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**THE CONSTITUTIONAL
HUMANITARIAN LAW AS A SUB-
BRANCH OF THE CONSTITUTIONAL
LAW OF UKRAINE**

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Abstract

The paper considers the scientific analysis of political and legal prerequisites and objective factors regarding the formation and setting apart a humanitarian component – constitutional humanitarian law, in the system of the constitutional law of Ukraine. The legal nature (substance) and content, subject matter and methods of the constitutional humanitarian law are discussed at the levels of empirical and theoretical research methods. It is substantiated that the constitutional humanitarian law is a sub-branch of the constitutional law, the regulation subject of which covers public relations in the field

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of defining, securing and protecting human constitutional and legal freedom.

Keywords: constitutional law, constitutionalism, human rights, humanitarian law, humanization trend.

INTRODUCTION

Scientific, practical problems.

Modern integration processes, political and legal transformations in Ukraine, social relations transformation, as well as constitutional and legal doctrine development lead to an objective need for conceptual development of a new paradigm of the national constitutional law in order to make its role more effective in the process of ensuring the interaction of the state, the public authority and the human in terms of constitutionalism.

Thus, the innovative aspects of constitutional legal research should include the issue of setting apart the constitutional humanitarian law as a sub-branch of the constitutional law of Ukraine. In fact, at the present stage of the national constitutional law development, new areas emerge of the social relations legal regulation through constitutional and legal regulations, which is conditioned by the modern society and state development trends.

However, the constitutional humanitarian law of Ukraine remains understudied. The theory of human rights, which relates directly to the constitutional humanitarian law, was developed in the works by such scholars as: O.V. Batanov, O.M. Boryslavska, S.P. Holovaty, M.I. Koziubra, O.L. Kopylenko, A.M. Kolodii, A.Yu. Oliinyk, M.F. Orzikh,

V.F. Pohorilko, P.M. Rabinovych, P.B. Stetsiuk, Yu.M. Todyk, V.M. Shapoval et al. At the same time, all these works have a polyaspectual directional vector. Thus, O.V. Batanov looks into the issues of human rights in terms of municipalism.²¹² O.M. Boryslavska analyses the fundamental human rights in the constitutionalism system.²¹³ S.P. Holovatyι looks into the nature of human rights from the perspective of the Western philosophical, political, and legal traditions.²¹⁴ M.I. Koziubra defines the essence of human rights through their relationship with the rule of law.²¹⁵ Classification of the human rights and freedoms is the subject of scientific research by A.Yu. Oliinyk.²¹⁶ Scientific works on the protection and safeguarding of human rights is of great importance for the research topic. In particular, the scientists of the Institute of State and Law named after V.M. Koretskyi²¹⁷ consider the issues of safeguarding human rights and freedoms by public administration authorities in Ukraine. The issues are being brought up to date of the protection of human rights by the constitutional jurisdiction authorities.²¹⁸ Despite their substantive multidimensionality, certain works are an important basis for the

²¹² Batanov, 2010, p. 72-22.

²¹³ Boryslavska, 2018.

²¹⁴ Holovatyι, 2016.

²¹⁵ Koziubra, 2010, p. 24-25.

²¹⁶ Oliinyk, 2018, p. 170-175.

²¹⁷ Andriiko, 2015.

²¹⁸ See, for example: Derkach, 2019; Hultai, 2019, etc.

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theoretical and legal concept development of the constitutional humanitarian law; however, they are fragmentary in relation to the integrity of this concept. There is no comprehensive research on the definition and elucidation of the legal nature, concept, content and structure of the constitutional humanitarian law.

The practical significance of the results obtained is that the provisions developed in the paper can be applied in the research area for further scientific developments in the field of constitutional law in terms of its humanization; to improve law enforcement activities – in the process of judicial review and resolution of legal disputes by judicial authorities, consideration of the constitutional complaints of citizens by the Constitutional Court of Ukraine; in the educational process – when writing textbooks, developing training programs, educational and methodological complexes for constitutional and legal training courses.

Purpose of the study.

Purpose of the paper is to create a theoretical and legal concept of the constitutional humanitarian law as a sub-branch of the constitutional law of Ukraine, with the definition of political and legal grounds for setting apart the constitutional humanitarian law and substantiating legal specificity of this sub-branch of law.

Object and Subject of the Research.

Object of the research is the constitutional law in terms of the scientific and practical paradigm of the modern constitutionalism.

Subject of the research is the constitutional humanitarian law as a sub-branch of the constitutional law of Ukraine.

Research methods.

The methodological basis of the research include system of interconnected conceptual principles (anthropologism, cognition, genuineness and objectivity of scientific knowledge, unity of theory and practice, determinism), methodological approaches (directions) and methods (philosophical-belief, general-scientific, general-scientific, special-scientific) enabling a comprehensive and complex study of the constitutional humanitarian law in terms of the scientific and practical paradigm of the modern constitutionalism.

Integrative, systematic and essential methodological approaches (directions); logical, technical-legal methods, as well as the constitutional and legal modeling method made it possible to discover the specifics, determine the essence, content, subject matter, methods and principles of the constitutional humanitarian law as a sub-branch of the constitutional law of Ukraine.

The international legal documents, current legislation of Ukraine, acts of the Constitutional Court of Ukraine, press and Internet resources, statistical materials constitute the legal and empirical research basis.

RESULTS AND DISCUSSION

**GROUND FOR SETTING APART THE
CONSTITUTIONAL HUMANITARIAN LAW AS A SUB-
BRANCH OF THE CONSTITUTIONAL LAW OF
UKRAINE**

Traditionally, the humanitarian law is a concept characteristic of international law, that is, international humanitarian law, which along with the traditional law of war (armed conflicts),²¹⁹ covers international documents on the status and protection of human rights and freedoms, including international legal responsibility for violations thereof.

The most characteristic division of the international humanitarian law includes international documents on human and citizen rights (civil and political rights, economic, social and cultural rights, status of refugees, prevention of genocide, torture, etc.); international humanitarian law applicable during armed conflict (treatment of prisoners of war, protection of wounded and population, use of weapons, protection of cultural property, etc.); responsibility for crimes against peace and humanity.

International humanitarian law is closely linked to the international human rights law, since the subject of their regulation covers relationship between states and individuals with respect to the human rights and freedoms safeguarding. The main difference is that such

²¹⁹ See: for example: Tsiurupa & Diachenko, 2008; Hans-Peter Gasser & Hans Haug, 1993, et.al.

regulation is carried out in various aspects, namely: international humanitarian law as a sub-branch of the international law is a set of norms pertaining to hostilities and norms providing protection to persons under enemy's authority²²⁰ (that is, in the context of hostilities); international human rights law – a system of principles and norms that define and enshrine human rights and freedoms, the obligations of States and international organizations to respect thereof, as well as the international mechanisms for ensuring and controlling the international law entities compliance with their obligations in this area and direct protection of rights of individuals or groups of people²²¹ (i.e. in the context of a peaceful, ordinary life).

Consequently, these areas of international law are aimed on securing and protecting human rights and freedoms, but at the same time, one of the aspects of international legal regulation of the field of human rights and freedoms (in particular, international human rights law) is the control of human and citizen's rights and freedoms protection at the national level, that is, by specific states. This factor mainstreams the need for more detailed regulation of the national constitutional law in the area of human rights and freedoms, which is also determined by this area constitutionalization. The emphasis is made in the legal literature that in the modern world the process of constitutionalization of the human rights system is ongoing, namely: “Moreover, there is an ongoing process of implicit constitutionalization in both the human

²²⁰ Repetskyi & Lysyk, 2007, p.25.

²²¹ Shemshuchenko, 2007, p. 460.

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rights system itself and international law as a whole, although both continue to be constrained by the still important role of state consent and the failure of human rights generally to bind international organizations. These developments in the human rights system have combined to further and promote global constitutionalism”.²²²

It should be emphasized that “global constitutionalism” relates directly to the constitutionalism national systems. First of all, through their single liberal-humanistic theoretical basis, which is manifested in the humanization trend of the national constitutional law.

Thus, the constitutional reform and political and legal transformations aimed on developing Ukraine as a democratic, rule-of-law state, its gradual entry into the European legal space, determine the relevant development trends of modern constitutional law, among which the main trend can be distinguished, namely: humanization and increase of human measuring of the constitutional and legal realities. This means that the “alpha and omega” of the state and society activity is a human as the highest value, whose rights should be safeguarded by integral, comprehensive and meaningful state guarantees system.

The humanization trend effects to one extent or another all other development trends of the constitutional law, runs like a golden thread through the entire system of the modern constitutionalism²²³ – a core

²²² Stephen Gardbaum, 2008, p. 768.

²²³ Modern constitutionalism is a public-law system of the constitutional organization of modern society on the basis of law, democracy and the affirmation of human constitutional-legal freedom, the content of which is the constitution and

around which all the modern constitutional-legal scientific and practical issues of the constitutional law turn, versatile carrier of theoretical energy of modern constitutional science, and basic paradigm of constitutional-legal realities. Therefore, an important factor for isolation and formation of the humanitarian constitutional law is system formation and development of the modern Ukrainian constitutionalism.

Therefore, isolation, formation and development of the constitutional humanitarian law as a sub-branch of the constitutional law is objectively conditioned: first, by the constitutionalization processes of the human rights system in the modern world, that is, in the international and national law, which are interrelated (in particular, by proceeding on the dualistic concept of the relation between international law and national legal systems); second, the development of the scientific and practical paradigm of the modern constitutionalism, at the core of which is the human, who determines the humanization trend manifested in all spheres of the Ukrainian society and the state, namely: through perception of a human as society's value; recognition of its right to develop freely and show its abilities and capabilities; respecting the honor and dignity of the human; affirmation human well-being as a criterion for the social relations assessment, etc.

constitutional legislation, constitutional relations, constitutional justice, constitutional rule of law, functioning of which is aimed at restriction (self-restriction) of public authority for the benefit of civil society, human rights and freedoms (*A.R. Krusian*).

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**THE SECOND TOPIC: SUBJECT, METHODS AND PRINCIPLES
OF THE CONSTITUTIONAL HUMANITARIAN LAW OF
UKRAINE**

In addition to these political and legal grounds for setting apart constitutional humanitarian law, it is theoretically necessary to identify the basic features that characterize the legal specificity of this sub-branch as a regulatory subsystem of constitutional law, namely the presence of the subject of legal regulation – social relations of a particular type, which constitute an integral part of the constitutional law as a branch of law; specifics (features) of the legal regulation method; a combination of legal integrity (unity) and, at the same time, internal structural differentiation; special principles; legal integrity, that is, the existence of an interlinking and interdependent element ensuring the unity of the entire sub-branch of law.

With regard to the latter feature, it has an integrative value with respect to the entire system of legal features (characteristics) of constitutional humanitarian law. It is well known that the unity is possible only if there is interconnectedness and interdependence of all elements. The human constitutional and legal freedom is such an element with regard to the constitutional humanitarian law, which relates substantially to certain relationships between the human and the state.

In order to identify the essence and content of the constitutional humanitarian law, the study of public relations arising between the state and the human in the process of exercising public (state) authority is of theoretical and practical importance.

These relationships study remains relevant for a long time, starting from the birth of the classical theory of liberalism; by recognizing the freedom of the individual and integrity of the state in H. Spencer's²²⁴ political and sociological interpretation; through its understanding from the philosophical point of view in terms of the natural human rights theory²²⁵ to contemporary research on setting apart relevant models of relations between the state and the individual in the exercise of public authority. Thus, the modern approaches to defining these models include the system-centric and person-centric directions. Person-centrism defines a human as the highest point and "criterion of all things". The system-centric (sociocentric) approach has no person at all, or treats it as something auxiliary, capable of bringing greater or less benefit only to the achievement of some transpersonal goals. According to this approach, the state dominates over the individual.²²⁶

Third direction is getting widespread use in the contemporary legal literature, the essence of which is that, by denying hypertrophied perceptions of individual or collective origins in the human rights concept and its relationship with society, state and other forms of collective existence that are inherent in the past, it recognizes the need for organic combination of both personal and collective basis in the content of human rights and responsibilities.

²²⁴ Herbert Spencer, 2018, p.380.

²²⁵ Jacques Maritain, 1998, p. 219.

²²⁶ Todyka & Todyka, 2004, p. 102.

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This approach is based on the “law of individual and collective balance”, which is a condition of evolutionary (not revolutionary) society development and is universal. Yu.M. Todyka and O.Yu. Todyka substituted this approach in the Ukrainian science, suggesting that “it is important to maintain the balance of the citizen and the state interests”.²²⁷ Such scientific directions can be described as the balance concept of the individual and the state interests.

Undoubtedly, the balance of interests of the state and the individual and the partnership (social partnership) between these entities are attractive scientific concepts of the modern society development. However, it is difficult to build a partnership between a subject (state), which has authority and all its inherent means and attributes, and a subject (individual), who does not have such authority, but is a mere freedom bearer. At the same time, natural human rights give it the right to demand from the state the recognition, protection and guarantee of individual freedom in the system of relations with other people, society and the state. The extent of this freedom depends on the degree of restriction that the state imposes on itself and on other subjects of social relations. That is why such a concept is needed in this case, which would link the unified restriction (self-restriction) structure of public authority and the constitutional-legal freedom of the individual (the theory of constitutionalism).

V.M. Selivanov's position is worthy of support, who, considering the issue of the relationship between individuals and the state, believed:

²²⁷ *Ibid*, p. 103.

“Indeed, the legal order as the organization of relations between the subjects of law in the field of legal regulation in the society is possible only on the basis of a clear delineation of the activity areas of the state and individuals, which in a certain way effects the definition of all human and citizen's rights and freedoms: both private civil rights and subjective public and political rights.²²⁸ This argues for the concept: “just as an individual in his rights and freedoms should be limited by the public interests of the society, enshrined in the norms of public law, so the state is not omnipotent in relation to the individual, because in its activities it must be limited, “binded” by the constitutionally enshrined human rights and freedoms, norms of the private law.²²⁹ In addition, it is necessary for the state and society to take into account and perceive a provision having the status of an international standard and enshrined in Part 2 of Art. 29 of the Universal Declaration of Human Rights of 10 December 1948, namely: “in exercising one's rights and freedoms, each person shall be subject only to such restrictions as prescribed by law solely for the purpose of ensuring the due recognition and respect of the rights and freedoms of others and providing for fair requirements of morality , public order and general well-being in a democratic society”.

²³⁰

It seems that such a restriction is possible only on the basis of recognition and constitutional consolidation of the priority principle of

²²⁸ Selivanov, 2002, p. 169.

²²⁹ *Ibid.*, p. 173.

²³⁰ Universal Declaration of Human Rights, 1948.

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human rights and interests in relations with the state. Only under these conditions the state will not have global control over the individual and will be deprived of the possibility of arbitrary actions, vigilanteism, etc.

To define the aggregate characterization of human rights and freedoms in the context of defined relations with the state, while recognizing the value of modern constitutional law in the context of human-centrism as its humanization trend, the verbal structure is reasonable of the “human constitutional-legal freedom”.

The content (manifestation) of constitutional-legal freedom of a person is its individual freedom, while it has certain areas of its manifestation, which depend on the needs of the individual. The legal literature defines the so-called “pyramid” of the English sociologist D. Maslow (theory of natural needs), according to which the structure (“pyramid”) of human needs in its sequence looks as follows: physiological needs; the need for safety; the need to communicate with similar ones; the need for respect from other society members; the need for self-fulfillment. This “pyramid” is justly referred to as the “steps of freedom” based on the assumption that each of these levels of human needs is the next step towards freedom. The relationship between the “pyramid” and K. Vasak's three generations of rights theory is precise: depending on the time of proclamation of different human rights and freedoms, rights are divided into three generations: public and political rights; socio-economic rights and collective rights.²³¹ Fundamental human rights ensure various spheres of life: personal, political, social,

²³¹ Domashenko & Rubanyk, 2002, p. 40.

economic, cultural. It should be emphasized that these rights not only relate to the different areas of human life, but also differ in time of origin. Hence the emergence of the “human rights generation” concept. It should be noted that the modern science has a new perspective on the understanding of human rights through the prism of their relation to human dignity, and in particular it is proved that: “Human dignity is frequently found in close proximity to human rights. Human dignity is a concept that is increasingly used in legal discussions and has become a standard ingredient of, inter alia, the right to life, integrity and fairness”.²³²

These theories analysis allows determining the structures of human needs based on the principle of separation of tangible (physical) and intangible (spiritual) being of a human in order to ensure its individual freedom. Physical and economic freedoms are required to ensure tangible existence of human. The intangible (spiritual) part of an individual's life depends on its spiritual, cultural and political freedom.

Ensuring of physical, spiritual existence and human development requires the creation of conditions, first of all, of a legal nature, that is, constitutional securing and guaranteeing of the respective rights, freedoms and responsibilities of the individual and the citizen. This conclusion is in line with the legal position of the Constitutional Court of Ukraine, stated in the judgment of 11 October 2005 (case of the pension level and monthly life allowance):²³³ “the content of human

²³² Shaibakova, 2019, p. 409.

²³³ Decision of the Constitutional Court of Ukraine, 2005.

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rights and freedoms constitutes the conditions and means determining tangible and spiritual human capacity required to meet the needs of its existence and development.”. It is noted that “the scope of human rights is the quantitative indicators of the corresponding capabilities that characterize its multiplicity, magnitude, intensity and degree of manifestation and expressed in certain units of measure” (p. 4 of the judgement reasoning).

Therefore, the modern concept of human rights and freedoms and the entire system of relevant Ukrainian legislation should aim on ensuring human constitutional and legal freedom. This concept is based, above all, on the theory and practice of modern constitutionalism. On this basis, the concept of human rights and freedoms should be based on the best combination (not confrontation) of natural law and positivist theories of human rights. The essence of such a combination is that the inherent human natural rights and freedoms, owned from birth, should be enshrined in positive law, that is, the state, as an authority sovereign, should recognize (not “grant”) such rights and freedoms, ensure implementation thereof, safeguard and protect against unlawful encroachment. M. Cappeletti’s opinion supports this conclusion. He noted,

“Modern constitutionalism...is the only realistic implementation of values of the natural law in our modern world. ...More precisely,... modern constitutionalism is an attempt to remove the contradiction between positive and natural law. Modern constitutions, the bill of rights that constitute thereof, and judicial control are the synthesis between positive and natural law. They reflect the most important

*attempt of the millennia to “promote” these values, but with no absolutization or transferring thereof under the complete control of the situational desires of changing parliamentary majority”.*²³⁴

Thus, such a scope of human rights and freedoms should be enshrined at the constitutional level, which would legally secure all spheres of the individual human freedom.

However, as has already been argued, constitutional-legal freedom cannot be unlimited, since freedom does not imply a complete disregard for the interests and rights of others, society and the state. The State, having committed itself to the assertion and protection of human rights and freedoms (Part 2 Art. 3 of the Constitution of Ukraine), acquires the right to demand lawful conduct from the individual and the citizen. Hence, the constitutional affirmation of the obligations of the individual and citizen is logical. Here, it is appropriate to conclude that the inclusion of obligations in the legal status of individual does not violate the rule of law, since the rights of some individuals not confirmed with the obligations of others cannot be exercised.²³⁵ In addition, “everyone shall have certain responsibilities to a society, the only place, where the free and full development of his or her personality is possible”, which is enshrined in Part 1 Art. 29 of the Universal Declaration of Human Rights, 1948.²³⁶ Thus, the Constitution of Ukraine enshrines the

²³⁴ Cappeletti, 1989, p. 210.

²³⁵ Iierusalimov, Stakhurskyi & Iierusalimova, 2004, p. 43.

²³⁶ Universal Declaration of Human Rights, 1948.

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respective obligations of the individual and citizen (Part 2 Art. 51, Part 1 Art. 53, Articles 65–68).

Thus, human constitutional-legal freedom is the legal (constitutional-legal) and actual state of individual in the society and the state, according to which the individual is physically, economically, politically, spiritually independent (free) of any unlawful (unconstitutional) restrictions and interference with all areas of individual freedom by public authorities and other social entities.

The human in a relationship with public (state) authority acquires a certain legal (civil) status. Depending on the membership (or nonmembership) with a particular state, the human may have the following types of legal condition: citizenship, poly-citizenship, statelessness and foreignism, which determines its legal status. After all, the appropriate legal status is the basis and at the same time a prerequisite for the possession and enjoyment of the set of rights, freedoms and fulfillment of obligations enshrined in the legislation of a particular state. In this aspect, issues of citizenship, dual citizenship, etc. are gaining increasing significance.

Consequently, the subject of the constitutional humanitarian law is public relations in the field of human constitutional-legal freedom, which is determined by specific methods and principles of such regulation.

The defined concept of human constitutional and legal freedom necessitates a shift of emphasis in the choice and application of the constitutional and legal regulation methods in the field of human rights.

After all, human rights and freedoms and guarantees thereof determine in general the “content and focus of the state's activity” (Article 3 of the Constitution of Ukraine), and concern for “ensuring human rights and freedoms and decent living conditions” is one of the main motives for adopting the Constitution, the necessity for its protection (Part IV Preamble of the Constitution of Ukraine). Thus, the “human” becomes not only the main category of constitutional law, but the main value orientation of its development, as well as assessment indicator for the implementation effectiveness of constitutional laws, theories, ideas, institutions, political and legal practice.

Constitutional law establishes the nature and extent of interaction, the relationship between public authority and human freedom, providing not only freedom “for” the lawful, authority-independent human activity, but also “against” unlawful interference of authority in human life and activity. The human’s “constitutional-legal freedom” means certain relations of “penetrating” possibilities of law and “legal free space”, stipulated by the constitutional order, which is based on the principles according to which “no one can be compelled to do what is not provided by law”, but the human rights and freedoms are recognized as inalienable and inviolable, as is the right to “free development of one's personality” (Articles 19, 21, 23, 29 of the Constitution of Ukraine).

This, in turn, determines the increasing role and significance in these legal relationships, along with the imperative method (inherent in subordination and coordination relations), of such a method of

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constitutional regulation as the dispositive method (based on parity principles and inherent in coordination relations).

The legal regulation methods are determined by the principles which should constitute basis for the constitutional humanitarian law system. Given its humanitarian essence (nature) and functional-causal relation with the scientific and practical paradigm of constitutionalism, it seems theoretically correct and practically conditioned to conclude that the principles of this sub-branch of law correspond to the principles of modern constitutionalism.²³⁷

THE THIRD TOPIC: PROTECTION OF THE HUMAN CONSTITUTIONAL AND LEGAL FREEDOM

In order to ensure the reality of constitutional legal freedom, it is not enough to legally “formulate” it through law (objective and subjective public law), the protection required of this freedom, the mechanism of which is an integral part of constitutional humanitarian law. The value of any right or freedom, including constitutional and legal freedom, depends on the mechanism of protection thereof.

Protection of the human’s constitutional and legal freedom in the context of humanitarian definition of law is covered in two planes, namely: protection against the state (its possible arbitrariness) and protection by the state. With regard to the protection of human rights

²³⁷ See: Krusian, 2010, subsection 2.3. Principles of Modern Ukrainian Constitutionalism.

by the state, it is important to emphasize that the modern state must ensure and protect not only positive but also negative human rights, which determines the existence of corresponding negative and positive obligations. Thus, in its Judgment of 24 April 2018, the Constitutional Court of Ukraine stated that the human right to respect for its dignity, as well as its right to life, is inalienable, inalienable, inviolable and subject to unconditional protection by the state; Articles 27, 28 of the Constitution of Ukraine institutionalize not only the negative obligation of the state to refrain from acts that would violate human rights for life and respect for its dignity, but also the positive obligation of the state, which includes, in particular, the obligation to ensure a proper system for national protection of constitutional human rights by developing appropriate regulatory framework; implementation of an effective protection system for human life, health and dignity; creating conditions for an individual to exercise its fundamental rights and freedoms; guarantee the procedure for the compensation for damage caused by violations of constitutional human rights; ensuring the inevitability of liability for violations of constitutional human rights (paragraphs 4, 5, subparagraph 2.1 of paragraph 2 of the reasoning).²³⁸

State protection of the human's constitutional and legal freedom means the existence of a technical and legal protection mechanism for the rights and freedoms of the individual and the citizen. Such a mechanism, in the context of constitutional humanitarian law, includes

²³⁸ Decision of the Constitutional Court of Ukraine, 2018.

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normative (substantive and procedural) and institutional forms and means.

The normative part is represented by a large number of normative acts: the Constitution of Ukraine, international treaties, the consent to bindingness of which was provided by the Verkhovna Rada of Ukraine, laws and subordinate legislation. The shortcomings should be noted of the regulatory part of the human rights protection mechanism in Ukraine. First, legal acts contain more than half of the prohibition norms that do not meet global standards. Second, the implementation level of regulations on human and citizen rights and freedoms is unsatisfactory.²³⁹ Third, the issue remains in question of harmonization of human rights legislation with international legal standards and compliance with these standards.

A great significance for Ukraine in the context of the European integration is the implementation of the “Association Agreement between Ukraine, on the one part, and the European Union, the European Atomic Energy Community and their Member States, on the other part”²⁴⁰ (Agreement ratified by the Law No. 1678-VII of

²³⁹ See: Annual Report of the Ukraine’s Human Rights Ombudsman on the Status of Observance and Protection of Human and Citizen's Rights and Freedoms in Ukraine, 2018.

²⁴⁰ Association Agreement between Ukraine, of the one part, and the European Union, the European Atomic Energy Community and their Member States, of the other part, 2014.

16.09.2014²⁴¹). In particular, the Agreement stipulates that one of the Association objectives is: “to promote the gradual rapprochement of the Parties, based on common values and close privileged links, as well as through deepening Ukraine's relationship with EU policies and its participation in programs and agencies”. These shared values include the “respect for democratic principles, the rule of law, good governance, human rights and fundamental freedoms...”

Thus, in connection with further European integration processes in Ukraine, the need becomes relevant for implementing legal measures on observance of human rights and fundamental freedoms, which constitute the basis of the constitutional order of the state and form modern constitutionalism. At the same time, according to the Ukraine's Human Rights Ombudsman, there are many problems in Ukraine regarding the observance of international standards in the field of human rights and freedoms.²⁴²

Thus, it is important not only to improve the legislation of Ukraine in accordance with international instruments, but also to observe and enforce the same, in order to overcome violations of human rights and freedoms and bring them in line with the international standards in this field.

²⁴¹ On the ratification of the Association Agreement between Ukraine, of the one part, and the European Union, the European Atomic Energy Community and their Member States, of the other part, 2014.

²⁴² See, for example: Annual Report of the Ukraine's Human Rights Ombudsman on the Status of Observance and Protection of Human and Citizen's Rights and Freedoms in Ukraine, 2018.

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The regulatory part of this mechanism is directly related to the institutional one, which is represented by the state institutions. Considering that the rights and freedoms of the individual and the citizen and their guarantees determine the content and orientation of the state's activity, and the assertion and protection of human rights and freedoms is the main obligation of the state (Part 2 Article 3 of the Constitution of Ukraine), all public authorities shall perform the function of the state to protect the rights and freedoms of the individual and the citizen. At the same time, as M.P. Orzykh rightly points out, "none of these and other authorities and organizations possesses as much universal competence and human rights remedies as judicial instances do".²⁴³ This conclusion is based on the functional characterization of the court as the only authority exercising justice in Ukraine (Article 124 of the Constitution of Ukraine). Therefore, the judicial reform in Ukraine acquires significance, and in particular, the adoption of the Law of Ukraine 'On Amendments to the Constitution of Ukraine (on Justice)'²⁴⁴ in order to ensure the autonomy and independence of the judiciary, implementation of effective and fair justice.

The mechanism for the protection of human's constitutional and legal freedom will be complete provided that the human rights and freedoms can be protected not only on the part of the state but by the state itself, perceiving human rights in this case as "rights against

²⁴³ Orzykh & Krusian, 2006, p. 79.

²⁴⁴ On Amendments to the Constitution of Ukraine (on Justice), 2016.

society represented by the state and its officials”.²⁴⁵ The need to protect human rights against the state is confirmed by the legal position of the Constitutional Court of Ukraine. The decision of 24 March 2005 (tax lien case) states that, “recognizing an individual as the highest social value, the Fundamental Law of Ukraine establishes a list of rights and freedoms, guarantees the protection thereof, including against violations by the state, its authorities and officials ”(p. 4.2 of the reasoning). According to Yu.S. Shemshuchenko, “the main issue is that the rights and freedoms enshrined in the Constitution of Ukraine are not properly implemented, and in many cases violated. As a result, we have high levels of crime and corruption and a low level of law and order in the country”.²⁴⁶

Important in the context of strengthening the mechanism for the protection of human’s constitutional and legal freedom is the introduction of a constitutional complaint institute in Ukraine. The introduction of this institute will contribute to elimination of certain obstacles to the proper exercise of the rights and freedoms of the individual and citizen by the Constitutional Court of Ukraine, facilitate the implementation of the constitutionally guaranteed right of every individual to its rights and freedoms protection (Article 55 of the Constitution of Ukraine), facilitate the effective implementation of the constitutional principle of direct effect of norms of the Constitution of Ukraine (Part 3, Art. 8 of the Constitution of Ukraine). In addition,

²⁴⁵ Henkin, 1978, p.2.

²⁴⁶ Shemshuchenko, 2008, p. 4.

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consideration of constitutional complaints by the constitutional justice authority may also contribute to reduced scope of appeals of Ukrainian citizens to the European Court of Human Rights. In fact, an effective individual complaint to the Constitutional Court of Ukraine can become a national filter for referral of cases to the European Court of Human Rights.

However, the Institute of Constitutional Complaint in Ukraine is under implementation. In order to make it effective, it is necessary to step up the activities of the Constitutional Court in this area, carry out more informational-analytical and scientific-applied activities, as well as amend the current legislation of Ukraine in order to establish this institution as an important tool of the modern safeguarding mechanism for the rights and freedoms of the individual and citizen in Ukraine.²⁴⁷

Of great importance is the protection of constitutional-legal freedom against the arbitrariness of the state, which means, first of all, the ability of an individual to apply personally to the international courts for the protection of its rights. The Constitution of Ukraine enshrines the right of everyone, following exercise of all national remedies, to apply for the protection of the rights and freedoms to the relevant international judicial institutions or the relevant authorities of international organizations, of which Ukraine is a member or participant (Part 4, Art. 55). Therefore, the human is given international legal remedies to protect own rights and freedoms. This protection is independent, that is, protection with no state interference.

²⁴⁷ For more details see: Krusian, 2019a, p. 13-21; Krusian, 2019b, pp. 270-274.

The European Court of Human Rights holds an important place in such a protection. Its decisions are legally binding (Art. 46 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950), which is also provided for by the Law of Ukraine of 23 February 2006 'On the Enforcement of Judgments and the Practice of the European Court of Human Rights' (Art. 2).²⁴⁸ Due to this, the observance and enforcement by the Member States of the Convention on the Protection of Human Rights and Fundamental Freedoms is subject to the direct control of the Council of Europe, which makes it possible to respond quickly and effectively to violations of human rights and fundamental freedoms in a given country. This substantiates the existence and the reality of the existence of a mechanism for the protection of human rights and freedoms against the state (its unlawful, arbitrary actions, inaction or interference with the sphere of individual human freedom, etc.), which is necessary in the context of ensuring human constitutional and legal freedom.

CONCLUSIONS

In the current conditions of the constitutional development of Ukraine, favorable circumstances arise regarding the formation and isolation in the system of national constitutional law of such a humanitarian component (sub-branch) as a constitutional humanitarian law. The need for setting apart the formation and further

²⁴⁸ On the Enforcement of Judgments and the Practice of the European Court of Human Rights, 2006.

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development of constitutional humanitarian law is due to the following: first, the current stage of constitutional transformations in Ukraine, which determines such a tendency for the national constitutional law development as its humanization and enhancement of the human criterion of constitutional and legal realities; second, processes of constitutionalization of the human rights system in the modern world, that is, in international and national laws, which are interrelated (in particular, based on the dualistic concept of the relation between international law and national legal systems); third, the development of the scientific and practical paradigm of modern constitutionalism, the “core” of which is an individual, thus determining the need for comprehensive constitutional and legal regulation of social relations in the field of human’s constitutional and legal freedom. After all, the Constitution stipulates that Ukraine admits an individual, its life and health, honor and dignity, integrity and security as the highest social value. Human rights and freedoms and their guarantees determine the content and focus of the state operation. The state is responsible to the individual for its activities. The establishment and protection of human rights and freedoms is the main obligation of the state (Art. 3 of the Constitution of Ukraine). This provision is part of the constitutional order in Ukraine. It is imperative to create a legal basis for implementing the constitutional provisions into modern realities. For this, inter alia, it is necessary to improve the system of modern constitutional legislation in the field of human and citizen's rights and freedoms, create an effective mechanism for safeguarding thereof by the state. Hence, it is important to create a theoretical and legal concept of constitutional humanitarian law, which will contribute to the

formation and further development of the modern Ukrainian constitutionalism system, the purpose of which is to establish human's constitutional and legal freedom.

The nature of constitutional humanitarian law is noted in the fact that modern constitutional law has a certain connection with humanism ("humanism" – Latin "Human"), which is manifested in its humanitarian focus, i.e. – focus on the establishment and maintenance of human's constitutional and legal freedom.

Constitutional humanitarian law is a sub-branch of the constitutional law, the regulation subject of which is public relations in the area of defining, securing and protecting human constitutional and legal freedom.

Increased social significance of relations in the field of human constitutional-legal freedom, their specificity and development in the context of humanization of constitutional law and the formation of modern Ukrainian constitutionalism, in the system of which it is important not only to legally define and consolidate the relevant human rights, freedoms and responsibilities, but also to establish a set of requirements for safeguarding thereof, both by the state and encroachments from the state – all this determines the need for setting apart and formation within the constitutional law of independent sub-branch – the constitutional humanitarian law, the subject of which is public relations in the field of human's constitutional and legal freedom.

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Within the framework of the constitutional humanitarian law, the differentiation of legal material (while preserving its unity on the basis of an integrative concept – human constitutional-legal freedom) is methodologically justified, which makes it possible to identify such basic institutions as: the institute of human rights and freedoms; institute of human responsibilities in the democratic society and the state, institute of civil (legal) personality statuses (citizenship, foreignism, statelessness, poly-citizenship); institute for safeguarding human constitutional and legal freedom. It is thought that such structuring will contribute to the effective functioning of the constitutional humanitarian law.

Therefore, based on the foregoing, it is possible to summarize the recognition of the constitutional humanitarian law as the sub-branch of the constitutional law of Ukraine, the formation and development issues of which require further researches taking into account the constitutional and legal realities of the present.

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