

UDC 342.1

DOI <https://doi.org/10.32837/chern.v0i5.274>

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POLITICAL PARTIES AND FREEDOM OF ASSOCIATION: PROBLEMS OF THE UKRAINIAN CONSTITUTIONAL TERMINOLOGY

The content of the constitutional right to freedom of association in political parties in Ukraine is one of the elements of this subjective right. Traditionally, the structure of any subjective right is analyzed in the composition of the subjects of this right, its object (objects), as well as the content, and constitutional subjective rights are not an exception to this rule. It should be emphasized that this approach is fully justified and should be followed. In studying the content of the constitutional right to freedom of association in political parties in Ukraine, the question of distinguishing between the concepts of “union” and “association” arises.

The relevance of the research topic is that European integration processes are currently underway in Ukraine, which provide for the harmonization of national legislation with human rights standards adopted in the EU. It is within these processes that the author analyzes and substantiates the need to move to a wider application of the concept of “association” in national legislation and Ukrainian legal literature.

So far, experts in constitutional law have not analyzed the issue of distinguishing between the concepts of “union” and “association” in the context of the study of the right to freedom of association in political parties in Ukraine. In this regard, in writing the article used works devoted mainly to general issues of the theory of state and law (primarily the development of professors Krestovskaya, Matveeva), as well as general issues of constitutional law in terms of subjective rights (primarily developed by professors Shapoval, Mishyna). We should also take into account the dissertation for the degree of Candidate of Law, devoted to the constitutional right to unite in political parties, that was submitted by A.M. Moiseev on the materials of foreign law and case law.

The author argues that the need to distinguish between the concepts of “union” and “association” in relation to the constitutional right to freedom of association in political parties in Ukraine.

The author recommends to abandon the use of the concept of “association of citizens” in favor of the concept of “association” in Art. 36-37 of the Constitution of Ukraine and bring other laws and bylaws in line with the Constitution of Ukraine, first of all – the Law “On Political Parties in Ukraine”, where in Art. 2 “The concept of a political party” gives this definition. Prospects for further research are to use the same thesaurus used by foreign scholars working in EU countries when studying the right to freedom of association in political parties in Ukraine

Key words: units, unions, associations, political parties, freedom of associations, the right to associate in the political parties.

Осауленко С. В. ПОЛІТИЧНІ ПАРТІЇ ТА СВОБОДА ОБ'ЄДНАННЯ: ПРОБЛЕМИ ТЕРМІНОЛОГІЇ УКРАЇНСЬКОЇ НАУКИ КОНСТИТУЦІЙНОГО ПРАВА

Зміст конституційного права на свободу об'єднання в політичні партії в Україні є одним з елементів цього суб'єктивного права. Традиційно структура будь-якого суб'єктивного права аналізується за складом суб'єктів цього права, його об'єкта (об'єктів), а також змісту. При цьому конституційні суб'єктивні права не є винятком. Автор підкреслює, що такий підхід цілком виправданий і його слід дотримуватися.

Досліджуючи зміст конституційного права на свободу об'єднання в політичні партії в Україні, постає питання щодо розмежування понять «об'єднання» та «асоціація». Актуальність теми дослідження полягає в тому, що наразі в Україні тривають євроінтеграційні процеси, які передбачають гармонізацію національного законодавства зі стандартами прав людини, прийнятими в ЄС. Саме в межах цих процесів автор аналізує та обґрунтовує необхідність переходу до ширшого застосування поняття «асоціація» в національному законодавстві та українській юридичній літературі.

Дотепер фахівці з конституційного права не аналізували питання розмежування понять «асоціація» та «об'єднання» в контексті дослідження права на свободу об'єднання в політичні партії в Україні. З огляду на це, під час написання статті використано праці, присвячені загальним питанням теорії держави і права (зокрема, розробці професорів Крестовської, Матвєєвої), а також загальним питанням конституційного права з точки зору суб'єктивних прав (зокрема, розробки професорів Шаповала, Мішиної).

Автор аргументує, що необхідно розрізнити поняття «асоціація» та «об'єднання» стосовно конституційного права на свободу об'єднань у політичні партії щодо України.

Автор рекомендує відмовитися від використання поняття «об'єднання громадян» на користь поняття «асоціація» у ст. 36–37 Конституції України та привести у відповідність до Конституції України інші закони та підзаконні акти, зокрема Закон «Про політичні партії в Україні», де у ст. 2 «Поняття політичної партії» надається таке визначення. Перспективами подальших досліджень є використання того ж тезаурусу, який використовують іноземні науковці, які працюють у країнах ЄС, вивчаючи право на свободу об'єднання в політичні партії.

Ключові слова: асоціації, об'єднання, політичні партії, свобода об'єднань, право на об'єднання в політичні партії.

Formulation of the problem. The content of the constitutional right to freedom of association in political parties in Ukraine is one of the elements of

this subjective right. Traditionally, the structure of any subjective right is analyzed in the composition of the subjects of this right, its object (objects), as

well as the content, and constitutional subjective rights are not an exception to this rule. It should be emphasized that this approach is fully justified and should be followed. In studying the content of the constitutional right to freedom of association in political parties in Ukraine, the question of distinguishing between the concepts of “union” and “association” arises.

The degree of research of the problem. So far, experts in constitutional law have not analyzed the issue of distinguishing between the concepts of “union” and “association” in the context of the study of the right to freedom of association in political parties in Ukraine. In this regard, in writing the article used works devoted mainly to general issues of the theory of state and law (primarily the development of professors Krestovskaya, Matveeva), as well as general issues of constitutional law in terms of subjective rights (primarily developed by professors Shapoval, Mishyna). We should also take into the account the dissertation for the degree of Candidate of Law, devoted to the constitutional right to unite in political parties, that was submitted by A.M. Moiseev on the materials of foreign law and case law.

The purpose and task of the article is to argue the need to distinguish between the concepts of “union” and “association” in relation to the constitutional right to freedom of association in political parties in Ukraine.

Presentation of the main material. The Constitution of Ukraine “gives” the name to the analyzed law – “the right to freedom of association in political parties”. Article 36 provides that “citizens of Ukraine have the right to freedom of association in political parties and public organizations”. Despite the combination of the concepts of “right” and “freedom” in one phrase, at the present stage of development of legal science, this is quite acceptable. Experts in the theory of law note that often the terms “human rights” and “human freedoms” are combined in one term: for example, such is the right to freedom of movement. The use of the term “human freedom” is designed to emphasize the free, most independent human self-determination in some areas of public life. The state ensures human freedoms primarily by not interfering in this self-determination both by the state itself and by all other subjects of law [1, p. 208].

Despite the fact that Articles 36-37 of the Basic Law of Ukraine are placed in Section II “Rights, freedoms and responsibilities of man and citizen”, their provisions do not directly follow the components of the content of the studied law, as they mostly concern the subjects of this right and its object – political parties.

The Law “On Political Parties in Ukraine” contains the components of the subjective law under

study in Section II “Membership in Political Parties and Their Formation”:

- the right to sign the decision to establish a political party (Article 10, enshrined indirectly);
- the right to participate in the constituent congress (conference, meeting) of a political party, which approves the statute and program of a political party, elects its governing and control and audit bodies (Article 10, fixed indirectly);
- the right to be a member of a group of citizens of Ukraine consisting of at least 100 persons, who create a political party (Article 10, enshrined indirectly) [2].

The Law “On Political Parties in Ukraine” in Section II “Membership in Political Parties and Their Formation” also contains:

- the right to suspend or terminate one’s membership in a political party at any time (Article 6, expressly enshrined);
- the right to hold elected office in a political party (Article 6, enshrined indirectly).

But these rights can hardly be included in the content of the constitutional right to freedom of association in political parties for two reasons.

The first reason is that according to Article 8 of the Law “Statute of a political party”, political parties must have a statute. The charter of a political party must contain the following information: ... 4) the rights and obligations of members of a political party, the grounds for termination or suspension of membership in a political party” [2].

The question of whether the rights and responsibilities of members of a political party can be attributed to the components of the content of the subjective right to freedom of association in political parties is ambiguous in the legal literature. On this issue, V.M. Shapoval put it this way: “the rights and freedoms of man and citizen enshrined in the basic law are not exhaustive, as is the case, in particular, in the first part of Art. 22 of the Constitution of Ukraine. Thus, in our opinion, legal forms of fixing of the rights and freedoms of the person and the citizen are limited by the constitution and laws. In other words, subjective rights, which are established at the level of bylaws, should not be interpreted as human and civil rights and freedoms, otherwise the very concept of such rights and freedoms would lose its meaning” [3, p. 94].

It should be agreed that V.M. Shapoval attaches great importance to the legal form of fixing subjective rights. The rights enshrined in corporate norms (namely, the legal nature of the statute of a political party) can hardly be included in the content of any constitutional right.

Secondly, if we look at the study of the content of the right to freedom of association in political parties from a formal point of view, it covers only those rights that are associated with the formation of a

political party as an association. This approach is indirectly agreed by A.M. Moiseev. He writes: “without abolishing or diminishing the right of everyone to association (as stated in the Constitution ...), its extension in the theory of the constitutional right to a plurality of persons (citizens) allows us to consider freedom of association as part of the general right of citizens on association (as a phenomenon). Thus, it consists of:

1) the right of everyone to association (ie the right of a citizen to form, join and leave an association, to participate in its activities), and

2) freedom of association (independence of associations from the state, democratization of decision-making, etc.)” [4, p. 39].

In addition, the concept of “unification” is not unambiguous and clear, as written by A.M. Moiseev. In his work “The Constitutional Right of Citizens to Associate in Political Parties and the Judicial Practice of Its Protection”, he pays great attention to this issue in order to prevent possible terminological confusion. The following considerations deserve to be used, which reveal the roots of the ambiguous understanding of this concept: “Returning to the analysis of the reason for mixing the concepts of the right to association and freedom of association, it should be noted that Russian regulations do not the term “association”, when in a particular legal act refers to the association. On the one hand, it can mean a process. In this case, the right to unite is understood as the own right of citizens to carry out unifying actions, ie citizens can conduct activities aimed at consolidating their interests. On the other hand, “association” can be understood as a subject. In this case, the form is placed in the head of the corner” [4, p. 45–46]. A similar situation has developed in Ukrainian legislation.

We should also agree with the conclusion of A.M. Moiseev on how to understand the concept of “unification”. He argued in his study for the degree of Candidate of Law:

– “Obviously, the word “union” means the process, the activities of individuals. A legal entity, or, if citizens act without its formation, is the result of a unifying process, but not the process itself. Non-proliferation of guarantees of the right to association enshrined in the Constitution ... and international legal acts at all stages of interaction of citizens does not allow to form such an association as a voluntary, self-governing, non-profit formation created on the initiative of citizens united on the basis of common interests for the realization of the common goals specified in the charter of the association” [4, p. 46];

– “association” should be understood as a long process that includes all stages of creation, liquidation, reform... association, based on the union of common wills and interests of the members of the association” [4, p. 46].

Unfortunately, A.M. Moiseev does not propose the use of different concepts in order to distinguish between association as a process and association as a result (in his works – the subject). It is worth proposing to talk about “association” to denote a process, and to speak about “association” to denote the result of such a process (subject, object of the subjective law under study). This will be fully consistent with international practice – as the concept of “association” in the context of the law under study is used in most international human rights standards ratified by Ukraine, including the Universal Declaration of Human Rights in 1948, the International Covenant on Civil and Political Rights of 1966, as well as in documents whose ratification is promising for Ukraine – for example, in the Charter of Fundamental Rights of the European Union in 2000.

As for Ukrainian legislation, this concept is used ambiguously. It is used infrequently to refer to associations as an object of freedom of association, at least not as often as the term “union”. Thus, the Constitution of Ukraine of 1996 does not operate with the concept of “association” or cognate, as well as the Law “On Political Parties in Ukraine”.

The Law of Ukraine of March 22, 2012 “On Public Associations” mentions associations in several articles:

– in Article 2 “Scope of the Law” in the context that this Law does not apply to public relations in the field of formation, registration, operation and termination, including associations of local governments and their voluntary associations;

– in paragraph 2 of the Final and Transitional Provisions in part that public organizations, their unions (unions, associations, other associations of public organizations), legalized on the day of entry into force of this Law by registration or notification of establishment, do not need respectively re-registration or re-submission of documents for notification” [5].

Thus, it becomes obvious that the authors of the text of the Law of Ukraine “On Public Associations” considered unions as a kind of public associations, but did not specify the characteristics of such an association. Similarly, this concept was used in the now invalid Law of Ukraine of June 16, 1992 “On Unions of Citizens”. The term “union” was used more often, in particular, political parties could use it in the name – Article 1 provided that “unions of citizens, regardless of name (movement, congress, association, foundation, union, etc.) in accordance with this Law is recognized political party or public organization” [6]. Article 12-1 “Name of the unions of citizens” contained a similar norm: in part 2 it was stated that the name of the association of citizens should consist of two parts – general and individual. The common name (party, movement, congress, union, union, association, foundation, foundation,

association, society, etc.) may be the same for different unions of citizens. The individual name of an association of citizens is mandatory and must be significantly different from the individual names of duly registered unions of citizens with the same common name” [6].

Finally, Article 10 of the “Union of Citizens’ Unions” also contained the concept of “union” – Part 1 of this article established that ‘unions of citizens have the right to establish or join unions... on a voluntary basis, “to form blocs and coalitions, to conclude agreements on cooperation and mutual assistance” [6].

Thus, it should be emphasized that the Law “On Unions of Citizens” in terms of application of the term “union” did not correspond to international, including European standards. As this discrepancy was not the only one, it was later updated – In 2011 the Law “On Political Parties in Ukraine” appeared, and the analyzed document continued to apply only to public organizations. Only shortly after the ruling of the European Court of Human Rights in the case of *Korotkiy and Others v. Ukraine*, in the framework of general measures provided for by the Law of 23 February 2006 “On Enforcement of Judgments and Application of the Case Law of the European Court of Human Rights”, the legal norms on public associations were also updated, but, as revealed above, the relevant terminology was not fully adopted by the Law of Ukraine of March 22, 2012 “On Public Associations”.

In a similar sense, the term “union” is used in bylaws (see, for example, the Procedure for conferences of public unions, election of members of the Supervisory Board of the public joint-stock company “National Public Television and Radio Company of Ukraine” and termination of their powers, approved by the National Council of Ukraine on television and radio broadcasting on May 21, 2015 № 707 (as amended by the decision of the National Council of Ukraine on Television and Radio Broadcasting of April 26, 2018 № 593)).

It should be emphasized that in the legislation of Ukraine the concept of “association” is used not only in the context of constitutional but also international law. Examples are documents related to Ukraine’s European integration aspirations (see, for example, the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other).

There are also examples in the Ukrainian legal literature of the synonymous application of the terms “union” and “association”. Thus, the authors of the Scientific and Practical Commentary to the Constitution of Ukraine in 2011 emphasized that “the purpose of forming associations of citizens is to implement, promote, protect rights and freedoms and satisfy political, economic, social, cultural and other interests. The European Court of Human Rights has repeatedly emphasized that the activities of associations are also a collective realization of freedom of expression” [7, p. 264].

Conclusion. It should be recommended to abandon the use of the concept of “association of citizens” in favor of the concept of “association” in Art. 36–37 of the Constitution of Ukraine and bring other laws and bylaws in line with the Constitution of Ukraine, first of all – the Law “On Political Parties in Ukraine”, where in Art. 2 “The concept of a political party” gives this definition. Prospects for further research are to use the same thesaurus used by foreign scholars working in EU countries when studying the right to freedom of association in political parties in Ukraine (see, for example, [8; 9]).

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