as defined by law; special requirements for the protection of women, men and women, established for reproductive health; any affirmative action (special temporary measures that are carried out with a legitimate, objectively justified purpose, aimed at eliminating legal or factual inequalities in opportunities to exercise on equal grounds of law and liberty).

The European Court of Human Rights has repeatedly stated in its decisions that achieving gender equality is one of the core objectives of the member states of the Council of Europe, and differences in treatment can only be compatible with the Convention, for very good reasons (see decisions of February 22, 1994 in the case «Burghartz v. Switzerland», the judgment of 24 June 1993 in the case «Schuler-Zgraggen v. Switzerland» and other). Among the ECtHR judgments that have established gender discrimination are the following: «Abdulaziz, Cabales and Balkandali v. the United Kingdom» (excellent attitude towards reunification with family of male and female immigrants), «Emel Boyraz v. Turkey» (access to public service, including security), «Opuz v. Turkey» (gender-based violence as a form of discrimination against women), «Carvalho Pinto de Sousa Morais v. Portugal» (discrimination against women by sex and age in the context of their sexuality) and other.

The European Court of Justice in 1976 ruled that the elimination of discrimination on the grounds of sex is a fundamental personal human right which is a general principle of EU law which the court is obliged to enforce (Burri, 2013). The Court of Justice of the European Union has also investigated and recognized discrimination against women in relation to men in many cases, namely: «Bilka - Kaufhaus GmbH v. Karin Weber von Hartz» (restrictions on the retirement rights of women who work part-time vs. men), «Regina v. Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez» (Indirect sexual discrimination), «Hilde Schönheit v. Stadt Frankfurt am Main» та «Silvia Becker v. Land Hessen» (equal pay for men and women for equal work) and other.

In analyzing family policy, through the prism of gender equality, scholars have distinguished the following models: 1) the pro-natalist model (France is considered to be the representative), which implies that the state should contribute to raising the birth rate, including a rather high level of financial support for the family supporting mothers, creating the conditions for combining their professional employment with motherhood; 2) the traditional model assumes that the main task of the state is to preserve the traditional nuclear family with a male breadwinner and a female housewife. Historically, this model was formed in Germany and did not provide for the creation of the necessary

conditions for women to combine motherhood and employment. However, the reforms implemented in recent years are evidence of a change in family policy and a gradual departure from the traditional model; 3) a pro-egalitarian model (Sweden is a typical representative) ensures gender equality in both the public and private spheres. Not only this model is characterized by the creation of conditions for motherhood, but also the encouragement of men to participate actively in the process of raising children, including through the institute of parental leave for child care; 4) the family model (in the UK, the USA and Canada) provides for maximum state interference in family life. Undoubtedly, the state provides support to families, but it is limited and targeted. As regards women's employment, the state also provides limited supporty (Henderna rivnist' i rozvytok, 2016). Undoubtedly, these models are in pure form at present, as a rule, there are mixed family policy models that combine traditional models in different proportions. In Ukraine, there is a similarly mixed model of family policy that is characterised as more pro-natalist.

5. Conclusions

In Ukraine, the situation regarding gender equality has improved in recent years, but many problems remain, including the unequal distribution of responsibilities within the family, which makes it difficult for women to combine family and work responsibilities.

Real gender equality can be achieved in the case of an effective gender-based public policy, which should: stimulate gender expertise; introduce quotas for representation of women in all areas of employment, except those that may harm their health; ensure that gender components are taken into account in all economic and social development programs; introduce a gender component through the educational process in the secondary, vocational and higher education system; ensure gender mainstreaming in teacher training programs and public officials; promote the elimination of gender stereotypes and counteract discrimination; contribute to reducing the pay gap; to promote the activities of public associations in the field of gender equality and combating domestic violence, etc.

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ПРОБЛЕМИ РЕАЛІЗАЦІЇ ПРИНЦИПУ ҐЕНДЕРНОЇ РІВНОСТІ (ПОРІВНЯЛЬНО-ПРАВОВИЙ АСПЕКТ)

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Анотація

Мета дослідження полягає у порівняльно-правовому аналізі проблем впровадження принципу ґендерної рівності в Україні та зарубіжних державах.

Вказану мету було досягнуто завдяки застосування системи методів, зокрема порівняльно-правого, формально-юридичного та статистичного.

У результаті дослідження було встановлено, що принцип ґендерної рівності забороняє дискримінаційне відношення за ознакою статі у різних суспільних сферах. При цьому відсутній єдиний підхід до розуміння поняття «ґендерна рівність», яке розкривають як: рівність прав чоловіка та жінки; справедливе ставлення до чоловіків та жінок; рівний доступ до ресурсів та розподілу між чоловіком та жінкою.

Обґрунтовано, що принцип ґендерної рівності є субпринципом принципу рівності і означає гарантування рівних прав та можливостей незалежно від статі.

Досліджено міжнародно-правові засади принципу ґендерної рівності, у тому числі положення Стратегії ґендерної рівності Ради Європи на 2018-2023 рр. та їх впровадження в Україні. Проаналізовано практику Європейського Суду з прав людини щодо тлумачення змісту принципу ґендерної рівності та сфер його застосування. Встановлено, що ЄСПЛ визнав ґендерне насильство формою дискримінації жінок.

Виявлено, що Суд Європейського Союзу вважає усунення дискримінації за ознакою статі загальним принципом права ЄС, яке має забезпечуватися судом.

Досліджено моделі сімейної політики крізь призму ґендерної рівності, зокрема: пронаталістську модель (сформована у Франції); протрадиційну модель (історично виникла в Німеччині); проегалітарну модель (типовим представником є Швеція); просімейну модель (поширена у Великій Британії, США, Канаді). Обґрунтовано, що наразі переважають змішані моделі сімейної політики, які в різних пропорціях поєднують традиційні моделі. В Україні так само змішана модель сімейної політики, яка найбільше тяжіє до пронаталістської.

В результаті дослідження зроблено висновок, що реальної ґендерної рівності можна буде досягти у разі ефективної ґендерної державної політики, що має: стимулювати проведення ґендерно-правових експертиз; впровадити квоти для представництва жінок у всіх сферах зайнятості, окрім тих, які можуть зашкодити їхньому здоров'ю; забезпечити врахування ґендерних компонентів у всіх програмах економічного та соціального розвитку; впровадити наскрізно у навчальний процес в системі середньої загальної, професійно-технічної та вищої освіти ґендерний компонент; забезпечити внесення до програм курсів підвищення кваліфікації вчителів, публічних службовців питання ґендерної рівності; сприяти доланню ґендерних стереотипів та протидіяти дискримінації; сприяти зменшенню розриву в оплаті праці; сприяти діяльності громадських об'єднань у сфері утвердження ґендерної рівності та боротьби з насильством в сім'ї і т.п.

Ключові слова: *рівність; стать; чоловіки; жінки; заборона дискримінації; ґендерне насильство.*

UDC 342.72

INFORMATION PRIVACY: A CONCEPTUAL APPROACH

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Summary

The paper attempts to expose the basic concepts of informational privacy reflected in Western jurisprudence, as well as to outline the author's vision of the content and scope of informational privacy, to distinguish the relevant powers from which this right consists, to reveal its place and role from the standpoint of system-structural approach.

It is noted that in the modern scientific literature, dedicated to ensuring the privacy and respect for his / her privacy, clearly distinguishes two main approaches to understanding the informational advantage - broad and narrow. Proponents of the narrow approach consider the primes solely in the informational aspect, and other constituents (physical, visual, phonetic privacy, etc.) tend to relate to the content of other fundamental rights. However, one group of authors interprets information privacy as the right of the person to control their personal data, while the second group considers it more rational and efficient to consider information pricing as the right of ownership of personal data. Attempting to unite both camps of supporters of a narrow interpretation of the information front is the Restricted Access / Limited Control (RALC) theory.

Proponents of the broad-based approach view information primacy as important, but only one of the many substantive elements of constitutional law in favor. At the same time, the authors' exit beyond the information sphere when considering the content of the precedence can be considered progressive and more consistent with the essence of this right and its purpose in ensuring personal freedom and autonomy.

In view of the author, revealing the content of the right to privacy, it should be borne in mind that the object of this right includes several areas (aspects), in each of which a person may be in different states of privacy, and the privacy itself has certain measurements. On this basis, information is regarded by the author as an element of the constitutional right of privacy, distinguished by the aspects of privacy and the form (method) of its objectification.

Unlike other aspects of privacy, the informational aspect is detached from the physical body of the individual and exists independently, and relevant information continues to exist even after the death of the individual. Therefore, even the death of a person does not make sense of the information associated with that person, and sometimes even enhances its value and significance. It is noted that unlike other aspects of the case, information privacy has no states (such as loneliness, intimacy, anonymity, etc.); it merely provides information protection for such states and does not allow them to be disclosed without the consent of the entity itself.

Key words: human rights; privacy; information privacy; personal information; privacy types.

1. Introduction

Modern society, traditionally known as information society, has radically changed the system of values and priorities of human development. Nowadays, it is not the one who has the money or the power rules the world, but the one who has the information, because by having the information it is quite easy to get both money

and power. It is not surprising that many thinkers have been focused on the problems of building an information society and human's being in such a society since the last third of the XX century. We are quite sure that jurisprudence is not an exception, where the relevant issue is being mostly discussed within the framework of the triangle Human Being – Civil Society – State. However, the problems of guaranteeing human rights are increasingly being highlighted considering the "human dimension" of the domestic and foreign policies of the states. The concept of privacy has also undergone significant changes in this context, or, to put it more adaptably for post-Soviet jurisprudence, the protection of personal privacy.

It is appropriate to pay attention to an interesting detail: the problem of protecting the privacy over the last hundred years has made a certain circle, returning, in fact, to its origins, but already at a new, higher quality stage of social and state development. It should be reminded that the privacy as one of the basic human rights was recognized and received constitutional consolidation within the information aspect – in the form of prohibition of unauthorized disclosure of information about the facts of the citizens' private life.

We should remind that the privacy is one of the most technological human rights: it was formed under the influence of the latest achievements of science and technology, the emergence of which no longer allowed a person to hide his private life under the protection of the walls of his apartment and, accordingly, the phrase «my house is my fortress» lost its relevance. The well-known formula of the privacy as the right to be left alone, suggested by L. Brandeis and S. Warren, envisaged journalists, photographers, editors of tabloid publications as counterparties, to whom the demand was addressed, because operative photography and the tabloid press were considered as the main threat to the privacy at the change of the XIX and XX centuries (Warren & Brandeis, 1890). One hundred years later, the privacy having filled its scope with such aspects as spatial, corporeal, visual, phonetic and even odorological, was again updated within the information aspect at the change of XX and XXI centuries, but now as the challenges of the information society and information and communication technologies. According to H.V. Presnyakova, who rightly notes on this occasion, the right to personal privacy is «one of the most affected and vulnerable in the information age» (Presnyakova, 2010).

The world legal opinion over the last thirty-forty years has accumulated a significant amount of theoretical and empirical material focused on the information privacy. However, the level of scientific understanding of this political and legal phenomenon still does not meet the challenges of the present time: the rapid pace of the development of information and communication technologies is creating new threats for the privacy and forcing the scientific community to respond to them promptly. One of the key problems in this area is the lack of unified approaches to the understanding of the information privacy, its content and correlation with other aspects of this right. Western legal doctrine, is not traditionally inclined to make clear legal definitions, it is focused on finding effective ways to protect the information privacy from unlawful encroachments, but scientific debate is doomed to scholasticism and irrelevance without a clear understanding of the content and scope of this right, its place and systemic relations with other aspects of the privacy.

As a supporter of the systematic and structural approach to the study of the content and scope of the privacy (as well as other constitutional human rights), we have tried in our previous studies, to reveal all aspects of the privacy step by step, leaving the information aspect to the point. Such considerations were based on the hypothesis of the comprehensiveness, the complex nature of the information privacy and its key role within the current systematic and structural model of the privacy in general. Nowadays, when all other aspects of the privacy have been revealed and characterized both in theory and in the empirical experience of normative consolidation and right-realization (Serohin, 2010, 2013, 2014), we have sufficient doctrinal basis to substantiate our own concept of the information privacy.

Structurally, our research will consist of two sections: first, we will try to highlight the basic concepts of the information privacy, reflected in the Western jurisprudence, and during the second one, to outline our own vision of

the content and scope of the information privacy and to distinguish the relevant powers, which constitute this right, to reveal its place and role from the standpoint of systematic and structural approach.

2. Modern concepts of information privacy

The modern scientific literature, focused on ensuring personal privacy and respect for one's private life, clearly distinguish two main approaches to understanding the information privacy – the broad and narrow ones.

Proponents of the narrow approach consider the privacy solely within the informational aspect, and other components (physical, visual, phonetic privacy, etc.) tend to relate to the content of other fundamental rights. For example, one of the apologists of the Western doctrine of the privacy A. Westin has defined the privacy as «claim of individuals, groups, or institutions to determine for themselves when, how and to what extent information about them is communicated to others» (Westin, 1967). However, there is a certain «dinarchy» in the camp of supporters of the narrow approach: one group of authors interprets the information privacy as the right of a person to control their personal data (Moore, 2007), while the second group assumes it more rational and efficient to consider the information privacy as the right to own personal data (Westin, 1967; Laudon, 1996; Varian, 2002). However, the difference between these approaches in a more careful study, is insignificant, since both of them talk about the protection of personal data (Orito & Murata, 2007; Guarda, 2008; Banisar, 2011).

It is worth noting that the legislation of many world countries has chosen this way (mostly those belonging to the Anglo-Saxon legal system), where laws under the name "Privacy Act" are limited only to the information sphere. Examples of this are the American Privacy Act of 1974 and the Electronic Communications Privacy Act of 1986, the Canadian Privacy Act of 1983, the Australian Privacy Amendment (Private Sector) Act of 2000, the New Zealand Privacy Act of 1993 and others.

However, this approach is not correct enough, because, on the one hand, not all personal data is covered by the concept of «information privacy», and on the other – the information privacy is not limited to personal data. For example, information about a person's party affiliation is his or her personal information, but is not covered by the concept of «information privacy», since it is related to a person's public life, but not private one. In turn, impersonal data about a person's gastronomic preferences obtained by analyzing the purchases at the supermarket over a certain period of time is related to private life, and do not fall into the category of personal data, unless the person can be identified by its help. Besides, many other aspects of private life that are «not covered» by other constitutional rights remain devoid of legal protection within the narrow approach.

Restricted Access/Limited Control (RALC) theory is attempted to unite both camps of supporters of the narrow interpretation of the information privacy. This theory emphasizes that the privacy and control are interrelated, but still different concepts. According to H. Tavani and J. Moor, «privacy is fundamentally about protection from intrusion and information gathering by others. Individual control of personal information, on the other hand, is part of the justification of privacy and plays a role in the management of privacy» (Tavani & Moor, 2001).

In this approach, a person's privacy is ascertained when it is protected from invasion, interference and access to information by other people. On the one hand, the RALC, as well as the theory of restricted access, emphasizes the importance of creating such zones for the person that will allow to reliably restrict other people's access to the information, on the other hand – it also admitts the importance of individual control over the movement of personal information, as well as the control theory. This approach does not incorporate the notion of control into the privacy's definition, and does not require people to have full or absolute control over their personal information in order to have the privacy. Only limited management elements are required to control own information privacy. In other words, the RALC assumes that a person has control over his or her choice, consent and correction, and therefore must be able to make the right and conscious choice in situations that allow him or her to choose the desired level of access. This includes, for example, the ability to

waive the right to restrict others from accessing certain types of information about yourself, as well as being able to access and correct your information if needed.

Proponents of the broad approach view the information privacy as an important, but only one of the many substantive elements of constitutional right to privacy.

In particular, the aforementioned H. Tawani notes the information privacy along with three other types of the privacy; «*Accessibility privacy*, also called *physical privacy*, is freedom from intrusion into one's physical space. *Decisional privacy* is freedom from interference with one's choices. *Psychological privacy*, also known as *mental privacy*, is the freedom of intrusion upon and interference with one's thoughts and personal identity. Finally, *informational privacy* is having control over and being able to limit access to one's personal information» (Tavani, 2007, 2008). D. McMenemy while saying that «privacy thus relates to what we say, what we do, and perhaps even what we feel», also draws attention to the complex, multi-element nature of the privacy (MacMenemy, 2016).

R. Clarke was the first privacy scholar of whom we are aware to have categorised the types of privacy in a logical, structured, coherent way. Clarke's four categories of privacy include privacy of the person, privacy of personal data, privacy of personal behaviour and privacy of personal communication (Clarke, 1997). M. Friedewald, R. Finn, and D. Wright, based on R. Clarke's approach and creatively developing it, distinguish seven types of the privacy. These include privacy of the person, privacy of behaviour and action, privacy of data and image, privacy of communication, privacy of thoughts and feelings, privacy of location and space, and privacy of association (including group privacy) (Friedewald, Finn & Wright, 2013). It is worth noting that the chosen objects to be protected by means of the privacy rather than aspects of private life or ways of existance were the criterion for the classification in both cases. Then the information aspect of this right appeared to be «vanished» among other types. However, the very fact that authors went beyond the information sphere while considering the content of the privacy, can be considered progressive and consistent to a greater extent with the essence of this right and its purpose in ensuring personal freedom and autonomy.

3. The concept and content of the information privacy.

In our previous works, we have already been able to cover our own concept of the content and scope of the privacy (Serohin, 2010, 2013, 2014), then let's only outline it in general terms. To our point of view, revealing the content of the right to personal privacy (privacy), it should be borne in mind that the object of this right includes several areas (aspects), where a person may be in different forms of privacy in each of them, and the privacy itself has certain dimensions. In particular, we have distinguished the following powers in terms of the private life,: the right to physical (physical, tactile) privacy; the right to phonetic (sound) privacy; the right to visual (optical) privacy; the right to odorological (scent) privacy; the right to geographical (dislocation) privacy; the right to information privacy. In this regard, we consider the information privacy as an element of the constitutional right to privacy, distinguished by the aspects of private life and the form (method) of its objectification.

The fact is that the information privacy is a certain «imprint» of a person's private life in the form of certain information (data). It is information about the relevant facts, phenomena, events that relate to a person's private life, and therefore this information is a priori confidential, and the access mode can only be changed (weakened) by itself.

Comparison of the information privacy with other aspects of the privacy makes it possible to state that the information privacy has a number of specific features. First of all, it should be noted that all other competences are directly related to the physical existence (being) of a person and, accordingly, make sense only during his life. Instead, information is a special form of substance being that does not have a firm «attachment» to a person's physical being; it has certain autonomy and self-worth compared to a human being. Unlike other aspects of the privacy, the information aspect is detached from the physical body of a person and exists independently, and the relevant information continues to exist even after the death of that person.

Therefore, even the death of a person does not make the information pointless that is related to that person, and sometimes even enhances its value and significance.

Besides, it should be borne in mind that a person's private life, its existence in a private space, leaves behind many traces and consequences that, in terms of cognitive activity, are sources of information about that person. Moreover, the information component of a person's private life is not limited to specific information about that person: it also includes information about those who make up the private communication, the content and forms of communication between them, the environment, where the communication took place, etc. Unlike other aspects of the privacy, encroachments on the information component of this right does not require direct contact of the offender with the subject of this right; it is quite often the offender has enough contact with sources of confidential information. Of course, the degree of the relevance of particular data to one's private life is also different, but all of them are important in terms of completeness and excellence of person's private life.

Information is an indication of the content received from the outside world in the process of our adaptation to it and the adaptation of our senses. Accordingly, information is a characteristic of the relationship between the message and its consumer, but not of a message. Without a consumer, at least potential, there is no point in talking about the information. It should be borne in mind that the same information message (newspaper's article, announcement, letter, sms, reference, drawing, etc.) may contain different amount of information for different people – depending on their previous knowledge, level of understanding of this message and interest in it. Therefore, the presumption of a «zero» level of consumer awareness of the content of the message should be basic for the legal qualification of the relevant information legal relations, whereas the actual level of such awareness may affect the degree of punishment for the offender of the information privacy.

We should remember that the information privacy is not, in fact, a person's right to introduce limited access to certain types of data about himself, but rather the right to protect information about all those aspects of human being that make up his or her private life, characterize it in a certain way, provide uniqueness and special value. In other words, the content of the information privacy is made up of such powers that enable a person to keep confidential information about those facts, phenomena and events that make up the content of all other aspects of the privacy (physical, phonetic, odorological, etc.). Accordingly, this may be information not only about the person himself, but also about his premises, the transport (personal or public) he uses, the people who communicate with him, the educational institutions, where he studied and the enterprises, where he worked, about private activities, where he participated, etc. Considering this, we can surely state that the transition of the problem of protecting the information privacy into the plane of protecting personal data is not only an unjustified narrowing and simplification of this problem, but also harms the comprehensive and complex protection of the privacy in all its aspects.

If the privacy is the ability of an individual to determine himself the way (character) of his private life and is aimed at meeting own needs and interests in privacy and private communication, then *the information privacy* is the ability of an individual to independently determine the scope and mode of access to information about the way of his private life. Private life refers to the sphere of human activity, which is a set of phenomena that characterize the existence and define the development of an individual as a private (ordinary) person, that are applied only to him, not related to the performance of public functions and removed from the public view.

Structurally, the information privacy consists of several powers, in particular:

- the right to determine voluntarily the mode of access to information about one's private life;
- the right to prevent third parties from accessing confidential information about the private life;
- the right to knowingly misrepresent information about one's private life in dealing with third parties;
- the right to demand the immediate termination of actions aimed at disclosing confidential information about one's private life;

- the right to study information about his or her private life stored in public authorities, public formations, at enterprises, institutions and organizations;
- the right to request to delete data on his or her private life, if the data do not correspond to reality, were collected in violation of the established procedure or did not meet the purpose of the collection;
- the right to voluntarily disclose information about his or her private life (if this information relates to private life of others, such disclosure is allowed only with the consent of those persons or in case of the impersonation of the relevant data).

On the other hand, the information privacy means the inadmissibility of any information activity (collection, storage, distribution, use) regarding data relating to a person's private life without his or her consent. In practice, this is often accompanied by discussions about the classification or non-classification of certain data to the category of «related to» the person's private life, but determining the *extent* to which particular facts relate to private life is a matter of a particular fact, which should be established by the jurisdictional agency in case of the dispute, taking into account all the circumstances of the case on the basis of the principles of legality and the highest social value of the person.

Unlike other aspects of the privacy, the information privacy has no forms (such as loneliness, intimacy, anonymity, etc.); it merely provides information protection for such forms and does not allow them to be disclosed (divulgation) without the consent of the subject himself.

All aspects of the privacy have a systemic nature, and the violation of at least one of its aspects inevitably harms many other aspects. For example, paparazzi, trying to get a photo of a movie star in a private setting, often violate not only information and visual, but also geographical (dislocation) privacy, and a drunk person, trying to "take selfie" with an outstanding athlete, violates not only his information, but also physical (body) and odorological (odor) privacy.

Providing public information about private life does not mean that it ceases to be such in the future, since its content is not changed, it still contains information about private life, but the number of people who have the potential to get acquainted with such information is changed (Krotov, 2015).

Some categories of information, such as health status, sexual orientation, financial position, party and ethnicity, etc. are classified into a specific category of «sensitive information». Summarizing the views expressed in the specific literature on the specificity of «sensitive information», we can distinguish several specific features of such data. (First, sensitive information can lead to significant forms of harm. Second, sensitive information is the kind that exposes the data subject to a high probability of such harm. Third, sensitive information often is information transmitted in a confidential setting. Fourth, sensitive information tends to involve harms that apply to the majority of data subjects) (Ohm, 2015).

There have been already repeated attempts in the constitutional science to rank sensitive information, but that seems unpromising from theoretical point of view, since the measure of the «sensitivity» of certain data is variable depending on specific historical, socio-political, socio-economic, spiritual, economic and even technological conditions of the development of society. For example, the less acute for the society is the issue of state-confessional and inter-denominational relations, the less sensitive is the information about a person's religion. And on the contrary, the rapid development of information and communication technologies makes one say that «we need to create new sensitive information laws and broaden our current laws at least to cover precise geolocation and some forms of metadata but also to go further…. to do this to respond to a growing threat of harm stemming from advances in technology and evolving business models, forces that create a significant threat of a global database of ruin» (Ohm, 2015). Another thing is that the degree of sensitivity of data related to the information privacy is different, and this should be taken into account while developing the relevant legislation.

4. Conclusions

Information privacy is an individual's ability to determine the volume and mode of access to information about own personal life.

The narrow understanding of the information privacy, which adequately reflected the es-

sence and content of this right in the early XX century and is still preserved in certain laws of the states of the Anglo-Saxon legal system, is no longer able to reflect the full range of the protection of private life, required from the states, and therefore must be reviewed. It should be replaced by the broad understanding that implies the interpretation of information privacy within the systematic and structural terms, as one of the elements (powers) of the constitutional right to privacy, distinguished by the aspects of private life and the form (method) of their objectification. At the same time, the information privacy itself has its structure and consists of a number of powers of the «second level».

Unlike other aspects of privacy, the informational aspect is detached from the physical body of an individual and exists independently, and the relevant information continues to exist even after the death of that individual. Therefore, even the death of a person does not make the information pointless that is related to that person, and sometimes even enhances its value and significance. Information privacy, unlike other aspects of privacy, has no forms (such as loneliness, intimacy, anonymity, etc.); it merely provides information protection for such forms and does not allow them to be disclosed (divulgation) without the consent of the subject himself. The so-called sensitive information is distinguished out of the types of information that are protected by the information right. Its content and volume depends on the specific historical and socio-cultural context.

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ІНФОРМАЦІЙНЕ ПРАЙВЕСІ: КОНЦЕПТУАЛЬНИЙ ПІДХІД

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Анотація

У статті здійснено спробу висвітлити основні концепції інформаційного прайвесі, відображені в західній юриспруденції, а також викласти авторське бачення змісту й обсягу інформаційного прайвесі, виокремити відповідні правомочності, з яких це право складається, розкрити його місце й роль з позицій системно-структурного підходу.

Відзначено, що в сучасній науковій літературі, присвяченій забезпеченню недоторканності приватного життя та поваги до нього, чітко вирізняються два основні підходи до розуміння інформаційного прайвесі – широкий і вузький. Прибічники вузького підходу розглядають прайвесі виключно в інформаційному аспекті, а інші складові (фізичне, візуальне, фонетичне прайвесі тощо) схильні відносини до змісту інших фундаментальних прав. При цьому одна група авторів тлумачить інформаційне прайвесі як право особи на контроль за своїми персональними даними, тоді як друга група вважає більш раціональним та ефективним розглядати інформаційне прайвесі як право власності на персональні дані. Спробою об'єднати обидва табори прихильників вузького тлумачення інформаційного прайвесі є Restricted Access/Limited Control (RALC) theory.

Прихильники широкого підходу розглядають інформаційне прайвесі як важливий, але лише один із багатьох змістовних елементів конституційного права на прайвесі. При цьому вихід авторів за межі інформаційної сфери при розгляді змісту прайвесі можна вважати прогресивним і таким, що більшою мірою відповідає сутності даного права та його призначення в забезпеченні особистої свободи й автономії.

На погляд автора, розкриваючи зміст права на недоторканність приватного життя (прайвесі), необхідно враховувати, що об'єкт даного права включає в себе декілька сфер (аспектів), у кожній з яких особа може перебувати в різних станах приватності, а сама приватність має певні виміри. Виходячи з цього, інформаційне ппрайвесі розглядається автором як елемент конституційного права на прайвесі, що виокремлюється за аспектами приватного життя та формою (способом) його об'єктивації.

На відміну від інших аспектів прайвесі інформаційний аспект відірваний від фізичного тіла особи й існує самостійно, а відповідні відомості продовжують існувати й після смерті самої особи. Відтак, навіть смерть людини не позбавляє сенсу інформацію, пов'язану з цією людиною, а іноді – навіть посилює її цінність і значення. Відзначено, що на відміну від інших аспектів прайвесі, інформаційна приватність не має станів (як-от усамітненість, інтимність, анонімність тощо); вона лише передбачає інформаційний захист таких станів і не допускає їх розкриття (оприлюднення) без згоди самого суб'єкта.

Ключові слова: *права людини; прайвесі; інформаційне прайвесі; особиста інформація; типи прайвесі.*

SECTION 2
CONSTITUTIONALISM AS MODERN SCIENCE

UDC 342.4

THE CONSTITUTION OF THE STATE IN THE CONTEXT OF ITS FUNCTIONS

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Summary

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

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

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

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

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

1. Introduction

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

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

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

On the one hand, the Constitution is a kind of construction, on which practically all legislation is being built (Onishenko, 2005). It is the Constitution that defines the nature of the current legislation, the process of law-making – determines, which basic acts are adopted by various bodies, their names, legal force, the process and procedure for the adoption of laws (Kozlova, 2003). The development of legislation is possible only within the parameters enshrined in the Constitution, which serves as an important condition for ensuring its unity, internal coherence (Luchin, 2002). As S. Shevchuk notes, the constitutional norms are formulated in the form of an open text, and, consequently, constitute «empty vessels», which must be filled with a specific content (Shevchuk, 2005). Therefore, the adoption of a new constitution in the state, as a rule, causes significant changes and updates to current legislation. Ukraine is no exception. Although, as V. Opryshko notes, «the current legislation does not yet fit into the legal framework defined by the Constitution of Ukraine» (Oprishko, 2000).

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

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

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

tions, parliamentary regime, and judicial constitutional control.

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

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

3.Constitution properties

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

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

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

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

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

4. Legal force of Constitution

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Conclusions

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

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КОНСТИТУЦІЯ ДЕРЖАВИ В КОНТЕКСТІ ЇЇ ФУНКЦІЙ

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Анотація

Мета. Наукова публікація присвячена висвітленню особливостей правової природи конституції. Автори розглядають структуру та зміст конституції держави в контексті її функцій. Розглянуто специфіку змісту новітніх конституцій в історії світового конституціоналізму.

Методи. Методологічною основою роботи є постпозитивістська методологія дослідження проблем парадигми сучасного українського конституціоналізму, що є впорядкованою системою взаємоузгоджених ідеологічних принципів і методів, що дозволяють ґрунтовно і всебічно дослідити юридичні властивості парадигми конституціоналізму та визначити сутність та зміст її правовідносин.

Результати та висновки. Отже, головним і досі невирішеним питанням є двозначність того, що пропонується прийняти: нову Конституцію, нову редакцію чинної Конституції, зміни та доповнення до чинної Конституції. Хоча парадоксально, але в президентських промовах ці терміни неодноразово використовуються як синоніми. Однак юридично це абсолютно різні поняття. Ця термінологічна плутанина несе велику небезпеку втрати орієнтирів і заважає чіткому формулюванню проблеми в суто юридичній сфері.

Таким чином, ми вважаємо, що конституційний процес сьогодні надто політизований. На наш погляд, триває гостра політична боротьба за прийняття форми конституції, зручної для однієї із партій. Але насправді – для влади – кожен хоче максимум потужності. У тому числі через свою Конституцію, яка якось виконується. Однак Основний закон повинен бути прийнятий не з урахування кон'юнктури політичної доцільності, а повинен бути повним юридичним документом, що враховує досягнення світової юриспруденції, із суворим дотриманням усіх встановлених правових процедур. Адже конституція повинна бути головним документом держави, принаймні на десять років.

Key words*: юридичний зміст; конституції; основний закон; правовий статус; юридична природа; характер конституції.*

UDC 342.4

CONSTITUTIONAL FOUNDATIONS FOR THE COORDINATION OF RECEIPTED AND NATIONAL LITHUANIAN LAW IN 1918–1920

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Summary

The research object of this study is the provisions of the Provisional Constitutions of 1918, 1919 and 1920 concerning the establishment of the Lithuanian legal system. The aim of the study was to determine what was the basis for the reception of foreign law and the particularism of the law, what law was recepted and what was the relationship between it and the newly created national law. The main methods used are systematic, teleological, historical, linguistic, and comparative. This article presents an original vision of recepted law and a critical assessment of the interwar Lithuanian governmental decision to completely eliminate recepted law. In the authors' opinion, law reception and particularism enshrined in the Provisional Constitutions met the expectations of the citizens, and the government's ambition to completely eliminate recepted law in all areas of people's activities in the intensive development of the national law was in line with the strategic interests of the state and society. Particularism was a natural expression of pluralism inherent in the Western legal tradition and had a great potential for the development of Lithuanian law, which was not exploited due to the negative appreciation of particularism and the attempt to eliminate it completely.

Acts issued by the Russian authorities in 1914-1915 and by the German authorities in 1915-1918 restricted the rights of Lithuanian residents, severely restricted monetary and property relations, made it difficult to rebuild the country's economy, providing for repressive or restrictive measures against the citizens of hostile states. The restored state of Lithuania endeavoured to establish peaceful relations with all states, including those with whom Russia and Germany were at war. Cancelling the law imposed by the Russian and German authorities during the war was a reasonable and useful decision of the Lithuanian State authorities.

The interpretation of the constitutional provision «[laws] which existed before the war» as «which existed before August 1, 1914», common in the historical legal literature of Lithuania, is incorrect. The question what laws were recepted has to be addressed not by the date of the adoption o a certain act, but by its content – insofar it is linked or unrelated to the First World War. All acts by which the Russian Empire intervened or were preparing to intervene in this war shall be considered to be excluded from the legal system of the

restored State of Lithuania in the sense of the constitutional norm «[laws] which existed before the war» and the general spirit of this Constitution.

The system of constitutional control entrenched in the Provisional Constitutions, where a court or an executive authority verified the compliance of a recepted law with the Constitution before applying it is subject to criticism from the standpoint of contemporary legal science, but under the conditions of Lithuania of 1918-1920, it was flexible, fast, allowing citizens to raise the issue of the constitutionality of the law and present their arguments.

Key words: Legal history; Lithuanian Provisional Constitutions; law reception; particularism of law; Western legal tradition; legal pluralism; public law; private law

1. Introduction

In 2020, the Lithuanian people celebrate the centenary of the convocation of the Constituent Seimas of the Republic of Lithuania, which resolution of May 15 completed the reconstruction of the State. The years 1918-1920 were a period of intense legal work. Its main results are the Lithuanian legal system, based on three Provisional Constitutions, which merged newly adopted national and recepted foreign law. The preamble to the valid Constitution of the Republic of Lithuania (1992) contains a reference to the Statutes and Constitutions of the Republic of Lithuania (interwar and 1990) as the foundations of a multi-year Lithuanian statehood. However, the three Provisional Constitutions receive very little attention in historical legal literature as being short-lived, unable to make a more tangible impact on our constitutional traditions (Maksimaitis, 2002). Although significant monographs (Grisxkevicx, et al., 2016, Maksimaitis, 2005; Maksimaitis, 2011) and articles (Machovenko, 2017; Machovenko, 2018; Machovenko, Valanciene, 2018; Machovenko, 2019) have appeared, examining various Lithuanian institutes of constitutional law of 1918-1920, there are still gaps there. In addition, even recent publications tend to demonstrate stereotypical views on the insignificance of the Provisional Constitutions as the subject of research. For example, the dissertation of A. Juskeviciute-Viliene concludes that the Provisional Constitution of 1918 had almost no significance in restoring the Lithuanian economy and regulating economic life (Jusxkevicxiuxtex-Vilienex, 2017).

This article presents an original vision of recepted law and a critical assessment of the interwar Lithuanian governmental decision to completely eliminate recepted law. The research object of this study is the provisions of the Provisional Constitutions of 1918, 1919 and 1920 (Fundamental Laws of the Provisional Constitution of the State of Lithuania, 1918; Fundamental Laws of the Provisional Constitution of the State of Lithuania, 1919; Provisional Constitution of the State of Lithuania, 1920) concerning the establishment of the Lithuanian legal system. The aim of the study was to determine what was the basis for the reception of foreign law and the particularism of the law, what law was recepted and what was the relationship between it and the newly created national law. The methodological significance of this study was based on the teaching on the Western legal tradition given in H. J. Berman's monograph (Berman, 1999). The main methods used are systematic, teleological, historical, linguistic, and comparative.

2. Constitutional Foundations of Foreign Law Reception

At the time of the adoption of the first of the three Provisional Constitutions, the territory of Lithuania was still occupied by Germany. As the defeat of Germany in the First World War and the end of the occupation were perceived to come soon, it was important to decide on the law that Lithuanian people had to rely on in the future. Since the end of 1917, the political elite relied on the vision that the State of Lithuania was being restored and it was a continuation of the pre-existing statehood. The decision to return to the last laws of the independent Lithuania would have been doctrinally correct. However, such return would have been inconsistent with the needs and expectations of the inhabitants. After all, those last laws were the privileges of the Grand Duchy of Lithuania, resolutions of the

Seimas, the Statute of Lithuania and other acts adopted in the late 18th century or even earlier, also the old customary law. During the 19th century, fundamental changes in the society, people's consciousness and the economy were taking place, moreover, the legal relations based on the law of the Grand Duchy of Lithuania practically almost disappeared (Maksimaitis, 2001).

The solution was obvious and well-known in history, but it was necessary to make a decision on the preferred option. In 1918, the Provisional Constitution solved this issue in an original and interesting way. Article 24 of this Constitution (as well as Article 28 of the Provisional Constitution of 1919 literally repeating it) established that in the areas of human activities where laws of the Republic of Lithuania are not yet in force, pre-war laws remain in force insofar as they do not conflict with this Constitution.

The aforementioned constitutional provision is described in Lithuanian historical legal literature as follows:

1) the continuity of legal regulation is ensured and the threat of legal vacuum is eliminated;

2) the foreign law that is inappropriate for the Lithuanian society remains in effect, i.e. its reception is going on;

3) the intention of the Government of the Lithuanian State to regulate all relations by national legal norms is explicit;

4) the adoption of a national law means that the corresponding recepted law ceases to have effect;

5) there is a transitional period until all recepted are superseded by new national law;

6) interpreting the provision «before the war» as «before August 1, 1914», the norms adopted by the German occupation authorities and those issued by the Russian authorities after the beginning of the war are included into the Lithuanian legal system;

7) the particularism of law is consolidated – the three pre-war systems of recepted private law that existed before the war remain: a) the one based on Volume 1 of Code X of the Russian Empire in a large part of the territory of Lithuania, b) the one based on the Napoleonic Code – in Lithuanian Uznemune, c) based on Part III of the Compendium of Domestic Laws of the Baltic Governments of the Russian Empire – in a small part of the territory of Lithuania which became part of the Latvian State in 1918, but in 1921 it was recovered by Lithuania under an interstate treaty (Palanga district and parts of Zarasai county). Two criminal law systems also appear: a) the one based on the Criminal Statute of the Russian Empire – in a large part of the territory of Lithuania and b) the one based on the Criminal Code of the German Empire – in the recovered Klaipeda region in 1923 (Maksimaitis, 2001).

While basically agreeing with such evaluations, we would like to make two points:

1) The authors of the text of the Provisional Constitution of 1918 are characterized by maximalism and idealism – the pursuit of complete elimination of recepted law in all areas of people's activities through intensive development of the national law – both in the public and private spheres, and the belief that it is possible and useful. Presumably, the reason for this aspiration was the negative evaluation of recepted law as being essentially inappropriate for Lithuania and recepted compulsively, just because it was meant to avoid chaos and not to leave the relationship without any legal regulation.

This position of the interwar Lithuanian legislator can be understood and justified. To abolish recepted law means to liquidate the order established by the occupying Russian authorities, the consequences of its policy towards Lithuania, and the institutes of law imposed on the Lithuanian nation. In 1918–1920, it was crucial to convince the people of Lithuania that they were an integral nation of Lithuania, that Lithuania was their common state, that all its citizens were equal according to law. Common national law would have been an important contribution to the development of citizenship and the loyalty of the population. The removal of recepted law as soon as possible was a guarantee of state strength and political stability. Today, however, the law reception that took place can be seen as part of the Western legal tradition. In retrospect, recepted law can be viewed as an inheritance, a value, an important resource, the possession of which is an advantage and not a disadvantage.

2) the negative evaluation of particularism was established in both interwar Lithuanian and contemporary historical legal literature as well as the desire to emphasize that particular-

ism had to be sanctioned «out of trouble when there was no other way out». In one of our earlier publications, we have already drawn the attention of readers to the fact that particularism, especially in private law, is not evil *per se* (Machovenko, 2017). According to H. J. Berman, particularism is one of the expressions of pluralism in the Western legal tradition, and pluralism itself (the existence of cooperative and competing legal systems and jurisdictions) is a key identifying feature and a driving force of this tradition (Berman, 1999). The Western legal tradition is characterized by the need and ability to constantly evolve, grow quantitatively and qualitatively. In most cases, this growth is evolutionary and has enough internal resources of the Western legal tradition. Sometimes, however, this tradition faces such challenges and experiences such a crisis that needs to be resolved promptly and in the short term. A «legal revolution» is underway (according to H. J. Berman's terminology) – rapid transformation of the Western legal tradition, its qualitative leap (Berman, 1999). Such a revolutionary transformation of the legal system may not have enough its own internal resources and will have to borrow from other legal systems. Law reception is such borrowing. Recognized law is integrated into the legal system and becomes part of it which is alien only in terms of its origin.

The existence of different legal sub-systems in Lithuania meant that the legal regulation took the utmost account of the specific nature of public relations historically established in a particular territory. In addition, the coexistence of general and local laws of the Russian Empire, French and German law within the Lithuanian legal system meant that in certain cases citizens had the opportunity to choose jurisdiction and to find a better regulation. For example, civil metric existed only in Klaipeda region, therefore, non-denominational persons or those wishing to use ecclesiastical registration could register marriage in Klaipeda. This particularism of law also meant that there was abundant and very rich material for comparative legal analysis. Such a hypothetical analysis could identify the advantages of different legal subsystems, combine them and ensure a qualitative leap in the Lithuanian legal system, its «legal revolution». Unfortunately, this potential was not exploited in interwar Lithuania. Little progress was made in systemizing, especially in codifying Lithuanian law. Commissions for the development of civil and criminal codes were organized before 1940. Before the occupation of Lithuania by the Soviet Union it was possible to draft only a few sections. The most often cited reasons were the lack of human and material resources, a very disadvantaged unstable political situation for the development of law, a coup d'état of 1926, after which Lithuania *de facto* lost its parliament (The Seimas, dissolved in 1927, no longer convened, and in 1936, the elected Seimas was only a para-parliament since it passed only bills, not laws). In our opinion, one of the most important reasons was the goal of creating completely original national codes – an idealistic and volatile governmental solution. Though the Provisional Constitutions of 1918 and 1919were in force for a very short time, their pursuit to get rid of the recepted law and rely only on the new national law dominated in the elite consciousness and was realized until the occupation of Lithuania in 1940.

3. What was the pre-war law in Lithuania?

The specifications of Provisional Constitutions on the validity of pre-war law in Lithuania received little attention from researchers. The issue of why the legal norms adopted by the Russian authorities from the beginning of the war until the German occupation of the territory of Lithuania was not thoroughly investigated in the historical legal literature. These norms actually existed in Lithuania and their reception would have been a logical step. It is not difficult to see that most of these norms were linked to the prohibition or restriction, of certain activities, expropriation of property and introduction of new obligations. For example, the citizens of hostile states were forbidden to acquire and dispose of real estate in the Russian Empire by the Emperor's Order of October 5, 1914 (Averbah, 1915). At the beginning of the First World War, the nation of Lithuania had not yet restored its statehood, the decision of the Russian authorities to participate in the war was not an expression of the will of the Lithuanian people, legal acts related to military actions were not issued by the Lithuanian state institutions. To recept these le-

gal norms meant taking some responsibility for decisions that were not in the best interests of the Lithuanian nation. Reconstructed State of Lithuania endeavoured to establish peaceful relations with all states, including those with whom the Russian Empire was at war. Reception of the legislation providing for repressive or restrictive measures against the citizens of those states would have deviated from the principles and obligations of foreign policy declared by the State of Lithuania. The very aspiration to base the activities of the State of Lithuania and its citizens only on those norms which, in our opinion, were of great political and legal significance at the time of peace, was a clear signal to the neighbouring nations. Presumably, for the same reasons, the legal regulations introduced by the German occupation authorities, which were in force between 1915 and 1918, were not preserved.

Governmental acts of both public and private law of Russian authorities in 1914-1915 and German authorities in 1915-1918 constrained and restricted the rights of the Lithuanian population. The government of the restored state of Lithuania tried not only to consolidate the catalogue of civil liberties and rights in the Provisional Constitutions, but also to create conditions for their actual implementation. For example, as early as 1919, the Law on Press and the Law on Societies, both being important to the development of democracy, were adopted (political parties were established on the basis of the latter), the Law on Meetings was adopted in 1920. Legislation of Russian and German authorities adopted during the war severely restricted monetary and property relations, made it difficult to rebuild the economy of the country. Eliminating laws that restrict both political rights and economic freedom was certainly a reasonable and useful solution. There were, of course, some legal acts of Russian and German authorities that could be called neutral (for example, on the legal status of Cossacks, who did not live in Lithuania) or even useful (for example, on the fight against crime). Reception of such norms would have been a feasible and even meaningful step. However, such a selective reception would have been inconsistent from a doctrinal point of view, and would have been very complicated from a practical point of view. Therefore, cancelling all laws imposed by the Russian and German authorities during the war was the simplest and most meaningful solution of all (however, some exceptions were made with respect to German criminal law).

It is customary in Lithuanian historical legal literature to interpret the constitutional provision «[laws] that existed before the war» as «that existed before August 1, 1914». But was this what the authors of the text of the Provisional Constitution meant? Why did they not give that exact date, as it is common practice to set limits on the validity of an act? It is unlikely that in 1918 Lithuanian citizens could remember the date of the war so easily, all the more that it was not a well-known fact. The «Chrestomatous» start of World War I, July 28 (that day the Austro-Hungarian monarchy declared war on the Kingdom of Serbia), was only a later consensus among historians. August 1 as a more relevant date for Russia (when the German Empire *de jure* declared war on the Russian Empire, which had occupied and annexed Lithuania) is also a date chosen by consensus. By announcing global mobilization on July 31, the Russian government and the Tsar realized that they were *de facto* launching a war against Germany, and had no doubt that the German government and the Emperor would understand this move accordingly (Suhomlinov, 1924). The mobilization of private cars began on the same day, on July 30 martial law was declared in the Grand Duchy of Finland (an autonomous unit within the Russian Empire), even earlier, on July 29, martial law was declared in the Russian army and navy. If you look at the problem very formally and agree that the «[laws] that existed before the war» are those «that existed before August 1, 1914», then the above mentioned and other acts adopted at the end of July must be considered as recepted and valid in Lithuania in 1918 and later. However, it is clear that these acts, by their content and spirit, are actually acts of war, and their reception and validity would have been contrary to the policy of the restored State of Lithuania, its pursuit of peace and peaceful relations with other states. In our view, it is not the date of adoption of a particular act, but its content is important, insofar as it is linked to or unrelated to World War I. All acts by which the Russian Empire engaged in, or was preparing to engage in, this war are in accordance with

the meaning of the constitutional norm «[laws] which existed before the war» and the general spirit of this Constitution (the «spirit of the Constitution» is a term widely used by the Constitutional Court of the Republic of Lithuania to interpret the Constitution in force) must be considered as excluded from the legal system of the restored state of Lithuania.

There is an important statement in the constitutional doctrine of the Constitutional Court of the Republic of Lithuania that the Constitution cannot be interpreted on the basis of ordinary laws. However, it would be useful for readers to know that The Provisional Law on the Organization of Courts of 1918 (the first Ordinary Law issued in the restored State of Lithuania, which was in force until 1933) stipulated that courts established at that time must adjudicate civil and criminal cases under the laws «that existed under the Russian rule» (Article 2). Interestingly, the same article refers to Article 24 of the Provisional Constitution, which states «[the laws] which existed before the war». Presumably, the Council of the State of Lithuania, which issued both the Provisional Constitution and the Provisional Law on Judicial Organization, did not see any contradiction here. It is noteworthy that this law also does not contain an exact date, which indirectly confirms our guess that in law reception, not the moment of the adoption of laws but their content was of importance.

Today, such guesses can be confirmed or denied by instituting proceedings in the Constitutional Court, which has the power to formally interpret the Constitution. In the Provisional Constitutions of 1918, 1919 and 1920, the function of constitutional control is not enforced *expressis verbis*, however, the provision in question is derived from the provision on the validity of recepted laws to the extent that they are not in conflict with the Provisional Constitution. This means that before applying a recepted law, every time it is necessary to determine its compliance with the Constitution. In the absence of any special constitutional control institution, each law enforcement officer had to perform this function on a case-by-case basis. We agree with M. Maksimaitis that not only the courts but also the executive authorities had to decide on the constitutionality of the recepted law (Andriulis, et al., 2002). «Deciding» primarily means «clarifying», but no one could prohibit that institution from clarifying the constitutionality issue that has been clarified (of course within the sphere of its competence) to other legal entities (e.g. the court in its decision or the minister of justice in its circular). Such a «fragmented system of constitutional control» enshrined in all three Provisional Constitutions is not common nowadays. It can be reasonably criticized from the standpoint of modern legal science primarily because it cannot ensure a uniform, systematic, comprehensive interpretation of the Constitution, and is not protected from the unprofessional, biased, conjunctural solution of the constitutionality issue. However, under the conditions of Lithuania of 1918-1920, only it could verify the constitutionality of the recepted law. This system also had a number of advantages in that it was flexible, rapid, allowing litigants and interested parties in the executive branch to raise the constitutionality of the law and present their arguments (for comparison, in present-day Lithuania an individual constitutional complaint has been established very recently – citizens can use it to defend their rights from September 1, 2019). Of course, if the obligation of the institutions to review the constitutionality of recepted laws was enshrined at the constitutional level, there should have been a relevant practice as well. We believe that an analysis of practice of executive authorities and law cases would be an interesting and promising line of research. It could be possible to establish who and how many times questioned the constitutionality of the law, how the institution dealt with and how it reasoned its decision. To our knowledge, such studies are not yet available. However, it can already be stated that Provisional Constitutions were richer and the Lithuanian legal system based on them deserves more careful attention from researchers.

4. Conclusions

1. Law reception and particularism enshrined in the Provisional Constitutions met the expectations of the citizens, and the government's ambition to completely eliminate recepted law in all areas of people's activities in the intensive development of the national law was in line with the strategic interests of the state and society. Particularism was a natural expression of pluralism inherent in the West-

ern legal tradition and had a great potential for the development of Lithuanian law, which was not exploited due to the negative appreciation of particularism and the attempt to eliminate it completely.

2. Acts issued by the Russian authorities in 1914-1915 and by the German authorities in 1915–1918 restricted the rights of Lithuanian residents, severely restricted monetary and property relations, made it difficult to rebuild the country's economy, providing for repressive or restrictive measures against the citizens of hostile states. The restored state of Lithuania endeavoured to establish peaceful relations with all states, including those with whom Russia and Germany were at war. Cancelling the law imposed by the Russian and German authorities during the war was a reasonable and useful decision of the Lithuanian State authorities.

3. The interpretation of the constitutional provision «[laws] which existed before the war» as «which existed before August 1, 1914», common in the historical legal literature of Lithuania, is incorrect. The question what laws were recepted has to be addressed not by the date of the adoption o a certain act, but by its content – insofar it is linked or unrelated to the First World War. All acts by which the Russian Empire intervened or were preparing to intervene in this war shall be considered to be excluded from the legal system of the restored State of Lithuania in the sense of the constitutional norm «[laws] which existed before the war» and the general spirit of this Constitution.

4. The system of constitutional control entrenched in the Provisional Constitutions, where a court or an executive authority verified the compliance of a recepted law with the Constitution before applying it is subject to criticism from the standpoint of contemporary legal science, but under the conditions of Lithuania of 1918-1920, it was flexible, fast, allowing citizens to raise the issue of the constitutionality of the law and present their arguments.

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КОНСТИТУЦІЙНІ ОСНОВИ КООРДИНАЦІЇ ПРИЙНЯТОГО ТА НАЦІОНАЛЬНОГО ПРАВА ЛИТВИ В 1918–1920 РР.

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Анотація

Об'єктом дослідження є положення Тимчасових конституцій 1918 року, 1919 і 1920 років, що стосуються створення правової системи Литви. Метою дослідження є визначення, що послужило підставою для сприйняття іноземного права і партикуляризму закону, який закон був прийнятий і який зв'язок між ним і новоствореним національним правом. Основними методами, які використовуються є: систематичний, телеологічний, історичний, лінгвістичний та порівняльний. У цій статті представлено оригінальне бачення прийнятого закону і критична оцінка міжвоєнного рішення уряду Литви повністю скасувати прийнятий закон. На думку авторів, сприйняття закону і партикуляризм, закріплені у Тимчасових конституціях, відповідали очікуванням громадян, а прагнення уряду повністю скасувати прийнятий закон у всіх сферах діяльності людей при інтенсивному розвитку національного права відповідало принципам стратегічних інтересів держави і суспільства. Партикуляризм був природним виразом плюралізму, властивого західній правовій традиції, і мав великий потенціал для розвитку литовського права, який не використовувався через негативну оцінку партикуляризму і спроб його повного усунення.

Акти, видані російською владою в 1914-1915 рр. та владою Німеччини в 1915-1918 рр., обмежували права жителів Литви, жорстко обмежували грошові та майнові відносини, ускладнювали відновлення економіки країни, передбачаючи репресивні або обмежувальні заходи проти громадяни ворожих держав. Відновлена Литовська держава прагнула встановити мирні відносини з усіма державами, включаючи ті, з якими Росія і Німеччина перебували у стані війни. Скасування закону, введеного владою Росії та Німеччини під час війни, було розумним і корисним рішенням влади Литви.

Поширене в історико-правовій літературі Литви тлумачення конституційної норми «[закони], що існували до війни» як «ті, що існували до 1 серпня 1914 року», неправильно. Питання про те, які закони були прийняті, повинно вирішуватися не за датою прийняття того чи іншого акту, а за його змістом – оскільки він пов'язаний або не має відношення до Першої світової війни. Всі дії, якими Російська імперія втручалася або готувалася втрутитися в цю війну, повинні вважатися виключеними з правової системи відновленої Литовської держави в сенсі конституційної норми «[закони], які існували до війни» і загальний дух цієї Конституції.

Система конституційного контролю, закріплена у Тимчасових конституціях, коли суд або виконавчий орган перевіряє відповідність прийнятого закону Конституції до його застосування, піддається критиці з точки зору сучасної юридичної науки, але в умовах Литви 1918-1920 рр., він був гнучким, швидким, дозволяючи громадянам піднімати питання про конституційність закону, представляючи свої аргументи.

Ключові слова: *юридична історія; Тимчасові конституції Литви; прийняття закону; партикуляризм права; Західноєвропейська традиція права; правовий плюралізм; публічне право; приватне право.*

SECTION 3

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

UDC 321.01; 342.2

THE PARADIGM OF CONTEMPORARY UNITARISM IN UKRAINE: ISSUES OF FORMATION AND IMPLEMENTATION

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Summary

Aim. The article aims to investigate the essential and content characteristics of unitarism as a phenomenon of contemporary constitutional law. The synergistic connection between the doctrine of modern unitarism, the principles of unitarity of the state territory and the fundamental institutions of political-legal and state-administrative life of modern unitary states is shown. It proves that the unitary system is not only one of the important components of the process of accomplishing the tasks, goals and functions of most modern states, but also an immanent feature and strategic element of the mechanism of exercising their sovereign rights.

Methods. The methodological basis encompasses philosophico-ideological, general scientific principles and approaches and special scientific methods of inquiry for constitutional and legal phenomena and processes. The philosophico-ideological basis of the study is the position of dialectics, on the basis of which the causes and factors of the evolution of unitarism are thoroughly investigated. In general, the research was conducted on the basis of a combination of ontological, epistemological and axiological analysis of contemporary unitarism.

Results. The complexity, importance and relatively widespread use of unitarity as a form of government is causing a lively and ever-growing scientific interest in it throughout the world. The unique capability of unitarism to take into account the specific features of a particular condition allows it to manifest itself in each case in a new way. That is why it is important to analyze the mutual influence of unitary theory and practice, to explore and take into account the peculiarities of national unitarism.

The problem of unitarism and the unitary form of the territorial structure of the state and the status of its constituents is one of the least studied in domestic constitutional law. Modern scholars studying constitutional law, as a rule, are limited to consideration of individual issues of the territory, in particular, the features of the territorial organization of state power and local self-government, problems of state sovereignty, territorial integrity

and inviolability, etc. To a large extent, the problem has not been studied exhaustively in contemporary Ukraine which causes difficulties in understanding such interrelated but not identical phenomena as unitarism and unitarity, regionalism and regionalization, municipalism and municipalization, decentralization and deconcentration, etc. It should be noted that in modern literature related to problems of state territory, territorial organization of state power, and other issues of the status of territory, the complex, multidimensional nature of unitarism, as a constitutional category, is not always taken into account.

Conclusions. Unitarism is proved to be a multidimensional socio-political and constitutional phenomenon: it is an idea, a theory, a scientific direction as well as a global social constitutional practice and a constitutional form of the existence and functioning of territorial communities, it is the historical condition of national statehood and Ukrainian regional civilization and the form of realization of the national identity and civic consciousness, etc.

Key words: unitarism; unitarity; territory; state; state structure; unitary structure; administrative-territorial structure.

1. Introduction

The most important issue of the constitution□building process in modern Ukraine, which requires deep doctrinal interpretation, is the practice of municipalization and decentralization, which has intensified to the greatest extent in recent years, especially in the process of unification of territorial communities. Currently, in the context of the constitutional reform, and, in general, the renewal of political and legal systems, the state and civil society, their organizational structures have to perform a serious task. The task lies in concentrating positive democratic efforts and systematic implementation of unitary discourse in constitutional and socio-political matters, comprehensive development of the institution of unitarism.

For modern Ukraine, the issues of territorial organization of power, administrative-territorial structure and territorial structure, protection of territorial integrity are of particular importance. According to the Constitution of Ukraine, our state is unitary by the form of territorial organization. The Ukrainian people and the Ukrainian state face a number of complex internal and external threats and challenges, primarily related to such fundamental constitutional values as sovereignty, independence, freedom, democracy, territorial integrity, and so on.

Indeed, the annexation of the Autonomous Republic of Crimea and the armed intervention of the Russian Federation against Ukraine continue. Under the influence and support of the aggressor, terrorist groups operate in Luhansk and Donetsk oblasts. Separatist tendencies in different regions of Ukraine are constantly intensifying. Federalist scenarios of its constitutional development, language and confessional conflicts and contradictions, etc. are artificially inspired.

These and other problems are objectively related to the issues of the territorial structure of Ukraine and its principles, among which unitarism has a unique and system-forming significance. Unitarism is a constitutional and legal phenomenon whose concept, essence, content, goals and prospects of development have been the subject of scientific interest for a long time. However, the search for the paradigm of unitarism which is in line with the modern conditions of the changed world order still lasts in the domestic and foreign legal literature.

Concurrently, the diversity of opinions on key general theoretical issues indicates the actualization of the theory and practice of building unitary states whereas the significant theoretical basis of unitarism constantly requires additions, given that the practice of building unitary relations is dynamically expanding since the principles of unitarism are widely applied not only in the territorial organization of public power of unitary states, but also in the processes of institutionalization and functioning of political, legal, social, economic, financial, spiritual and other systems of society. Unitarism is constantly evolving, it is revealed in a new way and

thus it requires careful doctrinal constitutional and legal interpretation.

Aim and research tasks.

This study is aimed at deepening the conceptual and constitutional foundations of unitarism as a common law category, the category of modern constitutional law and constitutionalism as well as the paradigmatic basis of the territorial organization of modern Ukraine.

To accomplish the aim the following **tasks** have been set:

- to disclose the genesis of the system of ideas about unitarism in the aspect of the theoretical and methodological understanding of the doctrine of the state territory;

- to define the term «unitarism», reveal the features of its constitutional and legal nature;

- to study the axiological, ontological, epistemological, functional-teleological significance of the theory of modern unitarism and to reveal the paradigmatic-constitutional issues of its implementation in Ukraine.

Methods.

The methodological basis of the work is a set of philosophico-ideological, general scientific principles and approaches, and special scientific methods of inquiring constitutional legal phenomena and processes. The tenets of dialectics, on whose basis the causes and factors of the evolution of unitarism are comprehensively studied, are the philosophical and ideological basis of the study. In general, the study was based on a combination of ontological, epistemological and axiological analysis of modern unitarism.

Literature review.

Certain aspects of the theory and practice of contemporary unitarism, administrative-territorial structure and process were studied in the works by such modern scholars and experts as Yu. I. Hanushchak, B. P. Hdychynskyi, A. B. Het'man, R. V. Huban', O. P. Ishchenko, V. M. Kampo, O. L. Kopylenko, V. V. Kravchenko, I. O. Kresina, V. S. Kuibida, O. H. Kuchabskyi, I. Y. Manovskyi, V. I. Nudel'man, Kh. V. Prykhod'ko, S. O. Teleshun, A. F. Tkachuk, L. T. Shevchuk and others.

The author believes that the political and legal doctrines about the phenomenon of state territory in general, its tasks, functions, forms of organization, including primarily the unitary system of the state, formulated over the centuries in the context of domestic and international science, have not lost their importance up till now, and the comprehension of ideas about the nature of unitary statehood is necessary for the successful solving of the problems of administrative-territorial structure, territorial organization of power and strengthening of unitarism in modern Ukraine.

Taking into consideration the above, modern Ukrainian unitarism needs further research, chiefly, in view of its essence, content, principles, strengthening in the context of the administrative-territorial reform, local government reform and decentralization of public power, trends and prospects for development in the framework of the new world order as well as challenges facing Ukraine as a result of the annexation of the Autonomous Republic of Crimea and Russia's armed aggression, etc.

Results and discussion.

2. Unitarism in the doctrine of contemporary political science

It is well known that the term «a unitary state» comes from the Latin word unus, unitas, which means «one», «unity». Thus, a unitary state does not consist of state formations, but of administrative-territorial units, whose legal status is determined by the central government. The unitary character of the state means that the territory within the existing state borders is integral and inviolable, that the constituent parts of this territory are inextricably linked and marked by internal unity and have no signs of statehood, as is the case with constituent parts of, say, a federal state.

Other characteristics of a unitary state are also conceptually significant. For example, some scholars focus not only on its so-called «material» characteristics, but also emphasize that intangible factors also contribute to ensuring unitarism. This approach demonstrates the definition of a unitary state, represented as a simple single state entity, consisting of legally equal administrative-territorial units that are subordinate to the central government and have no signs of state sovereignty, and the majority of the population in such a state has unitary legal consciousness.

«Unitary legal consciousness» belongs to a group of features that are not limited to the form of state attributes and technological char-

acteristics of the unitary state. Unitary legal consciousness is more than a necessary sign of statehood and unitary capacity. This characteristic precedes unitarism and serves as its basis. This is a peculiar national tradition of territorial organization and a form of its historical and contemporary constitutionalization (Batanov, Prykhod'ko, 2016; Irynin, 2007).

The systemic approach deserves special attention in the context of universalization of methodological approaches to the unitary characteristics of the modern state. In the Western legal doctrine the concept of «a unitary system» is defined as a system of political organization in which all or most of the power is concentrated at the level of the central government, in contrast to the federal system. Under the unitary system the central government usually delegates authority to territorial units and allows the latter to implement political decisions.

Analyzing the genesis of the unitary form of the state structure, we must proceed from the fact that unitarism replaced particularism and feudal fragmentation, played its progressive role. It did not depend on the national-ethnic or racial structure of the population, but was demanded by a single regime, relative simplicity in exercising state power. The unitary state is currently the most common form of state in the world. More than 85% of the countries of the world have chosen the unitary form of their territorial structure. Despite the fact that these states are different in their territorial parameters, ethno-national composition, geographical location, economic and socio-cultural development, political and legal traditions, unitary states possess a complex system of features.

Among them there are such as: the territory of the state is divided into administrative-territorial units that are not endowed with state sovereignty; a single structure of the state apparatus whose competence extends to the entire territory of the state; single citizenship; a unified system of legislation whose pivotal center is a single state constitution, the norms of which are applied throughout the country without any restrictions; a unified judicial system; a unified system of constitutional control bodies; a single-channel taxation system; the participation of the state as an integrated whole in international relations and the like.

In terms of ensuring the public administration each of them has significant features. For instance, the United Kingdom decentralizes power in practice, but not in constitutional principles. It is one of the few countries that has chosen devolution as a form of decentralization and territorial organization. Other countries provide various degrees of autonomy to territorial units. In France, which is a classic example of a decentralized administrative system, some members of the local government are appointed by the central government, while others are elected.

A unitary state is characterized by a single system of higher bodies (the parliament, head of state, government). The jurisdiction of these bodies extends to the entire territory of the country, which is divided into administrative-territorial units that do not have political independence. These units (departments, oblasts, counties, districts, communities, etc.) usually form their own representative and executive bodies which operate in accordance with national legislation and are obliged to apply laws and other normative acts adopted by central government bodies.

The territory of a unitary state always has its own internal organization or the so-called administrative-territorial system (the so-called micro-states are the only exception) whose essence is to divide the single territory of the state into its constituent parts. The territory of a unitary state is nothing more than a large political and socio-economic supersystem, which within the boundaries defined by the state border combines the key functional subsystems of the life of society («governance», «manufacturing», «servicing», «resettlement») and to some extent localizes them within specific administrative-territorial units of the existing administrative-territorial division. Only in those cases when the localization of these subsystems on the territory corresponds to the existing administrative-territorial system (and respectively, to the existing system of governance), the administrative-territorial system can be viewed as optimal.

However, in our opinion, both in conceptual-constitutional and praxeological aspects, unitarism is a much more complex phenomenon with regard to its axiological, ontological, epistemological, teleological and other attributes and characteristics than the unitary system of the state.

3. Doctrinal approaches to understanding the constitutional and legal nature of unitarism

The theory of unitarism refers to one of the universal constitutional legal and political theories that develop and enrich the practice of constitutional law and process, the construction of modern statehood. The interpretation of the specifics of constitutional construction in modern Ukraine faces a number of doctrinal problems and, in particular, the need to develop categories that form a stable and at the same time dynamic political system. Such a political need in the present context and in the future actualizes the need to develop and clarify many notions.

These include the notion of unitarism, which is closely linked to the phenomenon of constitutionalism and the system of constitutional traditions, ideas, views that define the constitutional structure and are manifested in constitutional legal norms and institutions, constitutional customs and constitutional consciousness.

Today unitarism in contemporary Ukraine is developing in the conditions which are far from being perfect, they are primarily associated with the annexation of the Autonomous Republic of Crimea and the Russian Federation's armed intervention. The radical modernization of many constitutional, ideological and moral values that has taken place over recent decades necessitates the consolidation of constitutional and political consciousness, the constitutional and political culture of society. That is why today unitarism can become such a value-orienting paradigm that would become a system-forming idea and an important element of social legal consciousness.

The urgency of studying the institution of unitarism in this period is growing not only in view of doctrinal-cognitive perspectives, but also in the praxeological aspect, since many of the existing projects on constitutional, first of all, administrative-territorial, transformations are consistent with today's realities and promote fundamentally new constitutional values. in the system of which unitarism occupies a unique place.

This is primarily due to the fact that the unitarian idea in the process of its genesis goes beyond the spatial-technological, functional-teleological and instrumental-cratologic framework of the state structure and, in the current situation starts to become a form of the national model of constitutional order, absorbing many constitutional phenomena, relations and processes – beginning from the issues of forming municipalism and parliamentarism, the functioning of territorial communities and public authorities and ending with the problems of forming constitutional consciousness and constitutional culture. Nowadays, unitarism, as one of the fundamental principles of the constitutional order, objectively acts as a springboard for the introduction of unitarian ideology in the constitutional and legal life and social relations.

However, the modern theory of unitarism suffers from a lack of systemicity, integrity, adequate legal definitions of basic concepts. Owing to this, the development of the appropriate categorical-conceptual apparatus remains a rather important issue of modern legal and political science. Many concepts, in our opinion, are still not precisely defined, which gives rise to their ambiguous interpretation, different perceptions of essence, content and scope. Scientific works, including those specifically devoted to unitarism, often do not provide definitions of basic concepts at all, and there is no clear distinction between them. And concepts such as «a unitary state», «unitarity» and «unitarism» are often used by individual scholars as identical.

Thus, according to V. V. Mishchuk, unitarism should be understood as «the principle of state structure, whose essence is political unity, a single system of government bodies throughout the state territory, the situation when territorial units have no political independence, the unity of other political, economic and cultural institutions of the state». He also believes that «the principle of unitarism is based on the processes of centralization of state power and governance, combined with self-governing tendencies of local self-government. With the unitary form of territorial organization of the state there is only one constitutional system of public authorities, whose competence extends to the entire territory of the state».

V. V. Mishchuk also claims that the concepts of «a unitary form of the state» and «unitarism» are not identical because their content is different. In addition, the time of introduction of

these concepts into the scientific circulation is different: the definition of «a unitary state» first appears in the scientific works of theoreticians of the 19th century, while the term «unitarism» for various reasons is not widely used even in modern jurisprudence. Moreover, the unitary state itself arises and develops on the basis of the principle of unitarism. Notably, some elements of unitarism are observed in states with a federal form of territorial structure (Mishchuk, 2010).

Another example is the position of M. V. Savchyn, who considers unitarism as a form of state structure and argues that «domestic unitarism is based on administrative-territorial division which provides for the unification of legislation on local government and the unification of the system of public authorities and local authorities». He also notes that «unitarism does not end there, its principles are violated from the point of view of legal dogma – Ukraine includes the Autonomous Republic of Crimea, which is a dilemma of Ukrainian unitarism, as there arises the question about the possibility of emerging regionalist and even federalist tendencies» (Savchyn, 2009).

O. H. Kushnirenko's position is indicative in this regard. Although emphasizing that unitarism is «a form of state unity and the basic value of constitutional order» he also focuses on the analysis of the unitary form of the state structure (Kushnirenko, 2014).

Thus, it should be noted that developing a definition of unitarism is a rather difficult task. Many scientific papers do not give a clear definition or it is present implicitly, for example, when features, properties, traits are enumerated (Het'man, 2013; Hrechko, 2018). Not all of them are typical of unitarism. Their essence, content and number of the given signs and properties are different. Additionally, the concept of «unitarism» is used by researchers in various fields of scientific knowledge (lawyers, political scientists, sociologists, philosophers, economists, financiers), i. e. it is an interdisciplinary category.

The lack of a unified approach to understanding unitarism is due to several reasons. First of all, the unitary model of the state system: a) refers to both the structure and functioning of public power; b) it provides a synthesis of different trends in the development of the state organism: on the one hand, its unity, indivisibility, centralization and, on the other hand, municipalization, decentralization, deconcentration, devolution, etc.; c) is at the same time a constitutional and legal, political and social phenomenon; d) envisages certain goals and means of achieving them, and these goals may be local, regional and global in nature.

In addition, there are several models of unitary organization of the state, for which unitarism can be considered as the theory of the unitary form of the state structure as awell as a specific unitary state – a way to promote and implement this theory. Under this approach unitarism as a constitutional and legal phenomenon is actually identified with the scientific theory of this phenomenon, that is, the constitutional legal reality and its reflection in scientific knowledge do not differ. In this aspect the concept of «unitarism» contains the philosophy of a qualitatively determined state system, it is the theoretical and methodological basis for organizing the unitary structure. And «unitarity» is a type of a real state organization that meets all the principles of unitarism and is the embodiment of its philosophy.

Unitarism is also seen as a way of life, as a way of combining territorial unity and inseparability in the constitutional relations of various forms of statehood – from centralized to decentralized, deconcentrated, regional states and local self-government.

4. Paradigmatic and constitutional issues of contemporary unitarism

The current stage of development of unitarism in Ukraine is due to significant changes in the mechanism of constitutional and legal regulation of social relations and qualitative renewal of the system, structure and content of «the constitutional». From our perspective, the essence and content of classical municipalism must be considered and understood from a variety of positions:

– ***axiological,*** which reveals the value potential of the phenomenon of unitarism as a constitutional legal and political ideology that is a system of ideals and ideas about the territory of the state, its structure as a constitutional value (their genesis, system, forms of expression, methods and the degree of implementation and pro-

tection) (Bondar, 2014), which is based on a symbiosis of constitutional legal theory and practice. For example, sovereignty, separation of powers, rule of law, inviolability, subsidiarity, proportionality, systematicity, stability of the administrative-territorial structure are sense-forming values of contemporary unitarism;

– ***epistemological***, which provides knowledge about the processes of formation and permanent development of unitarism in individual European states, generally in the European continent and in the general civilizational meaning with regard to the formation of Ukrainian, European and world constitutionalism, the processes of democratization, globalization and European inter-state integration. The evolution of domestic unitarism is a long process stretched out in time and space, consisting of a chain of historical stages, the criteria for selecting which are usually sharp, turning points in the development of society and the state, democracy and government institutions, which were caused by a number of common civilizational, state and regional, internal and external, socio-legal, geopolitical, financial-economic, spiritual, cultural, environmental, national security, other trends and processes that determine the possibility of the emergence, recognition and development of sovereign democratic statehood;

– ***ontological,*** which conceptualizes the phenomenon of unitarism as a special form of social consciousness and the mechanism of embodying in human existence the ideals of national constitutionalism and the ideas of the authority of the state territory as a fundamental constitutional value, respect for its integrity and indivisibility, namely – unitarian consciousness built on the conscientious conviction with regard to the necessity, usefulness, functional and teleological value of state unitarity and legal norms on the basis of which they are recognized by the Ukrainian people and the state, establish guarantees of the constitutional order of Ukraine, model opportunities to protect diverse interests of the Ukrainian people, state, territorial communities and a person at the place of his / her residence with the help of actions and steps on the part of public authorities.

We believe that this aspect is one of the key aspects in the process of forming modern unitarism in Ukraine in general, strengthening the unity and integrity of the state territory, and in terms of democracy, decentralization and local self-government. Indeed, the most important precondition for progress in strengthening the unitarity of Ukraine should be the formation of specific constitutional and legal unitarian attitudes and unitarian thinking of society, the development of unitarian culture, the demand for the very principle of unitarism;

– ***vital***, which captures such determinants and teleological guidelines for the existence of unitarism, which are life-giving not only for society and the state generally but also for a person and local communities. The territory is an indispensable condition for the development of all state life. Territory along with the categories of «people» and «power», forms a triad of elements that create the state (Sysoieva, 2006). In this respect, the territory of the state does not only enable the emergence, existence, organization and functioning of the state, acting as «a space of self-determination of the people, within which the state exercises its sovereignty and jurisdiction» (Baburin, 1998), but also becomes the spatial basis of its division into constituent parts – administrative-territorial units in order to create for all citizens, regardless of their place of residence, favorable conditions for developing human potential, ensure the necessary level of providing administrative, social and other services, the functioning of a rational system of socio-economic processes, sustainable development and more.

Traditionally, the division of state territory into administrative-territorial units is due to geographical, historical, economic, social, cultural and other factors. Owing to this the territory in the spatial dimension optimally captures both complex problems of national importance and basic issues of human life, political, economic, spiritual and moral values and social achievements of a person in any field of social development. In a unitary state, this generally causes special unitary sociality;

– civilizational: understanding the historical as well as modern experience of unitarism through the prism of the civilizational approach allows us to realize the prospects of political and socio-economic development of Ukraine as a sovereign state in the distant future. The civilizational approach allows us to comprehend the mean-

ing of the national experience of unitarism and compare it with the experience of unitarism of those foreign democracies where it has become a stable civilizational tradition. In this aspect, in particular, the process of formation of the paradigmatic construction of unitarism as thre theoretical reflection of political, socio-economic, eco-humanistic, informational, national security strategy and practice of developing the Ukrainian people and Ukrainian statehood is revealed;

– praxeological, which provides knowledge about contemporary unitarism as a practice of territorial organization and the functioning of public power and the realization of human rights; this practice has developed under the influence of generally accepted ideas and principles of modern constitutionalism and municipalism.

Thus, in particular, currently the most urgent task of the state and state power is to protect the sovereignty, ensure the integrity and inviolability of the territory of Ukraine; social development, first of all – the development of human capital, protection of rights, freedoms and legitimate interests of citizens of Ukraine, European and Euro-Atlantic integration (the creation of necessary conditions for gaining full membership in the EU and NATO); the restoration of territorial integrity within the internationally recognized borders of Ukraine, development of defense and security capabilities that would prevent armed aggression against Ukraine by raising the cost of this aggression; the ability of society and the state to respond quickly and adequately to changes in the security environment and to maintain the sustainable functioning of their basic mechanisms. The implementation of these and other priorities should be ensured by restoring peace and state sovereignty in the temporarily occupied territories of Donetsk and Luhansk oblasts, implementing the necessary range of accompanying international legal, political-diplomatic, national security, eco-humanitarian and socio-economic measures, etc.

We are convinced that one of the paradigmatic foundations for the implementation of the respective state tasks and goals should be the doctrine of Ukrainian unitarianism.

As for the role of municipal authorities in the corresponding processes, it consists not only in implementing its self-governing functions and powers but also the formation and consistent realization of various organizational and legal forms, methods, means, areas of direct public self-government activities that would promote as much as possible full involvement of the population in the process of solving the problems of local life, stimulating interest and initiative in self-organization. It is this circumstance that forms both the practical significance of effective, based on European standards, municipal democracy, organization and activities of municipal authorities, and research interest in this issue, taking into account the huge social demand for methodologically meaningful information that would highlight the multifaceted aspects of public power activities of the local self-government, primarily, with regard to strengthening domestic unitarism;

– ***functional***, which shows the role and importance of public (state and municipal) power as a dynamic system and purposeful activity, through which, in fact, the functional and teleological mission of the state and the practical foundation of modern unitarism are realized. The fact remains that the strength of a contemporary democratic state is determined, first of all, by how effectively it performs its functions, how effective its domestic and foreign policy is. Thus, the unitary state has its own special qualities, which, inter alia, characterize its state structure (the legalization of unitarism), which are manifested in its policies differently in each country, society, in specific situations in accordance with the tasks to be solved by society, set goals, rights, freedoms and citizens' legitimate interests, i. e. it is an effective, full-fledged, authoritative and self-confident state that clearly performs all its functions and social mission.

As the history of development of states demonstrates, the mechanism of the state will be effective only when the economic, political and social tasks it sets are successfully accomplished, when the stability of the government, its state legal institutions is ensured, when the methods of state legal regulation are used correctly, when the proper balance is maintained in the system of elements that make up the mechanism of the state, and state bodies will perform all the functions assigned to them, i. e. the activities of the state mechanism will meet the fundamental interests of society and citizens.

This approach indicates the transition in the functional theory of the state from the traditional emphasis on its formal components to the so-called «human factor» from the standpoint of a broad humanistic approach intended to lead to a certain reassessment of the ratio of objective and subjective factors in the system of the governance of society in favour of its interests. In particular, the human dimension of the problematics of the functioning of the mechanism and apparatus of the state is a methodological basis that allows for a more detailed analysis of the issues which are new for legal science, but extremely pressing and important; these are very complex issues of politics and law, national security and defense, information and personnel support, organizing and doing public service, etc. (V. V. Volynets, 2012; O. M. Loshchykhin, 2013);

– ***organizational***, which provides information about the institutional peculiarities of contemporary unitarism in the context of the emergence, formation and development and about the systemic qualities of the subjects and organizational structures of unitary statehood. In this aspect the constitutional mechanism of state power should be understood as a single system which is based on legal principles; this is the system of interconnected, public, legal, normatively defined, organizationally and functionally provided institutions aimed at the practical implementation of state functions and they are based on available resources. In this respect the structure of the constitutional mechanism of state power should be viewed as a complex multilevel system of normative and institutional means with whose help purposeful, effective influence on state-power relations is exercised through interdependent, balanced functioning of all structural elements in order to create optimal political, economic, social, spiritual, cultural, ideological, legal and other conditions for the functioning of a sovereign, independent, democratic, legal state, and unitarity being one of the organizational principles of its existence (Shatilo, 2018);

– ***communicative***, which allows us to consider unitarism as a tool for implementing one of the main tasks of modern constitutional history – combining into a single whole the interests of the state, society and the individual, since the main sense, essence and functional-teleological mission of unitary statehood is to harmonize rights and freedoms of a person and a citizen with the interests of the state and society. It is human rights and freedoms and their guarantees that determine the content and direction of the activities (function) of the state. The state is responsible to the person for its activities. The establishment and maintenance of human rights and freedoms is the main responsibility of the state. Indeed, the right to determine and change the constitutional order in Ukraine belongs exclusively to the people and cannot be usurped by the state, its bodies or government officials.

It is worth noting that among many concerns of modern society, one of the most acute issues is the issue of alienation, xenophobia, pathological egocentrism and individualism. Combined with crisis phenomena in economic and political life, this issue causes a number of pessimistic views on the fate of mankind in general, the evidence of which is the «survival strategy» officially recognized by the UN. Throughout its history, human civilization has accumulated valuable experience in overcoming enmity and mutual hatred, it is the experience that has been consolidated in such a social and spiritual value as human solidarity. The main means of ensuring solidarity is the culture of human relations, a civilized way of communication, or the so-called «communicative culture» (Sarnovs'ka, 2000). In view of content and terminology, the notion of «communication» is on a par with similar notions of «interaction» (relationship), «human relations», «interdependence», «mutual influence», etc., the content of which optimally characterizes the processes of the formation and functioning of unitary statehood;

– ***definitive (categorical),*** based on the assumption that unitarism as a conceptual element is capable of singling out the system of categories of contemporary constitutional law («the territory of the state», «state structure», «administrative-territorial structure», «unitarity», «a unitary structure», «regionalism», «regionalization», «municipalism», «municipalization», «decentralization», «deconcentration», etc.).

5. Conclusions

First, only in their unity the determined and other aspects in understanding the essence of unitarism (also in the context of ideas and val-

ues of world constitutionalism, its content and systemic-structural characteristics, including freedom, sovereignty, solidarity, democracy, rule of law, separation of powers) allow us to speak of the existence of this phenomenon not only as an attractive conceptual model but also an objective reality which has axiological, epistemological, ontological, civilizational, institutional, constitutive, normative, functional-teleological, historical, national and mental parameters that have evolved under the influence of respective ideas and principles.

Second, such a symbiosis of essential, content and system-structural characteristics of modern unitarism allows understanding, developing, protecting unitary statehood. As a matter of fact, only under the condition of such paradigmatic-constitutional, institutional and functional installation in the mechanism of a democratic constitutional system does the unitary idea become an optimal and, in fact, universal basis for resolving a significant number of public affairs, including and, primarily, related to human rights. This testifies to colossal humanistic potential of contemporary Ukrainian unitarism.

Third, unitarism should not be identified exclusively with the traditional organizational or functional attributes of the unitary form of the state structure. Unitarism is a multidimensional socio-political and constitutional phenomenon: it is an idea, a theory, a scientific direction, socio-political and constitutional practice, and a constitutional form of existence and the functioning of the people (people's rule), state (statehood), regions (regionalism) and territorial communities (community sovereignty and municipalism), it is also the historical state of national statehood and Ukrainian regional civilization (national identity), and the manifestation of citizenship (unitary legal consciousness), etcetera.

Fourth, unitarism is a metatheoretical social phenomenon, whose forerunner are numerous attempts to theoretically comprehend the national and foreign experience in the development of a unitary state structure. That is why it is extremely important to generalize various studies of unitary systems as well as accumulate different scholarly traditions and concepts within the framework of the national paradigm of unitarism.

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ПАРАДИГМА СУЧАСНОГО УНІТАРИЗМУ В УКРАЇНІ: ПРОБЛЕМИ ФОРМУВАННЯ ТА РЕАЛІЗАЦІЇ

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Анотація

Мета. Метою статті є дослідження сутнісних та змістових характеристик унітаризму як феномену сучасного конституційного права. Показаний синергетичний зв'язок між доктриною сучасного унітаризму, принципами унітарності державної території та фундаментальними інститутами політико-правового та державно-управлінського життя сучасних унітарних держав. Доводиться, що унітарний устрій є не лише одним із важливих компонентів процесу досягнення завдань, цілей та функцій більшості сучасних держав, а й іманентною ознакою та стратегічним елементом механізму реалізації їх суверенних прав.

Методи. Методологічну основу роботи складають сукупність філософсько-світоглядних, загальнонаукових принципів і підходів та спеціально-наукових методів пізнання конституційно-правових явищ та процесів. Філософсько-світоглядною основою дослідження є положення діалектики, на основі яких всебічно досліджені причини виникнення та фактори еволюції унітаризму. Загалом, дослідження здійснювалось на основі поєднання онтологічного, гносеологічного та аксіологічного аналізу сучасного унітаризму.

Результати. Складність, важливість та відносно широке використання унітарності як форми державного устрою викликає жвавий і постійно зростаючий науковий інтерес до неї у всьому світі. Унікальна здатність унітаризму враховувати специфічні особливості конкретного стану дозволяє йому проявляти себе в кожному випадку по-новому. Ось чому важливо проаналізувати взаємний вплив унітарної теорії та практики, дослідити та врахувати особливості національного унітаризму.

Проблема унітаризму та унітарної форми територіального устрою держави та статусу її складових є однією з найменш вивчених у вітчизняному конституційному праві. Сучасні представники науки конституційного права, як правило, обмежуються розглядом окремих питань території, зокрема, особливостей територіальної організації державної влади та місцевого самоврядування, проблем державного суверенітету, територіальної цілісності та недоторканність тощо. Значною мірою недостатнє вивчення проблеми в сучасній Україні спричиняє труднощі у розумінні таких взаємопов'язаних, але не тотожних явищ, як унітаризм і унітарність, регіоналізм і регіоналізація, муніципалізм і муніципалізація, децентралізація та деконцентрація тощо. Слід зазначити, що у сучасній літературі з питань державної території, територіальної організації державної влади та інших питань статусу території складний, багатовимірний характер унітаризму як конституційної категорії не завжди враховується.

Висновки. Доводиться, що унітаризм є багатовимірним соціально-політичним та конституційним явищем: це і ідея, і теорія, і науковий напрям, і глобальна соціальна та конституційна практика, і конституційна форма існування та функціонування територіальних громад, і історичний стан національної державності та української регіональної цивілізації, і форма реалізації національної ідентичності та громадянськості тощо.

Ключові слова: *унітаризм; унітарність; територія; держава; державний устрій; унітарний устрій; адміністративно-територіальний устрій.*

UDC 342.9

PUBLIC ADMINISTRATION, ETHICAL INTEGRATION AND GLOBALIZATION

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Summary

The presented paper deals with globalization in connection with the ethical and moral dimensions in public administration, global ethics, ethical conceptions and a feasible ethical integration in the area of public administration. The core of the article is concentrated on the most influential and debated ethical theories and their influence on public administration decision making and professional traits which have to take a dominant place in the field of administrative profession. Special attention is put on the role of public administration procedures of taking ethical decisions.

Key words: globalization; ethics; integration; public administration; decisions.

1. Introduction

Globalization is a phenomenon which dominates our contemporary world in all spheres of our life. It is mostly evident in the economic and technological interconnections, in the fields of trade, financial sectors and mobility of capital and labor producing thus fastening of our interdependence not only in the field of commerce but at the same time networking our culture, habits, minds and way of our everyday lives. As it is expressed by Kimberly Hutchings the word *«global»* is generally used *«to signify something pertaining to the world as a whole. If something has global causes or global effects, then the suggestion is that either its causes or its effects are worldwide»* (Hutchings, 2010). With its positive as well as negative impacts and effects it touches all world regions, and sometimes it is difficult to distinguish between the local, regional and global. Deep influences are evident on the European Union as a whole influencing its big countries as well as smaller ones. At present the most depressing consequences of worldwide financial crisis are bringing excessively difficult burden especially on smaller countries, such as Slovakia, and terribly ostentatious effort on public administration attempting to moderate the most extreme depression consequences on their citizens.

According to Hutchings living in a world in which all humanity shares a common situation the concept *«global»* indicates the following implications:

a) a worldwide scale of commonality or sameness; commonality across people and peoples in which even the statement *«we»* signifies humanity as such; we participate in world markets, all of us are the subjects of international law, we all have some human rights, etc.,|

b) a worldwide scale of interconnection and interdependence; thanks' to the easier communication, transport and media events in one part of the world have an immediate effect on other parts of the globe and a direct influence on people to an unprecedented scale.

In spite of the widening spread of globalization supported by the integration processes, enlargement, and concentration on the increase of the knowledge-based society underlined with the ideas of bringing up progress and improvements of citizens` lives, it is noticeable that all those proclamations are pretty far away from the common European citizens lacking legitimacy in their eyes together with the absence of a pan-European loyalty to those institutions. The vague conception and pronouncements of generally accepted ethical values, principles and

norms are somewhere at the edge of all those processes. What is rather depressing in this situation is the existentially lost individual.

2. Public Administration and Integration Processes

Unification of globalized world and integration processes are with us, they are even accelerating, but at the same time they are successfully avoiding such intrinsic worth as common decency, honesty, integrity, openness, generosity, morality and the rest of all human ethical and moral qualities. So in spite of the speedy European integration, the integration in the ethical infrastructure is lacking behind, if not missing at all, being sometimes purposely, sometimes accidentally pushed to the margins of our attention. In some way it is more advantageous and profitable to close our eyes, being blind not seeing awful and appalling things around us and just let them unnoticed as they are. Generally speaking, at present it is still much more comfortable and easier to be unethical than ethical. We have only to agree with the words and opinion of Törbjörn Tännsjö that what we have left behind us when we look back at the 20th century are just unbelievable cruelty, terror, violence, devastating wars, holocaust, inhumanity and injustice. It is true that in Europe at the beginning of the 20th century most people accepted the authority of morality which had to be observed and obeyed as it is expressed by Immanuel Kant in his writings articulated in the following way: *«the starry heavens above me and the moral law within me»* (Tännsjö, 2008). In spite of the generally respected morality, morals, ethical principles and moral law by the 20th century, let us say, by the decent and highly civilized public, it seems to be that all those values and virtues had been relevant only in theory and, as we all know, their practical application had been in fact far away from was theoretically and officially declared. At the start of the 20th century the Europeans had some ideas and believes in moral progress and to see human ferociousness, brutality and civilized barbarism in retreat, but at the end of century, as expressed by Tännsjö, Singer, Krejčí and many other authors and scholars, and also as we feel it ourselves, it is hard to be confident either about the validity of moral law or about any moral progress done, not only at that time but at this time as well. Even today, when discussing global processes and the European integration, we must admit that there are still lacking certain general and integral global or at least European ethical standards, which would create a kind of broad-spectrum of some clearly defined values, principles and norms which might serve as a kind of guide for the appropriate and decent ethical behavior to be followed. As mentioned by Margozata Perzanowska and Marta Rekawek –Pachwicewicz, today it is the high time to call for more ethics in public life, using their words: *«This is the time to build a different kind of European integration – ethical integration.»* (Perzanowska and Pachwicewicz, 2011). Ethical integration is wanted if we wish to make interdependent and mutual relations among human beings more ethical and more human. This calls for the creation of globally accepted European human identity and human relations. It is here where ethical issues arise and a link between global, Europe and ethics is formed, *«without morality, without universally binding ethical norms, indeed without ´global standards´, the nations are in danger of maneuvering themselves into a crisis which can ultimately lead to national collapse, e.g. to economic ruin, social disintegration and political catastrophe»* (Hutching, 2010).

As it is presented by Kimberly Hutchings ethics in its original meaning refers to codes of behavior or sets of values that state what is right or wrong to do in particular contexts and, accordingly to what was said, an ethical person denotes someone who aims to act following such codes of values. In a view of that, global ethics can be defined as *«a field of theoretical enquiry that addresses ethical questions and problems arising out of the global interconnections and interdependence of the world`s population»* (Hutchings, 2010).

Of course, there are differences concerning the ethical values or what is good and right to do in our relations with others, not only among the individual European countries, but individuals as well, regarding their traditions, cultural and historical backgrounds, language differences, attitudes, standard of living and last but not least, their own individual perception of understanding moral and ethical values. So moral truth might be perceived to be relative,

what from one culture or temporal perspective is right from another cultural or temporal perspective might be wrong. Anyway, there are some thinkers who try to find out a core of common beliefs, values and principles that operate across different conceptions and cultures in order to come to some reasonable starting point to arrive at global ethical standards that should govern human behavior, e.g. there are theoretical conceptions from theological point of view, such as Hans Küng`s *«Global Responsibility: In Search of a New World Ethic»*, or secular ones based on a set of wide-ranging universal moral standards that might be commonly accepted across different cultures and the world.

3. Ethical Theories and Ethical Standards

Most conceptions on Global ethics find their inspiration and arguments developing the basic ideas of some traditional and most widely debated ethical theories. In all of them we can distill some important principles that can guide us in our ethical-decision-making. Let us mention at least some of the major ones which might provide the most practical assistance for creating theoretical as well as practical grounds for the European ethical integration in the area of public administration.

One of them is the theory of ***ethical relativism*** which considers that it is not possible to come to certain type of ethical values unification as each individual, culture or time is allowed to act in accordance with its own moral outlook. For the first time this conception had been proclaimed in Ancient Greece by Protagoras and his disciples known as sophists. According to their philosophical outlook, law is the creation of people, and therefore, it is always in accordance with the interest of legislator. Following this idea relativists come to the conclusion that law is nothing else than the enforcement of free will of those who are in power and who can do what they want to do. Even in the Ancient Greece their conception of ethical and moral relativism had been criticized and firmly refused by Socrates and Aristotle for sophists `conviction that truth is losing its objective foundation and for their commencement that when there is not an absolute truth, right and wrong are just vague and relative concepts.

Contrary to their theory is the conception of ***virtue ethics,*** developed during the period of antiquity, some 300 years before Christ. According to this theoretical conception, the most basic idea is not what we ought to do, but what kind of persons we ought to be. The virtue ethics approach focuses more on the integrity of the moral actor than on the moral act itself. For the first time the classification of virtues was done by Plato. However, his list of virtues is closely interconnected with characteristic traits of his ideal state representatives. Virtue ethics had been more precisely elaborated by his successor Aristotle in his work *Nicomachean Ethics*.

Typical of virtue ethics is its interest in general traits of character in contradiction to the traits of personality. It is assumed that traits of character can be developed by means of training and education while traits of personality are closely tight to our biological nature. The prime moral virtues are: wisdom, justice, compassion, and respect for persons, courage, temperance, generosity, kindness, reliability and industry. If we develop these virtues, we are more likely to act rightly; a good character is a character that tends to lead to right actions. It is suggested that the most proper thing to do is instead of analyzing what makes right action right to focus our attention on those character features which ought to be fostered in ourselves and in our children through bringing up and education. Although virtue ethics as a philosophical tradition began with Aristotle, a number of contemporary ethicists have brought it back to the forefront of ethical thinking, especially the idea that ethical culture and behavior in public administration can be thought, e. g. Linda K. Treviño and Katherine A. Nelson.

Virtue ethics may be particularly useful in determining the ethical qualities of an individual who works within a professional community that has well-developed norms and standards of conduct. But it is also inspiring for management administration posts within the public administration, of course, not excluding deontological and consequentialist approaches which are discussed below.

The action, its outcomes and consequences for individual human being are in the center of attention of the theoretical conception of ***utilitarianism***. Utilitarianism is probably the best

known ***consequentialist ethics***. According to the principle of utility, an ethical decision should maximize benefits to society and minimize harms, so a consequentialist thinks about ethical issues in terms of harms or benefits. On the other hand, virtue ethics would suggest thinking about ethical issues in terms of community standards.

In consequentialist ethics a sharp distinction is made between actions that are right and those which are wrong. If an action is not right, then it is wrong, and if an action is not wrong then it is right. The actions which we ought to do or the obligatory actions form a specific kind of sub-class actions that are right for us. So the utilitarian criterion for rightness of particular actions is stated by Tännsjö in the following way *«...an action is right if and only if in the situation there was no alternative to it which would have resulted in a greater sum total of welfare in the world»* (Tännsjö, 2008). The idea that we ought always to act so as to maximize the sum total of welfare in the universe is hold by the utilitarian conception. According to classical utilitarianism we have to maximize happiness and well-being, utility means usefulness and convenience in order to bring pleasure. Our degree of pleasure is a quality of our total experience; the more our desires are satisfied, the better.

The utilitarian theory was for the first time presented by the English philosopher, lawyer and social reformer Jeremy Bentham. He based his arguments on a view of human beings as naturally driven towards pleasure and happiness away from pain and unhappiness. And therefore, they have an interest in pursuing the former and avoiding the latter. On this basis he built up an ethical theory that had one basic principle – the principle of utility. He makes a distinction between higher and lower qualities of well-being and according to his conception of utilitarianism we should try to maximize higher forms of well-being rather than lower ones following the idea that it is better to be dissatisfied Socrates than a satisfied fool.

Another essential aspect of Bentham`s utilitarianism is the principle to act impartially meaning that in his decision-making the moral subject must respect the equality of other subjects` interests, even the interests of animals. So there could be no moral justification for putting one`s own interests ahead of anyone else`s.

The radical ethical conception is the idea that ends up with the formation that we must always act so as to maximize the sum total of our own welfare. This most extreme conclusion is known as ***ethical egoism which is an extreme form of contractualism***. The egoist need not bother about the far reaching consequences of his/her actions; it is only the welfare of the agent that counts. You act wrongly whenever you do not maximize your own best interests, so any decision is right, so long as it satisfies the interests of the agent. Ethical egoism confers too much moral license to the agent, who is according to Thomas Hobbes in his fundamental nature egoistic and selfish, even if not, he lives in a constant fear of attack from others and desire for self-protection. When Hobbesian individuals are put in a state of nature, in which there is no external regulation of their deeds and actions, Hobbes argues that there will be a condition of *«war of all against all»*; *«Bellum omnium contra omnes»*; in this state of conditions there is no meaningful distinction between just and unjust, as Hobbes puts it, life in the state of nature is *«solitary, poor, nasty, brutish and short»*. The only solution to normalize the given state of nature consisting of self-seeking individuals who live in a state of constant fear, danger and violence is the idea of agreement, he terms it *«covenant»* that has become known as the idea of *«a social contract»*, where the individuals will give up their natural rights to the newly created overarching power - the state rule which would guaranty order, justice and security. According to Hobbes, people must be forced to some extent by the state to cooperate; the state must supervise their actions and if they fail to respect the rules of law, threaten them by all sorts of punishment. Hobbes ethical contractualism is closely combined with politics. It is based on the social contract between people and the sovereign state power. Nowadays there are several different applications of contractualism.

On the other hand ***deontological ethics or principle-based theory*** is founded on respecting duties, prohibitions which are bound to the agent irrespective of the consequences which might follow them. The best known representative of deontological ethics is the German philosopher Immanuel Kant. According to

deontological ethics, some types of actions are prohibited and some are obligatory to do irrespective of their consequences. He declares that there is one general idea and that is the supreme and absolute duty, he calls it ***«categorical imperative»***, which has to be followed, using Kant words: *«to act only in accordance with that maxim through which you can at the same time will that it become a universal law»* (Tännsjö, 2008). So a maxim is simply the rule we follow in any deliberately intentional act.

By Kant`s critical philosophy human capabilities are limited and conditioned by human inclination to natural passions and needs similar to Hobbesian view of human nature. But according to Kant at the same time human beings are endowed by pure *«practical reason»* which offers us possibilities of transcending and take priority over our passions and natural partiality, *«…human perfection lies not only in the cultivation of one's understanding but also in that of one`s will, moral turn of mind, in order that the demands of duty in general be satisfied. First, it is one`s duty to raise himself out of the cruelty of his nature, out of his animality more and more to humanity…»* (Kant, 1983). Only a rational human being has the power to act according to his conception of laws, it is the capacity of being able to detect and act on what is required by the moral law, so acting morally is ultimately equivalent to acting rationally. Moral principles are universally prescriptive and acting morally does not mean to act according to those moral principles but unpromisingly acting because of those moral principles. As it is mentioned by Hutchings the criterion of universality is central in Kant`s apprehension of human beings as non-angelic who act morally only respecting and acting according to the universal categorical imperative. The moral law stands for all rational human beings, human or non-human as well. *«The difference between humans and angels is not to do with different moral standards, but with human imperfection that means that we experience moral rules as a constraint on our non-rational drives and desires»* (Hutchings, 2010).

Kant's philosophical theory is quite often comprehended as contradictory to Bentham`s utilitarian ethics, when in Bentham`s theory dominates importance of utility as an outcome, Kant considers the importance of moral principles regardless of their consequences in particular contexts. Where Bentham accepts some toleration of swapping some rights in pursuit of the maximization of utility, Kant persists on the obligation to respect every individual as an end in him or herself.

However, all of the presented ethical theoretical approaches have some limitations; no one in itself provides a perfect guidance in every situation, each of them finds its own areas of application which are more practical and useful to be applied following the dictum of the specific case and situation. In spite of many differences among the various theoretical conceptions all of them are interconnected by generally accepted universal human values, principles and norms which are more or less respected and observed by everybody and everywhere. As it is emphasized and put into our attention by Jan Vajda, this common foundation which ought to be followed as the leading principle for the code of behavior of all human beings in all spheres of our life should be ***the basic principle of humanism, the principle of justice and fairness, and the principle of honesty and meticulousness*** which cover in themselves a deep awe and respect not only to all human beings, peoples, nations, one's own homeland, love and respect to freedom and qualities of other individuals, but at the same time they articulate responsibility and a deep respect and esteem towards all alive creatures, natural world and the entire environment around us. In its essence the principle of humanism is many-dimensional highlighting qualities of human being, which ought to be placed at the top of the value pyramid, expressed by Kant`s words: *«Act so as to treat humanity in oneself and others only as an end in itself, and never merely as a means; …the freedom of the agent…can be consistent with the freedom of every other person according to a universal law…»* (Kant, 1983), or by the well-known classical Biblical ruling *«to regard a neighbor`s interests as we do our own.»*

As it has been already mentioned before, it is without any doubt that global changes have an evidence of their progression and thus shaping the world around us, especially, by exercising deep impacts on the state governments and public administrations, and in this way directly influencing citizens as they are the citizens who

are most closely interconnected with them. Decisions taken by public servants and dignitaries affect considerably the fulfillment of individual and collective needs. The time of economic transformation in Central and Eastern Europe was a period which left enough room for unethical deeds and actions in the area of public administration. Carrying out public services leads to many situations that put the individual against difficult choices, either to gain personal advantages, which are a big temptation, or to be honest and serving their society following the public interest. Furthermore, even when people know the right thing to do, they often find it difficult to do because of the environmental pressures; it might be the pressure from society, group, organization or institution.

Another thing is that even when they are aware that they are facing some ethical dilemma, cognitive limitations and biases often limit their ability to make the best moral judgment. We have to be frank and we have to admit that there are such situations when it is hard to take the proper stance and to decide. Therefore, a certain kind of standardized European system of socio-ethical norms and guidance in decision-making processes is necessary. The European proper standard system of values, principles and norms seems to be very urgent mainly in the public administration which plays the most decisive role in future of the European integration processes since there are the quality and effectiveness of ethical values and norms which are creating conditions for the decent and human social order in all aspects of life. To acquire ethical standards and values means setting up some definite determinants this might lead and regulate individual relations among people. Social trust and ethical standards produce the most fundamental elements of the needful European social capital.

At present it is generally accepted that there is a crises of values and authorities affecting nearly every sector of public life, that`s why there is a pressing need to seek new ways of motivation in carrying out our professional duties. In this connection a certain kind of revival of ethics initiatives have increased and have their continuation since 1970s, especially in the USA and some Western countries. At present some initiatives have been slowly finding their place in Eastern European countries as well. There is no doubt that at present the quality and effectiveness of public affairs management comes to the fore and it is extensively debated and evaluated by scholars as well as by practitioners.

The right to good administration which is guaranteed by ***the Charter of Fundamental Rights of the European Union*** in paragraph 41 refers to the right to good administration. It says: *«Every person has the right to have his/her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.»*. Besides that, the right to participate actively in public matters governance is guaranteed by the majority of the European countries constitutions, e.g. the right of the Slovak citizens to take part in public matters is stated in Article 30 of the Slovak Constitution. The comprehensive analyses of the Article is presented in monograph *«Proceeding on Legal Regulations Control before the Constitution Courts of the Slovak Republic and the Czech Republic»* by Julia Ondrová. Further on, she accentuates in her article *«Constitution Relevant Conflict Interpreted by the Constitution and/or by Constitution Law»* to respect rights and duties by all administrative bodies as it is stated by the Constitution and law (Ondrová, 2009). Besides the legally stated rights to good administration, the direct participation of all subjects by means of direct democracy plays one of the most decisive roles. The difference between the legally stated norms in comparison to moral and ethical norms consists in reality that they are stated by the norm - creating authority and consequently they comprise in themselves a kind of binding enforcement including sanctions and punishment. Anyway, between morals and law there are dual interrelated complementary relations who in many aspects complement and adjust each other (Geffert, 2010). Besides that, public administrators should have strong obligations to self, democracy, general welfare, and humanity and at the same time they should have strong obligation to Constitution, laws, organization-bureaucratic norms, and professionalism. This is the appropriate balance that should always be observed in terms of ethical administration.

Finally, concerning good administration it would be convenient to mention one of the recent ethical theories of the Slovak scholar Vasil

Gluchman which might create a serious theoretical ground for the practical application in the area of public administration. It combines in itself universal validity of moral and ethical values and principles, but not excluding a certain kind of ***moderate situation relativism*** which is applicable mainly in decision-making processes. Moderate situation relativism put a special importance on taking into consideration the significance of the particular and specific contexts which might decisively influence our taking decisions. His theory is called ***ethics of social consequences***; the core of his theoretical thinking is his theoretical conception of the crucial social consequences on individual human beings and their social and natural environment caused by the moral subjects` decisions. Furthermore, he stresses the importance of the traits of moral subject character, such as his views, attitudes which play a decisive role in moral subject`s decision-making processes directly influencing his actions and deeds which might have had an unprecedented impact on conditions of people`s life and the locality where they live. In the ethics of social consequences the priority is given to action consequences, motives and intentions are the subject of investigation, especially, in connection with the negative social consequences. The positive moral social consequences to which the action of the moral subject should be aimed at constitute the highest principle of the ethics of social consequences. Positive social consequences create good resulted from right and just decision-making which is in accord with the principle of humanity and human dignity. To reach goodness is not achievable without justice. Goodness is in compliance with the highest moral principle which is aimed at the fulfillment of human being happiness guaranteeing for people peace, social security, providing them with feelings of satisfaction and safety.

So at the beginning of the 21st century ***the ethical theory of positive consequences*** might be the answer in which way to drive the European ethical integration in order to foster the creation of such conditions which would assure fulfillment of decent economic, social, cultural, spiritual, family and professional aspirations for as many people as it is possible to achieve. The basic Moral Code of the European Public Administration regarding their decisions is to eliminate to minimum negative consequences and to promote positive ones to maximum.

4. Ethical Decision-Making Processes in Public Administration

Having in mind the importance and impacts on the general public of taking decisions in public administration, it is necessary to follow the main idea of public administration, and that is to serve citizens and to pursue general welfare of a community in order to fulfill one of the most important factors in public administrative processes to respect and defend public interests which must be guaranteed by means of these processes. Another factor important in taking decisions is necessity to avoid irrationality of spontaneous-immediate-deciding, which might be determined and influenced by one`s personal character traits, tensed situation, operating working voltage or by a specific social background of a definite organization, as it is emphasized by many authors and ethicists, it is necessary to take decisions which are based on the rational thinking and reasoning. The theory of taking eight linear steps elaborated by Linda Treviño and Katherine A. Nelson regarding taking decisions in the area of business might be applicable to public administration as well.

The first step is defined as *«Gathering the Facts»*, it concerns with gathering necessary data and facts required for the objective, proper and impartial decision in order to solve the problem in question. Sometimes it is not so easy to find out all needful information and facts, but in spite of limitations of this first step, we have to try to bring together all facts which are available.

«Define the Ethical Issues» is the second step in order. The aim of this second step is to avoid quick decisions and solutions of problem-areas without taking into consideration all ethical and moral aspects. To solve occurred dilemma of our deciding, the deontological, or the principle-based theory or other theories discussed above might help us. While virtue ethics would suggest thinking about the ethical issues in terms of community standards, a consequentialist approach would think about ethical problems in terms of harms or benefits. The dilemma might be helped to be solved when we present the problem to our colleagues who might help us to see the matter-in-question from a different angle.

The third step covers the art of empathy known as *«Identification of the Affected Parties»*. It means to try to see the problem from the point of view of the citizen who comes with his/her complains problems and objections. This is especially important in the case of public administration since one of their main goals is actually the need to deal with issues important for citizens and communities in the best possible way. Empathy or ***role taking method*** as it is called by Lawrence Kohlberg finds its practical relevance in decision-taking processes in various organizations and institutions including public administration as well. This theoretical and practical approach is based on moral reasoning to see the situation through others` eyes in order to take into consideration all affected parties and to comprehend the particular situation from different perspectives. In this theory the Golden Moral Rules incorporated *«treat others as you would like others to treat you, or try to put yourself in their shoes»* (Treviño and Nelson, 2010).

The fourth step concentrates on *«Identification Consequences»* of our decision. This step is derived from the consequentialist approaches. The impacts on citizens and community have to be identified and in our decisions we have to try avoiding particularly negative ones, at least to minimize the negative ones. Here the application of the approaches of ethics of social consequences is relevant.

Step five gives attention to *«Identification of Obligation»* which are indispensably to be fulfilled, e. g. obligations towards community, the affected parties of our decisions and the people involved.

Step six points to *«Consideration of Character and Integrity»*, meaning whether we will feel comfortable if our decisions are disclosed and made public. Public Administration decisions have to be transparent, open, fair, objective and unbiased. Linda Treviño and Katherine A. Nelson used the words of Thomas Jefferson to express the spirit and real meaning of this level of decision-taking: *«Never suffer a thought to be harbored in your mind which you would not avow openly. When tempted to anything in secret, ask yourself if you would do it in public. If you would not, be sure it is wrong.»* (Treviño and Nelson, 2010).

Step seven emphasizes *«Creativity in Thinking regarding Potential Actio*ns*»*. Before taking any decision it is good to think over all alternatives into consideration and to choose the best one. Being the representative of public administration we cannot allow to be forced to the corner by some interest groups, individuals, even bound by some measures which are usually being applied in similar cases, it is always wiser to focus on finding out even if different but more proper equivalent.

5. Conclusions

The seven step concerns with not excluding ones *«Intuition and Insight Perceptions»* means to be sensitive to situations where something is not quite right. If facing ethical dilemma it is advisable to combine our inner intuition with rational thinking. Nevertheless, we have to say that the ethical decision in public administration is not always a linear process and the presented steps of decision-taking might be useful only as a kind of guide, inspiration or a helpful tool to make public administration decisions more accurate and righteous.

Finally we can conclude our short discourse in ethics using the words of Linda Treviño and Katherine Nelson that *«ethics is not about connection we have to other being – we are all connected – rather, it is about the quality of that connection»* (Treviño and Nelson, 2010).

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ДЕРЖАВНЕ УПРАВЛІННЯ, ЕТИЧНА ІНТЕГРАЦІЯ ТА ГЛОБАЛІЗАЦІЯ

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Summary

У представленому документі глобалізація розглядається в зв'язку з етичними і моральними аспектами державного управління, глобальною етикою, етичними концепціями і можливою етичної інтеграцією в області державного управління. Ядро статті зосереджено на найбільш впливових і обговорюваних етичних теоріях і їх вплив на прийняття рішень в державному управлінні та професійні якості, які повинні зайняти домінуюче місце в сфері адміністративної професії. Особлива увага приділяється ролі процедур державного управління у прийнятті етичних рішень.

Ключові слова: *глобалізація; етика; інтеграція; державне управління; рішення.*

UDC 342.5

SOME ISSUES OF INCREASING THE EFFICIENCY OF THE FUNCTIONING OF THE CONSTITUTIONAL MECHANISM OF GOVERNMENTAL AUTHORITY

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Summary

The aim of this work is the analysis of the main trends of development and the determination of the ways to improve the efficiency of the functioning of the constitutional mechanism of governmental authority in Ukraine.

The methodology of research of the mechanism of governmental authority consists of the methods of cognititon, identified and developed by philosophy, history, sociology, theory of law and state, sectoral legal sciences and proven by legal practice. The methodological basis of the research consists also of a number of general scientific and special scientific methods, among which there are: systemic, structural and functional methods, utilized to identify the features of the constitutional mechanism of governmental authority; formal and logical method for determining the basic concepts, legal foundations for resolving conflicts of constitutional and legislative regulation of the constitutional mechanism of governmental authority. Modeling and forecasting methods were used to find the optimal model for the organization and functioning of the constitutional mechanism of governmental authority and for identification of specific shortcomings that should be addressed to ensure practical results and expected outcome. With the help of the critical method, it is possible to analyze the system of factors and tendencies that influence the development of the constitutional mechanism of governmental authority, to identify among them the positive and negative factors and to outline ways to improve the functioning of the constitutional mechanism of governmental authority.

The results of the study show that the deficiencies in constitutional regulation are facilitated by the existence of conflicts in constitutional law (conflicts in legal regulation, in law enforcement, and conflicts of purpose). This, in turn, impedes the effectiveness of the functioning of the constitutional mechanism of governmental authority and causes such negative tendencies as the mutual disrespect of the institutions of governmental authority and the decrease of trust in civil society by the latter. In the event of a conflict of laws in the state, the person applying the law chooses the most convenient and/or advantageous option of behavior or does not comply with the requirements, which results in the effectiveness of the functioning of the constitutional mechanism of governmental authority. Unification of the system of constitutional legislation, which will lead to qualitative changes in the system of such regulatory acts, can overcome such conflicts. This approach of the legislator will help to harmonize the structure of the legislation, which, in turn, will greatly simplify the process of enforcement.

Based on that, the author comes to *the conclusions* that the most optimal range of trends that promote the constitutional mechanism of the governmental authority include the systemic modernization of: legislation, management activities, relationships of competence between public authorities, outsourcing of governmental functions, promoting of increase of state and public control as well as of the decentralization process.

Key words: Constitution; constitutionalism; constitutional legislation; unification; conflict of laws; public authorities

1. Introduction

The current stage of state formation in Ukraine is characterized by the search for an optimal model of the effective functioning of the constitutional mechanism of governmental authority. The process of constitutional and law reform requires from the science of constitutional law: renewed concepts, scientific theories, approaches, which, combined with the development of strategic priorities for the development of the state and putting of them into the practice of state formation, will contribute to the improving of the functioning of the constitutional mechanism of governmental authority.

Comprehensive analysis of the transformational changes that accompany the current process of constitutional and law modernization sometimes leads to undesirable and unpredictable results. Therefore, the natural reaction of the science of constitutional law to this process should be a theoretical analysis of positive and negative tendencies of the development of the constitutional mechanism of governmental authority, while simultaneously developing strategic priorities for development and mechanisms for overcoming negative consequences.

2. The main tendencies of the development and the need for the increase of the efficiency of functioning of the constitutional mechanism of governmental authority.

The constitutional mechanism of governmental authority is an organized system that evolves under the influence of a number of factors that have already been reviewed in the previous studies (Shatilo, 2018; Shatilo, 2019).

Based on the proposed factor model, we can identify a number of tendencies in the development of the constitutional mechanism of governmental authority and suggest specific ways to improve the effectiveness of its functioning.

To determine the tendencies of development of the constitutional mechanism of governmental authority, it is better first to determine the semantics of the term tendency. In the dictionary of foreign words and expressions «the tendency» (from the Latin. Tendere – direction) is understood as: 1) desire, inclination towards something, conscious intention, a predetermined conclusion; 2) the direction of the development of a phenomenon (Adamchik, 2007). Extrapolating the semantic meaning of the term to the problem under scrutiny, one can identify the tendencies of the development of the constitutional mechanism of governmental authority as the main directions (conscious, substantiated by subjects of constitutional relations and (or) established in the constitutional legislation) of the development of the constitutional mechanism of governmental authority in Ukraine.

It should be noted that a comprehensive analysis of the main tendencies of the development of the constitutional mechanism of governmental authority in the current conditions of constitutional reform will have not only theoretical importance for the development of constitutional law science, but also praxeological, and prognostic, which will allow solving a number of problematic issues and identify ways of improving efficiency of Ukrainian statehood and constitutionalism in general and the functioning of the constitutional mechanism of governmental authority in particular.

The mainstream tendency of the development of the constitutional mechanism of governmental authority is the systemic modernization of constitutional legislation. The current stage of constitutional and legal reform and qualitative changes to the Basic Law have caused significant changes in the system of constitutional and legal institutions, which have led to a structural and functional renovation of the model of the constitutional mechanism of governmental authority in Ukraine.

The systemic modernization of constitutional legislation lies in ensuring the effectiveness of the current legislation and the internal consistency of normative legal acts. Moreover, the effectiveness of a system of law is not a simple set of legal norms, but a complex systemic entity elements of which are internally consistent and interrelated. With the development of social relations, the process of expanding the sphere of legal regulation is underway, and it determines the development of legislation, and therefore the legislative power is entrusted with the important task of streamlining a large mass of regulatory material.

Of course, in the course of the activity, the legislator adopts normative acts not in an arbitrary, chaotic manner, but based on the justified

needs of social development, which require normative legal regulation, and for which the social, economic, political, cultural and other preconditions have been shaped.

The approach of N.A. Gushchina that «the system of law and the system of legislation play the role of stabilizing factor – ensure the integration of society, create normal conditions for its development, while ensuring legitimate activity of the state itself. Through them, the streamlining of social relations is achieved» (Gushchina, 2003) makes sense. At the same time, the Constitution of Ukraine plays a decisive role in the process of building the system of Ukrainian legislation, because it regulates the most important social relations in the sphere of constitutional order, rights and freedoms of the individual, mechanism of governmental authority, state and political regime, etc. In addition, the Constitution of Ukraine is an act of supreme legal force, and therefore determines the development of all other branches of law and their structure.

Therefore, ensuring the effective functioning of the constitutional mechanism of governmental authority must continue to proceed in the direction of systemic modernization of the legal basis of its functioning, namely constitutional legislation. Successful implementation of aforementioned vector of development of the constitutional mechanism of governmental authority is, first of all, conditioned by the unification of constitutional and legal regulation, which aims not only at the substantive part of regulatory legal material, but also at improving the systematicity, internal consistency and overcoming conflict of laws; second, the need to codify the legal regulation of certain institutions of the constitutional mechanism of governmental authority; third, the improvement of legal technology; fourth, by improving the legislative process; Fifth, the need to develop a unified concept of reforming constitutional legislation that would be justified from a scientific and theoretical point of view.

3. Systemic modernization of constitutional legislation as a necessary element of the proper functioning of the constitutional mechanism of governmental authority

Unification is a form of systematization of constitutional legislation in the sphere of ensuring and improving the functioning of the constitutional mechanism of governmental authority, which is carried out with the aim of minimizing the imbalance of the constitutional legislation system and its consequences, and therefore requires: bringing the constitutional legislation system into conformity with the Constitution of Ukraine and international institutions; the elimination of conflicts and duplication in the criteria for determining the areas of competence of public authorities and other state bodies; unification of the system of legal acts.

The term unification (Lat. Unus – one, facio – make; create; union) means the consolidation of something to a single form, system, uniform standards (Komlev, 2000). In jurisprudence, this term means the activity of an organization or competent authorities of a state(s) that is designed to develop legal rules that equally govern certain types of social relations.

In the legal literature, there are different views on the unification of the system of law. So much so, S.V. Polenina defines the unification of legislation as a process of «regulation within a single legal institution and the extension of norms previously intended to regulate a certain range of relations to similar relations» or as a tendency which is manifested «... in the unification, consolidation of normative acts» (Polenina, 1979). Another scientist N.I. Baru proposes to understand the unification as an «elimination of differences in the regulation of certain relationships» (Baru, 1971). According to I.M. Senyakin, unification consists not only of the development of general regulations, but also «... of competent technical and formalized design of the already adopted unified provisions, i.e. in the systematization of regulations» (Senyakin, 1993). O.F. Skakun concludes that unification is defined «... as the principle of systematization (categorical requirement, basis), without which neither codification nor incorporation nor consolidation can occur, and as a legal and technical means by which it takes place, bringing to a «common denominator» the norms contained in the prescriptions of different regulations» (Skakun, 2005).

Summarizing the abovementioned, we can conclude that unification occurs in the process of recognition by the legislator of the need for a unified approach to the legal regulation of the

totality of social relations and is embodied in the process of legislative (law-making) activity with the use of legal technology.

In the process of unification of constitutional legislation, special attention should be paid to the need of overcoming conflict of laws (constitutional law conflicts). It should be noted that the conflicts in the constitutional legislation are numerous and varied in content, hierarchy and in ways of resolution.

Conflict of laws is mainly understood as the differences or contradictions between separate legal acts regulating the same or related social relations, as well as contradictions arising in the course of enforcement and exercise by the competent authorities and officials of their authority (Matuzov and Malko, 2004). Contradictions, especially constitutional ones, give rise to constitutional conflicts and constitutional crises, and that does not contribute to the coherence and efficiency of the functioning of the constitutional mechanism of governmental authority. In addition, A.F. Skakun points out, «... political conflicts often become the basis of conflict of laws: violation of the principle of separation of powers and the system of «checks and balances», transgression by the organs of State power of their lines of authority, invasion of each other's competence, political ambition, rivalry for leadership, opportunistic considerations, etc.» (Skakun, 2005).

The occurrence of conflicts in constitutional law is conditioned by the qualitative renewal of constitutional legislation in the context of modern reform processes, and, consequently, by a significant increase in their number. That is why it is necessary to approach the process of constitutional law reform more carefully and systematically, to constantly adjust it, to bring it in line with the new constitutional law realities and ratified international acts.

According to the classification proposed by N.I. Matuzov and A.V. Malko, conflict of laws is divided into six generic groups: 1) conflicts between normative acts or separate legal norms; 2) conflicts in law-making (systemlessness, duplication, issuing of mutually exclusive acts); 3) conflicts in law enforcement (differences in the practice of implementation of the same regulations, inconsistencies in management actions); 4) conflicts of authority and status of state bodies, officials, other power structures and entities; 5) conflicts of purpose (when conflicting and sometimes mutually exclusive targets are laid down in regulations of different levels or different bodies); 6) conflicts between national and international law (Matuzov and Malko, 2004).

The most common ways of overcoming conflict of laws are: 1) interpretation; 2) adoption of a new regulatory act; 3) cancellation of the old one; 4) making of amendments or adjustments to the existing regulations; 5) judicial, administrative, arbitral proceedings and third party settlement; 6) systematization, harmonization of legal norms; 7) negotiation process, establishment of conciliation commissions; 8) constitutional justice; 9) optimization of legal thinking, correlation of theory and practice; 10) international procedures (Matuzov and Malko, 2004).

It is possible to partially agree with the proposed methods of conflict resolution, but it is worthwhile to propose a mechanism of conflict management in constitutional law, which consists of three blocks: 1) doctrinal; 2) regulatory; 3) applicable, which are in the subordination (vertical) dependence. In each of these blocks, there are separate ways of overcoming conflicts.

The presence of conflicts in the constitutional legislation actually causes constitutional regulation to be defective, slows down the process of functioning of the constitutional mechanism of governmental authority and causes (negative) tendencies such as: double standards in the activity of state authorities; mutual disrespect for public authorities; lack of regularity of procedures of own activity; weak economic viability of the reforms being implemented; corruption in the process of governmental activity; lobbying and so on, and hence civil society feedback: diminished authority, disrespect for law, legal nihilism, absenteeism, and more.

Of course, if one and the same situation is governed by several regulations that are mutually exclusive or contradictory, then the law enforcer receives several options of legal behavior: either he chooses the most «convenient», «favorable» option of behavior, or does not comply with the regulations. All this has a very negative impact on the functioning of the constitutional mechanism of governmental authority.

The unification of the system of constitutional legislation is conditioned by the unifica-

tion of legal regulation. It should lead to qualitative changes in the system of acts, for example, to changes in the number of acts regulating such situations, to preventing and overcoming conflicts, and thus to contribute to the harmonization of the structure of legislation, which, in turn, will greatly simplify the law enforcement process.

4. Conclusion

Summarizing the analysis which was carried out, we believe that among the main tendencies that will contribute to the development and optimization of the constitutional mechanism of governmental authority are the following: 1) systemic modernization of constitutional legislation; 2) optimization of the system of competence relations between public authorities; 3) modernization of management activity and formation of qualitative human resources potential for public service and political management; 4) improvement of the mechanism of functioning of the institute of state and public control over the activity of state authorities; 5) facilitating the process of decentralization of governmental authority; 6) introduction of the institute of private delegation (outsourcing of state functions); 7) promoting the implementation of the state policy of preventing corruption. It should be noted that this list is not exhaustive and can be supplemented by other important trends affecting the development of the constitutional mechanism of governmental authority, such as: ensuring the institutional modernization of the constitutional mechanism of governmental authority; ensuring national security and territorial integrity; defining and implementation of foreign policy priorities and others.

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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.*

Наукове видання

КОНСТИТУЦІЙНО-ПРАВОВІ АКАДЕМІЧНІ СТУДІЇ

Випуск 2

Відповідальний секретар: *доц. Берч В.В., Стойка А.В.*

У авторській редакції

Дизайн обкладинки: *Шанта Катерина*

Макетування та верстка: *Кокіна Рената*

Офіційний сайт: http://konstlegalstudies.com.ua/

Підписано до друку 09.10.2020. Формат 60x84/8. Умов.друк.арк. 12,3.
Гарнітура Droid Serif. Папір офсетний. Зам. № 2651. Наклад 100 прим.

Оригінал-макет виготовлено та віддруковано:
ТОВ «РІК-У», 88000, м. Ужгород, вул. Гагаріна, 36
Свідоцтво суб'єкта видавничої справи ДК №5040 від 21.01.2016 р.

Свідоцтво про державну реєстрацію друкованого засобу масової інформації серія КВ № 21083-10883 Р, видане Державною реєстраційною службою України 24.11.2014 р.

Конституційно-правові академічні студії. Випуск 2. Ужгород: ТОВ «РІК-У», 2020. 106 с.
ISSN 2663-5399 (Print)
ISSN 2663-5402 (Online)
Журнал розрахований на науковців, практикуючих юристів, адвокатів, суддів, нотаріусів, прокурорів та інших правників, а також усіх, хто цікавиться науковими дослідженнями з актуальних проблем конституціоналізму, конституційного будівництва, розвитку конституційного права та процесу в Україні та зарубіжних країнах.

КОНСТИТУЦІЙНО-ПРАВОВІ АКАДЕМІЧНІ СТУДІЇ ▪ №2 2020 р.

досконалість

Наукова серія
«Право на всякі потреби»
започаткована в 2001 р.

Ідея проєкту студій належить проф. Бисазі Ю.М.,
проф. Бєлову Д.М., проф. Заборовському В.В.
Креативно-організаційне забезпечення видання:
доц. Берч В.В., Стойка А.В.

Мир Всім Нам