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ІНСТИТУЦІЙНА СПРОМОЖНІСТЬ ДЕРЖАВИ ТА ПРАВА ЛЮДИНИ

Анотація. *У статті розкриваються основні параметри інституційної спроможності держави. Верховенство права як критерій легітимності діяльності держави передбачає методичне втілення владних рішень в життя, які мають ґрунтуватися на фундаментальних цінностях гідності людини, свободи, рівності, поділу влади та демократії. В якості основного методологічного підходу розглядається синтетичний, який побудований на основі міждисциплінарних досліджень, що поєднують розуміння права як природних законів та результатів людської діяльності, що зумовлює певну структуру суспільства та його організацію в державу. Набуває нового значення приватноправовий механізм формулювання та визнання правил і процедур. Зокрема, це проявляється у доктрині прямої дії права наднаціональних об'єднань у сфері прав людини, які накладають негативні і позитивні обов'язки на державу. Обумовленість організації держави правами і свободами людини визначається через інституції, процедури і правила щодо обмеження влади. У силу цього держава покликана гарантувати економічні свободи, здійснювати справедливий розподіл благ та рівний доступ до них громадян. Трансформація національного суверенітету передбачає його політичну та юридичну складову, а також передачу частини суверенних повноважень на наднаціональний рівень. Критерієм демократичної легітимності такої передачі повноважень служить якість захисту прав людини та забезпечення національних інтересів. У світлі цього необхідно досягти належного рівня симбіозу людства із природою і воно є питанням глобального рівня та потребує кардинальної зміни у підходах щодо ухвалення владних рішень на всіх рівнях організації влади. Це надає особливого характеру сучасному процесу глобалізації як руху в сторону посилення охорони довкілля, забезпечення прав людини та втілення демократичної конституційної держави. Тому набуває значення конкурентоспроможність національної економіки, незважаючи на циклічність економічних процесів та наявні конфлікти між державами. Виходячи з цього, розкрито різні варіанти втілення європейського та євроатлантичного векторів інтеграції Україні за допомогою адекватних конституційних засобів.*

Ключові слова: верховенство права, демократія, захист конституції, інституційна спроможність держави, конституціоналізм, національний суверенітет, права людини.

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INSTITUTIONAL CAPACITY OF THE STATE AND HUMAN RIGHTS

Abstract. *The article reveals the main parameters of the institutional capacity of the state. The rule of law, as a criterion for the legitimacy of state activity, provides for the methodological implementation of authority decisions in life, which should be based on the fundamental values of human dignity, freedom, equality, separation of powers and democracy. The main methodological approach is synthetic, which is based on interdisciplinary research that combines understanding of law as natural laws and the results of human activity, which determines a certain structure of society and its organization in the state. The private-law mechanism of formulating and recognizing rules and procedures is taking on new significance. In particular, this is manifested in the doctrine of the direct effect of the right of supranational human rights associations that impose negative and positive obligations on the state. The conditionality of the organization of the state by human rights and freedoms is determined through institutions, procedures and rules for restriction of power. For this reason, the state is meant to guarantee economic freedoms, to ensure fair distribution of goods and equal access to them for citizens. Transformation of national sovereignty implies its political and legal component, as well as the transfer of part of the sovereign powers to the supranational level. The criterion for the democratic legitimacy of such a devolution is the quality of human rights protection and the safeguarding of national interests. In light of this, it is necessary to achieve the proper level of symbiosis of humanity with nature, and it is a global issue and requires a fundamental change in the approaches to making authority decisions at all levels of government. This is of particular importance to the current process of globalization as a move towards greater environmental protection, human rights and the realization of a democratic constitutional state. Therefore, the competitiveness of the national economy becomes more important, despite the cyclical nature of economic processes and the existing conflicts between the states. Proceeding from this, various options of embodiment of the European and Euro-Atlantic vectors of integration of Ukraine with the help of adequate constitutional means are revealed.*

Keywords: rule of law, democracy, protection of the constitution, institutional capacity of the state, constitutionalism, national sovereignty, human rights.

INTRODUCTION

This paper considers a constitutional state capable of making decisions, which are formulated as a result of social interaction and are based on social consensus on fundamental social values, enabling them to be implemented methodologically. The criterion for the verification of authority decisions and the ability to introduce them is their recognition and ability to implement them on the basis of respect for human dignity. In particular, it will consider (1) the transformation of sovereignty on the basis of the network-centricity of building public authority, which (2) is conditioned by human rights and (3) determines the parameters of the institutional capacity of

the state. (4) Provision of secure national identity in the context of globalization becomes particularly important, through (5) the constitutional means of becoming of a global law. The author considers the institutional capacity of the state through the lens of ensuring the dignity of its democratic legitimation as a fundamental constituent decision. Such a fundamental decision defines the character of modern statehood as legal, determines the content of its basic functions and is implemented in its specific authorities. The methodological basis for this is the separation of powers, subsidiarity and the ability to defend constitutional democracy (the doctrine of *militant democracy*).

The purpose of this research is to identify mechanisms for securing national sovereignty through the lens of the institutional capacity of the state. For this purpose, the achievements of liberal, liberal-democratic and social constitutionalism will be analyzed against the background of globalization processes. The main methodological approach will be a synthetic one, built on the basis of interdisciplinary research that combines the understanding of law as natural laws and the results of human activity, which determines a certain structure of society and its organization in the state. The scientific novelty and practical importance of this paper is the development of criteria for the institutional capacity of the state to effectively implement its own decisions on the basis of constitutional values.

The question of the institutional capacity of the state in the Ukrainian constitutional doctrine was stated in the works of Bohdan Kistyakivskyi [1] and Oksana Shcherbanyuk [2]. In fact, this doctrine came to us from Western literature. In particular, Kistyakovskyi's views were influenced by the works of Immanuel Kant [3], and Shcherbanyuk's – by Nicholas Spykman [4] and Zbigniew Brzezinski [5]. In the domestic doctrine of constitutionalism, apart from the works of Oksana Shcherbanyuk, which focus on the capacity of power, this issue is only indirectly considered through the lens of human rights and civil society institutions. In view of the deepening of integration processes, these issues should be considered through the lens of globalization and the competitiveness of the national economy in global and regional markets in terms of securing national interests and economic freedoms.

The article will reveal the mechanism of interaction between civil society institutions and the state in the context of ensuring national sovereignty through the lens of parameters of the institutional capacity of the state. The first part of the paper highlights the tendencies towards a network-centric construction of public power and adapt the content of the principle of subsidiarity to the peculiarities of the constitutional structure of Ukraine. The second part reveals the conditionality of the constitutional structure of human rights in terms of the duty to protect as a fundamental constitutional principle, and its substantive content through institutions, procedures and rules. The third part defines the basic parameters of institutional capacity, with consideration of the constitutional dynamics and values. The fourth part reveals the peculiarities of the emergence of global civil society and global law and their impact on national sover-

eignty. The fifth block of issues is devoted to the constitutional means of implementing the globalization of law, including particular aspects of European and Euro-Atlantic integration.

1. MATERIALS AND METHODS

The core of this research is a comparative constitutional law toolkit based on the complementarity of comparative legal research and the functional method. According to the principles of legal pluralism, Ran Hirschl's approach will be taken as the basis for the exchange of ideas and doctrines in constitutional law on the basis of complementarity [6]. Such an exchange of ideas is important for understanding the nature of institutions and procedures for the effective implementation of authority decisions based on fundamental values – human dignity, freedom, equality and the rule of law. In accordance with the multidisciplinary approach, the achievements of philosophy will also be used to determine the nature of constitutional values as the basis for understanding the state in the system of constitutional values, and the achievements of political science – to determine the role of the doctrine of militant democracy [7] as institutions for the protection of constitutional values, sociology and game theory, to determine the basis of certain provisions, procedures and the rules that make up the institutional capacity of the state. The main achievements of the doctrines of liberal, liberal-democratic and social constitutionalism [8–10], as well as the doctrines of communicative and procedural democracy are also used in the paper [11].

On the basis of an analysis of the formalistic, procedural and substantive doctrines of the rule of law, the positive duties of the state will be formulated in the light of human dignity and fundamental rights. Human dignity, as self-identity and the possibility of free self-determination of an individual, sets standards for the formulation of provisions of legislation and practice of its application. The basic quality requirements that meet them are the clarity and certainty of the laws and the reasonableness and clear motivation of court decisions that would be appropriate for the application and implementation. The matter of the content and quality of the state's performance of such duties will be addressed through the lens of the rule of law [12–14]. In particular, it emphasizes the need for process inclusivity (involving as many interested parties and opportunities as possible) and validity (reasonableness, prudence and balance) of decision making. The doctrine of state responsibilities at the supranational level is of particular importance [15], as it raises questions about the effective upholding and realization of national interests at the regional and global level.

2. RESULTS AND DISCUSSION

2.1 Subsidiarity and the network-centric structure of public authority

The transformation of national sovereignty stems from at least a two-way movement upon formulating and recognizing rules. Since sovereignty is the property of the public authority bearer to independently make certain decisions and enforce them

through legal means, they may either recognize a certain order of things or define the desirable rules for the future. As a result, the private legal mechanism for formulating and recognizing rules and procedures is gaining importance. In particular, this is reflected in the doctrine of direct effect of the right of supranational human rights associations, also called the horizontal effect doctrine. This is important for defining the goals and objectives that underpin the formulation of the powers of public authorities. Human rights, as the limits of the exercise of power, determine the main directions of their activity, which are also conditioned by access to resources and the state of the environment. The question arises as to the division of powers between the levels (tiers) of public authority: communities – regions/autonomies – subjects of federation – supranational associations [16].

It also imposes restrictions on the division of powers between levels of government, which is determined, in fact, by the criterion of the effectiveness and efficiency of human rights protection. For example, on July 16, 2015, the Verkhovna Rada adopted a resolution, in accordance with which was directed a bill amending the Constitution regarding the decentralization of power of the Constitutional Court (hereinafter referred to as "the Constitutional Court") in order to conclude on its compliance with Articles 157 and 158 of the Constitution[1]. On July 30, 2015, the Constitutional Court issued a positive opinion (Opinion No. 2-rp/2015) on compliance with the constitutional values and principles of the content of this draft law – the integrity of the substance of human rights and fundamental freedoms. The aforementioned Opinion of the Constitutional Court is the first display that only human rights are the permissible limits of public authority interference in the field of private autonomy, which, at first glance, resonates with the idea of protecting the three constitutional values set out in Article 157 of the Fundamental Law. Because of the predicate – the sovereignty and territorial integrity of the state – it is hardly possible to properly assess the democratic dimension of constitutional statehood. The limitation here is posed specifically by human rights. It is no coincidence that human rights served as an objective criterion for the admissibility of the transfer of a part of the sovereign powers of the state to the institutions of the European Union during the ratification of the Treaty of Lisbon, which was subsequently reflected in the decisions on the constitutionality of this Treaty of the Constitutional Tribunal of Poland, the Constitutional Council of France, the constitutional courts of Germany, the Czech Republic, etc.

Returning to the demonstrated approach of the Constitutional Court in its Opinion dated 30 July 2015, it should be noted that, in a substantive and material sense, the human rights criterion determines the review of constitutional draft laws:

– proper implementation of negative and positive obligations by the state to ensure access of individuals to certain material and spiritual goods, their legitimate interests in self-determination as an individual;

[1] Constitution of Ukraine. (2019, February). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

– institutional components of the functioning of power institutions based, in particular, on respect for human dignity, non-discrimination and arbitrariness through separation of powers and principles of self-regulation, initiative, access to management services;

– procedural components of statehood, which include the principles of trust, due process and consideration of all material circumstances of the case, hearings of interested parties, competitiveness of the process, the right to appeal against decisions, the principle of res judicata.

Therefore, the review of the constitutional draft law on compliance with human rights and freedoms is sufficient, as human rights themselves determine certain requirements for the quality of organization and order of activity of governmental institutions, in particular for ensuring the sovereignty and territorial integrity of Ukraine. On this basis, nation-states are given the opportunity to exercise their sovereign powers at the supranational level. At the same time, it is important to involve the regions in the decision-making process at national and supranational levels. In addition, the values of supranational unification are of key importance for constitutional statehood, as they, according to the doctrine of modern constitutionalism, shall be based on respect for human dignity, freedom, equality, the rule of law, human rights, democracy, due process of law, etc. Proceeding form this, modern states should combine the traditional hierarchical structure of the organization of power with the extension of horizontal interaction between the institutions of power. The functioning of public authority should generally follow current trends in the formation and reproduction of rules, which increasingly enhance the role of horizontal relations [16].

2.2 Human rights predicament of the constitutional structure

The constitutional structure consists of the composition of authorities. Traditionally, it is associated with forms of state rule and state structure. The dynamics of implementation of the relevant principles of organization of power is expressed by the state regime. As previously noted, the question arises whether, at a satisfactory level, these components meet the criteria of effective provision and protection of human rights, which in itself is a fundamental constitutional decision. Preferably, it has a two-tier nature. The constitution is an act of constituent power of the people. The Constitution of Ukraine establishes a system of checks and balances. The functioning of such instruments is aimed at protecting constitutional values, above all the private autonomy of a freely evolving individual. The Federal Constitutional Court of Germany in the case of Lut said that the constitution "establishes an objective order of values, which substantially strengthens the effectiveness of the fundamental rights. This system of values, at the heart of which is the freely developing individual and their dignity, should be considered as a pivotal, fundamental constitutional decision that influences all branches of law and is a priority for the development of law, public administration and justice". The second level of the constitutional structure

consists of established institutions – legislative, executive and judicial authorities. The Constitution of Ukraine[1] identifies these three main functions in the state, which are aimed at preventing arbitrary decisions, as it threatens to excessively restrict human rights or deny their essence. Therefore, the division of authorities between the institutions of power expresses a national constitutional tradition. For young constitutional democracies, resolving the dilemma of parliament and judicial constitutional control is key. In this coordinate system, there is always a struggle between the majority and human rights.

Paul Gauder emphasizes the importance of providing a transition from an authoritarian interpretation of legal statehood, which comes down to the ideas of regulation and publicity, whereby the right serves to streamline relations between people and the use of public officials, "for officials to explain their behavior to whom they apply coercion" which is a requirement for the justification of power decisions [12]. A strong version of the rule of law is no longer formalized, but is rather based on publicity as a criterion of materiality. The concept of generality, in turn, is based on expression as the result of an agreement (convention) that has an egalitarian content, which denies the division of people into castes, the distribution of public goods and the consideration of the interests of different entities [12].

Earlier, the author of these lines, together with Mykola Onishchuk, had already outlined the basic parameters of constitutional reforms, which seemingly have not yet been resolved, despite the amendments to the Constitution of Ukraine[2] concerning justice and European and Euro-Atlantic integration. Let us outline them here: the definition of mechanisms of accountability and accountability of government before the people; the principles of people's sovereignty limited by constitutional values through provision of a balance between the rule of parliament and constitutional justice; free and democratic elections as the basis of parliamentary legitimacy; ensuring the democratic foundations of forming a government, in particular through a vote of confidence and a constructive vote; proper integrity and accountability of the government to parliament [17].

The recently raised issue of the constitutionality of illicit enrichment (Article 3682 of the Criminal Code) in the decision of the Constitutional Court No. 1-p/2019 in connection with the alleged violation of the principles of the legal definition of the crime as a component of the rule of law, the presumption of innocence and the constitutional guarantee regarding self-blame, is solved completely differently. It is quite rightly pointed out by Anna Peters, that corruption is targeted primarily at social rights, moreover, such corruption is of low intensity, not large, like it is at the highest level, but daily, as it is mainly concerned with ensuring a decent standard of living for the individual, in particular quality education, medical services [18]. According to a suc-

[1] Constitution of Ukraine. (2019, February). Retrieved from https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80

[2] *Ibidem*

cessful remark, “corruption, whether systemic, endemic or small, violates the enjoyment of all rights by citizens guaranteed by all international means” [19]. Of course, Peters translates the solution to the issue of corruption in the implementation of the state's own negative and positive obligations, in particular to protect, procedural and procedurally independent duties, the source of which was often a denial of causality between the quality of legislation (for instance, its gaps) and the denial of the substantive content of rights, including social rights [18]. Everything rests upon the allocation of resources on the basis of the overall scale and effectiveness of institutions, procedures and rules.

1) Institutions play a steady role in the allocation of resources, which are always scarce and, with regard to their equitable allocation, planning for the future must be in palce, albeit in view of the cyclical nature of economic processes. In particular, privatization carried out in the 1990s without the formation of market institutions, which were determined through acceptable procedures and price rules, led to an unfair distribution of national wealth and the enrichment of the former nomenklatura and criminal capital. All this quite substantially undermined the state's institutional capacity. Therefore, the elimination of state dirigism in the economy should be accompanied by the formation of adequate market institutions. It also undermines the judicial system's drastic reduction of the judiciary from over nine thousand to five thousand courts. Considering the post-colonial nature of the state with its inherent low level of social trust in the state's institutions, we have a striking mix of decisions that significantly affects the course of the presidential and parliamentary elections, as well as the intertness of the accountability and control procedures of the government.

2) Procedures, in the context of uncertainty in the nature of constitutional decisions, play but a decisive role. Even Roberto Michaels' famous oligarchy iron law urges democracy to elect members of parliament who thus hold office in the state and then, by using their office as channels of access to resources, pass such electoral legislation as would allow them to remain in office. And such cycles can last forever, until a crisis occurs in the country. However, this has nothing to do with the requirements of due process, the components of which at the micro level are the right of every interested person to be heard, the equality of parties in the process, the validity of decisions and the ability to challenge their own decision. At the micro level, this translates into requirements for moral integrity and proximity to public servants, accountability and control of election officials. Problems in the implementation of the procedures were evident in the presidential elections in the United States, France and Ukraine. This has resulted in the elaboration of special programs and electronic protocols of social media users on the Internet and determining the form of influence on target audiences, both on television and on social networks.

3) Rules on the application of social rights, according to the doctrine of "Untermaβverbot" (positive actions of the state) of the Federal Constitutional Court

of Germany, should determine the content of the measures of the state to such an extent that they are not allowed to a minimum level of ensuring a decent standard of human life and should meet the criteria of "adequacy" or "reasonableness" [20]. The basis for defining such rules and recognizing them is respect for human dignity, an equal scale of attitude and validity in differentiating the legal regulation of the status of certain categories of persons who need special protection because of their vulnerable position. The doctrine of horizontal effect, in turn, requires the equalization of the situation, in particular between the employer and the employees, since often the former can act as a monopolist in this respect. At the same time, situations of foisiting interests of the minority should also be avoided if there is a place for particularity of relations in the market.

2.3 Parameters of the institutional capacity of the state

The parameters of determining something are key, crucial to determine fairness, validity of certain research results. This is where the multidisciplinary approach will assist us. The institutional capacity of the state is declared in Article 3 of the Constitution of Ukraine as follows: "Promoting and safeguarding human rights and freedoms is the main duty of the state". Therefore, the sense of functioning of the Ukrainian state is to provide conditions for the free development of the individual in all forms of their manifestation as a self-sufficient personality. This fundamental decision also establishes requirements for the state to act in accordance with stable and predictable rules of the game, which determines the legal certainty and validity of power decisions. In accordance with the rule of law, the political process must be subject to the constitution. The doctrine of social contract as the basis of the constitution involves reaching public agreement on the restriction of power and the recognition of the universal value of human dignity as an individual's ability to self-identify, self-express and freely develop.

This is an issue of the institutional capacity of the state. It can be measured through the following parameters.

1. The ability of the Constitutional Court of Ukraine to make decisions, being guided by constitutional values and principles. This implies their proper argumentation and their presentation in a clear language for ordinary citizens. The real ability of the courts to control the actions of the executive power regarding the compliance with internationally recognized human rights standards. Effective judicial review is also measured by the enforcement of judgments. Unenforced judgment constitutes the absence of fair justice as such. For this, the courts themselves must comply with the requirements of competitiveness and equality of parties in the process, guarantee the parties to be heard in the process, and thoroughly investigate all the relevant circumstances of the case in the hearing and make a well-founded decision.

2. Upon adoption of legal acts by the Verkhovna Rada and public administration bodies, they must take care of their content, the adequacy of available resources for

their implementation and ensure the requirements of predictability and legal certainty. Therefore, behind the laws, there should be a clear algorithm for their implementation. Laws must meet the criteria of legitimate purpose. For example, the law governing the quality of a chemical product may not, even in its transitional provisions, rule the disciplinary liability of constitutional or ordinary judges. This is not in line with its legitimate purpose (material aspect) and it would be reasonable to assume that parliamentarians did not properly discuss these issues upon adopting the law (procedural aspect). Experience shows that such kind of law will not work properly.

3. The checks and balances system must work properly. Parliamentary committees are important not only for legislative activity, but also for exercising control over the executive branch. The absence or inadequate parliamentary control leads to permissiveness in the activities of the public administration, which does not contribute to the quality and effectiveness of human rights. In particular, poor quality parliamentary control in the field of national security and defense has led to a scandal over government contract fraud related to Ukroboronprom company.

4. The engagement of public administration with the people and the provision of quality administrative services to the population, the implementation of administrative procedures to facilitate the exercise of economic freedoms as a basis for ensuring the distribution of public good and access to education, healthcare, intellectual property and cultural heritage. It contains a significant share of the state's positive obligations to protect fundamental rights, based on fair access to public good. The protection of classical liberal rights is based on the requirement of non-interference with private autonomy and here the state has a duty to protect them from encroachments by third parties and public authority. Everything here is also about guaranteeing fair justice and compliance with contracts.

5. Karl Schmitt once stated that he was a sovereign able to apply a state of emergency [21]. We are by no means adherents of Schmitt, but we consider him a rather witty diagnostician of issues of transitional constitutional democracy, to which the Weimar Republic once belonged, which has not lost its relevance to Ukrainian parliamentarism to this day. The question here centers around choosing the optimal model for protecting the constitution in the event of an external threat. The right of a political nation organized into a state to defend itself against an aggressor is recognized in Article 51 of the UN Charter. The state has the discretion to take all necessary measures to protect national sovereignty from external threats, even under the guise of what is now, for some reason, called a "hybrid war", although, as evidenced by history, Russia's constant military conflicts with Ukraine are commonplace. Therefore, human rights and national security must be weighed on the principles of proportionality in resolving these issues, which should be addressed by an independent and fair tribunal.

2.4 National sovereignty and the protection of constitutional values in the context of global law

The current system of collective security is in deep crisis, within the framework of the traditional system of ensuring the sustainability of the world order. In particular, this is evidenced by the rather inert mechanisms of accountability within the UN General Assembly. Only recently has a relevant resolution been adopted stating that there was an inter-state armed conflict between Ukraine and Russia that has led to the occupation of Crimea today (A/C.3/71/L.26). Therefore, in the light of these provisions, mechanisms for defending national interests in the context of globalization processes should be considered.

Ensuring the protection of fundamental constitutional values is linked to the protection of constitutional identity. Julian Cocott and Martin Caspar highlight the struggle between sovereignty of parliament and judicial review as a key issue in the legal protection of the constitution [8]. This discussion has its origins in the views of Albert Venn Dicey, who identified two key pillars of British constitutionalism in the second half of the 19th century as the sovereignty of parliament and the common law of the courts [22].

The High Court of London, in the case on the constitutionality of a referendum on withdrawal of the United Kingdom from the European Union stated that the principle of parliamentary sovereignty is decisive in the application of foreign policy prerogatives, in particular on the approval or termination of international treaties. The government does not have the proper prerogatives to do this, because on behalf of the Crown, in accordance with the principle of parliamentary sovereignty, such decisions shall be made by parliament. With that, the court referred to the fact that the United Kingdom is a constitutional democracy, limited by legal rules and the objectives of the rule of law. Courts are empowered with a constitutional fundamental obligation to be governed by law in a democratic state by implementing the rules of constitutional laws in a different way than courts enforcing other laws. [23].

Highlighting the role of parliament in securing the rule of law, Kokott and Caspar emphasize the range of powers and procedures that belong to the parliament, which has the highest level of representation of the people [8]. The Constitutional Court of Ukraine is involved in the process of protecting fundamental constitutional values, which is intended to ensure the supremacy of the Constitution. The well-known reservations regarding the relationship between the rule of parliament and judicial constitutional control are, in fact, suggestions for resolving the dilemma of ensuring a balance between majority and minority. Thus, the American constitutionalist Thomas Baker notes the following on this matter [9]:

"In this structure, constitutional control is an asset, not a drawback. The constitution has no problems with judicial constitutional control; it has problems with the majority. In fact, the main threat to individual freedoms is government power. The

greater the power of government, the less individual freedom; the more individual freedom, the less power in government. Government power and individual freedoms are two sides of a zero-sum game".

According to the principle of republicanism (Article 5), there is a requirement that fundamental constitutional values be subject to review directly by a majority of voters in an all-Ukrainian referendum (Article 156 of the Constitution), not by parliament.

As these issues relate to national identity and the preservation of the national constitutional tradition, it is important to maintain a dialogue between different legal cultures and to ensure the compatibility of legal values while preserving and enhancing the national legal heritage. This facilitates the provision of interaction between different levels of public authority. The current Constitution of Ukraine is conservative in this regard. In addition to the fact that the provisions of Article 157 of the Constitution block the process of transferring part of the sovereign powers of the state to supranational institutions, there is also no mechanism to consult with regional institutions of power on the forms and methods of Ukraine's participation in inter-, trans- and supranational cooperation. Similarly, the Law on Transfrontier Co-operation does not contain appropriate mechanisms.

A number of researchers consider globalization as a threat to a democratic constitutional state, including its right to self-determination. Globalization is often seen as an Americanization of lifestyles, as an extension of the capitalist strategy with its associated practices of colonialism, the weakening of state institutions, in particular, according to the concept of Niklas Luhmann, on the formation of a world society (Weltgesellschaft) [11]. However, it is difficult to talk about world society, proceeding from the modern realities, which are characterized by a discussion about community in values that can serve as guidelines and standards in the construction of public institutions, rules and procedures. Such an illusion can be found in authors who express dominant discourse within the EU or the UN institutions. In light of the military conflict between Ukraine and the Russian Federation, which directly attacks the global collective security system, one can merely talk of a significant fragmentation of the world society and the process of its formation. This conclusion is also based on the experience of Ukraine's involvement in integration processes. The verification of this process was implemented the solution of the dilemma of the Euro-Atlantic and Eurasian models of integration of Ukraine. After all, the Customs Union of the Eurasian Economic Union does not correspond to the values shared by Ukrainians – democracy and the rule of law, since the highest bodies of the Union are formed by representatives of the executive power: The Supreme Eurasian Economic Council consists of heads of states and governments, and the Eurasian Economic Commission – of the deputy heads of governments.

In this context, it is accepted that the internationalization of constitutional law lies in consolidation (Verdichtung) of international law, which is observed in the context

of globalization and which is functionally necessary in these conditions to adequately secure the global interests of the common good, as well as its emancipation from the will of the individual state [15; 24]. The effectiveness of the global rule of law shall be measured by the effectiveness of human rights protection. If one is to proceed from the essence of the debate between the realistic and axiological doctrines of international law, then the constitutional and global values introduce quality to the content of the world globalization process, in which, strictly speaking, the world society is being formed, whose sprouts currenly are still weak. Furthermore, the value of human rights, democracy and the rule of law is still being challenged in many states, which is a testament to the poor adaptation of local public institutions, rules and procedures to such values.

2.5 Constitutional means of becoming of the global law

Today there is a controversial process of becoming of the world society, which has to formulate a new quality of social solidarity in the form of a world civil society. It is in this area that constitutionalism, as a rule, develops as a system of institutions, rules and procedures for ensuring the functioning of limited power and a mechanism for the protection of human rights. Since this is a two-way process – constitutional and international mechanisms for the formation of global law, then it is likely that it should become a world constitutionalism, which has been often discussed recently.

i) General principles. The emergence of global law can be ensured through certain constitutional means, which will be discussed below. We should now dwell on the concept of "constitutional security". Professor Yurii Voloshyn quite correctly considers this phenomenon in terms of human rights in the following aspects: they are an epistemological source for determining the nature of the state in the context of its legal regime; ontologically, they determine the main subject and strategic purpose of the state; in a pragmatic-demarcating sense, they are aimed at defining the concept of implementation of such an objective; in the management and statutory contexts aimed at creating a multifaceted, multi-level, complex regulatory mechanism based on constitutional and legal relations – constitutional and legal support [25]. This approach is based on the concept of national statehood, which, with the emergence of world civil society and global constitutionalism, is likely to be eroded by, first and foremost, a network of cooperation that can be vertical, horizontal and mixed. In doing so, subordination relations can also be eroded, and individual models of decisions will be transferred from standard contracts in private law and arbitration awards.

In general, this is an abstract question of the mechanisms for the formation of global constitutionalism and sovereignty at the global level. In this regard, considering the models of international law (as coordination, the combination of coordination with informal government cooperation and unilateralism), Armin von Bogdandy emphasizes the following nature of sovereignty [11]:

"The notion of sovereignty, which is understood as state independence, is, accordingly, a leading substantive paradigm and probably even a fundamental principle in the sense of the imperative requirement of optimization in the development and formulation of international law. At the same time, the central formula for the international system is sovereign equality, and certainly not democratization".

It is quite a logical assumption that global constitutionalism must develop in plane of guarantees of equality between states, which, however, depends on the real power of the state itself and the art of diplomacy, as well as its institutional capacity. At the same time, remembering the process of becoming of the supranational nature of the EU, one must first of all rely on the judgment of the Court of Justice in Costa v. ENEL, which recognized the horizontal effect and direct effect of fundamental rights and freedoms. The implementation and protection of human rights, in other words, are making a significant transformation in the world order. Similarly, private legal instruments, such as standard contracts and arbitration, form a network of rules and procedures that are independent of national states and supranational institutions, which are then codified and recognized by public authorities. Here, we would like to underline the institutional forms of influence on national, inter-, trans- and supranational institutions, which, in Niklas Luhmann's context, can be conditionally characterized as the institutions of global civil society, which produces the natural space for the exercise of freedom.

In domestic and foreign doctrine, these issues are considered through the lens of ruling capacity of the state [2–5]. In this context, they actually reveal the state's ability to defend national interests, which comes down to the institutional capacity of the state. When it comes to renouncing sovereignty, this construct most likely has the consequence of denying national statehood. Although in fact sovereignty is a certain property of the state to implement institutionally capable governmental decisions based on a balance of private and public interests, with the aim of realizing national interests at the inter-, trans- and supranational levels. If one is to consider this in the context of the relationship between law and geopolitics, the Spykman scheme [4] appears to be a rather ideal model, which is undergoing substantial transformation due to the state of development of civil society institutions, the institutional capacity of the state and the provision of a strategy for the sustainable development of the nation-state, at the heart of which is the harmony in the development of the individual and the environment. The same thing is emphasized by Zbigniew Brzezinski, who underlines the strategic legacy of mankind and the environment. Brzezinski's strategic legacy includes the sea, air, space and virtual space, as well as nuclear space related to the issue of nuclear weapons proliferation. The environmental legacy covers the geopolitical implications of water management, the Arctic and climate change [4]. Therefore, the issue of human symbiosis with nature is a global issue and requires a dramatic change in approaches to decision making at all levels of government [5].

The significance of Constitutional Law No. 2680-VIII for Euro-Atlantic integration and the prospects for Ukraine's integration with the European Union[1]. The law, which has become an integral part of the Constitution of Ukraine and the constitutional order, has a dualistic nature: it imposes specific positive responsibilities on public authorities, and on the integration of Ukraine into the EU, determines the political orientation of pursuing a foreign policy.

1) With regard to Euro-Atlantic integration, Law No. 2680-VIII[2] entrusts specific authorities with the triangle of power: the Verkhovna Rada – the President – the Cabinet of Ministers. All this is performed in the light of the requirements of "confirmation of the European identity of the Ukrainian people and of the irreversibility... of Euro-Atlantic course of Ukraine", which became part of the Preamble to the Constitution. In fact, it is difficult to accept the arguments put forward in the separate opinions of some judges of the Constitutional Court upon exercising preventive control of the constitutionality of this law, which allegedly "does not specify the procedure for amending" the Preamble of the Constitution and allegedly it only "fixes the historical moment of its adoption" at least in view of the dynamic interpretation of the Constitution, which was implemented by the Constitutional Court upon adopting Opinion No. 3-в/2018. The deepening of the content of the Constitution, which directs public authorities to implement specific measure to strengthen national security and defense within the framework of NATO cooperation, in the context of the actual Ukrainian-Russian war, is also important for the gradual transformation of the content of the Preamble and for its provisioning with specificity regarding the national and European constitutional identity of Ukraine. It is also difficult to characterize as a kind of "technique of circumvention" of the rigid procedure for amending Sections I, III and XIII of the Constitution, referring to the constitutional principles of the foreign policy of the state, defined in Article 18 of the Constitution of Ukraine, since the preconditions for the authorities serve as the provisions of the Preamble duly specified in the provisions on the constitutional powers of public authorities in this field (Articles 85, 102, 116).

Despite its different interpretations, Ukraine's Euro-Atlantic integration does not limit its sovereignty, since it is a political course towards joining an international organization on the basis of an international treaty that does not provide for the delegation of part of the sovereign powers. NATO is, by its nature, an international organization that performs collective security functions by coordinating efforts and ensuring Member States' interaction in the field of national security and defense.

2) With regard to European integration, Law No. 2680-VIII defines the goals of national policy by focusing the foreign policy course on "confirming the European

[1] Law of Ukraine "On Amendments to the Constitution of Ukraine (Concerning the Strategic Course of the State for Acquiring Full Membership of Ukraine in the European Union and in the Organization of the North Atlantic Treaty". (2019, February). Retrieved from https://zakon.rada.gov.ua/laws/show/2680-19

[2] *Ibidem*

identity of the Ukrainian people and the irreversible nature of the European ... course of Ukraine"[1]. With regard to Article 18 of the Constitution of Ukraine, there is no narrowing here, because, organically, the Ukrainian statehood developed within the framework of European identity with certain Byzantine influences at an early stage of its formation during the Rus' period. The positive obligations of the State regarding international cooperation within the meaning of Article 18 of the Constitution of Ukraine remain unchanged.

In this case, the implementation of the European integration course of Ukraine will depend entirely on the desire of the European Union to include Ukraine in its membership, which must meet the Copenhagen criteria of EU membership. At present, in practical terms, this means significant reform of the public service, decentralization of power, the establishment of real independent and impartial justice, the qualitative assertion of economic freedoms (Ukraine is currently only at 71 place in terms of economic freedoms), the effective and efficient provision and protection of human rights and freedoms.

As the EU is a supranational association, this issue is connected with the interpretation of the content of national sovereignty. For Ukraine, the solution is possible within the framework of three doctrines of the nature of the EU as an association of sovereign states, a sui generis supranational union and cooperative federalism. According to the tenets of the first two doctrines, it will be necessary to amend a number of provisions of the Constitution of Ukraine in accordance with a rigid procedure, since they will affect the issue of sovereignty within the meaning of Articles 5, 18 and 157 of the Constitution of Ukraine, as well as the exercise of certain powers of state authorities and local self-government bodies (e.g. according to the principles of subsidiarity, upon adopting EU acts, there should be procedures for hearing the opinions of regional public authorities). In such circumstances, the forthcoming constitutional draft law must, first and foremost, be flawless in terms of fundamental rights to participate in democratic governance. According to the doctrine of cooperative federalism, the EU is regarded as a supranational level of exercise of national sovereignty, in particular specific foreign policy functions of the state, the horizon of which is expanded by access to decision making of the relevant public authorities at the supranational level. Since Article 6 of the Treaty on the Functioning of the EU provides for respect for national constitutional traditions in the light of the potential candidate country's accession to the EU under the Copenhagen criteria, in this context the state acquires new qualitative human rights criteria, as stated by the Federal Constitutional Court of Germany the cases of Solange I (German "and so on") and Solange II. Proceeding from such practices, there is a possibility for the interpretation of the provisions of the Treaty of Lisbon and other constituent acts of the European Union by the Constitu-

[1] Law of Ukraine "On Amendments to the Constitution of Ukraine (Concerning the Strategic Course of the State for Acquiring Full Membership of Ukraine in the European Union and in the Organization of the North Atlantic Treaty". (2019, February). Retrieved from https://zakon.rada.gov.ua/laws/show/2680-19

tional Court of Ukraine in the light of existing constitutional principles and provisions defining the competence of public authorities in the field of foreign policy. Nevertheless, the specified measures regarding the implementation of the idea of Ukraine's potential accession into the EU will depend on the results of socio-political debate, the content of which will be to some extent filled by the doctrine of constitutional and international law in Ukraine.

CONCLUSIONS

Effective exercise of power is based on the rule of recognition of the legitimacy of authority decisions and the ability to consistently implement these decisions. These are interrelated things. In fact, the rule of recognition is true when finding the algorithm for executing power decisions. Therefore, respect for human dignity, freedom, equality, democracy and the rule of law – the system of values that underlie constitutionalism – is critically important here. This requires mutual control and balance in the state government. First of all, it consists in judicial control of authority decisions, which is impossible without guarantees of the independence of the courts. The division of powers between the tiers of the government and the holders of power at a certain level balances the system, especially in crisis situations, when a certain center of gravity of the government launches an attack on constitutional values. Then other power holders act as a counterbalance. But in any situation, judicial control is most important. For adoption of optimal decisions, it is necessary to exchange best practices through doctrine and jurisprudence, and one simplly cannot do without constitutional comparative studies here.

The ability to consistently implement authority decisions focused on the enforcement of human rights evidences the institutional capacity of the state. However, there are also safe and human-centric dimensions at play. From the standpoint of national security, it might be reasonable for Ukraine to join collective security systems and supranational institutions. The process of Ukraine's integration into global structures makes sense if these supranational and security institutions respect human dignity, human rights, freedom and the rule of law as fundamental values. From the standpoint of the value of human dignity, the activity of the courts, which should be guided by this fundamental decision as the basis of constitutional statehood, becomes more important. In particular, in the fight against corruption, the multiplication of all kinds of punitive institutions is of fundamental importance. Guarantees of economic freedom, compliance with contracts and fair justice come to the foreground.

The competitiveness of Ukraine in global structures will be achieved provided that the entrepreneur is free to choose their field of business activity without external pressure, with an awareness of the full responsibility for their risks. Therefore, the state should not engage in redundant dirigism here, excessively restricting economic freedoms, but instead maintain a modern and efficient market infrastructure based on free competition.

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