Rule of Law and Constitutionalism: Modern Approaches

I. Zabokrytskyy
National University “Lviv Polytechnic”
12, Stepana Bandery Str., Lviv 79000 Ukraine
ihorzab@gmail.com

Abstract. In this work the main modern approaches to the relationship between the doctrine of the rule of law and constitutionalism are analyzed. Approaches of Ukrainian and foreign scientists to the essence of the rule of law are reviewed, the legal opinion of the Constitutional Court of Ukraine on the rule of law and the concept of “lawful law” are researched. The conclusion that the rule of law is the main mechanism of constitutionalism doctrine realization and fundamental constitutional principle, the quintessence of constitutional ideas is made.

Keywords: law, constitutionalism, constitution, Ukraine, rule of law, constitutional court.

Introduction. Essence of constitutionalism can be most correctly disclosed on the example of its elements. And the first and fundamental one is the constitutional principle of the rule of law. English scientist C. Mellwain believed that constitutionalism or the rule of law is the legal constraint on the state and complete opposite to the arbitrary rule (C. Mellwain, 1940, p.21). Thus we see a very interesting idea - the identification of constitutionalism with the rule of law principle. Clearly, if we talk about the basic idea of constitutionalism - limitation of the government, we can realize this is possible only through legal instruments and mechanisms that most logically are fixed in the text of the Constitution, which typically because of its features of adoption, implementation and complicated amendment procedure has increased level of legitimacy and stability. Rule of law and constitutionalism concepts were also analyzed in the works of S. Holovatiy, V. Kovalchuk, SerhiyIschuk, M. Kozjubra, M. Rosenfeld, S. Shevchuk, A. Shulga and others. Therefore it is necessary to consider in more detail modern approaches to the rule of law principle and it’s interrelation with constitutionalism doctrine.

Method. In this work were used several methods: legal-comparative, method of system analysis, formal-logical. Legal-comparative method was used for the research of different views on rule of law concept. Method of system analysis was used for the identification of the rule of law in the system of constitutional law and its relationship with constitutionalism. Formal-logical method was used for the determination of different concepts, such as “rule of law”, “constitutionalism”.

Results. Generally the rule of law is seen by most scientists as an integral part of constitutionalism, one of its fundamental principles. However, close binding, impossibility of one without the other existence, encourage us to intuitively agree with the discussed opinion of C. Mellwainand to consider the constitutionalism and the rule of law as identical concepts. It is obvious that these two legal phenomena are the cornerstones of modern Western democratic society, understanding of which "merges" with each other. The modern constitutional state is a state based on the rule of law, embodying the ideals of constitutionalism. However, some differentiation does exist. As generally the doctrine of constitutionalism is considered as limitation of power, it raises the obvious question - how can we limit any power? The answer is only one - through legal mechanisms, the rule of law principle embodied in the law that really is "legal", when there is real equality before the law and there are no exceptions that would undermine confidence of the rule of law. Thus, we can conclude that the rule of law is the main mechanism of constitutionalism doctrine realization and fundamental constitutional principle, the quintessence of constitutional ideas.

Discussion. It should be noted that interpretation of this principle was given in Ukraine by the Constitutional Court in its judgment of 02.11.2004. It was stated that “the rule of law means the domination of law in society. The rule of law requires the state to implement it in lawmaking and law enforcement activities, including in the laws that in its content should be filled with the ideas of social justice, freedom, equality and so on. One
manifestation of the rule of law is that the law is not limited by laws (formal legal acts) as one of its forms, and includes other social regulators, including morality, traditions, customs, etc., which are legitimized by society and caused by historically achieved cultural level of society. All these elements of law are united by quality that corresponds to the ideology of justice, the idea of law, which largely was reflected in the Constitution of Ukraine”. However, one can hardly agree with the position, which was expressed in its decision of the Constitutional Court. Of course, the thesis according to which the laws of its content must be soaked with the ideas of social justice, equality and freedom seems correct. Modern legal thought comes to the conclusion that not all even formally adopted in compliance with the due process law can be considered "legal". Thus, AM Shulga points out that the concept of "lawful" and "unlawful" law arising as a result of difference between law and legal acts, "unlawful" law concept in general law science is considered arbitrary, ie what is the opposite of law (Shulga, 2011, p.852). In general the problem of possible existence of unlawful law indicates primarily withdrawal of purely positivistic legal understanding, in which every accepted and sanctioned by the state legal act is binding. Of particular importance is the problem in the aftermath of the Second World War when the world was forced to reconsider their views on many social phenomena, including the Law. Increasingly important natural and legal ideas were discussed in classic debate between professors H.L.A. Hart and Fuller on the pages of Harvard Law Review in 1958 (Hart, 1958, pp. 593-629; Fuller, 1958, pp. 630-672).

The fundamental problem that is the basis of this discussion was the next question - can formally adopted law provided that it is contrary to the principles of morality be legal? Is it possible to believe that the actions of certain individuals in Nazi Germany based on legislation that existed at the time meet all the requirements of law? Professor Hart in his article cites a very interesting example where in 1949 a woman in West Germany was prosecuted for the crime of illegal deprivation of liberty (due to the fact that in 1944 she denounced on her husband who criticized Hitler; although the law didn’t demand from her to carry out such actions, but any words that undermined the credibility of the Third Reich or otherwise served on weakening the military defense of the German people were banned. The man was sentenced to death, which was later replaced by sending him to the front). Hence arises the main problem - the woman insisted that the act for which her husband was sentenced, acknowledged punishable under the Criminal Code that was in effect at the time. However, the Appeal Court found that even though he violated terms of formal law, but it is "contrary to common sense and the very spirit of justice inherent in all normal people." Although this view seems at first glance quite logical and it would be one of the criteria for distinguishing legal law from "not legal", but Hart, who was a supporter of positivistic legal thinking disagreed and believed that it undermines the very foundations of law. He believed that we can solve this problem in other way- to adopt a retrospective statute which would recognize women act a criminal offense, believing this way was "lesser of two evils." However, despite the fact that the opinion of Hart would be more consistent with the very essence of the right way to solve the problem, it is unlikely completely to agree, as the recognition of a criminal offense retrospective act would violate one of the fundamental principles of criminal law, according to which the retroactive effect of laws that establish criminal responsibility is violated. It is worth noting that contemporary international law allows for the departure from these principles in individual cases - as according to Art. 1 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 26 November 1968 - limitation periods do not apply to genocide and crimes against humanity even if the act is not a violation of domestic law of the State in which such crimes were conducted. It is also to some degree is the infringement of Nullum Crimen Sine Lege principle, according to which there can be no crime unless it is provided by law. Thus, the conclusion is that there are so special and unique cases of apparent inconsistencies of formally adopted laws with such requirements that are the basis of law. We can see in the Fuller’s reply to Hart, who argues that morality is a source of mandatory legal force of law, thus upholding the concept of "internal morality of law".

Generally this problem is extremely complex, and like many humanitarian problems, it is unlikely to be completely resolved. Practice has shown that there are situations that have no clearly correct decision and to resolve them we must sometimes violate not only formally enacted laws but even certain legal principles. In today's world it is clear that not every law can be legal - and an example of this we can see in the history of Ukraine, namely the notorious "laws of January 16", which were adopted at the time of revolutionary events called “Euromaidan” in early 2014, which established clearly disproportionate restriction of human rights and in its essence were really "contrary to common sense." Although they did not last long, as people realized their constitutional right to protest (and the possibility of such is recognized by constitutional theory - in the
Declaration of Independence of the United States it was stated that "whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness". It is clear that the essence of the possibility of such protest and regime change derived from the constitutional principle of popular sovereignty, according to which source of power is the people. The issue of civil protest were developed by modern Ukrainian scientists - Kovalchuk V.B and Ishchuk S.I. believe that "civil protest is a public, non-violent, political conscious activity, which, however is made against illegitimate actions and acts of the government and, as a rule with the aim of changes in law or government policy" (Kovalchuk and Ishcuk, 2013, p. 186), which led to their quick withdrawal, but over certain period of time they were formally existing law.

Returning to the interpretation of the rule of law provided by the Constitutional Court of Ukraine the thesis according to which "the law is not limited by legal acts as a form, and includes other social regulators, including morality, traditions, customs, etc." doesn’t seem very correct. Realizing that Constitutional Court attempted to bring its doctrinal position to the natural law ideas, one can hardly agree that morality or tradition is the part of law. Certainly there need to be a connection between them what Fuller called the internal morality of law, and where the law clearly does not meet the requirements of morality, then the question arises whether the legal acts is lawful. However, the inclusion of morality to the law can lead to a false conclusion that such rules will have general validity and will have legal force. So we need not to confuse these concepts and divide them, realizing that morality, tradition, etc. can act only as basis of law, and the correlation between them is necessary to be established to state that laws and other legal acts and court decisions are in fact "legal". Only in this case we can speak about the real implementation of the rule of law.

We agree with S.P. Holovatiy opinion that "an important feature of the rule of law is that with it it is traditionally related with the idea of constitutions, but in the end - the idea of constitutionalism itself ... constitutionalism characterized by three common features: 1) limited government; 2) adherence to the rule of law; 3) the protection of fundamental rights and freedoms "(Holovatiy, 2006, p. 1627-1628). Thus the rule of law is an integral part of constitutionalism. This view supports M. Rosenfeld, indicating that the rule of law is the cornerstone of modern constitutional democracy and In the broadest terms, the rule of law requires that the state only subject the citizenry to publicly promulgated laws, that the state’s legislative function be separate from the adjudicative function, and that no one within the polity be above the law (Rosenfeld, 2001, p.1307). It is also clear that we need society institutionalization and normativization of its rules, which in modern conditions are Constitutions (formally objectivized and factual), based on constitutional ideas. Obviously, the lack of appropriate institutions based on the division of powers with an effective system of mutual balanced authority indicates that we can’t speak about the rule of law. It seems that essential relationship of constitutionalism and the rule of law is extremely strong and they can hardly exist without each other.

References: