КОНСТИТУЦИОННОЕ И МУНИЦИПАЛЬНОЕ ПРАВО

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JUDICIAL LAW-MAKING AS A NECESSARY ELEMENT OF THE COMPETITIVENESS OF THE JUDICIAL AUTHORITY IN UKRAINE

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SUMMARY

This article deals with judicial law-making as a necessary element of the independence of the judiciary in Ukraine through the prism of discretionary powers of the court, which are implemented by the latter on the principles of the rule of law. On the basis of the analysis of the phenomenon of judicial law-making, it is proposed to divide it into types, and the mechanism for preventing the arbitrariness of the court in its implementation. The study found out that judicial law-making is the element of the judiciary independence in Ukraine, which affects the balance of government branches in the context of the mechanism of checks and balances.

Key words: judicial law-making, discretionary powers, judicial discretion, supremacy of law, independence of the judiciary, mechanism of checks and balances.

СУДОВА ПРАВОТВОРЧІСТЬ ЯК НЕОБХІДНИЙ ЕЛЕМЕНТ САМОСТІЙНОСТІ СУДОВОЇ ВЛАДИ В УКРАЇНІ

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АНОТАЦІЯ

У цій статі розглянуто судову правотворчість як необхідний елемент самостійності судової влади в Україні через призму дискреційних повноважень суду, які реалізовані останнім на засадах верховенства права. На основі аналізу явища судової правотворчості запропоновано її поділ на види та механізм запобігання свавілля суду при її здійсненні. У ході дослідження встановлено, що судова правотворчість є тим елементом самостійності судової влади в Україні, який впливає на баланс гілок державної влади в контексті механізму стримувань та противаг.

Ключові слова: судова правотворчість, дискреційні повноваження, судова дискреція, верховенство права, самостійність судової влади, механізм стримувань і противаг.

REZUMAT

Acest articol discută despre legiferare judiciară ca un element necesar al independenței sistemului judiciar în Ucraina, având în vedere puterea discreționară a instanței puse în aplicare mai târziu pe principiile statului de drept. Pe baza analizei fenomenului de elaborare a legii judiciare, sa propus divizarea acesteia în specie și un mecanism de prevenire a arbitrarității instanței în aplicarea acesteia. Studiul a constatat că legiferarea judiciară este elementul independenței sistemului judiciar din Ucraina, care afectează echilibrul ramurilor puterii de stat în contextul mecanismului verificărilor și balanțelor.

Cuvinte cheie: legiferare judiciară, puteri discreționare, discreție judiciară, statul de drept, independența sistemului judiciar, mecanismul controalelor și balanțelor.

Introduction. Modern democratic society is permanently evolving, and the same time the law is also evolving. The goal of the society development is to achieve the general welfare and harmony of mankind, while the purpose of law is the regulation of relations, based on the principles of goodness and justice. The evolution of law erases the boundaries between schools of law, so today we can observe the features inherent in the Roman-Germanic law school in the countries, which traditionally professed Anglo-Saxon traditions of law, and vice versa, in the Romano-Germanic tradition of the right to observe the features inherent in the Anglo-Saxon school of law. In this case, we can state the synergy of law schools for the sake of the future of democratic countries.

Not an exception to this is Ukraine, whose legal system relates to the Roman-Germanic legal family, because today a judicial precedent starts to play a more significant role in the regulation of social relations. Judicial precedent is the result of the law-making of the court, which arises when a court exercises discretionary powers on the basis of the rule of law. The fundamental basis of constitutional guarantees of the

law-making of the court is the rule of law, which gives the court the opportunity to coexist on a parity basis with other branches of government and have a real influence in the system of "checks and balances". The possibility to create a rule of law is one of the main functional elements of the power independence of the court. The analysis of legal literature on this issue has shown that not all scholars share the idea of the possibility of a court to create a rule of law, because such a function is enshrined in other branches of government, and the court performs only a function of enforcement in the administration of justice. However, according to the author, such an approach is based on a conservative understanding of the provisions of the Romano-Germanic school of law, and is refuted by the realities of the present, which will be proved in this work.

The purpose of the article. During the research, the author aims to investigate the constitutional principles of judicial law-making in Ukraine as a necessary element of the judiciary independence, its legal nature and the influence of regulating social relations in Ukraine, through the prism of discretionary powers of the court, which are implemented on the basis of the supremacy of law.

Statement of the main provisions. Absolute positivism, as an inheritance of the Soviet school of law, for a long time played a dominant role in Ukraine, which led to the formation of not a «legal» system of law in Ukraine, but «lawful». The principle of the rule of law was considered exclusively in the theoretical aspect and identified with the lawfulness of the existence of judicial law-making was denied, because it did not correspond to the existing legal doctrine.

The situation began to change after the adoption of the Constitution of Ukraine by Verkhovna Rada of Ukraine on June 28, 1996 [1], which consolidates the division of state power in Ukraine into legislative, executive and judicial (Article 6), as well as declares the principle of the rule of law in Ukraine (Article 8).

Taking into account the legal nature of the Constitution of Ukraine, as a limiter of state power arbitrariness, it did not favor any of the branches of power, but exclusively allocated powers among them in order to create a balanced society and to make it impossible to usurp power. The mentioned balancing is ensured through the rule of law, which in its nature is an abstract category, and also provides the court with the possibility of its own discretion in the administration of justice.

The practical implementation of these provisions of the Constitution of Ukraine gave the court the opportunity to manifest itself as a power that has a legitimate influence in the system of coordinates built in the concept of «checks and balances.»

The theoretical basis for dominating the rule of law in Ukraine was the work of Western European and American scholars who gave priority to the regulation of social relations as a natural rather than a positive right. In particular, W. Blackstone noted that human laws are ineffective if they contradict «natural law» [23, p. 44], and he also believed that a judge or other official of a State with powers of law enforcement does nothing wrong with the exercise of a natural right that can not be found in written sources. When a judge comes to conclusions that are not necessarily based on positive law, he applies the right that forever exists in society, rather than creates a new law. Thus, a judge who is not limited in his activity by «laws in books», goes farther the written text, acts not in opposition, but in accordance with the law [23, p. 44-49].

A special role in the court, as a power, is played by the law-making, which arises when the court exercises discretionary powers on the basis of the rule of law.

The driving force for the development of legislation in Ukraine was the inability of the legislative branch to respond to the challenges of society on time, and therefore, the judiciary, being the most mobile among the authorities in the system of «containment and counterbalance», was the first to respond to the change of approaches to law as solely positive law and began to complete the rules of law where there were conflicts and to change the norms that contradicted the fundamental rights of the person guaranteed by the Constitution of Ukraine and the Convention on Human Rights and Fundamental Rights and Freedoms.

Contemporary Ukrainian science the term «law-making» comprehends in the same way. In particular, M. I. Koziubra understands the law-making activity as a special type of activity inherent in the specially authorized bodies, in formulating, changing or abolishing legal norms, which are based on the needs and interests of people [12, p. 192], O. R. Dashkovska calls law-making the organizationally regulated, special form of activity of the state or directly to the people, as a result of which the needs of social development and the requirements of justice acquire the legal form, which find its expression in a certain source of law (normative act, precedent, customs, etc.) [13, p. 321], N. M. Parkhomenko under the lawmaking understands one of the stages of law-making, the legal form of the state and the authorized organizations for the adoption, modification, suspension and abolition of legal norms [20, p. 355].

Consequently, under the lawmaking it is necessary to understand the activities of the officially authorized entity in relation to the creation, modification, abolition of legal norms on the basis of the rule of law.

Judicial law-making is a form of law-making, which features all the features of law-making, including such as: the implementation of a specially-authorized entity; the focus on the creation, modification or abolition of regulatory requirements; recognition of its procedural-procedural activity; consolidating its results in certain legal acts-documents [17, p. 50]. In this case, lawmaking is characterized by specific features that distinguish it from other types of law-making, as well as from other types of legal activities: the implementation of specially-authorized judicial authorities; connection with the implementation of the functions of the judiciary; implementation in a special procedural form; the direction of law-making activity on the establishment of legal regulations; their fixation in judicial law-making acts [19, p. 1].

According to the provisions of the Constitution of Ukraine, the legislator did not directly grant the lawmaking court. However, such a court activity is inextricably linked with its functions of administration of justice, judicial control and judicial constitutional control, during which the court eliminates gaps in the law, as well as identifies and eliminates conflicts of laws with the Basic Law of Ukraine.

As M.I. Koziubar noted, overcoming the gaps in legislation, resolving conflicts, and non-compliance of existing normative regulations with fundamental human rights are those exceptional cases in which the court may, acting on the basis of an appropriate argument, act as a subject of law-making [12, p. 202].

Judicial law-making is not only a leverage of the court's influence in the system of checks and balances, it is above all a guarantee of the protection of fundamental human rights, which, due to unfair encroachments on them, require immediate restoration.

S.V. Shevchuk notes the importance of judicial law-making in his work. Thus, according to him, the legislative process was aimed to protect the constitutional human rights as much as possible, when judges, not only from constitutional norms, but also from the principles of justice, reasonableness, natural law, compliance with moral criteria, social necessity and the goals of constitutionally-legal regulation in society. Therefore, the constitutional terms «rule of law», «proper legal procedure», «freedom», «equality», «justice», etc., do not have the oblig-

atory legal force and independent legal significance without proper judicial interpretation in the process of constitutional and general judicial proceedings [22, p.12].

Judicial law-making is an intellectual process of creating a new, just, qualitative, which will have a positive effect on non-regulated laws, or not regulated in a just way relations in a civilized society.

Judicial law-making, as well as judicial discretion, most effectively manifest themselves within the functional element of the independence of the judiciary and they are the levers of the influence of the court in the system of checks and balances that make it impossible to absolutise power in one's hands.

In this case, lawmaking is a derivative legal phenomenon of judicial discretion, which is implemented on the basis of the rule of law.

Since judicial discretion has different grounds for its existence, the law-making process has different origins.

Thus, judicial dissent in Ukraine is of three types:

1) discretion is directly specified in the law, which gives the court the opportunity to choose one of the variants of behavior, which are provided by the law (procedural discretion);

2) discretion given to the court in order to eliminate gaps in law or overcome conflicts (analogy of law and law);

3) discretion based on the priority of fundamental human rights over the law.

Judicial lawmaking exists within discretion that is given to the court in order to eliminate gaps in law or overcome conflicts (analogy of law and law) and discretion based on the priority of fundamental human rights over the law.

The constitutional prerequisite for judicial law-making is the provisions of Articles 3, 8, 129 of the Constitution of Ukraine [1], in particular: human rights and freedoms and their guarantees determine the content and direction of the state's activities; the principle of the rule of law is recognized and in force in Ukraine; the judge, while administering justice, is independent and governs the rule of law.

Thus, judicial litigation existing within the limits of discretion given to a court with the purpose of eliminating gaps in law or overcoming conflicts (analogy of law and law) is subsidiary to law, since its purpose is to eliminate gaps in legislation on the basis of a certain algorithm of actions that is an analogy of law and law. The aforementioned type of judicial law-making does not contradict and does not refute the law, manifests itself exclusively in the system of coordinates established by the legislature, is to a large extent an element of the functions of justice, and not judicial control, as a result of which its influence on the balance of state power in Ukraine is not essential.

The legal basis for this type of judicial law is the provisions of Article 7, paragraph 6, of the Code of Administrative Justice of Ukraine [5], Article 10, Part 9 of the Civil Procedural Code of Ukraine [7] and Article 10, Section 10 of the Commercial Procedural Code of Ukraine [4], according to which, in the absence of The law regulating the relevant legal relationship, the court applies the law governing such relationships (analogy to the law), and in the absence of such a law, the court proceeds from the constitutional principles and general principles of law (analogy rights).

As an example of this type of judicial law-making, the Chernivtsi Regional Administrative Court judgment of 22.12.2017 in the case No. 824/1034 / 17 can be brought against the person's 1 claim to the State Architectural and Construction Inspection in Chernivtsi Oblast to declare illegal and cancel the ruling. By this ruling, the court, in connection with non-regulated Code of Administrative Procedure of Ukraine, the actions of the court in case of receipt of an administrative case that falls within the subject-matter of another court, applied the analogy of the law and on the basis of the provisions of paragraph 2 of Article 29, paragraph 1 of the Code of Administrative Justice of Ukraine (actions of the court in case of receipt of an administrative case belonging to the territorial jurisdiction of another court), transferred the case to another court to which subject jurisdiction it belongs [10].

As to judicial law-making, which exists within the limits of discretion based on the priority of fundamental human rights above the law, it should be noted that it has the character of restorative legal, as the court, through judicial control and judicial constitutional control, guided by the norms of the Constitution of Ukraine and international treaties, the consent to be bound by the Verkhovna Rada of Ukraine creates new norms which are based on the principles of the rule of law, replacing existing non-legal norms of the current legislation of the Uk raini That is, the court actually restores the legal regulation of social relations, which were previously regulated not by law.

The legislative precondition for the implementation of this type of judicial law-making is including provisions of Article 7, paragraphs 4, 5 of the Code of Administrative Justice of Ukraine [5], parts 4, 6, 8 of Article 10 of the Civil Procedural Code of Ukraine [7] and paragraphs 4, 6, 8 of Article 11 Economic Procedural Code of Ukraine [4] according to which, if the court concludes that a law or other legal act is contrary to the Constitution of Ukraine, the court does not apply such a law or other legal act, and applies the norms of the Constitution of Ukraine as rules of direct action; the court applies, in the cases before it, the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and its protocols, the consent to be bound by the Verkhovna Rada of Ukraine, and the practice of the European Court of Human Rights as a source of law; if an international treaty, the consent to which the Verkhovna Rada of Ukraine has made binding, establishes rules other than those established by law, then the rules of the international treaty of Ukraine will apply.

It is precisely in the realization of this type of litigation that the principle of rule of law bestows itself, which refutes the unjust postulates of positivism and restores the violated right of a person on the principles of goodness and justice.

For this reason, it is worth giving just and accurate words SV. Shevchuk, according to which Ukrainian judges are only beginning to realize that the true independence of the judiciary begins with the application of the rule of law in the process of the administration of justice, which can not be identified with the principle of the rule of law as blind, mechanical obedience to all the normative regulations of the state power [22, p. 49].

The criteria for distinguishing between legal and non-legal laws must be established by the judiciary, which is most capable of doing so. This is especially true of constitutional courts, because in contemporary science of constitutional law it is considered that all these basic principles and ideals as criteria of distinction are contained in the constitutions or are organically linked with its text and are «disclosed» by the courts in the process of interpreting their provisions. And all this is nothing more than judicial law-making [22, p. 53].

As an example of the implementation of this type of judicial lawmaking, one can instruct a judge of the Popasnyansky district court of Luhansk region dated April 5, 2017, in the case No. 423/369 / 17 on bringing to the administrative responsibility of individuals 1 part 1 of Article 164 of the Code of Ukraine on Administrative Offenses (violation of the procedure of proceeding economic activity) in which the court came to the conclusion that the administrative penalty may be imposed below the lower limit, if the statutory enforcement is clearly unfair. In particular, in accordance with the content of the ruling offense provided for in Article 164 of Part 1 of the Code of Administrative Offenses [6], a pensioner of 1944, who receives a pension of less than UAH 1,500, committed a pension, in connection with which the court considered this provision to be punishable as a fine in the amount of 17,000 to 34,000 UAH.

obviously unfair. Justifying its position, the court applied Articles 1, 8, 129 of the Constitution of Ukraine, the Constitutional Court of Ukraine decision No. 15-rp / 2004 dated November 2, 2004 in a case under the constitutional petition of the Supreme Court of Ukraine regarding the compliance of the Constitution of Ukraine (constitutionality) with the provisions of Article 69 of the Criminal Code of Ukraine the case of imposing a more lenient sentence by the court) [8], and mentioned the words of Aristotle and the position of the judges of the United States Supreme Court, expressed in a separate opinion in the case of Petrella v. Metrogoldwyn-Mayer, Inc., et al. [9].

The chosen by the judge approach to the case in this situation is based on the principles of an anti-formalist revolution in Europe, which resulted in the recognition of a new «creative» and active role of a judge in law enforcement and an absolute denial of the role of a judge as «the mouth of the law.» This process was accelerated by laying the principle of the rule of law in the basis of modern justice. The result of the revolution was the «discovery» of the fact that the activity of a judge is much more complex and more complex than it is customary to assume in accordance with traditional scientific doctrines. At least, the activity of a judge can not be reduced to the simple application of deductive logic (method of deduction) in making decisions without taking into account factors of an economic, political, and moral nature, that is, it can not be absolutely «neutral» [22, p. 51].

However, the implementation of a law-creating court that exists within the discretion of a priority-based fundamental human right over the law may give rise to arbitrariness of the court, since it is based on abstract categories such as the rule of law, justice, goodness, natural law, morality, and tradition – understanding which depends on the individual characteristics of the judge. Consequently, there is a risk of judicial arbitrariness, which will lead to an imbalance of state power in Ukraine and discredit the court as a power.

In addition, it should be mentioned that the law on the implementation of judicial law-making, which exists within the limits of discretion based on the priority of fundamental human rights above the law, the legislator of the Law of Ukraine «On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Justice of Ukraine and other legislative acts «dated October 3, 2017, No. 2147-VIII [3], the courts of all instances in Ukraine that carry out administrative, civil and economic proceedings, which may also display ITIS stability on regulation of social relations.

However, the existing procedural codes contain safeguards to eliminate judicial arbitrariness in the courts of general jurisdiction in the course of judicial law-making, which exists within the limits of discretion based on the priority of fundamental human rights over the law. In particular, paragraph 2 of part 4 of Article 7 of the Code of Administrative Justice of Ukraine [5], paragraph 2 of part 6 of Article 10 of the Civil Procedural Code of Ukraine [7] and paragraph 2 of Article 6 of Article 11 of the Economic Procedural Code of Ukraine [4] contain a rule according to which if the court concludes that a law or other legal act is contrary to the Constitution of Ukraine and has not applied such a law or another legal act, and applies the norms of the Constitution of Ukraine as rules of direct action, it shall, after making a decision in a case, appeal to the Verkhovna Rada On the Court to address the issue of bringing Ukraine to the Constitutional Court about the constitutionality of a law or other legal act, a decision on the constitutionality of which is under the jurisdiction of the Constitutional Court of Ukraine.

So, having analyzed the provisions of the procedural codes of Ukraine, it should be concluded that the courts of general jurisdiction of all instances in the course of judicial law-making which exists within the limits of discretion based on the priority of fundamental human rights over the law carry out primary judicial law-making, the legitimization of which takes place only after the adoption of the Constitutional The court of Ukraine is the decision, which recognizes the unconstitutional law, which in its decision referred to the court of general jurisdiction.

In the event that such a decision is not made by the Constitutional Court of Ukraine or the refusal by the Supreme Court to submit a submission to the Constitutional Court of Ukraine regarding the constitutionality of the law or other legal act, the activity of courts, using the provisions of Article 7, paragraph 4, of the Code of Administrative Justice of Ukraine [5], Article 10, Section 6 of the Civil the Procedural Code of Ukraine [7] and Section 6 of Article 11 of the Economic Procedural Code of Ukraine [4] can not be recognized as judicial law-making, and such court decisions themselves are subject to cancellation. Consequently, the legislator provides in the procedural laws the filters that will eliminate judicial arbitrariness in the implementation of judicial law-making, which exists within the limits of discretion based on the priority of fundamental human rights. It should be noted that the fact of the annulment of the court decision, which created a new norm, does not refute the law-making nature of the court's activity in resolving the litigation, since the laws, adopted by the legislative body, are also subject to cancellation, losing the validity.

At the same time, the author believes that such filters are not enough to prevent judicial arbitrariness, as procedural control by higher courts does not suffice, while reviewing a case in which a new norm is set out.

Therefore, in order to make this impossible, it is necessary to develop a unified algorithm for the implementation of judicial law-making, which exists within the limits of discretion based on the priority of fundamental human rights above the law. Alternatively, it is possible to borrow a three-component test developed by the European Court of Human Rights to assess the justification for interference with the rights of individuals guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms of 04.11.1950 [2]. In particular, when assessing the interference with the rights of a person, the European Court of Human Rights, checks whether interference with the rights guaranteed by the Convention occurred «in accordance with the law», whether the «legitimate aim» of the interference was pursued and whether the interference was «necessary in a democratic society» an urgent public need, was proportional to the legitimate aim, and the reasons given for its substantiation were sufficient and relevant) [24].

The facts presented in this paper may lead to the idea that the judiciary, as a result of its opposition to the absolutisation of the legislature, itself usurps the power, thus unbalancing the system of checks and balances. However, this view is false, because in the concept of «checks and balances», the judiciary is not an active participant in social relations, which can independently initiate state changes. By its functional purpose, it acts as an arbiter between the legislative and executive authorities, as well as in case of violation of the last fundamental rights, freedoms and interests of a person or rights and interests of a legal entity, and is an integral institution of the mechanism of social regulation of social relations.

Such «imaginary passivity» of the judiciary is due to its legal nature, the guardian of the rule of law and the restorer of justice. For the functional activation of the court for the implementation of justice, judicial control in the field of public-legal relations, judicial constitutional control, the official application of the relevant subject of legal relations is necessary, and only in this case the court manifests itself as the authority that regulates the existing legal conflict, including by creating a new norm.

Judicial law-making is simultaneously a «sword» of the court, in protecting the constitutional rights and freedoms of individuals from unlawful encroachments, and a shield in the

system of «checks and balances» from the absolute power of the legislative or executive power.

Judicial law-making should not be identified with a judicial precedent, which is its possible result. Law-making is carried out by all courts in Ukraine, but as the precedent it can be considered only the decision of the Constitutional Court of Ukraine and legal positions, which are set out in the decisions of the Supreme Court on the basis of their general validity and calculation for long-term and repeated application. It should be noted that the regulation of legal relations with the judicial precedent in Ukraine is not a panacea for the stable functioning of the legal system of Ukraine, since in the countries of the traditional application of the judicial precedent there are a number of shortcomings in its application.

As an example of this, I will quote the words of English judge Lord Buckley: «I am not able to substantiate the correctness of the decision that I intend to announce. But I am bound by a precedent, which I must observe «[16, p. 54].

Judicial law-making should also be distinguished from the court's interpretation of the rules of law, since law-making is the creation of a new, and the interpretation of this explanation of the existing one. Although on this occasion in the legal science there are ongoing discussions as to whether the court interprets the law as a law-making activity. In particular, such scholars as O. N. Vereshchahin [11, p. 41], S. P. Cherednichenko [21, p. 174] include the interpretation of the right to law-making activity, while VM Kartashov in his work, in a sharp form refutes this position, and notes that «only by virtue of professional illiteracy one can include in the content of law-making an official interpretation and other types of legal activity by nature» [15, p. 359].

Conclusion. When reforming the legal system in Ukraine it is not necessary to blindly borrow dogmas that are not inherent in the Romano-Germanic law school, it is necessary to act sensibly, taking into account the intellectual potential of the subjects of law-making and our mentality.

Legislation and law-making can and must exist in Ukraine as parts of a single whole, complementing each other. For this reason, it is advisable to quote the words of the famous Russian civilist N. A. Pokrovskyi, who at the beginning of the 20th century said: «The law and the court are not two opposing forces, but two equally necessary factors of jurisdiction. Both of them have the same goal – the achievement of a materially fair; the law for this achievement requires a living complement and cooperation of a judge. One should not be afraid of this creative activity of a judge: the judge is not less than the legislator, the carrier of the same social justice» [18, p. 94-95].

Competition among the branches of power is destructive, and overcoming it is possible only with the clear regulation of the powers of the legislative, executive and judicial branches of power.

Judicial law-making is a necessary attribute of the judiciary, which, within the limits of judicial discretion, enhances the role of the court in the system of checks and balances and prevents absolutisation and power. However, it can not be arbitrary, and therefore there should be filters that will make such arbitrariness impossible. Existing procedural codes within the limits of procedural or constitutional control are precluded by fences of arbitrariness of a court in the course of judicial law-making, as it takes time to implement them. Therefore, it is necessary to develop a unified algorithm for the implementation of judicial law-making, which exists within the limits of discretion based on the priority of fundamental human rights over the law.

Finally, I will quote the words of S. Z. Zimanov, which poetically but practically accurately characterize the need of society in an independent judiciary: «... rise in court power, preserve the judiciary, save the judiciary - the salvation of democracy, the Fatherland» [14, p. 27].

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