Mykola Sambor
Ph.D.
(the Pryluky Police Department of the Main Department of the National Police in Chernigiv oblast)

DOI: 10.31733/2078-3566-2018-2-115-121

ADMINISTRATIVE DISCRETION IN ADMINISTRATIVE-DELICT LAW

Самбор М. АДМІНІСТРАТИВНИЙ РОЗСУД В АДМІНІСТРАТИВНО-ДЕЛІКТНОМУ ПРАВІ. У статті розглядається теоретичне поняття «розсуду» у праві. Аналізуються доктринальні підходи до розуміння «розсуду», «адміністративного розсуду», а також наявні узагальнення судової практики, що дозволяють з'ясувати зміст розсуду. З урахуванням наукової доктрини виділяються ознаки адміністративного розсуду у адміністративно-деліктному праві, а також досліджуються межі адміністративного розсуду під час застосування адміністративної відповідальності із урахуванням посилань на можливість такого розсуду, що міститься у законодавстві.

Запропоновано авторське визнання адміністративного розсуду у адміністративно-деліктному праві. Визначено ключові ознаки адміністративного розсуду у адміністративно-деліктному праві.

На думку автора, дослідження адміністративного розсуду в адміністративно-деліктному праві сприятиме якості законодавства, його визначеності та зрозумілості, а також дотримання заборон, встановлених у нормах вказаного законодавства, а також дозволить створити чітко окреслену сферу застосування адміністративного розсуду, що гарантуватиме дотримання прав, свобод та інтересів людини і громадянина, інтересів суспільства і держави від протиправних посягань, стабільності суспільних відносин.

Ключові слова: *розсуд, адміністративний розсуд, адміністративно-деліктне право.*

Formulation of the problem. Legal regulation of social relations is based on the basic methods related to imperative and dispositive methods of influencing the behavior of the participants in the relationship. Typically, for the sphere of public-legal relations, in particular for the subjects of power relations - officials of the executive branch, inherent in the strict regulation of their behavior. This issue is defined in the constitutional rules of direct action, in particular, in Part 2 of Art. 6 of the Constitution of Ukraine, which states that the executive authorities exercise their powers within the limits established by this Constitution and in accordance with the laws of Ukraine, as well as Art. 19 of the Constitution of Ukraine, according to which the legal order in Ukraine is based on the principles according to which no one can be compelled to do what is not stipulated by law. State authorities, their officials are obliged to act only on the basis, within the limits of authority and in the manner provided by the Constitution and laws of Ukraine.

But despite such regulations, the law always leaves scope for alternative actions, independently determine which norm to apply in certain circumstances, in one way or another, reveals a certain discretion that is not absolutely definite. Taking into account the constitutional prescriptions, methods of legal regulation of social relations on which the legal order is based in the state, we consider that the discretion of the subjects of power authorities should be directly provided for in the law as one of the ways of exercising powers. Administrative discretion in the Ukrainian legal system and the legal system has not received proper coverage and in-depth research, which does not have the best effect on the quality of implementation of powers by officials of executive authorities.

Recent publications revealing the problem. The research of the issues of discretion in the application of the rules of law and administrative discretion was defined for the purpose of scientific searches Berezin O.O., Rezanov S.A., Solovey Yu.P., Slyusareva T.G., Khavronyuk M.I., and others. However, to date, the issue of administrative discretion has a number of uncertainties, discussion issues, as well as unexplored gaps, the filling of which will significantly affect the quality of the application of the law, in particular administrative and tort standards, aimed at regulating public relations associated with the use of administrative liability and public coercion, and also enrich the theory of administrative and tort law.

The lack of common views on discretion among the theorists and practicing lawyers affects the place of administrative discretion in the area of administrative-delict law, the rules of which govern the application of administrative coercion, as well as measures restricting human and civil rights and freedoms. I am convinced that any means that allow subjects of power to deviate from the norms of positive law by restricting individuals in the exercise of their rights, freedoms and interests or, moreover, depriving individuals of all or individually guaranteed rights guaranteed by the Constitution and the world community, freedoms and interests must be thoroughly investigated, their use is absolutely defined.

The purpose of the article. Taking into account all the above aims of this article, it is an analysis of scientific opinions on administrative discretion and its place in the field of administrative and tort law and legislation of Ukraine.

Basic content. The essence of the regulatory influence of law on social relations is determined by the possibility of normatively constructing models of the necessary and possible behavior of the subjects of these relations. In practice, this is reflected in the provision of certain subjects of public relations certain rights and in the assignment of other legal obligations and the establishment of certain prohibitions [12, p. 32]. However, the system of legislation today does not guarantee all-encompassing regulation or the creation of formal mechanisms for the imitation of participants in public relations. The aforesaid applies to the sphere of legal regulation of social relations, where the parties are the subjects of the authority, which are entitled to apply measures of administrative responsibility. In addition, the actual social relations are different from abstract, fixed in the norms of positive law, socially useful forms of behavior that act as universal regulators. It is obvious that such a state of affairs, the ratio of actual social relations and the impossibility of timely prompt response of the right to change in public life called for the life of an alternative behavior within the limits of the rules of positive law, giving the subjects of public relations a certain discretion in choosing behavior, exercising rights, performance of duties. Undoubtedly, this also reveals the fundamental component of law - freedom.

On the one hand, the unrestricted freedom to choose a solution will inevitably lead to gross violations of the rule of law, adversely affecting the formation of the rule of law. On the other hand, the excessive restriction of discretion (or its complete exclusion) in some cases may deprive the subject of enforcement of the opportunity to take into account the individual peculiarities of the case, which negatively affects the validity of the decision. The main thing is that using legal instruments to determine the required degree, the amount of discretion of the subject of law enforcement [10, p. 4]. The key idea of discretion, including administrative discretion, is to define its boundary, in such a way as to prevent the transformation of freedom from arbitrariness, ensuring the coexistence of freedom, equality and justice as the fundamental principles of combining the interests of different members of social relations.

In our opinion, in order to understand administrative discretion, one should plunge into understanding the very right as the foundation for all other categories and legal concepts.

Actually for the legitimate approach, law is understood as a product of the state, including discretion. At the same time, Nersesyants VS noted that for the legal type of legal understanding under the law is meant somewhat objective, not dependent on the will, discretion and arbitrariness of the law of the governing authority [3, p. 28]. Consequently, the right should be deprived of state discretion, the discretion of state officials, since such a discretion distorts the idea of law, since it allows manipulating the law in its own interests. Although, on the other hand, such a sign of positive law, as a general obligation, is a product of the state's discretion.

Obligibility of the law - it is only a consequence of arbitrary discretion of the state, the mandatory of his orders, instructions [3, p. 72]. Legisty reduces the right to the law and interprets the power of coercion as the essence of law and its distinctive rice. According to this logic, it turns out that with the help of coercion, official power may not right in its discretion and arbitrariness to turn into a law [3, p. 86]. The legislator should not and does not have the right to regulate everything at its own discretion, in violation of the requirements of supranational law ("the idea of law") [3, p. 459-460].

Discretion, based on interest, acts as the engine of the formation of law in its positivist sense. Happiness acquires a fundamentally important sound, which distinguishes it from arbitrariness, when it becomes a consequence of the combination of the interests of freedom, equality and justice.

No less important influence of discretion is felt during its implementation. Particularly acute is the question of discretion when applying the rules of law by authorized entities by the

state, in particular, officials of executive bodies. Extremely relevant discretion appears in the context of the application of coercive measures, legal liability, including administrative liability.

In the theory of law there is a point of view that discretion distorts legal requirements. Alekseev SS he wrote, however, that it is the individual-legal activity (judicial and administrative discretion) that allows the judicial and other authorities of the state to overthrow the democratic legal establishment, to eliminate their relatively progressive content, to correct laws [4, p. 85-86].

Applying this approach in the sense of discretion to the sphere of administrative and tort law, we have the opportunity to note that the discretion in administrative tort law should be as determined as possible in the norms of positive law, that is, in the legislation on administrative offenses. In favor of this statement convincingly we are constitutional norms of direct action, contained in Art. 6 of the Constitution of Ukraine, which states that the executive and judicial authorities exercise their powers within the limits established by this Constitution and in accordance with the laws of Ukraine, as well as in art. 19 of the Constitution of Ukraine, which indicates that bodies of state power and bodies of local self-government, their officials are obliged to act only on the basis, within the limits of authority and in the manner provided by the Constitution and laws of Ukraine. In this way, the Basic Law of Ukraine lays down restrictions for administrative discretion in administrative and tort law.

It is important to understand the administrative discretion in the administrative-delict law to find out the available scientific doctrines of understanding the discretion, administrative discretion.

O.M. Zherebtsov and Ye.O. Chaban indicate that administrative law as a type of law enforcement discretion is a free choice of the authorized body of state or municipal government in the person of its official who is a state or municipal official capable of future lawful behavior, the actual basis of which are objective factors of the surrounding reality, based on the discretionary specificity of the activities of these bodies and the method of legal regulation of public-legal relations and implemented within the framework of legal regulation of public law [1, p. 53-54]. Discretion is interpreted as a free choice by the authorized entity of lawful conduct. The said perception of administrative discretion should be based on the existence in the norms of the positive law of alternative behavior of executive authorities and their officials.

T.G. Slyusareva writes that administrative discretion is defined as defined by normative-legal acts the freedom to choose the variant of behavior of an authorized subject (official) on the basis of his thinking activity, taking into account the realization of his public interest with a view to the adoption of an optimal managerial decision, to act or to abstain from its committing (inaction) for expedient realization of own powers [11, p. 7]. The key author determines the nature of discretion - mental activity, and the root cause - public interest, means of achievement - action or inaction, and also points to the ultimate goal - the exercise of authority. Taken together, we consider that one of the key elements for discretion is the scope of its implementation, those boundaries that outline the scale of the embodiment of discretion. However, in the case of officials of executive bodies, the legislator should determine as precisely as possible their sphere of conduct, and not an alternative and freedom to choose such behavior. In conditions of free choice of conduct, the presence of power and the right to coercion, the subject becomes arbitrarily in the pursuit of his interest. Under such conditions, the legal order will turn into an injustice, when all democratic principles are destroyed, and the rights, freedoms and interests of man and citizen are spoiled.

At administrative discretion it is necessary to understand the assessment of the actual circumstances, the grounds (criteria) which are not enshrined in the legal norms is sufficiently complete or specific, and which is carried out by the body (official) during the selection, within the limits permitted by the regulatory acts, the optimal solution for the solution of a specific administrative issue [8, p. 8; 9, p. 97]. Rezanov S.A. and Nightingale Yu.P. They are inclined to believe that administrative discretion covers the limits of assessment of factual circumstances that do not have a clear attachment to the rules of positive law.

Although there are other views on the understanding of administrative discretion. Similar definitions in essence are not much different from those outlined above, whose authors are inclined to focus on other elements of administrative discretion, in particular the internal state of the subject of administrative discretion.

For example, administrative discretion is the power of the public administration actors to carry out analytical, intellectual, creative activities within the limits and in the manner established by law, by evaluating the actual circumstances of the case for the purpose of lawful ob-

servance, observing the principles of the rule of law, justice, prudence, efficiency, and subsequently the choice of the optimal solution in a particular administrative case [6, p. 138-139].

We are convinced that understanding and realization of administrative discretion by officials of executive authorities and local self-government is an understanding of the limits of legal regulation, that is, an understanding of the optimal completeness of the legal mediation of social relations due to the necessity of state influence on the spheres of public life, which can not be regulated except for help right Defining here are the interests of society and the state, rights and freedoms of man and citizen, political, economic, social and other factors. Undoubtedly, the limits of legal regulation to a certain extent are conditional and can not be determined absolutely. But the fundamental principles here are, on the one hand, the optimal completeness of legal regulation of the most important for society, state, man and citizen of relations, and on the other - the prevention of legal regulation of public life. [13, p. 611]. It follows that discretion in general and administrative discretion in particular are an important constituent element of ensuring a high-quality and efficient legal regulation in the country. Unfortunately, this issue has not been given proper attention not only in the theory of administrative and tort law, but also in legislation. Although it is precisely in the presence of administrative and judicial discretion in administrative-delict law that the norm contained in art. 252 of the Code of Ukraine on Administrative Offenses (hereinafter - CUAO), which states that an authority (official) assesses evidence based on their internal convictions, based on a comprehensive, complete and objective study of all circumstances of the case in their totality, guided by law and legal awareness [14].

In connection with the existence of such a theoretical and normative gap in the sense of administrative discretion in administrative tort law, we will turn to related areas of law and legislation, in particular, in the criminal and criminal-procedural branch.

M.I. Khavronuk notes that the necessity of maximum limitation of judicial discretion by law follows, in particular, from the provisions of Art. 24 of the Constitution, according to which "citizens have equal constitutional rights and freedoms and are equal before the law". This provision should be understood as meaning that the rights and freedoms provided for by the Constitution of Ukraine are equally applicable to all citizens and have the same content and scope for them, and that the law can not impose on one more obligation than on the other, to demand from one which is not required from another. Unlimited jurisdiction can lead to the fact that one person in violation of Art. 58 of the Constitution of Ukraine will be responsible for acts that at the time of its commission are not recognized k.pr. (criminal offense - MS noted us), and the other one - no, in some cases one and the same damage will be recognized as significant or difficult directly on the basis of the law, and in others it will be in violation of Art. 62 of the Constitution of Ukraine only to be assumed. This also applies to valuation concepts that characterize the socially dangerous consequences of k.pr. and to determine which CC operates, in particular, the terms "death", "death", "grave consequences", "especially grave consequences", "harm", "damage" [2, p. 92]. Within the framework of criminal and criminal procedural law, discretion in the overwhelming majority is associated with the entity that has the power to examine the criminal proceedings in substance and to determine whether or not a guilty person has committed a criminal offense.

On this basis, the Supreme Court of Ukraine paid special attention to this issue by investigating the issue of judicial review in its ruling of February 1, 2018 in the case No. 634/609/15-k.

The concept of judicial discretion in court proceedings encompasses the powers of the court (rights and obligations) granted to him by the state, to choose between alternatives, each of which is legal, and the intellectual and voluntary power of the court to resolve disputed legal cases in the cases determined by law issues, based on the purposes and principles of law, general principles of legal proceedings, particular circumstances of the case, data on the identity of the guilty, justice and sufficiency of the chosen punishment, etc. The grounds for judicial discretion in imposing punishment are: criminal, relatively-defined (where the limits of punishment are established) and alternative (where there are several types of punishment) sanctions; the principles of law; empowering norms, which use the words "may", "right", in relation to the powers of the court; legal terms and concepts that are multi-valued or not normative, such as "guilty person", "sincere repentance", etc.; Valuable concepts, the content of which is determined not by law or regulation, but by the law-consciousness of the subject of law enforcement, for example, when taking into account mitigating and aggravating circumstances (Articles 66, 67 of the Criminal Code), the definition of "other circumstances of the case", the possibility of correction of the convicted person without service punishment that matters for the

application of art. 75 of CC etc; Individualization of punishment is a specification of the type and size of the measure of state coercion, which a court assigns to a person who committed a crime, depending on the peculiarities of this crime and its subject. The discretionary powers of the court are recognized by the European Court of Human Rights (in particular, the case of Dovzhenko v. Ukraine), which in its decisions refers only to the need to determine the legality, scope, methods and limits of the application of freedom of assessment by judicial authorities, based on the compliance of such powers with the court principle the rule of law. This is ensured, in particular, by the appropriate justification of the chosen decision in the court proceedings, etc. [7]. Relying on the provisions of Part 5, 6 of Art. 13 of the Law of Ukraine "On the Judiciary and the Status of Judges" [15], the conclusions on the application of the rules of law, set forth in the decisions of the Supreme Court, are mandatory for all subjects of power, which apply in their activities a normative legal act containing the relevant the norm of law. The conclusions on the application of the rules of law, set forth in the decisions of the Supreme Court, are taken into account by other courts in the application of such rules of law. From here we arrive at the conclusion that this understanding of discretion is possible only when applying the criminal law, and the said conclusion is not obligatory for the understanding of administrative discretion when applying the norms of the CUAO.

Administrative and tort law is inextricably linked with such a form of realization of law as an application, since only the latter allows one entity (under these conditions, to the subjects of authority - to the executive and local self-government bodies and their officials) to apply norms to relations , in which subjects of authority are not or were not direct participants. But in the course of its implementation an important role is played by the administrative discretion of the subjects of power authorities.

Berezin O.O. notes that the discretion of enforcement is carried out on the basis and within the framework of the law of the activities of authorized law entities, which provides for the choice of the most optimal solution in the legal case [10, p. 7].

The administrative discretion of authorized officials of executive power bodies in administrative and tort law should be established and implemented in strict conformity with the Constitution and laws of Ukraine, in particular CUAO.

In our opinion, it is important that even the drafting of an administrative offense protocol is a right, and not a duty of officials, which can not entail any liability for officials in the absence of a protocol on an administrative offense. Administrative discretion is inextricably linked with the procedural rules of administrative and tort law, since the latter determine the powers and behavior of officials, although the latter is the result of the application of the rules of material administrative and tort law. An example of such discretion can be the qualification of an act as an administrative offense in a situation where the legislator used valuing concepts to designate an objective part of an administrative offense. Evidence of this is the norm contained in Art. 173 CUAO, which states that petty hooliganism is an obscene language in public places, and abusive clinging to citizens and other similar actions that violate the public order and peace of citizens, but which "other similar actions that violate public order and the peace of the citizens "and belongs to the administrative discretion of officials of executive power, who have the authority to identify, document and terminate administrative offenses, which, at their discretion, determine the objective side of the administration the offense for which liability is provided for in Art. 173 CUAO, thus taking over the powers of the legislative body, since only the laws of Ukraine define acts that are administrative offenses (Article 22, part 1, Article 92 of the Constitution of Ukraine [16]). From this it can be concluded that the administrative discretion related to the formulation of the administrative offense directly contradicts the Constitution of Ukraine, and therefore can not be applied, despite the fact that the rules of CUAO such discretion is permissible. Returning to the limits of the application of administrative discretion, legal regulation, based on the general principles of law and law, in particular, such fundamental principles as the rule of law, observance of the rights, freedoms and interests of man and citizen, as well as methods of legal regulation, we note that attribution to the sphere administrative discretion in defining acts that are administrative offenses contradicts the principles of a law-governed state and in the future gives an unreasonably wide field for the realization of state measures. mousse officials against citizens or persons who are in the state.

A profound and comprehensive study of the circumstances of the case, the adoption of the results of such a study act of administrative and tort law depends partly on the administrative discretion of the subject of the application of the rules of administrative and tort law, as indicated by the norms of Art. 252 CUAO, and norms 280 CUAO, and the norms of art. 15

CUAO and st.st. 17-22 CUAO, art. 33-36 CUAO. and the actual sanctions of the norms of a special part of the CUAO, in particular those that are alternative, or set the upper and lower limits of administrative penalties.

No wonder Abdullayev MI notes that relatively specific sanctions provide for the choice of penalties within a single sanction at the discretion of the law enforcement agency, depending on the particular circumstances. Alternative sanctions provide the opportunity to choose one of the measures of punishment provided by this legal norm. [5, p. 197-198]. In this aspect, administrative discretion is extremely important, but the latter must be based on the high moral, national consciousness of the legal consciousness of the person who applies it, which guarantees the correct application of the law, a penalty that will be comparable to the offense committed and also capable of performing the tasks which are facing administrative-delict law.

Conclusion. To summarize the study, we note that administrative discretion in administrative-delict law is the intellectual and voluntary activity of officials of executive authorities or local self-government (or their authorized persons), based on the norms of positive law, is carried out on the basis, within the limits of authority and in the way provided by the Constitution and laws of Ukraine is connected with the assessment of evidence, comprehensive, complete and objective study of all the circumstances of the case in their totality in their internal contention tion, guided by their own sense of justice, aimed at strengthening the rule of law, human rights, freedoms and interests of man and citizen and is associated with the adoption of an individual act of law. The key features of administrative discretion in the administrative-delict law are: 1) the subject of implementation – an authorized official of the executive body or local self-government; 2) intellectual-volitional activity; 3) activity based on the norms of the Constitution and laws of Ukraine; 4) activity which is the product of the legal consciousness of the subject of administrative discretion, which is realized exclusively within the limits and in the manner specified by the Constitution and laws of Ukraine; 5) scope of administrative discretion: assessment of evidence, comprehensive, complete and objective study of the circumstances of the case; 6) goal - the establishment of the rule of law, observance of rights, freedoms and interests of man and citizen, stability of social relations; 7) adoption of an individual act of law enforcement; 8) application or non-application of administrative liability, depending on the circumstances of the case; 9) ensuring the enforcement of an administrative penalty in case of administrative liability.

We believe that the study of administrative discretion in administrative-delict law will promote the quality of legislation, its certainty and comprehensiveness, as well as compliance with the prohibitions established in the norms of the said legislation, and will allow the creation of a clearly defined sphere of application of administrative discretion that guarantees the observance of rights, freedoms and interests. rights and citizens, the interests of society and the state from illegal encroachments, stability of social relations.

References

1. Жеребцов А.Н., Чабан Е.А. Административное усмотрение, административный произвол и административное (чиновничье) обыкновение: теоретические и практические вопросы соотношения. *Административное право и процесс.* 2014. № 4. С. 53-58.

2. Дудоров О.О., Хавронюк М.І. Кримінальне право: навч. посібник / за заг. ред. М.І. Хавронюка. Київ: Ваіте, 2014. 944 с.

3. Нерсесянц В. С. Общая теория права и государства: учебник для юрид. вузов и факультетов. Москва: НОРМА—ИНФРА • М, 1999. 552 с.

4. Алексеев С. С. Общая теория права: в 2-х томах. Т. I. Москва: Юрид. лит. 1981. 361 с.

5. Абдулаев М.И. Теория государства и права: учебник для высших учебных заведений. Москва: Финансовый контроль, 2004. 410 с.

6. Семеній О. Ознаки адміністративного розсуду в діяльності суб'єктів публічної адміністрації. *Адміністративне право і процес*. 2017. № 6. С. 136-139.

7. Постанова Верховного Суду України від 1 лютого 2018 року у справі № 634/609/15-к, провадження № 51-658 км 17. URL: http://www.reyestr.court.gov.ua/Review/72009792 (дата звернення: 05.05.2018).

8. Соловей Ю.П. Усмотрение в административной деятельности советской милиции: автореф. дисс... канд. юрид. наук: 12.00.04 / Академия управления МВД СССР. Москва, 1982. 23 с.

9. Рєзанов С.А. Адміністративний розсуд: нормативна основа та її удосконалення. *Право і безпека.* 2005. № 4-5. С. 96-99.

10. Березин А.А. Пределы правоприменительного усмотрения: автореф. дисс... канд. юрид. наук: 12.00.01. Нижний Новгород, 2007. 26 с.

11. Слюсарева Т.Г. Административное усмотрение в деятельности государственных служащих: автореф. дисс... канд. юрид. наук: 12.00.04. Москва, 2013. 26 с.

12. Мельник О.М. Метод правового регулювання як засіб підвищення ефективності правового регулювання суспільних відносин. *Часопис Київського університету права*. 2008. № 3. С. 32-38.

13. Бобровник С.В., Богініч О.Л. Межі правового регулювання // Юридична енциклопедія: в 6 т. / Шемшученко Ю.С. (голова редкол.), Бурчак Ф.Г., Зяблюк М.П. та ін. Київ: Укр. енцикл., 1998. Т. 3: К-М. 2001. С. 611.

14. Кодекс України про адміністративні правопорушення від 7 грудня 1984 року (статті 1–212-[20]). URL: http://zakon5.rada.gov.ua/laws/show/80731-10/print1524162891578316; (статті 213–330) http://zakon5.rada.gov.ua/laws/show/80732-10/print1524416658814481. (дата звернення: 05.05.2018).

15. Про судоустрій і статус суддів: Закон України від 2 червня 2016 року. URL: http://zakon2.rada.gov.ua/laws/show/1402-19/print1509542343625494. (дата звернення: 04.06.2018).

16. Конституція України від 28 червня 1996 року. URL: http://zakon3.rada.gov.ua/laws/show/254к /96-вр/print1443619337497914. (дата звернення: 05.05.2018).

Received to editorial office 05.06.2018

Summary

The article deals with the theoretical concept of "discretion" in the law. The doctrinal approaches to the understanding of "discretion", "administrative discretion", as well as generalizations of judicial practice, allowing to find out the content of discretion, are analyzed. Taking into account the scientific doctrine, signs of administrative discretion in administrative and tort law are distinguished, as well as the limits of administrative discretion when applying administrative liability, taking into account references to the possibility of such discretion contained in the legislation.

***Keywords**: discretion, administrative discretion, administrative-delict law.*

Andriy Samotuga
Ph.D., As. Prof.
(the Dnipropetrovsk State University of Internal Affairs)

DOI: 10.31733/2078-3566-2018-2-121-125

SOCIAL CONTRACT AND PROBLEMS OF ITS LEGAL EMBODIMENT IN UKRAINE

Самотуга А. СУСПІЛЬНИЙ ДОГОВІР ТА ПРОБЛЕМИ ЙОГО ПРАВОВОГО ВТІЛЕННЯ В УКРАЇНІ. Незважаючи на більш як 25-річне існування незалежної Української держави та більш як 20 років з моменту прийняття її Конституції, наразі Україна все ще перебуває в процесі формування політичної нації. На підставі авторських узагальнень констатовано, що чинна Конституція України, з одного боку, є не суспільним, а політико-правовим договором, що має здебільшого ознаки компромісу владних еліт і центрів влади – Президента і Парламенту. З іншого боку, український історико-політичний досвід на зламі тисячоліть увиразнює деякі фундаментальні аспекти самого феномена суспільного договору. В сучасних соціально-політичних дослідженнях суспільний договір зазвичай розглядається скоріше не як конкретна історична подія, закріплена низкою доступних для дослідження документів, а як позначення деяких рис довготривалого історичного процесу, в результаті якого виникли сучасні ліберально-демократичні суспільства, до якого прагне і Україна

Суспільний договір є чинним лише за умови, коли його визнає принаймні більшість членів суспільства. Інакше він, залишаючись леґальною підставою існування суспільства, втрачає власну леґітимність. Для нормального існування суспільного організму леґітимним має бути не лише зміст суспільного договору, а також спосіб його укладання.

***Ключові слова**: суспільний договір, конституція, розробка, укладання.*

Formulation of the problem. Recent amendments to the Constitution of Ukraine have