

Formation of Early National Constitutionalism in the Second Half of the 17th – Early 18th Centuries

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Abstract

The relevance of the topic lies in the need to disprove the pseudo-scientific statements of the political leadership of the Russian Federation concerning absence of a historical tradition of Ukrainian state-building and national constitutionalism. The article is aimed at analyzing the main sources of constitutional law of the Ukrainian state and peculiarities of the process of formation of early national constitutionalism from the second half of the seventeenth to the beginning of the eighteenth centuries. In the course of the study, the historical comparative and historical typological scientific methods have been used which have made it possible to establish the characteristics of formation of national constitutionalism. Based on the principle of historicism, the objective regularities of the emergence and development of constitutionalism in Ukraine have been revealed. In the article, the process of rise of early national constitutionalism from the second half of the seventeenth to the beginning of the eighteenth centuries has been researched on the basis of the analysis of the sources of constitutional law of Ukraine such as Cossack customary law, Magdeburg law, constitutional legal acts, and treaties. Being in progress, this process was based on its own state and legal experience, in particular, of Zaporizhzhia Sich, as well as the experience of European countries. The key features of constitutionalism were the recognition and statutory expression of rights and freedoms, introduction of a republican form of government, and mechanisms for limiting the state power. It has been proved that the sources of Ukrainian constitutionalism of the Hetmanate period reflect treaty socio-political traditions that existed in the countries of Central and Eastern Europe. The main treaty tradition, which became the basis for the development of Ukrainian constitutionalism, was an effort to protect the interests of the Ukrainian state and representatives of its national elite in various treaty

forms, which laid the foundations for legal regulation of social relations. It should be taken in consideration that the features of the process of formation of early national constitutionalism from the second half of the seventeenth to the beginning of the eighteenth centuries were as follows: it was in progress simultaneously with the revival of the Ukrainian state and national liberation war with the Polish-Lithuanian Commonwealth and Tsardom of Muscovy, as well as struggle of officers' groups for power, confrontation between officers and lower strata of Cossacks. The formation of early national constitutionalism took place under the conditions of significant human and material losses, which was called the Ruin in the national historical science. The prospect of further research into the formation of Ukrainian constitutionalism is caused by the fact that the national historical and legal science and the science of constitutional law have not developed a unified position on the time and features of its emergence and development yet.

Keywords: *constitutionalism; Ukrainian state; hetman; Cossack law; treaty.*

Формування раннього вітчизняного конституціоналізму у другій половині XVII – на початку XVIII ст.

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Анотація

Актуальність теми полягає в необхідності спростування псевдонаукових заяв політичного керівництва російської федерації про відсутність історичної традиції українського державотворення та вітчизняного конституціоналізму. Метою статті є аналіз основних джерел конституційного права Української держави та особливостей процесу формування раннього вітчизняного конституціоналізму у другій половині XVII – на початку XVIII ст. У процесі дослідження використано історико-порівняльний та історико-типологічний наукові методи, які дозволили встановити ознаки формування вітчизняного конституціоналізму. Спираючись на принцип історизму, виявлено об'єктивні закономірності виникнення і роз-

витку конституціоналізму в Україні. На основі аналізу джерел конституційного права України другої половини XVII – початку XVIII ст., таких як козацьке звичаєве право, магдебурзьке право, конституційні нормативно-правові акти та міжнародні угоди, досліджено процес виникнення раннього вітчизняного конституціоналізму. Цей процес відбувався, спираючись на власний державно-правовий досвід, зокрема Запорозької Січі, та досвід європейських країн. Основними ознаками конституціоналізму стало визнання й юридичне закріплення прав і свобод, запровадження республіканської форми правління, а також механізми обмеження державної влади. Доведено, що джерела українського конституціоналізму доби Гетьманщини відображають договірні суспільно-політичні традиції, які існували у країнах Центральної та Східної Європи. Головна договірна традиція, яка стала основою для розвитку українського конституціоналізму, полягала в намаганні захистити інтереси Української держави та представників її національної еліти в різних договірних формах, що заклало основи правового регламентування суспільних відносин. Особливості процесу формування раннього вітчизняного конституціоналізму у другій половині XVII – на початку XVIII ст. полягають у тому, що він відбувався одночасно з відродженням Української держави та національно-визвольною війною з Річчю Посполитою та Московським царством, боротьбою старшинських угруповань за владу, протистоянням між старшиною та козацькими низами, а також в умовах значних людських і матеріальних втрат, що у вітчизняній історичній науці отримало назву Руїна. Перспективи подальшого дослідження формування українського конституціоналізму зумовлюються тим, що вітчизняна історико-правова наука та наука конституційного права не сформували уніфікованого підходу щодо часу й особливостей його виникнення і розвитку.

Ключові слова: конституціоналізм; Українська держава; гетьман; козацьке право; міжнародна угода.

Introduction

The study of the history of emergence and formation of early national constitutionalism is an important direction of the historical and legal science which was initiated in the post-Soviet period. Given the multifaceted nature of the subject of research and relatively short time of its study, the national historical and legal science and the science of constitutional law have not developed a unified position on the time and features of rise of early Ukrainian constitutionalism yet.

The relevance of the topic lies in the need to disprove the pseudo-scientific statements of the political leadership of the Russian Federation concerning absence of a historical tradition of Ukrainian state-building and national constitutionalism. The article is aimed at analyzing the main sources of constitutional law of the Ukrainian state and peculiarities of the process of formation of early national constitutionalism from the second half of the seventeenth to the beginning of the eighteenth centuries.

Literature review

In the post-Soviet period, issues of the history of emergence of national constitutionalism have been the subject of discussion by such experts in the field of state history and law and constitutional law as Yu. Barabash, I. Boyko, S. Holovaty, V. Honcharenko, V. Zhuravskiy, V. Yermolaiev, V. Kolisnyk, V. Kravchenko, A. Krusyan, O. Myronenko, O. Petryshyn, V. Rechytskyi, I. Slovka, V. Tatsiy, Yu. Todyka, M. Tsvik, S. Shevchuk. The authors of the joint monograph published under the editorship of S. Holovaty [1] have touched upon the problems of the national constitutional tradition and history of development of national constitutionalism. In the joint monograph under the editorship of V. Skrypnyk, there have been revealed the results of the study of the history of Ukrainian constitutionalism, ideology of the current Constitution of Ukraine, issues of the development of constitutionalism in Ukraine as an integral component of the modern legal culture [2]. The issues of theory, history and practice of modern constitutionalism in the developed countries worldwide have been in the field of view of foreign scientists N. Barber [3], D. Grimm [4], M. Loughlin [5] and others. T. Suami researches the threat to global constitutionalism caused by the war of the Russian Federation against Ukraine [6]. From the second half of the seventeenth to the beginning of the eighteenth centuries, the aggressive foreign policy of the Tsardom of Muscovy was the analogous threat to the national constitutionalism.

Materials and Methods

The empirical basis of the research has included the legal acts of the Ukrainian state – Hetman B. Khmelnytsky's universals of 1648-1657, the Treaty of Ukraine with the Ottoman Porte of 1648, Ukrainian-Polish treaties: the Treaty of Zboriv of 1649, the Treaty of Bila Tserkva of 1651, the Treaty of Hadiach of 1658, the Treaty of Chudniv of 1660, and the Ukrainian-Moscow treaties: the Pereiaslav Articles of 1654 and 1659, the Hlukhiv Articles of 1669, the Konotop Articles of 1672, the Kolomak Articles of 1687.

In the course of the study, the historical comparative and historical typological scientific methods have been used enabling to establish the characteristics of national constitutionalism formation. The synergistic method has enabled the study of the state and legal system of Ukraine from the second half of the seventeenth to the beginning of the eighteenth centuries as it was self-developed and had a weakly deterministic character. Using the sociological method, the influence of certain population groups on the formation of main components of national constitutionalism have been analyzed. Based on the principle of historicism, the objective regularities

of the emergence and development of constitutionalism in Ukraine have been revealed. The authors have relied on the principle of objectivity, which ensures impartiality, non-commitment of judgments and conclusions, independence from the researchers' worldview orientations or ideological preferences.

Results and Discussion

Cossack customary law and regulatory legal acts of the Ukrainian state from the second half of the seventeenth to the beginning of the eighteenth centuries as sources of constitutional law

In the middle of the seventeenth century, the political, social, and national conditions for the restoration of its statehood finally matured in Ukraine. It is evidenced by the national liberation war of the Ukrainian people which was anti-feudal by nature and had several common features with European bourgeois revolutions [7, pp. 40-41]. By that time, the Ukrainian national elite had already gained some constitutional experience which created opportunities for the formation of early national constitutionalism.

The restoration of the Ukrainian state in 1648 initiated the process of legal formation of early national constitutionalism. The Cossack legal customs – "Cossacks' ancient rights and liberties" formed in *Zaporozhian Sich* (Host) – remained valid in Ukraine-Hetmanate and became one of the sources of constitutional law. In the process of state formation, the Hetman and general government were guided by the system of Cossack customary law – it was the method which had been tested during the sixteenth and the first half of the seventeenth centuries. The norms of customary law determined Cossacks' rights and duties, regulated the procedure for the activities of the general, regimental, and *sotnia* (Cossack squadron) governments. The use of legal customs of Zaporozhian and registered Cossacks contributed to the formation of such democratic, republican institutions in Ukraine-Hetmanate as electability, collegiality, term of office, controllableness and accountability of the Cossack self-government bodies. When developing legal acts of the Ukrainian state and concluding treaties, the Hetman and the general government were guided by Cossack customary law. Several legal customs acquired legal consolidation in treaties and legal acts of the Ukrainian state. In view of this, according to the scientists, Cossack customary law should be called "customary constitutions" [8, p. 254].

The Statute on Organization of Zaporozhian Host, adopted by the *Rada starshyn* (Council of Officers) in June 1648, became the first constitutional and legal act of the Cossack state. It assigned the status of both the commander of the Cossack Host and the head of state to the Hetman. The Statute on Organization significantly expanded the Hetman's executive

and judicial powers. This constitutional and legal act determined the authorities of colonels, *sotnyks* (lieutenants of Cossacks), *horodovi otamans* (regimental town Cossack chieftains) and other Cossack officials. The Statute on Organization of Zaporozhian Host of 1648 has not been preserved, although references to it can be found in B. Khmelnytsky's universals [9, p. 110].

Several Hetman's universals and charters that protected the rights and freedoms of representatives of certain social groups established the elective, representative, collegial character of public authorities and became the sources of constitutional law of Ukraine. Thus, for example, B. Khmelnytsky's Universal of 1654 prescribed the rules of taxation of foreign merchants and introduced the position of a state watchman to collect duties [9, pp. 143, 228]. In the Universals adopted in June 1657, the Hetman confirmed the "rights and freedoms" of the Pinsk County nobility and the existing system of administrative and judicial bodies [9, pp. 231-235].

The Ukrainian state recognized the validity of the Magdeburg law which regulated the activities of municipal government bodies. The democracy and universality of the Magdeburg law and the spiritual kinship of Ukrainians with European culture objectively determined its rapid spread on the Ukrainian lands. The Hetman's charters confirmed the right of towns to self-governance or granted them such a right [9, pp. 93-94, 133, 177-178]. The Magdeburg law regulated rights and duties of townspeople, provided for the formation of municipal government bodies through election, established the division of bodies into administrative (magistrate, city council), executive (city administration, boards), and judicial (the bench), made provisions for collegiality, term of office and accountability of municipal government officials. The Ukrainian state abolished national and religious restrictions on representation in municipal government. In Ukraine-Hetmanate, ethnic Ukrainians, Orthodox believers received free access to municipal government bodies.

International treaties of Ukraine-Hetmanate from the second half of the seventeenth to the beginning of the eighteenth centuries as a component of formation of early national constitutionalism

The treaties, which are called constitutions by the scientists [8, pp. 257, 269, 271], became an important component of the development of early national constitutionalism. They include the Treaty of Ukraine with the Ottoman Porte of 1648, the Treaty of Zboriv of 1649, the Treaty of Bila Tserkva of 1651, the Treaty of Hadiach of 1658, the Treaty of Chudniv of 1660 concluded with the Polish-Lithuanian Commonwealth as well as the Pereiaslav Articles of 1654 and 1659, the Hlukhiv Articles of 1669,

the Konotop Articles of 1672, the Kolomak Articles of 1687 entered into with the Tsardom of Muscovy [10, p. 20]. The procedure for concluding treaties was fixed in Cossack legal customs and stipulated a few mandatory stages: 1) adoption of a preliminary decision on the essentiality to conclude a treaty by the General *Rada* (Council); 2) drafting the treaty by the general government; 3) coordination of its draft by the contracting parties; 4) ratification of the treaty by the General Council.

However, in practice, when concluding treaties, the Hetman and the general government often violated Cossack customary law. Thus, without the participation of the General Council, the Hetman and the Council of Officers approved the Treaty of Zboriv of 1649, the Pereiaslav Articles of 1654, the Baturyn Articles of 1663, and the Moscow Articles of 1665. The Hlukhiv Articles of 1669, the Konotop Articles of 1672, the Pereiaslav Articles of 1674, and the Kolomak Articles of 1687 were coordinated by the General Council, although the composition of such councils was formed by officers, all the issues submitted to their consideration had been previously decided by the Council of Officers who imposed their decisions on Cossacks. Thus, to participate in the Konotop Council in 1672, colonels and *sotnyks* selected privileged, so-called "*znachni*" (important) Cossacks. About 2,000 Cossacks were admitted to the Kolomak Council in 1687, while the Cossack Host numbered 30,000 members according to the register. The officers formed initiative groups from among the members of the Council, thereby ensuring the adoption of the acceptable decision [11, p. 15].

According to the scientists, the conclusion of the Treaty between the Zaporozhian Host and the Ottoman Porte in July 1648 demonstrated the international recognition of the Ukrainian state [12, pp. 48-49; 13, pp. 11-13].

Characteristics of the formation of early national constitutionalism in the treaties of 1649-1660 between Ukraine and Poland along with Ukraine and Muscovy

The restoration of the Ukrainian state was legally formalized and consolidated in the Treaty of Zboriv of 1649. Ukraine acquired an autonomous status as part of the Polish-Lithuanian Commonwealth within the boundaries of Kyiv, Chernihiv and Bratslav voivodships (provinces), and the Hetman received the powers of the head of the Cossack Autonomy. However, the Hetman's jurisdiction extended only to the Cossack population of the specified voivodships. The Hetman was directly subordinated to the King of Poland. According to the Treaty of Zboriv, Poland recognized the right of the Cossacks to elect the Hetman by the General Council [14, p. 5]. Under Art. 2 of the Treaty of Zboriv of 1649, the Hetman formed

a 40,000 Cossack register, which had to be approved by the Council of Officers. Registered Cossacks did official military service, had the right to participate in elections, bear part in activities of the general, regimental and *sotnia* councils. General, regimental, and *sotnia* governments as well as other administrative and judicial bodies were formed from among the Cossacks. Later on, the quantitative composition of the Cossack register was considered one of the most important factors that testified to the extent of Ukraine's sovereign rights. In pursuance of the Treaty of Zboriv of 1649, the Ukrainian nobility was equalized in rights with the Polish nobility, the Metropolitan of Kyiv received the right to participate in the work of the Senate of the Polish-Lithuanian Commonwealth [14, pp. 5-6].

Despite a number of unfavourable conditions for Ukraine, such as limitation of the territory of autonomy, reversion of the Polish administration, limited Cossack register, in the aggregate, the Treaty of Zboriv of 1649 contributed to the establishment of Ukrainian national statehood and formation of early national constitutionalism. Subsequently, it was used as a legal source for further constitutional projects.

After the defeats of the Cossack Host at Berestechko and Bila Tserkva in 1651, the Hetman and the general government were forced to conclude a new treaty with Poland, known as the Treaty of Bila Tserkva, which confined Ukrainian autonomy to the territory of Kyiv voivodship and the Cossack register to 20,000 members [15, p. 70]. The Treaty of Bila Tserkva confirmed the autonomous status of Ukraine-Hetmanate as part of the Polish-Lithuanian Commonwealth, but at the same time it circumscribed its sovereign rights. However, after the victory at Batih in June 1652, the Treaty of Bila Tserkva of 1651 lost its validity and Ukraine acquired the status of a sovereign state. Titling B. Khmelnytsky can be considered acknowledgement of this state and legal status as "the Hetman with the Zaporozhian Host" in the Universals of 1652-1653, whereas after the conclusion of the Treaty of Zboriv, he was titled "the Hetman of His Royal Grace" [9, pp. 126-137].

The search for allies in order to form an anti-Polish coalition forced the Hetman government to maintain foreign policy ties with the Tsardom of Muscovy. As a result of lengthy negotiations, on January 18, 1654, the Pereiaslav General Council adopted a decision in favour of a military and political union with Muscovy. The draft of an agreement, named B. Khmelnytsky's March Articles, was approved by the Council of Officers in Pereiaslav, and in March 1654, it was ratified by the tsarist government.

Until now, there is no unanimity among researchers regarding the qualification of the state and legal status of Ukraine according to the

Treaty of Pereiaslav of 1654. According to several authors, it should be considered that the Treaty of Pereiaslav of 1654 had the character of a bilateral international legal act. The content of the Treaty was reduced to the support and provision of military assistance by Muscovy to the sovereign Ukrainian state, which meant establishment of protectorate relations. In pursuance of the Treaty, Ukraine retained its own government bodies, legislation, administrative-territorial system, army, finances, tax system and customs, the state border with the Tsardom of Muscovy and other countries, the right to foreign policy activities. B. Khmelnytsky's title in the Universals of 1654-1657, "the Hetman of His Tsarist Majesty", was of a formal nature and does not disprove the sovereign state and legal status of Ukraine [9, pp. 140-237].

However, after B. Khmelnytsky's death, Muscovy embarked on a path of incorporating Ukraine. This pushed Hetman I. Vyhovsky and his supporters to terminate the Treaty of Pereiaslav of 1654. The Cossack officers were increasingly oriented towards the idea of Ukraine entering the Polish-Lithuanian Commonwealth with the rights of autonomy, which led to the conclusion of the Treaty of Hadiach of 1658.

One of the authors of the Treaty of Hadiach of 1658 was Yu. Nemyrych, a member of the general government. He made a significant contribution to the development of national constitutional thought. Yu. Nemyrych defended the concept of creating a federation of the Polish Kingdom, Lithuanian, and Russian principalities as part of the Polish-Lithuanian Commonwealth. He developed the concept of a state leader on whom the state's position depends [15, p. 97].

The Treaty of Hadiach of 1658 provided for the abolition of the Church Union of Berestia of 1596 and recognized the right of the Ukrainian people to practice Orthodoxy freely. Orthodox metropolitans received the right to participate in the work of the Senate. The powers of the head of Ukrainian autonomy – the Grand Principality of Rus within the Polish-Lithuanian Commonwealth – were attached to the Hetman. However, the Treaty of Hadiach subordinated the Hetman to the King of Poland, deprived him of the rights to collect taxes and engage in foreign policy activities, as well as circumscribed the Hetman's judicial authorities (Art. 4-6) [13, pp. 22-23]. The conclusion of the Treaty was supported by Cossack officers as the main holder of constitutional ideas. The lower strata of Cossacks, who saw it as the threat of the renewal of serfdom and oppression of Orthodoxy, were opponents of the Treaty. Given this, a group of Cossacks, led by the Poltava colonel M. Pushkar and the *Kish* otaman Ya. Barabash, made a stand against the signing of the Treaty of Hadiach, and Hetman I. Vyhovsky was forced to suppress the opposition with the help of the Host. Therefore,

under V.A. Smolii, V.S. Stepankov, and other scientists, one should not exaggerate the importance of the Treaty of Hadiach of 1658 in the matter of building the Ukrainian state [8, p. 261; 16, p. 115].

At the same time, the vast majority of modern researchers evaluate the possibility of concluding the Treaty of Hadiach positively [17]. Thus, in particular, V. Shevchuk believes that the Treaty "was the culmination of Ukrainian state formation in the seventeenth century" [15, p. 189]. According to the authors, the conclusion of the Treaty of Hadiach of 1658 would have meant the rejection of the union with Muscovy, where the social and state system was based on the principles of eastern despotism, and the choice of the European democratic model of organizing state power was rested on the principles of constitutionalism.

Yu. Khmelnytsky tried to expand the sovereign rights of Ukraine and the Hetman's authorities, offering Muscovy a draft of a new treaty – the Zherdiv Articles. However, the Muscovy Embassy, taking advantage of the struggle of officers' groups to gain power, was able to impose the Articles of Pereiaslav of 1659 on Ukraine since they were more favourable to it. According to the Articles, the tsarist government recognized the Hetman's authorities provided for by Cossack customary law but prohibited him from appointing and dismissing officers and circumscribed his judicial powers. Art. 5 prescribed deployment of tsarist troops in six cities, which should be qualified as the direct intervention of Muscovy in the Ukrainian internal affairs. The Hetman was subordinate to the Tsar in the matters of military strategy. Art. 9 deprived the Hetman of the right to diplomatic relations [11, p. 87]. This norm was contained in all the subsequent Ukrainian-Muscovy treaties. Thus, according to the Pereiaslav Articles of 1659, Ukraine lost the status of a sovereign state and acquired an autonomous status as part of the Tsardom of Muscovy.

Having been defeated in the war with Poland, in 1660, Yu. Khmelnytsky was forced to conclude the Treaty of Chudniv with it. The new Ukrainian-Polish agreement was based on the Treaty of Hadiach of 1658, although the Treaty of Chudniv did not foresee the creation of the Grand Principality of Rus. The Hetman was completely subordinate to the King of Poland. His military, administrative and judicial powers were noticeably narrowed compared to those declared by the Treaty of Hadiach and the Pereiaslav Articles. The validity of the Ukrainian-Polish Treaty was not recognized by the Left Bank regiments of Ukraine. The Treaty of Chudniv of 1660 initiated the process of splitting the Ukrainian state into the Left Bank as part of the Tsardom of Muscovy and the Right Bank in the composition of the Polish-Lithuanian Commonwealth.

Formation of early national constitutionalism in the international treaties of Left Bank Ukraine from the 1760s to the beginning of the eighteenth centuries

The Moscow Articles of 1665, adopted during the hetmanship of I. Briukhovetsky, who was supported by the lower strata of Cossacks and Muscovy, abolished the Ukrainian autonomy, and therefore they should not be considered among the sources of Ukrainian constitutional law. As a result of the anti-Muscovy uprising of 1666, which was supported by the Right-Bank Hetman P. Doroshenko, I. Briukhovetsky lost his power and was executed, and the Moscow Articles of 1665 lost their validity. For a short time, P. Doroshenko managed to unite the Left-Bank and the Right-Bank Ukraine under his rule. However, the Truce of Andrusovo of 1667, concluded between the Tsardom of Muscovy and Poland without the participation of representatives from the Ukrainian government, legally established the split of Ukraine into the Left Bank and the Right Bank, as parts of the Tsardom of Muscovy and the Polish-Lithuanian Commonwealth, respectively.

Under the conditions of deepening political contradictions between the officers' groups and taking advantage of the support of Muscovy, at the beginning of 1669, the acting Hetman D. Mnohohrishny seized power on the territory of the Left Bank of Ukraine. With the support of Muscovy, the Hlukhiv Council elected D. Mnohohrishny as a full-time Hetman and concluded a new Ukrainian-Muscovy treaty. In pursuance of the Hlukhiv Articles, the observance of traditional Cossacks' rights was guaranteed. The tsarist government recognized the validity of Cossack customary law and the Hetman's powers provided for by it. Due to the split of Ukraine, the Treaty of 1669 reduced the Cossack register to 30,000 members. The tsarist voivodes (governors) were supposed to be located in five cities, whereas they were deprived of administrative and judicial powers. Tax collection was entrusted to the Hetman. Art. 17 gave the Hetman the right to send representatives to international negotiations if they concerned the interests of the Zaporozhian Host [11, pp. 118, 126].

On the initiative of officers, the Treaty of Hlukhiv of 1669 legitimized the custom which provided for the curtailment of the Hetman's powers by the Council of Officers. Art. 6 forbade the Hetman to carry out judicial proceedings single-handedly, dispose of estates, and petition the Tsar to grant nobility. Furthermore, Art. 19 provided for the introduction of control of the Council of Officers over the Hetman's activities [11, p. 120].

The Konotop Articles of 1672, which were concluded at the same time as the election of Hetman I. Samoilovych, copied the main provisions of

the Treaty of Hlukhiv of 1669. However, the Konotop Articles stipulated additional restrictions on the Hetman's powers. Art. 4 enshrined the right of the Council of Officers to control the Hetman's activities and resolve foreign policy issues. At the same time, representatives of the Muscovy garrisons were forbidden to interfere in the affairs of municipal government and the judiciary, and their functions were reduced to purely military ones [11, p. 137].

In 1687, during the election of I. Mazepa as the Hetman, the Zaporozhian Host and the Tsardom of Muscovy concluded the Treaty of Kolomak. Taking advantage of the terms of the Eternal Peace with Poland of 1686 and the Hetman's election, the tsarist government abridged the sovereign rights of Ukraine once again. Art. 11 proscribed the Hetman from dismissing general officers without the Tsar's sanction. The tsarist government established control over the Hetman and sent a rifle regiment to Baturyn. Art. 19 of the Treaty of Kolomak deserves our special attention as it formally prohibited the recognition of the Hetman as the head of the Ukrainian state [11, p. 170]. However, due to I. Mazepa's state policy, by the beginning of the eighteenth century the articles limiting Ukraine's sovereignty remained unimplemented. Although it was provided for by the Treaty of Kolomak of 1687, I. Mazepa did not restrict the rights of the Cossack officers' elite, the main holder of constitutional ideas, and it was important for the further development of Ukrainian constitutionalism [18, pp. 214-215].

At the beginning of 1708, the Zaporozhian Host concluded a treaty with Sweden which aimed to protect the sovereignty of Ukraine from the encroachments of Muscovy. At the same time, an international agreement with the Polish-Lithuanian Commonwealth which was based on the Treaty of Hadiach of 1658 was concluded. In March 1709, Ukraine concluded a new treaty with Sweden [16, pp. 208-209, 216]. The text of these treaties has not been preserved but researchers managed to reconstruct their main provisions. The treaties of 1708-1709 are mentioned in I. Mazepa's address to the people of Ukraine and in P. Orlyk's "Summary of the Rights of Ukraine", which gives us grounds for comparing them with the Treaty of Hadiach of 1658. Thus, in the Treaty of 1708, it was stated that the Swedish King had no right to interfere with the rights and freedoms of the Zaporozhian Host. Ukraine "on both sides of the Dnipro must be forever free from all foreign possessions" [19, pp. 42-44, 45-49]. The conclusion of the Ukrainian-Polish and Ukrainian-Swedish treaties of 1708-1709 was another attempt to establish the Ukrainian statehood and principles of European constitutionalism.

During the second half of the seventeenth and at the beginning of the eighteenth centuries the Ukrainian state was forced to resist the Polish-

Lithuanian Commonwealth and Tsardom of Muscovy which claimed its territory. And therefore, L.T. Biabovol's statement that the history of the formation of national constitutionalism is the history of the national liberation struggle of the Ukrainian people for independence is quite correct [20, pp. 19-20].

Conclusions

Thus, being in progress, the process of formation of early national constitutionalism from the second half of the seventeenth to the beginning of the eighteenth centuries was based on its own state and legal experience and experience of European countries. The main features of constitutionalism were the recognition and statutory expression of rights and freedoms, introduction of a republican form of government – the elective, representative, collegial nature of public bodies, and mechanisms for limiting state power.

The sources of Ukrainian constitutionalism of the Hetmanate period reflect the treaty socio-political traditions that existed in the countries of Central and Eastern Europe. The main treaty tradition which became the basis for development of Ukrainian constitutionalism was an effort to protect the interests of the Ukrainian state and representatives of its national elite in various treaty forms, which laid the foundations for the legal regulation of social relations.

Despite the violation of Cossack customary law at the moment of their conclusion, the Ukrainian-Polish and Ukrainian-Muscovy treaties became an important source of Ukrainian constitutional law. The agreements had full force and effect, regulated the territory of Ukraine, its state and legal status, activities of higher and local state authorities, administrative-territorial division, judiciary, and tax system. Based on Cossack customary law, the treaties enacted the rights and freedoms of registered Cossacks, townspeople and Orthodox clergy, as well as electability, collegiality, controllableness and accountability of authorities in the Ukrainian state. The treaties legitimized the Cossack custom which required collegial resolution of the most important administrative, military, financial, and judicial matters and established the Hetman's controllableness to the Council of Officers. Provisions on the sovereignty of Ukraine, rights and freedoms of the Cossacks and other social classes, circumscription of the Hetman's powers implemented in the treaties became an important component of the process of formation of early national constitutionalism.

It should be taken into consideration that the features of the process of formation of early national constitutionalism from the second half of the seventeenth to the beginning of the eighteenth centuries were as follows:

it was in progress simultaneously with the revival of the Ukrainian state and national liberation war with the Polish-Lithuanian Commonwealth and Tsardom of Muscovy, as well as the struggle of officers' groups for power, confrontation between officers and lower strata of Cossacks. The formation of early national constitutionalism took place under the conditions of significant human and material losses, which was called the Ruin in the national historical science.

Recommendations

In the authors' opinion, the prospect of further research into the formation of Ukrainian constitutionalism is caused by the fact that the national historical and legal science and the science of constitutional law have not developed a unified position on the time and features of its emergence and development yet. Researchers should pay attention to the sociological, cultural, ideological, religious, and other components of the process of formation of early national constitutionalism from the second half of the seventeenth to the beginning of the eighteenth centuries.

References

- [1] Holovaty, S. (Ed.). (2021). *Constitutional Tradition of Ukrainian Statehood*. Kyiv: Pravo Ukrainy.
- [2] Skrypnyk, V.L. (Ed.). (2023). *Ukrainian Constitutionalism: History of Formation and Development Prospects*. Kharkiv: Pravo.
- [3] Barber, N.W. (2018). *The Principles of Constitutionalism*. Oxford: Oxford University Press.
- [4] Grimm, D. (2016). *Constitutionalism: Past, Present, and Future*. Oxford: Oxford University Press.
- [5] Loughlin, M. (2022). *Against Constitutionalism*. Harvard: Harvard University Press.
- [6] Suami, T. (December 13, 2023). Dead or Alive? Global Neconstitutionalism and International Law After the Start of the War in Ukraine. In *Global Constitutionalism* (pp. 1-30). Cambridge: Cambridge University Press. <https://doi.org/10.1017/S2045381723000369>.
- [7] Lukash, S.Yu. (2014). Particular Issues of Formation and Development of Social Component of Ukrainian Constitutionalism during Cossack Era. *Problems of Legality*, 126, 29-45.
- [8] Tsvik, M.V., & Petryshyn, O.V. (Eds.). (2008). *The Legal System of Ukraine: History, State, and Prospects. Vol. 1: Methodological and Historical Theoretical Problems of Formation and Development of Legal System of Ukraine*. Kharkiv: Pravo.
- [9] Krypiakevych, I., & Butych, I. (Eds.). (1998). *Materials for Ukrainian Diplomatarium. Series I. Ukrainian Hetmans' Universals. Bohdan Khmelnytsky's Universals. 1648-1657*. Kyiv: Alternatyvy.
- [10] Myronenko, O.M. (1997). *History of Constitution of Ukraine*. Kyiv: In Iure.
- [11] Yermolaiev, V.M., & Kozachenko A.I. (2002). *Bodies of State Power and Administration of Ukrainian State (Second Half of the Seventeenth – Eighteenth Centuries)*. Tutorial. Appendix 2. Kharkiv: Pravo.
- [12] Myronenko, O. (1999). Evolution of National Constitutionalism "from Bohdan to Ivan" (1648-1687). *Journal of the National Academy of Legal Sciences of Ukraine*, 3, 45-54.

- [13] Slisarenko, A.H., & Tomenko, M.V. (1993). *History of Ukrainian Constitution*. Kyiv: Znannia.
- [14] Honcharenko, V.D. (Ed.). (2007). *History of Constitutional Legislation of Ukraine: collection of documents*. Kharkiv: Pravo.
- [15] Shevchuk, V. (1995). *Cossack State. Studies on History of Ukrainian State Formation*. Kyiv: Abrys.
- [16] Smolii, V.A., & Stepankov, V.A. (1997). *Ukrainian State Idea of the Seventeenth and Eighteenth Centuries: Problems of Formation, Evolution, and Implementation*. Kyiv: Alternatyvy.
- [17] Kraliuk, P.M. (2018). The Treaty of Hadiach: Political and Legal Aspects. *Journal of National University "Ostroh Academy". Law Series, 1(17)*. Retrieved from <http://lj.oua.edu.ua/articles/2018/n1/18kpmypa.pdf>.
- [18] Strukevych, O.K. (2011). Views on Law and Constitutional Ideas of Cossack Officers. In *History of Ukrainian Cossacks: Essays*. (Vols. 1-2). Vol. 1. Smolii, V.A., Bachynska, O.A., & Hurbyk, A.O. (Eds.) (pp. 203-216). Kyiv: Kyiv-Mohyla Academy.
- [19] Hrushevsky, M., Franko, I. & Kostomarov, M. (1991). *Summary of Rights of Ukraine*. Lviv: Slovo.
- [20] Riabovol, L.T. (2023). Ukrainian Constitutionalism: Theory, History, Practice, Formation in Context of European Integration. In Skrypnyk, V.L. (Ed.). *Ukrainian Constitutionalism: History of Formation and Development Prospects* (pp. 11-30). Kharkiv: Pravo.

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Suggested Citation: Kozachenko, A.I., & Perebyinis, Yu.V. (2024). Formation of Early National Constitutionalism in the Second Half of the 17th – Early 18th Centuries. *Theory and Practice of Jurisprudence*, 1(25), 58-73. [https://doi.org/10.21564/2225-6555.2024.1\(25\).298765](https://doi.org/10.21564/2225-6555.2024.1(25).298765)

Submitted: 19.03.2024

Revised: 10.04.2024

Approved: 04.06.2024

Published online: 28.06.2024