CONSTITUTIONALISM AS A PHILOSOPHICAL AND LEGAL CATEGORY AND A SOCIO-POLITICAL PHENOMENON

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ABSTRACT

Description: The article deals with the study of constitutionalism as a philosophical and legal category and socio-political phenomenon.

Methodology: In the course of the study general and specific scientific methods were used, namely: comparative method was used when analyzing scientific categories, definitions and approaches; historical and legal method as well as logical-semantic method provided an opportunity to reveal the content of the concepts of "constitutionalism", "constitution"; the dialectical method made it possible to consider the state of scientific researches concerning this issue' the method of systematic analysis made it possible to identify significant features of constitutionalism; the analysis and synthesis method as well as the logical method were used to develop a holistic view on constitutionalism as philosophical and legal category; the legal modeling method was helpful in drawing conclusions of the study. The empirical basis of the research was the works of well-known domestic and foreign thinkers, specialists in the field of constitutional law.

The Results of the Study: Basing on the investigations the following conclusions were made: two antagonistic constitutional models were formed in the period between the two World Wars; the issue of so-called "Muslim constitutionalism", is worth of attention; Constitution and constitutionalism are not identical concepts; the existence of a Constitution does not solve all the problem of society; the Constitution of Orlik of 1710 and the works of Ukrainian scientists have had a significant influence on the development of constitutionalism.

Practical Implications: The formation of civil society, the further development of Ukraine as a sovereign, democratic, legal and social State, its integration into European society determines the need for appropriate scientific substantiation and provision of the process of formation of national constitutional legislation, taking into account the best European and world experience of modern constitutionalism.

Value/Originality: The authors' definition of the concept of "constitutionalism" as a philosophical and legal category and socio-political phenomenon was proposed and the authors' conclusions deriving from the research were formulated.

Keywords: Constitutionalism, Constitution, Category, Phenomenon, Greek Constitutions, Muslim Constitutionalism.

INTRODUCTION

Constitutionalism is a multidimensional phenomenon of State legal and socio-political life, which takes different forms and is filled with different content at different stages of the development of constitutional statehood. This is due, in particular, to the formulation of constitutional ideas and principles, the formation of constitutional traditions and the creation of scientific constitutional provisions and doctrines, constitutional drafts, adoption of Constitutions and amendments thereto.

The very concept of constitutionalism cannot be considered primary or even independently, since it is derived from the concept of "*Constitution*", both etymologically and scientifically. Constitution is a social contract that fixes the forms, methods, principles, foundations, rights, obligations and other interrelated relations between the State and society and their implementation.

Constitutionalism is characterized by the perception of political and legal doctrine of the past and the best achievements of the world constitutional and legal ideas at all key stages of its development. However, it was always characterized by a relatively independent nature and a diversity of enshrining constitutions and other constitutional acts in the form of treaties, universals, etc.

The relevance of the topic chosen is due to the public interest in the key issues of modern Constitutional law theory related to the study of constitutionalism. A considerable amount of work is devoted to the study of these problems, but the problem of constitutionalism remains relevant not only for natural law, but also for theoretical and legal researches, namely to clarify the role of natural law through the basic law of a State. It is worth to note that the importance of the topic is due to the need to use historical and foreign experience of the constitutionalization of socio-political relations in the context of constitutional reform in modern conditions.

MATERIALS AND METHODS

The materials studied are the works of Ukrainian and foreign scientists, who have studied the issue under consideration.

In the course of the study general and specific scientific methods were used, namely: comparative method was used when analyzing scientific categories, definitions and approaches; historical and legal method as well as logical-semantic method provided an opportunity to reveal the content of the concepts of "*constitutionalism*" and "*Constitution*"; the dialectical method made it possible to consider the state of scientific researches concerning this issue; the method of systematic analysis made helped to identify significant features of constitutionalism; the analysis and synthesis method as well as the logical method were used to develop a holistic view on constitutionalism as a philosophical and legal category; the legal modeling method was helpful in drawing conclusions of the study.

RESULTS

The following conclusions were made according to the results of the study:

1. Two antagonistic constitutional models were formed in the period between the two World Wars, which are commonly identified as capitalistic and socialistic;

2. In our view, the issue of so-called "*Muslim constitutionalism*", whose ideological basis is the principles and doctrines of the Qur'an, which is a reflection of a broader ideological struggle related to the role of worldly and spiritual in the Muslim State, is worth of attention.
3. Constitution and constitutionalism are not identical concepts, since the latter is a normative concept and should not be confused with an actual Constitution used in any society.
4. The existence of a Constitution does not solve all the problems of society; just the affirmation of the values of constitutional normative character as the rules in real life allows to guarantee the rule of law and the systemic stability of social life, the harmonization of the realities of social life with the principles of constitutionalism.
5. The Constitution of Orlik of 1710 and the works of Ukrainian scientists have had a significant influence on the development of constitutionalism.

DISCUSSION

Constitutionalism in the scientific community is usually regarded as: philosophical and legal category, ideological and political doctrine, socio-political movement and state-legal practice in the broad (political) sense.

According to Professor Avakian (2000), constitutionalism in the narrower (legal) sense is:

1. Firstly, "*the State government limited by the Constitution*";
2. Secondly, "*the doctrine of the Constitution as the fundamental law of the State; the Law that defines the relationship between the State and society*";
3. Thirdly, "*the political system based on the constitutional methods of government*".

In this context, it should be noted that scholars have not yet defined the concept (a single, universal concept) of constitutionalism in modern Constitutional law. Various scholars, considering some form of approaches and peculiarities in the understanding of constitutionalism, as well as their commitment to a particular school of law, provide different definitions of this category and the list of elements (components) of the system of constitutionalism.

Interesting is the statement of the modern Hungarian constitutionalist Shaio (2001) on this matter. He believes that there is the same situation with the concept of "*constitutionalism*" as it was with St. Augustine's relationship with God. When Augustine was asked who God is, he answered

"*I don't know, who God is, but I know what atheism means*".

Thus, according to Hrafskii (2009), the content and the essence of constitutionalism as a philosophical and legal category and socio-political phenomenon, is to reduce obstacles to arbitrariness and violence in any area of social life, first of all from State institutions, and to ensure the most essential for all people-the life at its best based on universal values (freedom, justice, property, pursuit of happiness, etc.).

The Professor of London University College Dworkin (1995) believes that constitutionalism is a legal system of constitutional protection of human rights in a democratic society, based on two interrelated doctrines: legal theory (legal positivism) and the philosophical concept of ancient moral skepticism.

Legal positivism as a theory of law, according to Dworkin provides two concepts of the performance of institutions of a democratic society:

1. A statistical concept, the essence of which is that political decisions in a democracy are made according to a specific function-the majority of votes, decisions or wishes of individual citizens;
2. A communal concept, under which political decisions in a democracy are taken by a single entity-the nation rather than any group of people one by one.

According to Shapoval (1998), the substantive basis, the very essence of constitutionalism, is expressed by the formula:

"Constitutional rule plus (+) the practice of its implementation"

The Associate Professor of the University of Oxford Barber (2018) divides constitutionalism into positive one and negative one. Unlike the negative one, positive constitutionalism recognizes that the State exists to benefit its people, and the Constitution is the set of rules that empowers and creates state institutions.

The professor of the Erty School of Management in Berlin, Christian et al. (2004) emphasizes that constitutionalism is an integral part of modern legal systems, as well as a philosophical and legal concept, which reflects the traditions and aims of the modern national democratic State. Constitutionalism creates a set of procedures at a higher or more binding level, and defines the list of legal obligations between government agencies and citizens.

Sonina (2001) believes that constitutionalism is a political and legal regime, which lies in the construction of an industrial or post-industrial society and the basis for constitutionality (harmony, justice), in order to ensure its full existence and development.

Sometimes the problems of constitutionalism are viewed in the context of the implementation of the social and philosophical concept of globalization of the activities of international and national institutions, subjects of the political system of society, based on the following principles:

1. The primacy of international democratic norms and principles of organization and functioning of political and legal system of society over national ones;
2. The priority of decisions of international institutions over national ones, which is reflected in the development and implementation of the human rights doctrine and the doctrine of equality of states over the rule of law on a planetary scale (Honcharov, 2016).

Despite the diversity of approaches to the understanding of the essence and content of the concept of "*constitutionalism*", most domestic and foreign scholars agree that constitutionalism as a philosophical category, a system of knowledge of political and legal nature and framework for the functioning of State power, originates from the ancient Greek constitutions (Latin word "*constitution*" means arrangement, order) that existed a few centuries before our era. Later, in the age of Principatus, the names of the constitutions (*constitutio ediktum, mandatum, decretum, rescriptum*) were given the imperial decrees and acts of the Roman Senate (*senatus consultus*).

With the development of human civilization, constitutionalism is beginning to be accepted not only as a political and legal category, but also as a fundamental value of world culture, which had been reflected in philosophical, theological, cultural and moral-ethical views of the philosophers of the past. These views were constantly developed, were filled with qualitatively new content in accordance with the realities of the time. Thus, at the beginning of the 19th century the concept of so-called "*monarchical constitutionalism*" was formed.

As it was noted by the outstanding philosopher Frank (1930), the power, consistent with the nature of society, must be based on the unity of two principles: it must combine the principles of mystical timeless unity of society with the interests and demands of present time, with free public self-determination. Historically, the most perfect implementation of this is the dualistic system of constitutional monarchy, in which the will of the monarch, as a symbol of traditional national unity represented by his freely elected representatives, cooperates with public opinion and the will of society.

An attempt to reconcile revolutionary sentiment in society with monarchical claims to the management of social life was enshrined for the first time in the French Constitution of 1814.

Grotke & Prutsch (2014) notes in this regard that this Constitution was, essentially,

> *"The prototype of Charte (Magna Carta of 1215), which has proven innovative and functional in post-Napoleonic conditions. It was favorably received by the political elites of the time and made monarchical constitutionalism the most influential model in Europe during the nineteenth century".*

Prof. Krusian (2010), exploring the historical logic of the emergence and development of constitutional and legal ideas, theories, principles and their institutional design, determines three periods in this process:

1. Antique;
2. Medieval;
3. The new age, when the systematic formation of constitutionalism in its modern sense begins.

Stetsiuk (2003) doesn't agree with this statement. He thinks that some assertions on the existence of "*ancient*", "*medieval*" or "*totalitarian*" constitutionalism were not quite logical, since neither the ancient world nor the middle ages knew the constitution as such. The Constitution cannot exist or turns in fiction under a totalitarian system. Therefore, it is not necessary to speak about the existence of constitutional norms, and even more so about their implementation in such cases. Although he acknowledges that it was in earlier times (before constitutions as such) that the foundations and conditions for the emergence of the State Constitution, the establishment of the constitutional State as a whole, and for the further development of constitutionalism as such were laid.

In this context, it should be noted that the following acts are close to the current conception of constitutional acts: the Grand Charter of Liberties (England, 1215), *"Instrument of Government"* (the full name-"*The Government of the Commonwealth of England, Scotland and Ireland, and the Dominions thereunto belonging*") (1653), Bill of Rights (England, 1689). The first constitutions appeared in the 18th century: the US Constitution (1787), which has the longest history of existence; Declaration of Human and Citizen Rights (France, 1789), the Constitutions of France and Poland, and the first constitutional act in Ukraine, which is known as Orlik Constitution (1710).

Orlik Constitution was approved on 5 (16) April at the meeting of the Cossacks near the town of Tiahyn on the right bank of the Dniester River. This document is not only a memorial of Ukrainian political and legal thought, but also as a memorial of the world political and legal and philosophical thought presented to the civilized world by the Ukrainian cultural elite.

The analysis of the document proves that the grounds for such an assertion are at least because the rules of this legal act have already contained the elements of the theory of natural

law and the elements of the doctrine of separation of powers between State organs-the Executive; the Legislature and the Judiciary.

The Constitution did not come into force because it was written in exile. Still, it is one of the first European constitutions of modern times-this document appeared 77 years earlier than the US Basic Law and 81 years earlier than the Polish Constitution.

The works of McIlwain (1939) *"Constitutionalism and the Changing World"*, "*Constitutionalism Ancient and Modern*", "*Constitutional Government and Democracy*" and "*Constitutional Reason of State*", "*Modern Democratic State*", and some later work-a series of articles by "*Constitutionalism*" have had a significant impact on the development of these ideals in the mid-twentieth century (Stetsiuk, 2004).

Thanks to the research of these outstanding constitutionalists, it was found that in the period between the two World Wars two antagonistic constitutional models were formed, which are commonly identified as capitalistic and socialistic. The first one was formed on the principles of liberalism, which was caused by the changes in the socio-economic and political structures of society. Hardin (2000) notes in this context that there are two relatively different historical branches-political and economic liberalization. Political liberalism, in his view, emerged in the 17th century in order to resist Universalist religious views, whose supporters were

> *"So passionate that they wanted to impose these views by force, and in some ways it was an instrument to solve that terrible problem. There have been many comparable social inventions, such as communism, egalitarianism, and perhaps socialism, which have failed to date".*

The philosophical basis for the socialistic model of constitutionalism is the postulates of Marxist theory about the regularities of development of the society and State development in their class nature and struggle. In particular, in Soviet state law of that period and in Soviet political science of that time the phenomenon of constitutionalism, as a rule, was silenced or misrepresented because of ideological reasons. "*Constitutionalism*" was represented as

> *"A reactionary course in politics and legal science, which recognizes the constitutional monarchy as the best form of government".*

Such a concept for defining models of constitutionalism is certainly has the right to exist, but in our view, its supporters do not take into account the existence of certain circumstances that have a significant impact on the process of constitutionalization of social relations and are worthy of consideration.

In this context, it is necessary to agree with Nersesiants (2004), who considers the positive attitude of European conservatism on the moral criticism of the ideas of individualistic liberalism and constitutional republicanism from the standpoint of religious providential doctrine and monarchism, as well as the critical perception of the main political conclusions of prosperity.

Recently, the theory of constitutional morphogenesis, that is, the socio-cultural cycle, whose essence lays in the fact that new (morphogenesis) or supported by old (morphostasis) constitutionalism is formed through cultural and structural interactions that are activated by social actors. Dobner & Loughlin (2010) states that this process is dependent on many variables and should not be taken for granted. At the heart of this process are two interrelated problems: the recognition of the State and its self-government, based on a constitutional approach.

In our view, the issue of so-called "*Muslim constitutionalism*", whose ideological basis is the principles and doctrines of the Qur'an, which is a reflection of a broader ideological struggle related to the role of worldly and spiritual in the Muslim State, is also worthy of attention. In some form, this struggle continues today. It is reflected in the attempts of modernist interpretation of the Qur'an and adaptation of its ideas to the needs of social life of the 20th century and in the concepts of modern apologists of Islam for its recognition as a "*Constitution*".

Interesting are the historical features of constitutionalism in the South Africa. Specifically, despite the fact that the legislation of the South Africa contributed to the strengthening of the authoritarian regime (apartheid), a space was created for litigation strategies that at least compensated for the redundancy of this authoritarian rule. Thus, Professor Dennis (2019) writes that the authority of the Constitution diminishes the potential for other forms of politics, taking a position of hegemonic authority, preventing actions aimed at building a society based on principles that do not conform to the principles of constitutionalism.

Thus, a Constitution and constitutionalism are not identical concepts. As German researcher Voit (1998) correctly points out constitutionalism is a normative concept and should not be confused with an actual Constitution used in any society. It is the multi-level system that functionally goes beyond the Constitution and law in general, reflects the peculiarities of mentality and the existence of people. Constitutionalism is a complex system consisting of a set of closely interdependent and interacting elements.

Authoritarian ideologies, movements, regimes, originally formed under national conditions, often enter the world stage using economic crises, cultural arguments, and exhaustion from democracy. It is only necessary to give an example from the Soviet past, when the existence of the Constitution of the USSR of 1937, which proclaimed democratic freedoms (freedom of speech, press, assembly, conscience, association in public organizations, etc.), did not become an obstacle for extrajudicial killings, famine and theft from rural people. Subsequently, this so-called experience was extended to the countries, which after the end of World War II, were influenced by the Soviet Union.

Consequently, the existence of a Constitution does not solve all the problems of society; just the affirmation of the values of constitutional normative character as the rules in real life allows to guarantee the rule of law and the systemic stability of social life, the harmonization of the realities of social life with the principles of constitutionalism. Thus, hierarchies have also become a decisive part of national legal systems. This implies not only an advantage but also determines the need for consistency and continuity in legislation. It creates a set of procedures at a higher or more binding level and creates certain legal obligations among citizens or between institutions and citizens. The envisaged territorial boundaries will also take into account the parallel existence of cultural, social and linguistic contexts and borders and their systematic reflection in the legal system (Grotke & Prutsch, 2014).

In this regard we have to agree with the statement of Todyka (2000) that:

> *"England, for example, has no written Constitution but constitutionalism as a system of democratic views of society, of the political elite, as a strict order based on respect for human rights and freedoms".*

Thus, constitutionalism in the modern sense is based on certain socio-political phenomena, among which are:

1. Common principles, procedures and structural mechanisms traditionally used to limit State power;
2. Constitutional means for establishing restrictions on State power;
3. Nationwide, non-party ideology;
4. Constitutional forms of public administration;
5. Domination of the concept of human rights priority under the condition of mutual responsibility of an individual and a State in all spheres of social and political life;
6. Affirmation of the principle of the rule of law, which enshrines the restriction of the powers of Heads of States and State bodies by law;
7. The existence of Constitution (written or unwritten), its active influence on the political life of the country, constitutional regulation of the State system, political regime, constitutional recognition of the rights and freedoms of the individual.

CONCLUSION

Despite the lack of a single universal definition of the concept of constitutionalism, it is regarded as a philosophical and legal category, ideological and political doctrine, socio-political movement and State and legal practice. Most domestic and foreign scholars agree that constitutionalism as a philosophical category is a system of knowledge of political and legal nature and the framework for the functioning of State power, originates from the ancient Greek constitutions, which were in force centuries before our era.

In the early 19th century the concept of so-called "*monarchical constitutionalism*" was formed, which proved its innovativeness and functionality in post-Napoleonic conditions, and was favorably received by the political elites of the time. The Constitution of Orlik of 1710 and the works of the founders of liberalism in Ukraine had a significant influence on the development of constitutionalism.

In the period between two World Wars, two antagonistic constitutional models were formed, which are commonly identified as capitalistic and socialistic. Recently, the theory of constitutional morphogenesis, that is, the socio-cultural cycle whose essence lies in the fact that new (morphogenesis) or supported by old (morphostasis) constitutionalism is formed through cultural and structural interactions that are activated by social actors. It is noteworthy that "*Muslim constitutionalism*", the ideological basis of which is the principles and doctrines of Qur'an, which is the reflection of a broader ideological struggle related to the role of worldly and spiritual in the Muslim State.

Constitution and constitutionalism are not identical concepts; constitutionalism is a normative concept and should not be confused with the actual Constitution used in any society. The existence of a Constitution by itself does not solve all the problems of society; just the affirmation of the values of constitutional normative character as the rules in real life allows to guarantee the rule of law and the systemic stability of social life, the harmonization of the realities of social life with the principles of constitutionalism.

Constitutionalism as a philosophical and legal category and socio-political phenomenon is the system for protecting ideological principles proclaimed by the Constitution and the principles of functioning of the State mechanism, which is enshrined legislatively, organizationally and realistically in the form of institutions, procedures and institutions of civil society. The legal and socio-political component of constitutionalism of modern democratic, social and legal State as a subject of postmodern globalization processes is characterized by transitional features from the industrial to the post-industrial stage of economic, cultural

development, the formation of new principles of transformation of world markets of goods, services, labor, and capital within the theory of noosphere and space civilization.

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