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ELECTORAL ENGINEERING: ESSENCE AND TECHNOLOGY

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The article analyzes the essence and technology of an interdisciplinary concept „electoral engineering”. Electoral engineering is defined as a purposeful, rational, science-based and pragmatic activity on constitutional and legal design of the electoral system and process in order to achieve a political and legal target result.

Keywords: elections, electoral engineering, the electoral system, election technologies, prognostication, effectiveness of legislation.

Formulation of the problem. The cognition of the electoral engineering phenomenon in Ukraine is at the stage of summarizing of the results of scientific research and empirical data, while the use of this multidisciplinary concept in constitutional law remains controversial.

There have been various in subject and content works on different aspects of electoral engineering in legal scientific literature. However, their peculiarity is in the fact that the theoretical analysis, carried out in their framework, is aimed to solving important, but fragmented scientific problems. A lot of disordered information about election practices and non-public nature of the development of electoral legislation also does not promote the scientific identification of electoral engineering.

The electoral engineering is an objective demonstration of the application of a socio-engineering approach to electoral sphere due to the practical need for effective, purposeful activities on the constitutional and legal designing of the electoral system and process with the aim of their rationalization.

The socio-engineering approach to constitutional and legal groundwork for electoral sphere is a theoretical and methodological orientation on the application of the scientific knowledge, on the one hand, and on the other, empirical data and practical experience in the process of goal-setting, prognostication, designing parameters of the electoral system and legal technologies of the electoral process, evaluating their impact in terms of optimization and efficiency. This is a development of „the technological process of implementation of science in practice” (M. Orzih) interpreting law as „a unique way of designing social life” (E. Anners).

The socio-engineering approach is based on the possibility of making conscious and planned changes. It needs justification of purposes of a subject of constitutional and legal construction in terms of their feasibility, the research of factors that affect the state of the electoral sphere, the correct formulation of tendencies of its development, as well as the determination of optimal and effective ways of transformation of the electoral system and process and evaluating the effectiveness of the results.

Analysis of recent research and publications.

Overview of scientific publications confirms a significant interest of representatives of sociology, political science and law in the socio-engineering approach and electoral engineering, because of the interdisciplinary nature and content of the subject of research.

The following domestic and foreign scientists expressed their views on the above mentioned topic: E. Anners, D. Antoniuk, Achkasov V., V. Bebig, V. Bobrov, V. Volkov, L. Volodin, K. Hahayeva, A. Gasteva, G. Golosov, M. Kaminsky, M. Keith, J. Klyuchkovsky, V. Komatovskyy, V. Kurbatov, A. Kurbatov, V. Lukow, P. Norris, M. Orzih, A. Petrov, K. Popper, W. Poltorak, Yu. Resnick, M. Savchin, J. Sartori, N. Stefanov, S. Ustimenko, F. Hayek, A. Chernenko, R. Chuprin, J. Sweda, J. Schumpeter, A. Yusupov and other scientists. Their researches were the theoretical base for the development of a new socio-engineering approach in the constitutional law.

Determination of the unsolved aspects of the problem. However, the issues of the theoretical and methodological foundations as well as the constitutional and legal groundwork for electoral engineering in Ukraine have not been researched in domestic science of the constitutional law.

The main purpose of the article is the implementation of interdisciplinary scientific analysis of the phenomenon of „electoral engineering” determination of its essence and technology with an aim to introduce the socio-engineering theoretical and methodological instruments in the science and practice of the constitutional law.

Presentation. The electoral engineering has a dual legal nature: on the one hand, it is a consideration of the laws of development of electoral sphere, determined by objective social, political, economic, legal, ideological conditions; and on the other, it is a purposeful activity of the constitutional and legal designing of the electoral system and legal technologies of electoral process that is exposed to active subjective influence.

It should be noted that in the Ukrainian political reality the active subjective influence is often directed to the achievement of illegal political objectives. Such application of electoral engineering has a socially negative result and it is not only the damage caused to the rights and legitimate interests of other actors, this is also a distortion of constitutional political and legal principles, a risk of destruction of the political system, a threat to the stability of the constitutional order. The abuse of a right in the framework of the electoral engineering appears to be a misuse of authority. It is an act that formally does not go beyond the competence of a public official or public authority, but it is contrary to the purposes and values of the constitutional order. That entails the abuse in the electoral legislation-making process which may be expressed in formal and meaningful aspects: the

abuse of a right in adopting acts of electoral legislation and providing a legislative framework for defective from the teleological and technological aspects rules of conduct that are the basis for the abuse of passive or active suffrage.

The abuse of power in constitutional and legal designing of the electoral system and process can be prevented only on the basis of the constitutional consciousness and awareness of legislators; concretization of powers in order to reduce variability and discretion in decision-making; consensus adoption of electoral laws by the qualified parliamentary majority; improving the quality of laws; strengthening the role of constitutional jurisdiction; using the resources of direct democracy and civil society institutions (open discussion with the involvement of scientists, experts, political parties, public organizations), international experts' activity in constitutional institutions, including the electoral law.

The research of the electoral engineering as an activity on the constitutional and legal design of the electoral system and electoral legal technologies reveals its structure through the following components:

- subjects (participants) of activity. The subject of electoral engineering is the parliament – the Verkhovna Rada of Ukraine as a body of public authority entrusted with the competence to adopt laws that define the essential characteristics of the electoral system and regulate the electoral process; the participants – subjects of legislative initiative in the Verkhovna Rada of Ukraine, the Central Election Commission, the Verkhovna Rada of Ukraine committees, working groups, experts, research institutions, civil society, international organizations, and informal participants, the so-called interest groups that are interested in a particular legislative decision and pursue their interests in creating particular laws;

- object of activity – the electoral system and process, their essential components and technologies which determine the outcome of elections: technology of running for an elected seat, voting, determination of election results by the authorized bodies, as well as the subjective, temporal and territorial components;

- Subject's influence on the object that forms a technological aspect of electoral engineering, which, in its turn, is constructed from the teleological („purpose”), constructional („means”), prognostic and resultative („result”) components. A close logical and functional correlation of these structural elements allows moving away from the contemplation of the scientific analysis of electoral engineering and acquiring knowledge of practical value.

The teleological and constructional components reveal electoral engineering as a strategically meaningful activity, based on a certain system of goals, benchmarks, criteria that reflect the essence of meaningful constitutional and legal characteristics of the future electoral system and process.

The teleological component of electoral engineering is characterized by means of its essential characteristics such as purposefulness, feasibility, rationality. The teleological determination is an active creative foundation of the constitutional and legal construction process. Axiological approach,

which reflects the values of the electoral engineering subject, is used in defining the teleological determination.

The teleological component requires scientific justification of the formulated objectives of legislative innovation, identification of the key constitutional and legal benchmarks in the electoral sphere. A lack of the above mentioned activity does not allow making a clear strategic prognostication of legislative activities and leads to the dependency of lawmaking process on political feasibility.

Objectification of the purposes of electoral engineering subjects is implemented in certain legal forms: accompanying, explanatory report of draft legislative act, the concept of draft laws, forecasts of the potential efficiency of draft laws, later in preambles or in the initial articles of electoral legislation.

The constructional component is revealed through the choice of legal instruments and legal technologies of the future design of the electoral system and process. Subjects of electoral engineering must define exactly the set of legal means that most effectively lead to a desired result. The most important for the constructional component of electoral engineering is to determine legal means which can lead to the achieved goals, as well as a sequence of their application in practice for an optimum solution of political and legal problems as well as an achievement of socially significant results.

At the stage of the constitutional and legal construction the achievement of political and legal objectives in the electoral area is possible only on the basis of selection from the plurality of legal means (legal instruments and technology) those which, in the opinion of electoral engineering subjects, are more appropriate and effective.

Legal technology answers the question „how” a subject acts, how it affects the object to achieve a goal. Legal technology provides a legislative framework which consists of a particular set of legal instruments, aimed at rationalization and optimization of activities. It includes only those legal instruments that are the most effective in achieving this goal and guaranteeing a legal result. Legal technology has a dual nature: on the one hand, it is a consolidated system of interconnected and interdependent legal instruments which affect social relations, and on the other hand, it is an activity aimed at their implementation in practice.

The choice of legal means is a crucial issue in ensuring the effectiveness of electoral engineering. Accurately chosen and practically verified means guarantee the efficiency of the electoral legislation. Legal instruments and technologies, which are adequate to the constitutional values and goals, are designed to enhance a positive effect of the legislation and to minimize a negative effect; otherwise factors of insuperable force will be more intense than legal means leading to the unpredictable results.

Correlation between the teleological and constructional components of electoral engineering has two aspects: first, it is necessary to set goals that correspond to the objective laws of social development; secondly, legal means, which are chosen to achieve a political and legal goal, must be able to turn this goal into a reality.

The predictive and resultative components interpret the technology of electoral engineering in providing prospective and retrospective evaluation of the effectiveness of the electoral legislation.

Prognostication within electoral engineering is a scientifically grounded presumable judgment about the future state of the electoral system and process, about how effective the legal instruments and technologies, selected for their legislative designing, will be, and about what society and state will receive as a result of their implementation.

Prognostication should be based on the laws of development and functioning of the electoral system and process in the past, scientific research of the political and legal trends taking into account the most likely patterns of political actors' behaviour.

The task of the prognostic component of electoral engineering is to identify quantitative and qualitative development parameters of the electoral system and process on the basis of adoption of corresponding legislation; to predict the behavioural patterns of subjects of law, influenced by the new rules; to establish a system of social and legal factors that could negatively or positively affect the rules that are projected.

The predictive component is based on legal means such as expertise of draft bills, legal and imitation modelling, legal experiment, etc., which should receive a normative regulation and take a worthy place in the domestic constitutional and legal practice.

The effectiveness of electoral legislation on political and legal reality should be estimated by means of the teleological and technological criteria. The teleological criterion facilitates to estimate a contribution to the implementation of constitutional and legal political rights, while the technological criterion permits to estimate standardization, algorithmization, universalization of election procedures, which is common for the electoral law.

The resultative component of electoral engineering provides the determination of a real effectiveness of impact of purposefully engineered electoral legislation on public relations as well as a response to the question whether the desired political and legal results have been achieved. Within

the resultative component it is important to establish the costs of the result and side effects appeared in connection with the implementation of legislative regulations. It is also necessary to define if the latter can discredit a goal of constitutional and legal construction.

Comprehensive retrospective estimation of efficiency of legislative influence can be obtained by a specially organized systematic observation, assessment of the status and dynamics of current electoral legislation, i.e. by legal monitoring. It has been proved that legal monitoring of electoral legislation promotes a purposeful planning and coordination of legislative activities, as well as improves law enforcement electoral practices.

The prospective assessment of the legislative impact on election legal relations is provided, particularly, by means of imitation modelling. It is a method of verification of the legislative innovations in an experimental mode to simulate their implementation engaging the recipients of legislative regulations. Thus it allows indentifying the deficiencies of law, including unexplained schemes of cooperation and sharing responsibility.

From a practical point of view, the prospective and retrospective assessment complements each other, so both types of assessment should receive equal attention and simultaneous development.

Conclusions and suggestions. In conclusion, it is worth noting that electoral engineering is a constitutional and legal design of electoral system and process; a rational, science-based, pragmatic activity based on a system of constitutional goals and values; aimed at instilling the desired political and legal characteristics to the electoral system and process by means of a system of legal instruments and technologies; related to the prediction of political and legal consequences and estimation of efficiency (monitoring) of obtained political and legal results. Technology of electoral engineering is formed by: teleological, constructional, predictive and resultative components. Understanding of the essence of electoral engineering and revealing its technology enables to identify and define the presence and self-sufficiency of this phenomenon among other political and legal phenomena.

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ВИБОРЧА ІНЖЕНЕРІЯ: СУТНІСТЬ ТА ТЕХНОЛОГІЯ

Анотація

У статті аналізується сутність і технологія міждисциплінарного явища «виборча інженерія». Виборча інженерія розкривається як цілеспрямована, раціональна, науково і прагматично обґрунтована діяльність з конституційно-правового конструювання виборчої системи та процесу, з метою отримання заданого політико-правового результату.

Ключові слова: вибори, виборча інженерія, виборча система, виборчі технології, прогнозування, ефективність законодавства.

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ИЗБИРАТЕЛЬНАЯ ИНЖЕНЕРИЯ: СУЩНОСТЬ И ТЕХНОЛОГИЯ

Аннотация

В статье анализируется сущность и технология междисциплинарного явления «избирательная инженерия». Избирательная инженерия раскрывается как целенаправленная, рациональная, научно и прагматично обоснованная деятельность по конституционно-правовому конструированию избирательной системы и процесса, с целью получения заданного политико-правового результата.

Ключевые слова: выборы, избирательная инженерия, избирательная система, избирательные технологии, прогнозирование, эффективность законодательства.

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L'AVENIR DU BARREAU UKRAINIEN: PROBLEMES ET PERSPECTIVES

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Cet article définit les problèmes et les perspectives de la réforme de barreau en Ukraine. L'auteur montre que la concurrence et le marché, les activités des firmes juridiques obligent les avocats à se réunir autour de l'idée de la préservation des traditions de barreau, de ses valeurs et ses principes fondamentaux. Le monopole sur la représentation et la défense, ainsi que la perfection d'autorégulation sont les directions de réalisation de cette tâche collective. Le rôle principal dans le processus de réforme appartient à l'Association nationale des avocats de l'Ukraine comme une organisation professionnelle qui réunit des avocats. L'auteur met en exergue une valeur de la réforme de barreau et sa conformité aux normes internationales.

Mots-clés: barreau, avocat, association des avocats, profession d'avocat, activité d'avocat.

Définition d'un problème. La question magistrale de nos jours est conserver un rôle professionnel et social de la profession d'avocat.

Au travers du temps la profession d'avocat conserve son rôle de conseil, de protection et de défense, mais depuis la seconde moitié du XX siècle on songe à une adaptation raisonnée de la profession aux exigences du marché.

En Ukraine la Loi sur le barreau et l'activité de l'avocat, n° 5076-VI de 5 juillet 2012 (ci-après «la Loi») [1], a marqué une nouvelle étape de la réforme de la profession. Après des années de discussion, le parlement ukrainien a adopté la Loi dans la version démocratique progressiste, qui répondait aux normes internationales les plus élevées. Cependant, les différences de statut des avocats et juristes sont toujours valables. Les cabinets d'avocats exercent les mêmes activités que les firmes juridiques et la question du monopole des avocats dans les tribunaux est discutable dans le contexte de la réforme.

Analyse des recherches et des publications. Les travaux de M. Fridman, M.S. Larson, Y. Dezalay, M.E. Katsh contiennent de nouvelles approches à la perception de la profession d'avocat. En XXI siècle les tendances d'égalisation des avocats avec les juristes et de transformation des avocats à la logique d'un marché mondialisé indiquent R. Susskind, D. Galbanski, J. Macfarlane, M. Sako, M.C. Regan Jr. et T.H. Palmer.

La question savoir si les avocats peuvent maintenir leur identité à l'avenir est un objet

de recherches en oeuvres de T.V. Varfolomeyeva, S.V. Goncharenko, K.P. Koval, A.S. Dekhanov, Y.S. Pilipenko, I. Yartikh, L. Assier-Andrieu, L. Karpik, T. Wickers, Ch. Jamin, F.H. Stephen.

En Ukraine, le problème de la répartition des activités entre les avocats et les juristes n'est pas analysé à la lumière de la réforme constitutionnelle, ainsi que l'importance de l'association des avocats.

L'objectif de l'article est la définition des directions et des objectifs de la réforme du barreau pour maintenir la tradition et principes fondamentaux de profession, limiter le marché incontrôlé dans les activités juridiques.

L'essence de la recherche. Le métier d'avocat résulte d'une longue histoire qui trouve ses origines dès l'Antiquité et le début du Moyen-Age. Comme le suggère A.Damien, la vie quotidienne des avocats au cours des âges ne fut pas simple. Dès qu'ils apparurent à l'aube de la société moderne, ayant découvert le rôle irremplaçable qu'ils doivent jouer dans la société, ils furent en butte aux attaques du pouvoir, de tous pouvoirs [2, p. 7].

La profession d'avocat a connu de nombreux changements qui l'ont conduit à s'adapter: multiplication des textes de lois, pression de la concurrence sur le terrain du conseil juridique, internationalisation des problématiques juridiques des entreprises, mais aussi développement des nouvelles technologies, émergence de nouveaux domaines de droit, nouveaux modes d'exercice du métier d'avocat.