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Instrumentalism of Law-making in the context of the functioning of the modern state

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■ **Abstract.** The effective functioning of any modern state and its ability to fulfil its assigned tasks are contingent upon the implementation of appropriate organisational and legal mechanisms for its activities. In the 21st century, the tasks of the state, the directions of its influence on societal relations, and its primary and ancillary functions are undergoing transformation, necessitating urgent theoretical comprehension of the inherent functions of the state. The purpose of the study is to analyse the instrumental characteristics of the legislative process as a crucial aspect of state activity. To examine the instrumental characteristics of law-making in the aspect of functionalism of the modern state, separate methods of scientific search were used, namely: dialectical, functional analysis, comparison, historical and legal, formal-logical, formal-legal, and system-structural. The obtained results emphasise that the transformation of the state's tasks and its impact on society are consequences of its role as a social phenomenon, primarily responsible for ensuring the integrity and stable development of society. It is established that the effectiveness of any state depends on a complex set of factors, with a correct determination of tasks, methods, and means being paramount for achieving the objectives faced at specific stages of its development. Consequently, state functions are an immanent dynamic characteristic closely linked with the activities of state authorities, especially legislative bodies. The creation of legal norms, compared to other forms of state activity, always aims to regulate specific areas of societal relations, which in turn constitute the essence of the state's political, economic, informational, and other functions. It is pertinent to understand legislation law-making as a legal form of ensuring the realisation of state functions. Such a conceptual approach enables authorised subjects of state power to identify, legitimise, and influence the directions through which the state intervenes in specific spheres of societal relations, adjusting their essence and content

■ **Keywords:** state functions; forms of state function realisation; goals and tasks of the state; legislation law-making as an instrument; legal regulation; value of law

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■ Introduction

Given the exceptional circumstances (martial law) and the intensification of integration processes in Europe against the backdrop of the war in Ukraine, the problem of transforming the content of individual state tasks related to legal influence, legal regulation, legislation law-making, and the effectiveness of such activities has become particularly relevant. Globalisation and integration processes that have taken place in the world since the mid-20th century, particularly the formation of various intergovernmental associations and transnational corporations, have altered traditional perceptions of the state and its purpose in society. This includes its fundamental properties and characteristics, necessitating the modernisation of the corresponding doctrine.

According to G. Hrystova (2018), the sphere of legal regulation involves the authority of state power bodies to substantiate the use of all available means and take appropriate measures sufficient to ensure, implement, and protect rights; under any conditions, it aims to transform the values of law into regulations, thus preserving the inherent value of the law. The value of law, as a product of legislation law-making, originates from the state's values, while its emergence, as stated by V. Topchiy *et al.* (2022), results from the will of the state and the functioning of state power directed toward ensuring legal order in society. N. Chirakitnimit *et al.* (2022) affirm that state power is a significant factor in solving problems related to changes or reforms.

Given the constant geopolitical transformations in the modern world, the significance of the results of legislative activities of international law entities and the value potential of international regulation for the global community and individual states cannot be overlooked. Recently, the legal values of the European community have gained particular importance for the essence and content of legislative activities in Ukraine. These values are transmitted into national legislation and serve as influential tools in the struggle for freedom, democracy, human and national dignity, and the defence of Ukraine's respect as a sovereign and independent state. N. Kaminska (2022) argues that, thus, as a result of law-making and corresponding legal realisation, Ukrainian legal values are acculturated within the framework of Ukraine's European integration.

The issues related to state functions, their essence, content, classification, forms of realisation, and the differentiation of the concept of state functions from the functions of state bodies are still the subject of discussion. However, there are not many comprehensive theoretical monographs on this issue. In particular, these are just a few papers worth paying attention to over the past two decades.

The purpose of the study by V.P. Plavych (2017) is a theoretical-methodological and philosophical-

legal analysis of legislation law-making. Among the fundamental works in the field of law formation and legislative activities, T.O. Didych's (2017) study focuses on the theoretical-legal and practical foundations of law formation in Ukraine, emphasising the analytical development and theoretical justification of a communicative-institutional approach to its understanding. Despite these studies, there are not enough papers in the scientific discourse devoted to a thorough analysis of the phenomenon of legislative activities as one of the functional characteristics of a democratic modern state. The complexity and controversial nature of this issue require clarification of the instrumental properties of legislative activities as one of the areas of state activity, which is directly the purpose of the study.

Given that the methodology of science is primarily understood as the doctrine of scientific methods of cognition or a system of scientific principles underlying the research and justifying the choice of means, techniques, and methods of cognition (Kolodiy & Kolodiy, 2021), the methodological principles of investigating ontological characteristics of legislative activities in the context of functionalism of the modern state became a complex of principles, general scientific, and special methods of cognition. These methods include comprehensive study, dialectical, hermeneutic, formal-logical, comparative, structural-functional, and classification methods, etc.

The analysis of the functions of the state and legislation law-making, as one of its forms of activity, was conducted through philosophical categories such as essence, content, form, structure, and others. The application of the dialectical method allowed defining the basic properties of the state's functions and legislation as phenomena of social reality and legal categories that develop, interrelate, and interact. The use of the structural-functional method investigated the content of legislation law-making and the functions of the state, their conditioning, and purpose. The comparative method enabled the comparison of concepts such as "goal", "task", "role", "purpose" and "function" of the state. The method of classification allowed the systematic categorisation of criteria for dividing state functions, revealing their features.

■ Functions of the State: Essence, Content, and Forms of Implementation

In modern science, the concept of "function" is used in various meanings, such as "task", "role", "purpose", "meaning", "goal" and others. This diversity requires clarification. Therefore, a thorough analysis of the functions of the state phenomenon, their content, classification, forms of implementation, and differentiation from the functions of state bodies is necessary. It is crucial to note that the conceptual

framework of the theory of functions, in general, and the theory of state functions in domestic legal science, was formed in the mid-60s of the 20th century. According to this concept, the state arises from the struggle between antagonistic classes and thus has a class nature. Consequently, its essence, tasks, and purpose in society were defined through the areas of state activity. Nevertheless, the general social dimension of the state was not considered. Such an approach in the prism of modern political and legal reality requires development.

Modern researchers, in particular I.I. Tkachenko (2020), define the functions of the state through the concept of activity, enriching it with various characteristic features. They emphasise the continuity of state activity in specific spheres, which is objectively determined by societal development and the activity that serves as a means to accomplish the state's tasks and the regularities of its organisation, reflecting its essence and possibilities on the international stage. Therefore, the functions of the modern state are understood as institutionalised and normatively formalised areas of state activity in key areas of societal life (economic, social, legal, foreign policy, cultural, ecological, etc.). These are fundamental spheres of social relations, which, due to their objective needs, are mediated by specific functions, determining societal functions that are socially significant and defining. The state, as a complex organised social system with internal and external dimensions, accomplishes its tasks by engaging in activities in these dimensions.

The functions of the state are predominantly analysed within a praxeological approach by emphasising the activity aspect of its essential manifestation (Loshchikhin, 2016). Activity is a form of communicative interaction that serves as a tool for organising state power. The transformation of state-citizen relations lies in improving communication through normative and institutional principles, promoting stable interaction to solve common tasks. Contemporary legislation law-making represents a communicative and institutional model of interaction emerging from this process (Dzyavelyuk, 2016; Bobrovnik *et al.*, 2019).

When defining the functions of the state, the state's objective as a societal institution holds paramount importance because the functions of the state serve as its means and capabilities to achieve this objective. Similar to the objective of any societal phenomenon, the objective of the state contains, in its ideal form, the result that can be achieved through its functions. In addition to the goal, the concept of the "tasks of the state" is included in understanding the term "functions of the state" as a complex phenomenon. Currently, a common approach in legal science involves differentiating between the state's activities as tasks and functions. It is asserted that these are

interconnected yet distinct concepts. Accordingly, the "tasks of the state" are interpreted as the spheres of societal relations that require state intervention and the realisation of its objective, while the "functions of the state" are defined as specific directions of its activity ensuring the achievement of the state's tasks. Considering the systemic nature of societal relations, the functions of the state should also be viewed as the subject of systemic analysis, allowing the determination of the state's activity, the purpose of which is to regulate societal relations through managerial influence, ensuring their stability and development (Melnychuk, 2018).

The tasks of the state serve as the external (defining) factor regarding the state's functions. They facilitate their realisation. Thus, the tasks of the state are the means to achieve the ultimate or existing objective of the state, which is to be accomplished independently or with the assistance of other public authorities. In the plane of the functions of the state, there is also the question of their importance, i.e., the objective necessity in the development of social relations, about the scope of their action. Thus, the concept of the functions of the state has a complex elemental meaning because it includes the purpose of the state in society, the nature and spheres of influence on social relations. This connection is a direct factor influencing the formation and development of the state's functions at any historical stage and under any legal regimes. In addition, this influence is mutual. That is, the main areas of state influence on public relations always occur in accordance with their social purpose or role. Considering this, the social purpose of the state characterises its role in different historical periods and in the future; the focus is on ensuring the implementation of socio-economic and political reforms, and so on.

Furthermore, the priority of state functions is determined by the importance of the goal and the tasks defined in accordance with it, which are solved by the state in different historical stages. Thus, in the objective realities of the formation and functioning of the state, certain areas of its activities may acquire greater or lesser significance, while others are always implemented, regardless of the priorities set by the state at this historical stage of its development (Volynets, 2012). Accordingly, in extraordinary circumstances, such as a state of war, the state simultaneously takes measures to restore territorial integrity, liberate occupied territories, preserve vital infrastructure, and, on the other hand, ensures the fulfilment of its usual functions.

The social purpose of the state is also important in terms of assessing the effectiveness of its functioning in ensuring the legal regulation of social relations, the rights and freedoms of individuals and citizens, the conflict-free existence of subjects of social

relations as its main goal. For example, according to Article 3 of the Constitution of Ukraine¹, the highest social value in the state is the human being. Accordingly, the rights and freedoms of individuals, their provision, protection, and defence are defined as the duty, content, and direction of the state's activities, the sphere of its responsibility. This provision of the Constitution of Ukraine reflects the essence of the relationship between the functions, purpose, social purpose, and tasks of the state. It can be concluded that the functions of the state are a complex concept, the content of which is the unity of purpose, tasks, purpose in society, and the main areas of their influence on social relations. The functions of the state implemented in practice determine its role in society.

In the absence of doctrinal unity regarding the classification of state functions, their division into basic and additional, external and internal, open and latent, economic, political, social, etc., based on different criteria, remains constant.

One of the attempts to modernise the doctrine regarding the distribution of state functions based on different criteria and to move away from their general division into internal and external can be the approach proposed by M.V. Dzyavelyuk (2016). Based on the philosophical perception of statehood as a certain image, a nomenclature of state functions is introduced instead of classification. Accordingly, only the most active, significant, and most important activities of the state can be among the functions. Accordingly, the inclusion of any field of state activity in its functions should have a nomenclature character. Among the nomenclature functions, according to the author, are ensuring national security, competitiveness, social order, and development; avoiding and countering crises and dysfunctions in the functioning of the social organism; supporting the reality of state sovereignty, reproducing its properties.

In view of the meaning of the concept of "nomenclature" in general and in jurisprudence in particular, it can be conditionally agreed with this approach. After all, "nomenclature" as a nominative way of designating objects does not have the meaning of the concept and does not carry its semantic and essential load. Moreover, in jurisprudence, it can be used to denote a specific list of positions according to the principle of subordination. However, in the context of this study, attention should be paid to the list of state functions provided. Among them, there is an absence of legal, legislative, law enforcement, and law-making functions. Therefore, the author does not consider law-making as a separate function of the state, thus determining its derivative nature.

Nevertheless, the functional analysis of the state, which involves the analysis of a wide range of its functions, is inherently determined by its institutional organisation, i.e., the way of organising state power, the mechanism, and the apparatus of the state.

The value of the separation of powers in a democratic society lies in its potential to organise the political power of the state and protect individual autonomy through the distinction between law-making and law-application. Meanwhile, the organisational value of the separation of powers provides the basis for the "formal" theory, its protective value leads to the "normative" theory. As a method of organising political power, the division of powers goes hand in hand with the technique of separating functions. The distribution of powers relates to one or several norms of competence, ensuring "independence" in the execution of functions. On the contrary, the division of functions means the allocation of the execution of a specific function among one or several individuals making decisions. The interaction between the distribution of powers and the division of functions leads to different strategies for organising public authority. These categories can be applied to most state structures, regardless of the number of official branches recognised by these structures (e.g., judicial power) (Sandro, 2022).

These considerations create the necessity to differentiate between the functions of the state and the forms of their implementation. Any function of the state requires a specific instrument for its realisation – a legal form. For a long time, the internal functions of the state were classified based on the nature of the activities of state authorities: legislative, executive, and judicial, thus replacing the phenomenon of functions of state authorities with organisational forms of their implementation. As forms of implementing state functions, it is necessary to understand the homogeneous activities of state authorities, thanks to which its functions are realised, tasks are performed, and goals are achieved. Among such forms, from the perspective of the purpose of the study, it is necessary to highlight the legal form of implementing state functions, which defines and establishes all other forms of implementing state functions, giving them a defined and legal character. Although, in a general sense, three legal forms of implementing state functions should be distinguished – law-making, law application, and law enforcement – among these forms, law-making activity occupies a special and defining place due to its essence, content, and purpose. It is about this activity in the aspect of the functioning of the state in legal science that the debates still do not

¹ Constitution of Ukraine. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>.

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subside and there is no unity regarding the nature of law-making, its independent or derivative character.

■ The Problem of the Phenomenon of Law-Making

Firstly, it is worth emphasising that the analysis of foreign legal doctrine in recent decades indicates a wide range of studies on issues related to the creation of legal norms by various subjects of lawmaking and their implementation. In particular, these are separate aspects of normative drafting, the effectiveness of legislation and its quality (Lewis, 2023); forms, content, and the process of implementation of regulations; the scope and specifics of the implementation of the powers of law-making subjects (Hopkins, 2020), and so on. Regarding law-making as one of the areas of state activity, state functions, or forms of its implementation and manifestation, the vast majority of research has an applied character and relates to the analysis of law-making by judicial authorities. Among others, it is worth highlighting a study on the features of law-making in the conditions of digitalisation of justice (Costantini *et al.*, 2023), the mechanism of judicial law-making as a source of law, judicial law-making, and the general law of negligence (Amirthalingam, 2020). The features of the legislative activity of international organisations and the European Court of Justice are actively studied (Iglesias, 2020; Florczak-Wątor, 2020; Maisley, 2023), and so on. However, questions directly related to the clarification of the instrumental properties of law-making as one of the areas of state activity and one of the problems of the theory of state and law, concerning the development and improvement of the conceptual-categorical apparatus of jurisprudence as a whole, have remained beyond the attention of foreign researchers.

For the domestic legal tradition and contemporary research in the field of legal theory and statehood, a constant appeal to the general theoretical issues of legal science is inherent, including the problems of state functions and its law-making activity as a factor in improving sectoral legislation and enhancing the effectiveness of legal regulation. Traditionally, in Soviet legal literature, law-making was considered the activity of state authorities in the creation, improvement, or cancellation of legal norms.

Currently, the issues related to activities associated with law, state legal influence on society, and law-making are extremely multifaceted. A fairly wide range of research is devoted to these issues. However, existing developments have not led to the creation of a unified concept of law-making as one of the types of legal activities of the state. Summarising the results of the studies conducted by the researchers mentioned above, it can be argued that the definition of the concept of law-making, due to the complexity

of its essence and content, has taken place in different dimensions, namely: from the perspective of the philosophy of law, sociology of law, and the dogma of law as an instrumental aspect of law-making.

In addition, it was emphasised that the content of the activities of state bodies authorised to engage in law-making; the provision by the relevant state bodies of the binding nature of the results of law-making – legal norms, objectified in the form of regulations; the task of the state to create and organise the regulatory framework; the affirmation of the state as the main subject of law-making, determining the paradigm of legal influence, etc., determine the place and role of the state in the law-making activity. Regarding the recognition of the independence of law-making as a state function or its derivative character, it is worth noting that while performing the legislative (law-making) function, the state is simultaneously a prerequisite for the existence and effective implementation of the functions of law-making (legislation). However, the functions of the state and law-making are different institutions with a certain interrelation (Didych, 2017). Thus, the author adheres to the conceptual approach recognising the independence of the law-making function of the state. In the opinion of the researchers, the state plays a decisive role in the implementation of law-making, which is covered by the corresponding function of the state, which occupies a central place in the system of state functions.

It is worth agreeing with the opinion of M.O. Teplyuk (2013), who, distinguishing three functions of the state: legislative, administrative, and law enforcement, emphasises their correspondence to different types of law-making: administrative function corresponds to sub-legal law-making, law enforcement corresponds to judicial precedent, legislative function corresponds to lawful law-making. However, such an approach, especially regarding the legislative function, which is conducted through lawful law-making activity, appears somewhat controversial in terms of nomenclature. After all, in this case, all other types of law-making can be considered illegal. V.V. Sukhonos (2015), while covering this issue, emphasises that the state performs law-making activities within the framework of the implementation of the political function of the state. Indeed, by exercising the political function, the state, through legal regulation of social relations, influences their state, transformation, areas of development, thereby organising them.

Another group of researchers, particularly L.O. Shapenko (2022) and V.P. Plavych (2017), adhere to the opposite position, considering law-making not as one of the functions of the state but as one of the forms of its functions' implementation. According to studies on the mechanism of the state and its functions during the Soviet era in Ukraine, law-making,

like legal regulation and various organisational activities of the state in the implementation of the rules it creates, including through encouragement, coercion, and persuasion, are forms of performing state functions. In this area, L.O. Shapenko (2022) states that law-making is a specific form of state activity or a form of regulatory activity performed by competent state bodies, authorised public organisations, or the entire population for the creation and development of the legal system. V.P. Plavych (2017) considers law-making simultaneously as a form of activity of state authorities or other subjects delegated with law-making powers and as a state function regarding the preparation, improvement, or cancellation of regulations.

On the other hand, this form of state function implementation in legal theory is sometimes referred to as legislative, the essence of which is understood as the constitutionally defined activity of the highest state authorities in creating mandatory norms, which, as rules, become laws and determine both the essence and content and the nature of state functions and the procedure for their implementation. However, in the author's opinion, this is a narrow approach that does not encompass all types of objectification of regulations in the modern state and, consequently, forms of law-making.

Regarding the further development of the doctrine of law-making activity as a form of state functions' implementation, it is worth emphasising that the material-legal content, which consists of competent authorities' decision-making on the establishment, modification, or repeal of legal norms, is an essential aspect of legal regulation, and the procedural-process form is only a means of implementing the material-legal content of law-making activity. Accordingly, law-making has a legal nature and is a complex material process in which both form and content are dialectically combined. Considering these concepts as categories of philosophy, such as content and form, it can be argued that the term "content" denotes the phenomenon of "law-making activity", and the term "form" denotes the "law-making process" (Plavych, 2017). Therefore, law-making activity is one of the forms of state functions' implementation – legal, the content of which is the activity of constitutionally authorised state authorities in adopting regulations, which has a homogeneous character (Shai, 2014). It is one of the state's activities in the field of law, like legal realisation, law enforcement, legal interpretation, and simultaneously – a legal form of state functions' implementation, which has legal consequences, one of the ways of their implementation, and is aimed at achieving the state's goals.

■ Conclusions

The functions of the state are its inherent dynamic characteristic associated with the activities of state authorities, primarily law-making bodies, the analysis of the transformation of which allows tracking changes in the state and determining possible ways for its further development. Law, due to its valuable properties, is a tool that defines the limits of state activity, its areas of development and functioning, and exerts regulatory influence on social relations. The analysis of scientific literature allows outlining several features and instrumental properties of law-making.

Legal values delineate the foundations of the legal system, and thus, they are simultaneously legal principles. Through law-making activities, legal principles are enshrined in regulations, primarily the constitution, permeating the fundamental tasks of the state and the mechanisms for their implementation. This is the so-called state policy – a connecting, mediating link between the state and its activities. By normatively defining the goal, the state undertakes corresponding obligations and creates mechanisms for their implementation, and ultimately can determine the effectiveness of performing a certain function as the ratio of the goal and the result. Thus, the creation of legal norms, compared to other forms of state activity, always aims to regulate specific areas of social relations, which, in turn, constitute the content of the state's political, economic, informational, and other functions. Therefore, understanding law-making as one of the forms – legal, ensuring the implementation of state functions, through which the state can achieve its goal in the most optimal and efficient way, is correct. Moreover, law-making is precisely the instrument that allows not only defining various state functions but also establishing connections between them, giving the state's activities a comprehensive, integrated, and adjusted character, ultimately leading to stable legal order and societal progress.

However, the conducted study does not exhaust the content of the issue, so it is essential to further clarify the features of forms, methods, and areas of law-making activities of authorised subjects during emergencies (martial law), fulfilling the state's obligations in the context of European integration processes, the transformation of the underlying principles of law-making, and others.

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■ Conflict of Interest

None.

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Інструменталізм правотворчості в аспекті функціонування сучасної держави

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■ **Анотація.** Передумовою та чинником ефективного функціонування будь-якої сучасної держави, виконання покладених на неї завдань є запровадження відповідних організаційно-правових механізмів її діяльності. У ХХІ ст. відбувається трансформація завдань держави, напрямів впливу на суспільні відносини, основних і додаткових функцій, що потребує нагального теоретичного осмислення іманентних функцій держави. Метою дослідження є аналіз інструментальних характеристик процесу створення законів як важливого аспекту діяльності держави. Для дослідження інструментальних характеристик правотворчості в аспекті функціоналізму сучасної держави було залучено окремі методи наукового пошуку, а саме: діалектичний, функціонального аналізу, порівняння, історико-правовий, формально-логічний, формально-юридичний та системно-структурний. У результатах дослідження зауважено, що трансформація завдань держави та її вплив на суспільство є наслідком її ролі як соціального феномену з основним завданням забезпечити цілісність і стабільний розвиток суспільства. Встановлено, що ефективність функціонування будь-якої держави залежить від комплексу чинників, головними серед яких є правильність визначення методів і засобів, які потрібно залучити для виконання завдань, що постають на певному етапі її розвитку. З огляду на це, було визначено, що функції держави є її іманентною динамічною характеристикою, пов'язаною з діяльністю органів державної влади, насамперед правотворчих. Створення норм права, порівняно з іншими формами діяльності держави, завжди має на меті впорядкування певних сфер суспільних відносин, які своєю чергою є змістом політичної, економічної, інформаційної та інших функцій держави. Коректним є розуміння правотворчості як правової форми забезпечення реалізації функцій держави. Такий концептуальний підхід дає змогу уповноваженим суб'єктам державної влади за допомогою правотворчої діяльності визначити, легалізувати напрями впливу держави на ті сфери суспільних відносин, які потребують втручання держави, корегувати їх сутність і зміст

■ **Ключові слова:** функції держави; форма реалізації функцій держави; мета й завдання держави; правотворчість як інструмент; правове регулювання; цінність права