

UKRAINIAN STATE AND LAW AT THE TURN OF THE 21ST CENTURY



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Ukraine gained its independence and formed as a state amid exacerbation of the global problems of the modern age. In the early 1970s, the world entered the phase of a systematic crisis on the very grounds of the exacerbation of global problems: food crisis, the problem of global ocean use and the use of substantial territorial areas, unprecedented flows of migration, environmental and energy problems, etc. The year 2009 was remarkable in terms of the largest economic crisis since the end of World War II, which led to a number of negative phenomena in public and social life — a significant drop in industrial production, an increase in inflation, unemployment and crime rates, etc. Without resolving state-legal problems, it is doubtful whether it is possible to expect the successful resolution of other social-economic tasks.

Ukraine is faced with the priority task to find and occupy its place in the modern world. It should be noted that the issue of foreign policy priorities is not merely a political issue, but also a

legal one, since it is related to the state's accession to a number of necessary international treaties and agreements, the provisions of which would need to be implemented within the state.

The legal uncertainty of its territory remains an extraordinary problem for Ukraine. Ukraine is one of the few countries with partially non delimited frontiers. The legal uncertainty of the border also means the legal uncertainty of substantial territorial areas, such as the Azov Sea and the Kerch Strait. The legal uncertainty and transparency of thousands of kilometres along the Russian-Ukrainian border in the North East and East contributes to Ukraine's transformation into a transit state for illegal migration flows to Central and Western Europe, according to the assessments of influential international organizations. Therefore, this is not an abstract challenge for Ukraine and the State must respond adequately.

Of the acutest problems that have arisen for the State of Ukraine is the problem of its place in the geopolitical

distribution of roles in Eurasia. Ukraine is practically the only state in Europe that is geographically located close to a number of politically unstable regimes — in Transdnistria and Abkhazia. Ukraine's active participation in separatist conflict resolution processes should not only be construed as the interest of world democracies in liquidating the roots of instability, but also as its own state interests. A state's ability to lead in the execution of such functions demonstrates such state's capacity to guarantee continued stability, at least on its own borders.

The world long discussed such an acute problem as the crisis of the parliamentary system, which has become characteristic for the European system of government at just the time when politicians and scholars perceived the insufficient capacity of the collegiate representative institution to efficiently resolve outstanding issues related to state administration. Hence, another phenomenon typical for the modern European constitutionalism — delegated law-making.

One of the well-recognized methods of resolving the problem under contemporary conditions is so-called «rationalized parliamentarism», when a government not only adopts decisions instead of parliament, but also determines the agenda for the latter (entrenched for the first time in the Constitution of France in 1958). However, does such model resolve all the problems affecting the effectiveness of the parliament? Probably not. French scholars have repeatedly complained that in the pursuit to improve the state's administrative efficiency, parliament's leading role in the state mechanism as a national representative institution and its authority in society have gradually diminished. A solution was proposed by Finnish legis-

lators who, during the adoption of a new Constitution in 1999, suggested enhancing the parliament's role by strengthening its control and foreign policy functions.

The constitutional process initiated in Ukraine has led to the inclusion of a number of other urgent issues of state formation on the agenda. The experience of western constitutionalism and national state formation practice demonstrate the need to take into consideration two such important fundamentals as professionalism and legitimacy, as well as to consolidate the above in the mechanism of developing and adopting amendments to the Constitution of Ukraine currently in force or to a new constitution of Ukraine. The first fundamental should be ensured through the development and preliminary approval of a new constitution by experts and/or members of parliament (members of the constituent assembly). A leading role in this process should be assigned to legal science and key academic institutions of Ukraine. With regard to the second fundamental, any amendments to the current or new Constitution of Ukraine must be approved by a national public referendum.

One of the significant issues at the current stage is the range of problems pertaining to the order of state institutions, first and foremost of the national representative institution — the Verkhovna Rada of Ukraine. One should distinguish between both the positive potential and certain threats to a young democracy in the parliamentary system. Therefore, the crisis of the national parliamentary system lies caused not in the fallibility of the idea of the parliamentary system, but in the inadequacy of approaches to the structure of the parliament itself and the means for its formation, as well as in the weakness and lack

of development in the party system. In our opinion, a strategic direction for improving the national parliamentary system could be a movement towards a bicameralism, which, on one hand, would ensure the proper representation of Ukraine's regional interests in the Verkhovna Rada of Ukraine, and, on the other, the specialization of chambers in parliamentary activities and increased law-making professionalism.

Establishing the foundation for an effective mechanism of constitutional and legal responsibility is a significant issue that should be addressed in the process of constitutional reform. Another is the issue of the proper interaction of various branches of power, which should ensure the principle of cohesion in the exercise of government authority. In this context, attention should be paid to the issue of assigning a number of control functions to a specific branch of power. First and foremost, these are the Prosecutor's Office, the Authorized Human Rights Representative of the Verkhovna Rada of Ukraine and the Chamber of Accounting. We believe that the first step should be the consolidation of issues pertaining to the operation of these institutions in one chapter of the Constitution.

Local self-governance is a relatively new object of constitutional regulation. Constitutions adopted after World War II (so-called third generation constitutions) must contain chapters devoted to the fundamentals of local self-government. The Constitution of Ukraine of 1996 is not an exception. However, at the time of its adoption, essential issues related to the organization and activities of municipal authorities in Ukraine remained unresolved. Since the adoption of the Constitution of Ukraine that is currently in force, a number of events have occurred, significantly changing

the status of local self-governance. The constitutional basis of local self-governance has started to lag behind the actual state of this subsystem of public government, impeding its further development and arousing the completely justified discontent of local communities. Thus, the reform of the existing system of local self-governance in Ukraine appears to be an entirely natural and objectively determined component of constitutional reform.

The reforms being introduced, envisage the further strengthening of local self-government and enhancement of its independence in the solution of a much broader range of issues and the fullest possible use of its democratic potential, to ensure the rights, freedoms and legitimate interests of local community members. No less important direction of municipal reform should also be the restoration of the regional (interim) level of local self-government, the formation of executive bodies of oblast and regional councils, and assignment of relevant powers and necessary material-financial resources to them, as required by the European Charter of Local Self-Government.

Another problem that has emerged in the 21st century is that of the preservation of the national identity and sovereignty of the people. First and foremost, European integration processes pose a threat to people's sovereignty. Currently, it appears that on one side of the scale is people's sovereignty, while on the other - an association of states under the banner of one federal (or confederate) state. A reliable safety device against the dissolution of people's sovereignty in global integration processes should be the determination on the constitutional level and in international treaties and agreements, of an explicit list of issues with regard to which powers are granted

to national bodies, along with a justification for the need to specifically grant such scope of competence, ensuring the broad participation of national representative bodies in the development and adoption of decisions on the relevant integration level, and the introduction of the exclusivity of the application the referendum institute when resolving paramount issues pertaining to the activities of similar supranational subjects of international interaction. The Treaty of Lisbon, which took effect on 1 December 2009, has raised new legal issues pertaining to integration processes in Europe.

The need arises to reconsider the conceptual basis of Ukraine's innovation policy, with due legal provision for such policy. The movement towards the European community and the wish for drastic changes cannot be successful in a legal environment, in which outdated schemes from the Soviet era continue to exist alongside the modern progressive approach to the introduction of new legal models. National science has made very little research on the issue of the development of an innovation policy and its legal regulation. Therefore, the Academy of Legal Sciences of Ukraine considers this theme to be a top priority for scientific research. As early as in 2006, we held a large all-Ukrainian conference titled: «The Innovative Development of Ukraine: Scientific, Economic and Legal Provision», which resulted in the development of many practical recommendations regarding the reformation of the national economy, the implementation of which, unfortunately, was barely implemented. More specifically, the participants supported the idea of establishing an Institute on the State and Legal problems of Innovative Development, the main task of which would be to develop a concept and program for the development of a

new economic system and an exhaustive set of measures for the legal regulation of innovation relations in Ukraine.

The main thing, without which one cannot expect fundamental social and economic changes, is the realization that a key figure in this process is an intellectual, productive of new ideas, around which an infrastructure is formed. The impetus for the involvement of intellectual resources should be competition, the environment of which will dictate the need for diverse innovative changes in goods, works and services. An intellectual should not be raised and educated on a parochial level, but exposed to the achievements of European and world sciences. There should be a demand for his/her knowledge both at home and abroad. For this reason, the system of education, scientific-technical activities and intellectual property institutions must undergo radical change.

The current condition of the environment both globally and in Ukraine is cause for grave concern. A specific feature of the current environmental situation lies in the increasing number of crisis spots both in Ukraine and abroad. Consequently, this results in the emergence of actual environmental tension, creating a direct threat to the existence of humanity as such. When natural processes can no longer support the dynamic operation of the «society-nature» system, only society itself will be able to execute relevant regulatory function. This should be a decisive factor in the conservation of the Earth's biosphere and the Planet Earth as a whole. The state, being the personification of public interests and performing the environmental function, should conduct the legal regulation of the use and regeneration of nature and environmental protection, as well as ensure environmental safety.

The Concept of the Ukraine's National Environmental Policy for the Period Ended 2020 considers ensuring the adoption of the Environmental Code of Ukraine and compliance with its major requirements to be a key instrument of the national environmental policy. The finalization of the codification of Ukraine's environmental legislation will permit to the establishment of necessary conditions for its sustainable development and participation in international co-operation in the sphere of environmental protection. It is also necessary to improve national environmental administration and environmental safety, not to mention bringing it in line with European standards.

The globalization era also influences national criminal doctrines as well. The international community is challenged by trans-national crime and terrorist groups. Human trafficking, drug-related crimes, smuggling and other types of crime have crossed national borders and present a danger not only to individual states, but to all of mankind.

EU states are making assertive measures to counteract such negative phenomena. Ukraine's intents regarding European integration require the standardization of the forms and methods for counteracting organized crime in accordance with the approaches of the European Union and the Council of Europe, adopting general procedures to counteract organized crime and other dangerous crimes. Counteracting organized crime is one of the lines of Ukraine's co-operation with the countries of the European Union, pursuant to the new EU-Ukraine Action Plan adopted on 2 February 2005.

One should also mention that presently, it is necessary to develop a legal framework for Ukraine's accession to new forms of international co-opera-

tion related to criminal matters. A top priority is the forging of relations with European law enforcement structures — Europol and Eurojust and to enter into relevant co-operation agreements with them. It is also important to approximate criminal and criminal procedure legislation to European standards. Taking into account the absence of legal regulation of Ukraine's relations with European supranational law enforcement structures, it would be expedient to develop a draft Law of Ukraine «On Organizational and Legal Principles for Ukraine's Participation in European Law Enforcement Structures». It is possible to develop and adopt an International Criminal Code, which would formulate indications of acts and liability for the intent to commit the most dangerous, global international crimes.

The criminal law aspect of the development of legal doctrine gives rise to certain discussions. First and foremost, the state and society are interested in ensuring the stability of criminal legislation, which conveys a firm and predictable criminal-legal policy of the state. Its stability is based upon the quality of criminal law, which is ensured by the Criminal Code, which, according to its substance and legal form, corresponds with the current needs and requirements of society regarding the fight against crime using criminal-law means.

At the same time, some instability can be seen in criminal legislation regarding the solution of the problem of the protection of citizens' property rights. In 2004, as the Law of Ukraine on Individual Income Tax dated 22 May 2003 took effect, there was movement towards the artificial decriminalization of publicly dangerous intent regarding property rights. As follows from the provisions of this Law and the Code of Ukraine on Administrative Offences,

theft is a crime if the value of the stolen property exceeds three times the untaxed minimum wages (UAH 907.50). For comparison: in 2003 the minimal amount of criminally stolen property constituted anything valued at more than UAH 51; in 2006 – UAH 525, in 2007 – UAH 600; in 2008 – UAH 772.50. In other words, within a period of six years, the threshold for such criminal intent increased 20 times, which led to the decriminalization of causing property damage with the value of such damage below the established threshold.

Members of the Academy of Legal Sciences of Ukraine did not agree with such a situation and provided justified proposals to reduce such amount from three times the minimum untaxed wage, to one (in 2009 this amounted to UAH 302.50 instead of UAH 907.50). However, Members of Parliament did not agree with such approach and on 4 June 2009 took a legislative step to maximally criminalize the theft of property by reducing the threshold for such criminalization from 3 to 0.2 times the untaxed minimum wage of citizens, i.e. by 15 times. After the law took effect on 26 June 2009, stealing property the value of which amounts to UAH 60.51 is sufficient for the theft to be qualified as a crime with relevant consequences, specifically being brought to the most severe responsibility of a repressive nature and such negative human «acquisition» as a conviction, which leaves a life-long mark on the guilty party. We believe that such decision does not improve the protection of human property rights, but rather creates conditions for abuse on the part of law enforcement and judicial authorities as well as for bribery, during the qualification of such actions.

Even though modern trends of crime in Ukraine demonstrate a decrease in the level of such activities, they do not, how-

ever, give grounds for complacency, due to the transformation of quantitative changes in crime figures into qualitatively new forms of criminal activity, such as «raids», illegal migration, human trafficking, smuggling, and corruption. The increase in «background» phenomena has resulted in an increase in the illegal drug trade.

The current legislative regulation of the fight against corruption does not permit Ukraine to rid itself of its negative image as one of the most corrupt states in the world. By providing for administrative responsibility for corruption in the Law of Ukraine «On the Fight against Corruption», without taking into consideration that international law recognizes such corrupt actions as criminally punishable, the legislator thus reduced the danger of corruption as a social-public phenomenon. New anti-corruption legislation, which takes effect on 1 January 2010, raises a lot of comments on the part of both academicians and practitioners. This undoubtedly necessary step towards strengthening responsibility for corruption requires significant improvement.

Having ratified the International Convention on the Elimination of All Forms of Racial Discrimination, Ukraine undertook to declare the offence «all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin,» to be punishable by law, also to declare illegal and prohibit any organizations promoting and inciting racial discrimination. Therefore, the legislative detailed regulation of responsibility for race-related offences and improvement of legislation in order to prevent such manifestations must be conducted. Furthermore, the adminis-

trative and disciplinary responsibility of officials for acts of racism and racial discrimination that have been caused by their actions or inaction should also be provided for.

Drug addiction is directly related to crime. At present, about 175,000 drug addicts have been registered in Ukraine, 90 % of them being under the age of 30. For instance, 63,838 crimes related to the trade in drugs, psychotropic substances, their analogues or precursors were registered in Ukraine in 2007 alone, with 21,712 belonging to the category of hard and particularly hard drugs. Therefore, the urgent task of criminal law science is to develop effective means and mechanisms to combat and prevent drug addiction, as a factor of a range of criminal acts.

The scope of research in criminal procedure law includes the following: research into the expansion of court jurisdiction in pre-trial proceedings in a criminal matter to enforce the constitutional right of every man/woman to court protection; differentiation of the criminal procedure form; introduction of simplified procedures, capable of effectively ensuring the execution of the tasks of criminal proceedings within reasonable time; and improvement of the system for the review of court decisions and correction of court errors. It is also important to introduce law enforcement mechanisms that would assist the parties involved in criminal proceedings to effectively protect their legitimate interests.

Scientific research in criminal enforcement law must be fundamental and directed towards the identification of the effectiveness of criminal enforcement norms. A comparison of theoretical provisions tested by existing practice of enforcement of punishments align with the activities of enforcement bodies and

entities, permits an improvement of law enforcement activities, as the main direction of work of enforcement bodies and entities, to take notice of the substantiation for the implementation of legal restrictions intrinsic to punishments, which will eventually contribute to a more comprehensive understanding of enforcement processes.

An in-depth research into the problems of the criminal enforcement service will not only allow the characterization of various directions of its activities, but also the identification of the means that may assist in the execution of the tasks assigned to such service. This requires improving the valid legislative framework, also continuing the extension of the reformation of organizational and legal groundwork for the activities of the criminal enforcement service. At the same time, the key objective of such reform should be high-quality changes, the increased effectiveness of the activities of enforcement bodies and entities.

A world-renown should be more concerned about preventive, rather than punitive activities remains relevant, also in Ukraine. Counteracting crime is the urgent task of structural divisions of all branches of power and society. Preventing crime should be viewed as an indispensable element of social and legal polices. The above should be facilitated by criminology, which is not only a totality of strategies and measures, but also, figuratively speaking, an ideology generator that increases the preventive «pressure» in society, forms social tolerance and respect for social values, accumulates «social capital» without which it is impossible to build a democratic, law-based state with a market economy.

Preventing crime consists of broad and complex directions of activities, which require systematic strategies and differentiated concepts which take into

consideration the social and economic, political and cultural conditions in the society in which they are implemented and society's development stage, with particular focus on the changes that are presently occurring in society and may occur in the future.

Often, society generates criminal behaviour or increases criminogenic potential by different means: lack of security, the poverty of some and the absence of control and greed in others, lack of real concern about «problem» families and deprived children, etc. Clearly, these shortcomings and imperfections can be corrected with the help of the proper organization of public life and the use of modern scientific knowledge, including in the sphere of the fight against crime.

Government programs must be developed on the basis of a global, integrated and co-ordinated approach, recognizing short-term or immediate, medium-term and long-term (permanent) tasks. When developing specific strategies, one should be guided by the criminogenic situation, the crime status, the criminogenic potential of members of society (part thereof), the development level of the theory of crime prevention, the level of resources and mechanism for their distribution and utilization, etc. In our opinion, criminological policy can have the following conceptual strategies: reducing opportunities to commit crimes; resolving complex adaptation tasks; educational and informational activities among the population; intervening in crisis situations; engaging the community in preventive activities; counteracting the so-called «background» phenomena entailing the social degradation and de-socialization of not only individuals, but also the morals and culture of society as a whole (neglect of children and teenagers, drug addiction,

substance abuse, vagrancy, parasitic mode of life, victimization and victim behaviour, alcohol addiction, prostitution, legal nihilism, a criminal subculture, sectarianism, begging, etc.).

The introduction of technical means to counteract crime is becoming widely-used in world practice. New scientific and technical achievements should be used in the interest of the people and thus, in the interest of effective crime prevention. At the same time, it should be remembered that new technology may facilitate the emergence of new types of crime. Such consequences must be foreseen and eliminated in advance, in order to avoid fighting against them in the future. Qualitative changes in crime, its transformation into a professional, organized and more sophisticated one challenges criminal science with tasks aimed at developing the latest methods and means of counteracting crime.

In this regard, the following should be recognized as relevant: more active and creative use of such technical and natural sciences by criminology according to its tasks; the introduction of such innovative developments in investigations as digital photo and video equipment, multimedia means, remote surveillance, and internet technology.

There is an urgent need to develop new, and modernize existing scientific recommendations related to the identification and investigation of individual types of crime (first and foremost – new types of crimes). Analyzing the factors obstructing the active introduction of criminology developments in judicial and investigative practice, one should note not only an insufficient level of scientific developments, but also conservative stereotypes that have formed in this practical activity, as well as a certain reluctance by practitioners to be «guided by science». The indicated stereotypes

should be eliminated and the most significant step in this direction should be made by researchers. It is they, who will have to review the recommendations proposed by science, since it is doubtful that some of the latter will serve as a practical instrument.

The co-ordination and planning of such activities is an important step towards increasing the effectiveness of

crime prevention. At the current stage of the fight against crime, it is necessary to renew the activities of previously existing Co-ordination Committee for the Fight against Crime, which would be professionally responsible for the planning, control and co-ordination of the activities of all government authorities in this sphere.