РОЗДІЛ 2
КОНСТИТУЦІЙНЕ ПРАВО; МУНІЦИПАЛЬНЕ ПРАВО

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CONSTITUTIONAL LAW SCIENCE

КОНСТИТУЦІЙНО-ПРАВОВА НАУКА

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The article is devoted to theoretical and features of the legal value of the category of "paradigm" in legal science. We give the historical origins and development of the concept. Particular attention is focused on a specific paradigm – the paradigm of constitutionalism.

Key words: constitutionalism, paradigm, paradigm of law, constitutionalism paradigm.

Статтю присвячено теоретичним особливостям правового значення категорії «парадигма» в юридичній науці. Наведено історичні витоки та розвиток концепції. Особливу увагу зосереджено на певній парадигмі – парадигмі конституціоналізму.

Ключові слова: парадигма конституціоналізму, парадигма закону, конституціоналізм.

Статья посвящена теоретическим особенностям правового значения категории «парадигма» в юридической науке. Приведены исторические истоки и развитие концепции. Особое внимание сосредоточено на определенной парадигме – парадигме конституционализма.

Ключевые слова: парадигма конституционализма, парадигма закона, конституционализм.

1. Introduction.

Constitutional law as a science – a system of scientifically based knowledge, ideas, theories, concepts of constitutional and legal relations and the constitutional and legal practice. Constitutional law as jurisprudence has its specialty code: 12.00.02 – constitutional law, municipal law.

Formally, the science of constitutional law is not present by laws, however, a large number of books, articles, monographs, reports. The constitutional law science studies the effect of constitutional law, its implementation rules and principles, the laws of development, formulating practical advices to improve standards of constitutional law and constitutional relationships. An important component of constitutional law science is the study the paradigm of constitutionalism.

Today, democratic governance in the country just do not conceivable without such categories as constitutionalism. He reveals essential side democratic governance and its functional and practical aspects. Practical implementation of the regime of constitutionalism is impossible without compliance with the relevant principles, requirements and appropriate instruments.

2. Constitutionalism: theoretical approaches.

The research process of genesis, evolution of constitutionalism as a science and its theoretical components are updated wide range of philosophical, epistemological and methodological issues related to the knowledge of general laws and structures of development of scientific knowledge. Powerful contribution to the development of this theoretical issues was conducted within the modern philosophy of science.

We said, in particular, the methodological value of concepts of science development of world famous philosophers of the twentieth century: K. Popper [1], T. Kuhn [2], I. Lakatos [3], P. Feyerabend [4], K. Polanyi [5] and others that are not only developed but also significantly upgraded the traditional scientific understanding of this area. Therefore, it is no exaggeration to say that today, without consideration of analytical and scientific contributions can not do any serious work on the methodology of constitutional law sciences.

A holistic vision of constitutionalism, followed to understand and explain the science of constitutional law based on certain conceptual precepts, which approximate to a number of basic units and diverge of long duration of its effect – the urgent requirement for the science of constitutional law, the answer to her desire to know the nature of their activities, through it – to know the nature of yourself. A possible variant of this review can serve as a paradigm approach.

This situation posit before constitutional doctrine and practice is quite complex and extremely important task: to develop the necessary theoretical, methodological and practical approaches to ensure system integrity, self-reliance and dynamism of the Constitution, on the one hand, and on the other – ensure the adequacy of the dynamics of social practice constitutionally established functional balance [6, p. 59].

3. Paradigm as the category of public science.

One of the specific features of legal knowledge is external preconceived of the paradigm. If other humanities themselves define a subject, specific consideration (and the certainty of this is largely a consequence of the value orientation of the researcher, the selection of priorities of public life on the basis of ideological priorities), European law past few centuries has some issue, purposes of legal proceedings are determined entirely practical tasks, and in fact any serious theoretical difference has direct practical way [7, p. 34].

T. Kuhn in his Structure of Scientific Revolutions (1962) used the term "paradigm" to refer to the conceptual frameworks and/or worldviews of various scientific communities [2]. For T. Kuhn, a *scientific paradigmincludes* models – like the planetary model of atoms – and theories, concepts, knowledge, assumptions, and values. The concept of a scientific paradigm was essential to Kuhn's argument that the history of science is characterized by conceptual frameworks giving way to new ones during what he called *scientific revolutions* [9, p. 88].

T. Kuhn believed that during periods of "normal science" scientists work within the same paradigm. Scientific communication and work proceeds relatively smoothly until anomalies occur or a new theory or model is proposed which requires understanding traditional scientific concepts in new ways, and which rejects old assumptions and replaces them with new ones[10, p. 51].

A paradigm of a scientific revolution in T. Kuhn's sense would be the *Copernican revolution*. The old model of the Earth at the center of a god's creation was replaced with a model that put Earth as one of several planets orbiting our sun. Eventually, circular orbits, which represented perfection and a god's design for the heavens in the old worldview, would be reluctantly replaced by *elliptical* orbits. Galileo would find other "imperfections" in the heavens, such as craters on the moon.

For T. Kuhn, scientific revolutions occur during those periods where at least two paradigms co-exist, one traditional and at least one new. The paradigms are incommensurable, as are the concepts used to understand and explain basic facts and beliefs. The two groups live in different worlds. He called the movement from the old to a new paradigm a *paradigm shift.*

Whether T. Kuhn was right or wrong about the history of science – and he has plenty of critics – his notions of a paradigm and a paradigm shift have had enormous influence outside the history of science. In many ways, how T. Kuhn is understood and applied is analogous to how Darwin's conception of natural selection has been misunderstood and applied outside evolutionary biology. For a paradigm of this type of misapplication, see the Skeptic's Dictionary entry onneuro-linguistic programming.

One of the more common applications of the terms *paradigm* and *paradigm* shift is to mean "traditional way of thinking" vs. "new way of thinking". Some New Age thinkers seem to think that paradigms can be created by individuals or groups who consciously set out to create them. They seem to mean by "paradigm" nothing more than "a set of personal beliefs", e. g., Essays on Creating Sacred Relationships: The Next Step to a New Paradigm by Sondra Ray and Handbook for the New Paradigm from Benevelent Energies. Many of the New Age self-help promoters base their approaches on the notion that one's current paradigm is holding them back and what they need to do is create a new paradigm (set of beliefs, priorities, assumptions, values, goals, etc.) for themselves that will allow them to break through, etc. [10, p. 58-59].

The paradigm is also the prevailing pattern of thought in a discipline or part of a discipline [11, p. 60]. The paradigm provides rules about the type of problem which faces investigators and the way they should go about solving them. For constitutional law, for example, the paradigm would be referred to when questions such as "what is constitutional law?"; "what are the legitimate areas of investigation for constitutional law?"; "how should constitutional law go about their investigations?" are asked. Perhaps the most powerful paradigm for Western thinkers has been the "scientific method".

Paradigm also had a narrower meaning: the so-called theory, which was taken as a model (method) resolution of a certain type of task or problem. In the methodology of science, the term coined G. Bergman, understanding him some common principles and standards of methodological research [21].

Today, the term "paradigm" is widely used in the scientific literature (*although in legal academic literature, this term is very difficult to find – D.B.)*. The original application it was in the fields of natural science, but has become quite common in the field of human knowledge in a variety of interpretations, sometimes quite contradictory. This fact is obviously related to the objective difficulties in the accuracy of the transformation of the concepts of technical arguments in the humanitarian sector. Any parallels here does not lead to an unambiguous interpretation. The reason for this, in our view, lies in the specificity of technical concepts and vagueness of humanitarian concepts. Should be mentioned the multiplicity of approaches, such as concepts (categories) as legal ideology, objective truth, justice, the legal system, the principle of law, civil society, legal, etc.

4. The paradigm in jurisprudence.

In jurisprudence the term "paradigm" use recently. In our opinion, it is caused by the lack of understanding the semantic meaning of the term relation to legal science. Another reason we see in numerous improper use of its practice in other humanities. In many publications, the same phenomenon in the same context call paradigm or the concept or idea, etc. [8, p. 11].

In legal scientific literature can be found the following definition of the paradigm of law. M. Kuparashvili believe that the *paradigm is the sum of the theoretical and methodological provisions adopted by the scientific community as the standard for both direct studies*

and their interpretation, ordering, classification and evaluation [15, p. 94]. F. Rayanov talking about the paradigm of law, defines them as initial positions of the law [16, p. 28].

A. Ovchinnikov offers the following definition of the legal paradigm: "a set of theoretical and methodological and axiological constants in the activities of legal thinking, which determines the development of legal science and practice on the basis of an understanding of the law, meaning law dominant in a particular historical and cultural point of legal thinking" [17, p. 161].

V. Malakhov uses the term "*in a broader sense than it is usually use in the scientific literature: "the most significant in the meaning of the term paradigm -scientist says – "to be a matrix of intellectual and spiritual understanding of reality, to be the epitome of the features of mental culture specific of nations and epochs, to represent the unity of intellectual and sensory perception of the world*" [18, p. 154].

The examples of the use of the term "paradigm" in law does not define its epistemology. In our opinion, the term "paradigm" in the legal interpretation is one of those philosophical positions, which, according to V. Sirih, can be considered scientific only after a comprehensive study [19, p. 129].

The introduction of the term "paradigm of constitutionalism" because of his metaphor requires caution, a similar use in other legal science terminology notation borrowed from other sciences ("legal matter", "energy of law", "law entropy", etc.). However, as noted S. Alekseev, to such terminological innovations have to go, "because the other way is not possible to mark something new and specific, that is revealed as a result of scientific research" [20, p. 7].

Thus, the paradigm of constitutionalism is the quintessential constitutional and legal knowledge at this level reached its integrity and interdependence of individual areas and structural components, and crystallized sociocultural functionality of this sphere of knowledge. With substantial part of the paradigm of constitutionalism is based on a synthesis of the main approaches to solving their problem field in all its aspects, with the exception of internal problems epistemological nature. Thus, the paradigm of constitutionalism in concentrated form reflects the social importance of constitutionalism for the operation and development of constitutional law, and more broadly – as the legal aspect of society.

5. Conclusions.

Today, the term "paradigm" is used in the sense developed by American scientist T. Kuhn in "The Structure of Scientific Revolutions". The purpose of Kuhn's work is to describe at least a schematic concept of science that arising from the historical approach to the study of the research activities. The scientist developed the concept of the progression of science, based on its history. He believed that science develops as a result of scientific revolutions, based on a paradigm.

We offer the following definition the paradigm of constitutionalism – a set of ideal pieces of constitutional reality (concepts, values, principles, ideas and practices) that are divided by society at the present stage of development of the state and form a definite vision of constitutionalism, and specific areas of solving the problem of constitutionalism.

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ФОРМИ УЧАСТІ НАРОДУ У ПРОЦЕСІ ЗДІЙСНЕННЯ ПРАВОСУДДЯ В УКРАЇНІ

FORMS PARTICIPATION OF PEOPLE IN THE PROCESS OF JUSTICE IN UKRAINE

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У статті автори зосереджують свою увагу на формах участі народу у процесі здійснення правосуддя – через народних засідателів і суд присяжних, відповідно до чинного законодавства України. Особливу увагу приділено висвітленню сутності інституту суду присяжних і народних засідателів, їх аналізу з метою розробки пропозицій щодо вдосконалення правового врегулювання їх статусу, а також співвідношенню цих двох інститутів.

Ключові слова: судді, суд/інститут присяжних, народні засідателі, судова система.

В статье авторы сосредотачивают свое внимание на формах участия народа в процессе осуществления правосудия – через народных заседателей и присяжных, в соответствии с действующим законодательством Украины. Особое внимание уделено освещению сущности института суда присяжных и народных заседателей, их анализу с целью разработки предложений по совершенствованию правового регулирования их статуса, а также соотношению этих двух институтов.

Ключевые слова: судьи, суд/институт присяжных, народные заседатели, судебная система.

In this article the authors focus on the forms of people's participation in the process of justice – because people's assessors and jury, according to the current legislation of Ukraine. Particular attention is paid to the nature and Institute jury of lay assessors, the analysis in order to develop proposals for improving the legal regulation of their status and the ratio of these two institutions.

Key words: judges, court/juries, people's assessors, the judicial system.

Актуальність даної теми обумовлено сукупністю різних факторів, в основі яких те, що інститут «суд присяжних», за законодавством України, є відносно новим щодо інших (як форма участі народу у процесі здійснення правосуддя був зафіксований у Конституції України 28 червня 1996 р., а порядок його реалізації – практично через 15 років); а також потребою аналізу механізму правового регулювання, зокрема дослідження правової природи, процедур організації й діяльності судів за участю представників народу – суду присяжних і народних засідателів.

Основну увагу дослідження приділено правовій природі суду присяжних та порівняльно-правовій характеристиці (формам участі народу у процесі здійснення правосуддя, ст. 124 Конституції України) суду присяжних і народних засідателів.

Метою даного дослідження є аналіз правової природи суду присяжних та народних засідателів згідно із законодавством України, встановлення недоліків функціонування й розроблення рекомендацій щодо їх усунення.

Для проведення даного дослідження було використано методи аналізу та синтезу для розгляду теоретико-методичних аспектів суду присяжних та народних засідателів; конкретно-історичний метод для вивчення специфіки правових явищ конкретного періоду; методи діалектичної і формальної логіки для систематизації результатів дослідження.

Значний внесок у розв'язання цієї проблеми здійснили О.Д. Бойков, В.Д. Бринцев, Ю.М. Грошевий, В.Т. Маляренко, М.М. Михеєнко, І.О. Русанова, П.П. Пилипчук та інші вчені.

Основний Закон нашої держави теоретично закріпив дві форми участі народу у процесі здійснення правосуддя у ст. 124: «Народ безпосередньо бере участь у здійсненні правосуддя через народних засідателів і присяжних» [1]. Проте, фактично, порядок реалізації цих двох форм участі народу у процесі здійснення правосуддя знайшов своє відображення в Законі України «Про судоустрій і статус суддів» від 7 липня 2010 р. та новому Кримінально-процесуальному кодексі України від 13 квітня 2012 р.