

AN UNCONSTITUTIONAL DEMOCRACY — IS THIS A NEW TYPE OF ANARCHY?

It is not a standard in Ukrainian legal literature to cover a wider scope of topics: constitutional law means constitutional law and nothing else. But constitutional law is embedded in a nation's life; and this life comprises more than the constitutional law. It is an influence of law on life and vice versa, otherwise any constitution role is weakened or even abolished.

Therefore, the article of V. Kampano offers a wider and therefore interesting view. He offers a view on the constitutional law, but also on related economic issues, the recent history of Ukraine and political theory¹.

Of course, a wide approach widens also the scope for remarks and different views.

The first remark concerns the «constitutional nihilism». Bearing in mind the circumstances in the 90ies in Ukraine we see these facts: a new concept of constitutional law had to be understood and applied by a generation of jurists, who had few or no experience with this concept. The legal literature on constitutional law was small in number and volume, foreign literature was accessible only for a minority due to the language barriers. Furthermore, in the 90ies a discussion went on, whether the Constitution has a direct effect, whether the Constitution is a legal norm. These discussions and arguments focused often on the fact, that the Constitution shall contain the «social rights»; the main argument was, how these rights shall be realized, when the Constitution has a direct effect, for example a remark of L. Pidpaolov in the meeting of the working group on December 5th 1995.

That means, two elements were crucial for the life of Ukrainian Constitution: the professional experience and the doubts, whether this document has any legal relevance. Not to speak about the very difficult political, social and economic movements in the years after 1996.

These problematic circumstances are not a Ukrainian phenomenon, they are probably the «normal» way how the awareness and the impact of a Constitution develops and grows. V. Kampano mentions the initiative of President L. Kuchma concerning the awareness of the population on the Constitution (p. 114); an interesting parallel can be found in the first period of the existence of the first French Constitution: Talleyrand considered the low awareness by the public as a serious problem and proposed 1791 a plan for the education on the Constitution in all types of schools with the purpose that all citizens know the Constitution, that they defend

¹ Кампо В.М. Чи потрібна була конституційна демократія для становлення соціально зорієнтованої ринкової економіки в Україні у 1994—2004 роках? (критичні роздуми з приводу однієї статті). *Економіка та право*. 2018. № 3 (51). С. 101—117. doi: <http://doi.org/10.15407/econlaw.2018.03.101>

and improve the Constitution and that they respect the values of the Constitution. That is exactly, what V. Kampo proposes in this and in other publications. A similar idea was the reason for article 148 of the Weimar Constitution and article 188 of the current Constitution of the State of Bavaria: «All school pupils receive a copy of the Constitution when ending the school».

Therefore, the wording «nihilism» implies an active position towards a Constitution aiming at a stable neglecting of the Constitution. I see of course such approaches in the recent history but I see more circumstances, which simply existed and exist in times of establishing a new constitutional state. Thus, may be it meets these facts better to speak about a «constitutional desert», which Ukrainian Constitutionalist have to change in a prosperous scope of law; and people in a desert will confirm, that it's hard and time-consuming to work on the improvement of a desert.

Comparing the situation, as V. Kampo describes it, with the development of the role and importance of constitutions in other countries, we read Luc Heuschling, who describes the low importance of the French Constitutions over a long period of time or Kjell Modéer and Mats Kumlien about the predominance of the social state over the Constitution in Sweden during nearly 50 years. A constitution becomes «real» only under a large bouquet of circumstances — and they grow step by step.

This «rule» can be observed in Ukraine: if we compare a book on Constitutional Law from the late 90ies with one, published recently, the chapter on rights and freedoms grew — nevertheless the chapters on the state institutions still dominate. And we can observe, that the isolation of the Constitutional Law in the legal education became less strictly: the fact, that «administrative law is the concretization of Constitutional Law» lead to the inclusion of the latter in the lectures on administrative law. Thus, the importance of a constitution becomes understandable and students actively apply the text and do not only refer to decisions of the ECHR.

A main stimulus for the realization of a Constitution seems to be the possibility for everybody to file a claim to a Constitutional Court: first, the Constitution is a remedy, a tool for the defense of

rights and freedoms. Second, a Constitutional Court has to decide about questions of citizen's life and not, whether a Minister acted within or outside of his competence. And when a Constitution has a practical importance for a large audience, the science and the education follows quickly. This effect can be observed in Germany, where the number of proceeding grow rapidly after the introduction of the right of an individual to file a suit to the Federal Constitutional Court of Germany; and parallel, the number of publications grew, authors and courts enriched the theory and practice of the Basic Law of Germany.

The second remark concerns Kampo's term «constitutional democracy»; democracy is one form of government among others. That means, we speak about a type of a state's organization. The way, a state is organized is usually fixed in an overall binding document — a Constitution. This fact provokes the questions: can a democracy exist without a democracy? Can an unconstitutional democracy exist?

The first question shall be addressed with a reference to the comprehensive work on constitutional law and theory by the German constitutionalist K. Stern: Analyzing the term «purpose of a constitution» he presents a list of single purposes, among them, «that a constitution has the purpose to organize the power (in a state)». That means, in a constitution must be fixed the state's institutions, procedures and (among others) the way, the power is legitimated; furthermore, a constitution has to fix the principles of a state's structure. Both aspects embrace the question of a democratic system in a state. That means, the Constitution is the precondition of the democratic structure of the state and the special mentioning in connection with democracy puzzling.

The second question raises a third, a polemic question: **An unconstitutional democracy — is this a new type of anarchy?**

Therefore, the term «constitutional democracy» raises doubts.

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