CONSTITUTIONAL LAW-MAKING IN WARTIME: INSIGHTS AND FUNCTIONAL ANALYSIS

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SUMMARY

The paper discusses general issues related to the respect of constitutional principles as essential sources of constitutional-law making in wartime in Ukraine. The research contributes to the development of the study of the issue of legislation by applying the existing concept of constitutional law-making. Enshrined in the Preamble of the Constitution of Ukraine, the state strategic course for Ukraine's full membership in the European Union and the NATO provides for the strengthening of the rule of law through the implementation of this course by public authorities, courts and judges, the legitimization of their activities in accordance with the features of European constitutionalism, and the development of civil society under martial law. The study analyses the ensuring of the implementation of constitutional and legal norms both through state coercion and through legal awareness of the people of Ukraine. The relationship between the implemented legislation and the existing legal system under wartime in Ukraine. This study contributes to extant research by adopting the existing concepts of law and law-enforcement.

Keywords: *democracy, constitutional law-making, Constitutional court, human rights, military aggression, rule of law, security, Ukraine, wartime*

In Ukraine under legal regime of martial law, the constitutional law-making is conventional in the observance of the principles of respect for human rights, rule of law, and separation of powers based on principle of "checks and balances". The analysis of the signs of modern constitutionalism in Ukraine based on the priority of two functional components: legitimation of law and use of legal protection. The goal of this paper is to map and give an overview of the importance of constitutional law-making as regulating power in force.

Currently, the constitutional law-making in Ukraine lies within the scope of definitions and policies, mentioned by the Law of Ukraine "On the Legal Regime of Martial Law", the Decree of the President of Ukraine « Decree № 64/2022 "On the imposition of martial law in Ukraine""[1], the Resolution of the Cabinet of Ministers of Ukraine 'On Approval of the Procedure for the Engagement of Able-Employed Persons to Publicly Useful Works in the Conditions of Martial Law'.

Although the Universal Declaration of Human Rights and the International Covenants on Human Rights, the United Nations established that everyone, without any

[1] https://www.president.gov.ua/en/news/prezident-pidpisav-ukaz-pro-zaprovadzhennya-voyennogo-stanu-73109

distinction, has all the rights and freedoms defined in these documents. Under international constitutional law, states have undertaken a number of obligations to non-discriminatorily maintain the cooperation and inerrability of human rights and fundamental freedoms, and the principle of subsidiarity recognizes that responsibility for the observance of human rights rests with the national state, not treaty bodies.

The results of research of these matters are presented in works of such Ukrainian researchers, as M. Baimuratov, O. Batanov, M. Buromensky, Yu. Voloshyn, V. Kravchenko, V. Kopeichikov, A. Kolodiy, O. Kopylenko, A. Krusyan, M. Orzih, M. Malyshko, O. Martselyak, V. Pohorilko, O. Prieshkina, M. Savchyn, O. Skrypniuk, V. Tatsii, Yu. Todyka, V. Fedorenko, V. Shapoval, and others. The problems of wartime in Ukraine are revealed in the writings of well-known constitutionalists: S. Holovatyi, O. Hryshchuk, V. Kolisnyk, O. Sovgyria, etc. Issues of guaranteeing constitutional principles under martial law and threats to national security were analysed by O. Hryshchuk, while the problem of restoring personal rights during the termination of the occupation regime is discussed in the papers of V. Kolisnyk, etc.

The judicial power is the main branch, empowered with erga omnes (lat. "regarding all") powers in the national and global dimension.

Emphasizing the relevance of the constitutional law-making and recovery of the status of law, it is worth mentioning that in today's global crisis conditions, a broad approach to constitutional values should be used precisely in the context of the implementation of the concept of comprehensive security.

In accordance with operation of the Constitutional Court of Ukraine, the presence of a wide range of problems that require emprovement is due to the following "open problems of constitutional and legal drama", namely:

- amendments to the articles of Chapter XI of the Constitution of Ukraine in the part of establishing 'decentralization', 'legal status of heads of communities';
- the need for an official interpretation of Article 4 of the Constitution of Ukraine regarding the fact that "there is a single citizenship in Ukraine';
- the importance of studying the practice of the Constitutional Court of Ukraine as a subject of the European system of human rights protection;
- the need to improve the legislative framework of the election process in Ukraine;
- the importance of interpretation of norms in the sphere of restriction of human and citizen rights in the conditions of martial law,
- identification of problems in the system of constitutional control;
- lack of legislative consolidation of the implementation of public control, which prevents the participation of civil society institutions in law-making activities;
- actualization of the normalization of the judicial process and the application of the norms of the Constitution of Ukraine by the courts; etc.

Therefore, an imbalance between the national, supranational and global legal order needs legal measures. The UN coordinate system (UN Security Council - UN human rights treaty bodies) lacks stable human rights enforcement. The UN Security Council has exhausted its normative resource, as it not only did not acquire the status of a global norm-setter, but highlighted the dichotomy between ensuring the values of the international community and satisfying the interests of ю6 military crimes and destructive

interpretation of international legal norms and principles for its own benefit, national interests, its international legal subjectivity. Nevertheless, the very existence of supranational law, the reception and implementation of pan-European legal acts and the inclusion of an international mechanism in the national legal system for the protection of human rights and civil liberties clearly demonstrates globalization.

Hall J.C. mentioned that '…as the foregoing discussion discloses, the applicable constitutional standard for assessing excessive force claims depends upon the context in which the claim arises. Any claim of excessive force must first identify the specific constitutional right allegedly infringed in order to determine the appropriate standard by which the issue is to be resolved. Use of force is inherent in law enforcement, and it is no surprise that challenges are common. The law enforcement community's response to the challenges is critically important'.[2]

Considering the constitutional rights, the state duty is to protect human rights within its jurisdiction.

In the global perspective, the assault of the russian invaders on the territory of the the Zaporizhska Nuclear Power Plant (NPP), Chernobylska NPP, the destruction of the Kakhovska Dam became examples of ecocide and genocide, being uncontrolled environmental threats and crimes of a planetary scale. These facts of the destructive influence on the international legal framework, the non-acceptance of the norms of international law, the weakening of the influence of international organizations (IAEA, etc.) are obvious.

The existing system of international protection of human rights can not prevent significant damage that is inflicted daily on the lives and health of citizens, as well as on the environmental security of Ukraine and neighboring countries. As noted by Ruslan Strilets, the Minister of Environmental Protection and Natural Resources of Ukraine, the full-scale Russian invasion caused damage to the environmental human rights by russian criminals 'stealing water not only from Ukraine, but from the whole world.'[3]

For the international community, there is the only way to balance law and politics in the conditions of asymmetric development of international legal relations: preserving the integrity and sovereignty of Ukraine and its national constitutional system.

On the national level, the Judge of the Constitutional Court of Ukraine, Serhii Holovatyi noted that 'the Constitutional Court of Ukraine will not stop in ensuring the highest legal force of the Act of constituent power of the people and establishing true democracy, protection of human rights and the rule of law in the state'.[4]

The Constitutional Court of Ukraine proceeds from the fact that, 'in accordance with Article 8 of the Constitution of Ukraine in its relationship with the provisions of the third part of Article 22, the first part of Article 64 of the Constitution of Ukraine, the "rule of law" (rule of law) requires that interference with the constitutional rights and freedoms of a person always was predictable.' In the Decision of the Constitutional

[2] Hall J.C. Constitutional Constraints on the Use of Force, *FBI Law Enforcement Bulletin* Volume: 61 Issue: 2 Dated: (February 1992) Pages: 22-31

[3] https://www.ukrinform.ua/rubric-society/3687842-ruslan-strilec-ministr-zahistu-dovkilla-ta-prirodnih-resursiv.html

[4] https://ccu.gov.ua/novyna/mizhnarodna-konferenciya-konstytuciya-ukrayiny-ta-triada-yevropeyskyh-cinnostey-poglyad-u

Court of Ukraine dated March 22, 2023. No. 3-p(II)/2023 emphasized that "restrictions on the realization of constitutional rights and freedoms cannot be arbitrary and unfair, they are established exclusively by the Constitution and laws of Ukraine, they must correspond to a legitimate purpose, be conditioned by the public need to achieve this purpose, reasonable ; in case of restriction of the constitutional right (freedom), the legislator is obliged to introduce such normative regulation, which will enable the optimal achievement of the legitimate goal with minimal interference in the realization of this right (freedom) and will not violate the essence of this right" (paragraph one of sub-clause 5.1 of clause 5 of the motivational part)'.[5]

Ukraine faced the task of ensuring the recovery of the country with restriction of the constitutional rights, taking into account the realities of modern state formation, and the evolution of the environment and the prospects of EU membership. In Europe, the order of international and supranational cooperation (integration) for the recovery of Ukraine has been established, but the current war in Ukraine and migration crisis outlined the European structural shortcomings of the European security system. The creation of a special tribunal to prosecute the leadership of the russian federation for committing the crime of aggression against Ukraine is a fact that will change russia's existing geopolitical disposition and approach to fairness and justice.

As stated above, in modern realities, the terminology of constitutional law acquires a new meaning, because today all social groups of the population globally feel the damage from missile strikes on civil infrucstructure in Ukraine.

A. Krusyan wrote, that 'the modern paradigm of Ukrainian constitutionalism contains constants that are unchanged under any extreme conditions, including those that are constant even in the conditions of a state of war, namely, the purposefulness (to assert human rights and freedoms) and the principles of modern Ukrainian constitutionalism that correspond to universal and European values'.[6]

Let us agree with Ukrainian Professor O.Martselyak that 'today there should be a generalization of the practice of the implementation of the Constitution and other legislation of Ukraine in conditions of war, the real state of ensuring human rights, the functioning of the national mechanism of public power taking into account the state of war, and based on this generalization, legal science, including the science of constitutional law, should be based on it, must scientifically substantiate and formulate the specific need for improvement of domestic legislation and determine the nature of the content of such changes'.[7]

It is obvious that human rights protection measures require efforts to observe and control them, to resolve conflicts by using mediation and diplomacy. Moreover, ending violence and agression requires joining force, envisaging humanism and the value of the human personality.

Furthermore, the Constitutional Court of Ukraine uses terminology and definitions

[5] https://ccu.gov.ua/storinka/64

[6] Krusian, A. «SUChASNYI UKRAINSKYI KONSTYTUTsIONALIZM V UMOVAKh VOIeNNOHO STANU». Ekspert: paradyhmy yurydychnykh nauk i derzhavnoho upravlinnia, no. 3(21) (Berezen 2, 2023): 12-22. data zvernennia Lypen 11, 2023. http://journals.maup.com.ua/index.php/expert/article/view/2340

[7] Marteslijak O. Priorytetni zavdannia vitchyznianoi nauky konstytutsiinoho prava v umovakh rosiiskoi ahresii. Tom 1 № 75 (2023): Naukovyi visnyk Uzhhorodskoho natsionalnoho universytetu. Seriia: Pravo. s.115

that should be studied by researchers in the future, namely: powers of public authorities to eliminate threats to state sovereignty and independence, protection of information rights of citizens and protection of state information resources, legal status of military state administrations of military, the legal status personnel, prisoners of war, the legal status of internally displaced persons, temporarily occupied territories and de-occupied territories, decentralization, the institution of prefects, responsibility for damage caused as a result of armed aggression, etc.

The development of a new international agreement on human rights is allegedly legal-political objective of the formation of constitutionalism in the conditions of global challenges.

Conlcuding, there is no doubt that active participation of civil society in decision-making process and control over the constitutional law-making in Ukraine are essential. However, such principles as rule of law and non-use of force is an 'initial tage' of current developments in Ukraine.

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