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### 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.*



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## 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 легальною підставою існування суспільства, втрачає власну легітимність. Для нормального існування суспільного організму легітимним 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

activated public debates and scientific searches around the problems that have constantly arisen since the adoption of this constituent act of the state. Between such established legal features of the Constitution as "the basic law of the state", "higher legal force", "direct effect of norms", "increased stability", "a special procedure for the adoption and amendment", in recent years, specialists are increasingly added such a sign as a "social contract".

Today, there are no appeasement that the country needs new clear rules of the game, and therefore a new social contract, a new Constitution and, in general, a reset of the state based on a new quality of relations between citizens and the authorities. Especially after the Revolution of dignity, at a time when the country is fighting for its independence, after attempts to launch serious structural reforms, the cause of which failures are often the burden of the past, which is like a ballast, impeding progress on the move. And yet the 1996 Constitution as a product of a compromise between the elites, the old post-communist and the new national-democratic, no longer responds to the request of time and society, even despite its corrections, and thus can not ensure the successful development of the state. It is necessary to rewrite it, but it is better to create it from scratch, launching a new constitutional process, convening, as proposed by some activists, a constitutional assembly with the participation of the best minds of society. Indeed, precisely because of the lack of its own rules of the game and the forced balance in the imposed paradigm, all efforts of the community end with a crash ... [4].

Moreover, the conclusions of recent author's publications indicate that the current state of Ukrainian society, its actual inactivity in the process of drafting and adopting the Constitution of Ukraine, as well as the introduction of changes to it, does not provide grounds to consider the current Basic Law of the state as a social contract, and especially the development, adoption, making changes and implementing the provisions of the Constitution of Ukraine allows us to characterize it as a political-legal agreement, based on a compromise between political elites and power centers - the President and the Verkhovna Rada of Ukraine [2].

**Analysis of publications that initiated the solution to this problem.** The question of the legal characterization of the social contract became the subject of studies of Ukrainian experts - theoreticians of law and constitutionalists. In general, they are worthy of attention to works of M.I. Kozyubra, A.R. Krusyan, M.P. Orzikh, V.F. Pogorilko, P.M. Rabinovich, Yu.M. Todyka, O.F. Frytsky and others. A special emphasis on the role of social contract as a component of the constitutional process is made in the publications and considerations of M.I. Stavniychuk, V.M. Shapoval and V.I. Shishkin [5-6]. However, they lack a coherent retrospective review of factors that would determine the legitimacy of a social contract both as an act and as a process.

**The purpose** of the article is to determine the problems of legal embodiment of a social contract in Ukraine.

**Basic content.** Ukraine is currently in the process of forming a political nation. The 25-year experience of independence has made it possible and necessary to comprehend this process.

In turn, the concept of a social contract is the key to such an understanding. On the one hand, without realizing the fundamental features of a social contract that raises our socio-political existence, we can not hope for the final formation of a full-fledged political nation and a true state of an independent state. On the other hand, the Ukrainian historical and political experience at the turn of the millennium reveals some fundamental aspects of the very phenomenon of a social contract. In modern socio-political studies, the social contract was usually considered not as a specific historical event, fixed by a number of documents available for research, but as the designation of some features of a long-lasting historical process, which resulted in the emergence of modern liberal-democratic societies [1].

Public agreement, remaining in the modern humanitarian concept, got all the specific features of the literary metaphor. Therefore, any attempt to capture the historical event of concluding a public agreement does not seem to be a scientific statement, but rather as an act of creative fantasy. In the end, the document embodying the social contract of the members of a political nation can be considered a constitution of the respective state. However, it is clear that the very act of adopting a constitution does not completely exhaust the complex process of concluding a public agreement. In addition, a public agreement is valid only if it recognizes at least the majority of members of society. Otherwise, while remaining a legitimate reason for the existence of a society, it loses its legitimacy. Moreover, for the healthy existence of a social

organism, not only the content of the social contract, but also the method of its conclusion, should be legitimate [3].

In the history of European political thought, we will see at least three fundamental concepts of a social contract. The first one belongs to the British philosopher Thomas Hobbes, who states: "We say that the state is founded, if a plurality of people come to an agreement and concludes an agreement with each one that, for the sake of peace between them and protection from others, everyone will recognize all his actions and considerations a person or a gathering of people, whom the majority gives the right to represent all (that is, to be their representative), regardless of whether he voted for or against them. "

As we see, for Hobbes's understanding of a social contract, it is characterized by the fact that it is made by the members of society with each other, and not with the authorities. Therefore, it follows from this that the authorities are not a party to a public agreement and, as a result, do not bear any responsibility to individual members of society. Such an understanding of the public agreement raises political conservatism. However, even for this concept, which denies the responsibility of the authorities to individual members of society, the responsibility of the authorities is valid for the whole society as a whole. Therefore, people have the right to uprising only in the case when the government threatens the life and welfare of not single citizens or groups, but to the whole social organism.

It should be noted that even according to this concept of a public agreement, the people of Ukraine had the right not only to peaceful opposition, but also to an armed uprising against Yanukovich and his flock in 2013. After all, by refusing to sign an association with the European Union, Yanukovich violated the existing public agreement that touched the interests of the entire society. The paradox of this event is that the rights and interests of those people who did not support the idea of association were more closely respected, but under the current social contract for a long time they had to build their own lives, plan their own careers, education and the future of their own children, taking into account this vector of development of the country. Thus, they legitimized this agreement, although they did not support it since the beginning of its conclusion, and Yanukovich personally delegated it, ignoring the long-term plans and expectations of all Ukrainian citizens [7].

The interim results of the Revolution of Dignity have been the subject of a number of legislative changes regarding the assessment of the historical past of Ukraine, the formation of new principles of the relationship between government and society. Thus, along with the repeal of the decision of the Constitutional Court of Ukraine of September 30, 2010, which marked the return to the parliamentary-presidential republic, laws on purification of power (lustration), condemnation of the communist and national-socialist regimes and the prohibition of the promotion of their symbolism (decommunization), as well as updating anti-corruption legislation and legislation on the organization and activities of the judicial branch of government. All these can be considered as new basis of social contract of modern Ukraine. Legislative innovations have led to numerous changes in the institutional component of the state mechanism as a response to social demands. For example, the creation of the National Anti-Corruption Bureau, the National Agency for the Prevention of Corruption, the Ministry of Information Policy, the Institute of National Memory, etc.

The second concept of a social contract belongs to John Locke, who formulates its basic principles in the following way: "Since people by nature are all free, equal and independent, then no one can be removed from this state and subjugate political power to another without his consent. The only way to abandon its natural freedom and to impose the bonds of civil society is to reach out to other people to join the community ... When a certain number of people have agreed to form a single community or system of governance in this way, they are becoming united through it. They form a single political body in which the majority has the right to act and decide on the rest." Locke almost reproduces Hobbes's wording. However, there are important differences between them. First, Hobbes considers the so-called "natural state", preceding the conclusion of a social contract, as a purely negative status as a state of "war of all against all".

Therefore, the social contract for him is primarily a safeguard of this crushing war, and it is concluded "for the sake of peace and protection from others." Lock, in turn, fixes first of all the positive characteristics of the natural state, stating that "people by nature are all free, equal and independent".

One can dare to argue that for Hobbes only a social contract predetermines the humanity of people who are in the natural state are predatory animals that destroy each other. As is well

known, Hobbes for the description of the natural state borrows the statement of the Roman playwright Plautus "homo homini lupus est" ("man to man is wolf"), although in Plautus's platitude, this statement is smoldering and has a slightly different and less radical meaning. In the "Asses" he writes: "Man is a wolf, if he does not know him." For Locke, instead, a public agreement realizes the fundamental characteristics of people, harmonizing them, harmonizing among themselves such natural features of man as freedom, equality and independence. This difference stems from a friend. According to Hobbes, the members of the public agreement, by negotiating with each other, renounce their own arbitrariness, and transfer all the rights of management of the society to a government that is not a party to a social contract, and therefore, it is not accountable to those who conclude it, but instead must always restrain their natural hostility to each other in order to enable the survival of a social organism. It follows from Locke's concept of a social contract that it is made not by fierce enemies in order to protect themselves from each other, giving the authorities an unlimited right to use violence for the sake of preserving peace, and free, equal and independent citizens with a responsible authority in their power to take care of observance of conditions for the realization of their freedom, equality and independence. Political liberalism relies precisely on this concept of social contract [8-9].

The change in the public attitudes of active citizens of Ukraine during and immediately after the first Maydan in 2004 can be interpreted as a transition from Locke's to Hobbes's understanding of a public agreement. The protest was caused by falsification of elections by the authorities. If you look at this in the eyes of Hobbes, then this does not justify mass protests, because according to his concept of a social contract, the authorities are not the party that concludes it, and she can not break it. Resistance to the authorities is legitimate only when the government becomes an enemy to the whole society, not when it has rigged elections, even though the majority of citizens have neglected the opinion. Instead, with the Locke's position, falsification of elections is a violation of a public agreement by the authorities, which not only justifies, but also requires active opposition from citizens. Immediately after the victory of the first Maydan and the election of Yushchenko as the president of Ukraine, the vast majority of former protesters were in a ghost stand in anticipation of the decision of the newly elected president and his team, if not all, of most social and political problems. Those who objected to the falsification of the election led Locke to understand the public agreement as an agreement between citizens and the authorities, began to look at the new government from the standpoint of the Hobbesian concept of a social contract, according to which the authorities are not as a party, as the subject of an agreement that its citizens conclude between by itself. The liberal demand from the authorities to be an honest participant in the deal turned into a conservative expectation of becoming a savior of the nation. This expectation is pleasing to those who are in power. However, the task turns out to be impracticable, and yesterday's winner turns into a loser. A vivid illustration of this was the miserable result of Yushchenko's presidential election in 2010.

The third version of the concept of a social deal is found by Jean-Jacques Rousseau. According to him, "... each of us transforms his person and all his power into a common property which is under the supreme command of universal will, and we recognize each member of the body as an integral part of the whole." At first glance, such an understanding of a public agreement best suited individual citizens and should lead to the success of society as a whole. However, it is this concept that contains the embryos of totalitarianism, when the will of individual real individuals dissolves in the supposed commonality of a nation or state, which enables either an individual or an individual party to usurp power on behalf of the whole of society. The most striking examples of such usurpation in the twentieth century were German Nazism and Russian Bolshevism.

The experience of this usurpation in the form of Soviet totalitarianism has survived several generations of modern Ukrainian citizens [10].

**Conclusion.** So we have the following social contract scheme: the civilization of the elite, the cultural contracts of elite groups with social groups, the elite pact (elite conspiracy), the system of trust between the elite and society, the public decision, why a society should be together, a constitution, international legitimacy (the ruling class, society, their constitution).

All these elements are actually what commonly referred to as a social contract.

And only some of these elements of a social contract fall into the Constitution in the form of values. For example, in the French Constitution, there are common values - "freedom, equality, fraternity", in the USA it is "freedom, property, aspiration for happiness". In Russia it

would be necessary to write - "justice, empire, greatness". This is not only a difference in the historical origin of these guidelines, but also the difference in the set of mental factors of different peoples.

If you ask what values should be in the Preamble of the Constitution of Ukraine, then you can point out completely different – independence, democracy, victory.

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#### **Summary**

In contemporary socio-political studies, a social contract is usually viewed not as a concrete historical event, fixed by a number of documents available for research, but as the designation of some features of a long-standing historical process, which resulted in the emergence of modern liberal-democratic societies, to which Ukraine aspires

A social contract is valid only if it recognizes at least the majority of members of society. Otherwise, while remaining a legitimate reason for the existence of a society, he loses his legitimacy. For the normal existence of a social organism, not only the content of the social contract, but also the method of its conclusion, should be legitimate.

**Keywords:** *social contract, constitution, drafting, adopting.*