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CONSTITUTIONALISM: ISSUES OF LEGAL THOUGHT

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Annotation. It is noted that establishing criteria for evaluating legal concepts remains one of the unresolved problems in law. Their interpretation often depends more on the subjective view of the legislator or scholar than on legal logic. At the same time, even the most detailed definition cannot encompass the full diversity of legal relations and be universally applicable. Therefore, formulating precise concepts in constitutional law is complicated by the fact that the theory and practice of national and international constitutionalism are still developing, and their terminological apparatus is still forming.

It is pointed out that the concept of "constitutionalism" has become firmly established in modern scientific discourse. Although the term has humanitarian origins, today it finds application in the natural sciences as well. However, "constitutionalism" is most often used in the humanities, especially in jurisprudence.

It is emphasized that most modern states have constitutions that define their structure and procedures for managing various spheres of life. However, the presence of a constitution is not a sufficient condition for recognizing a state as constitutional. The constitutionality of a state is not limited to the existence of a basic law, which may reflect a certain compromise of socio-political forces and establish the state structure and powers of authorities. Even if this law has supremacy over other laws and can be changed only by a special procedure, this does not guarantee true constitutionalism. Thus, a state can have a constitution but not have constitutionalism, and vice versa.

The authors conclude that despite the diversity of models of constitutionalism, common principles can be identified that characterize it as a legal concept:

1) The supremacy of legal laws, particularly the constitution as the fundamental law;

2) Legal protection of individual rights and freedoms;

3) Institutional and legal organization of state power with horizontal and vertical distribution.

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It is important to note that the universality of these principles is associated with the transformation of Western society from a religious worldview to a rational perception of the world. This change influenced the ideas about the state and society, contributed to the formation of classical liberal civil society and the concept of an autonomous individual.

Key words: paradigm, modern Ukrainian constitutionalism, constitutional order, constitution, transformation of the constitution, constitutional legislation, constitutional and legal reform, public authority, constitutional transit, constitutional model of power.

Problem statement. Establishing criteria for evaluating legal concepts remains one of the unresolved issues in law. Their interpretation often depends more on the subjective view of the legislator or scholar than on legal logic. At the same time, even the most detailed definition cannot encompass the full diversity of legal relations and be universally applicable. Therefore, formulating precise concepts in constitutional law is complicated by the fact that the theory and practice of national and international constitutionalism are still developing, and their terminological apparatus is still forming [1, p. 32].

The concept of "constitutionalism" has firmly established itself in modern science. Although this term has humanitarian origins, today it finds application in the natural sciences as well. However, "constitutionalism" is most often used in the humanities, especially in jurisprudence, where its use is most intensive [2, p. 25].

Analysis of the source base. The theory and history of constitutionalism in Ukraine have been specifically studied by such domestic scholars as A. Georgitsa, V. Kampo, A. Krusyan, O. Myronenko, M. Orzikh, M. Savchyn, I. Slovska, N. Stetsyuk, P. Stetsyuk, V. Shapoval, S. Shevchuk, Y. Shemshuchenko. The following domestic and foreign scholars address specific problems of the formation and theory of constitutionalism in their research: E. Barendt, N. Bobrova, S. Holovaty, V. Zhuravsky, M. Kozyubra, I. Kravets, O. Martselyak, O. Priyeshkina, A. Selivanov, Y. Todyka, V. Fedorenko, O. Frytsky, A. Sajo, and others.

The authors **aim** to examine the category of "constitutionalism" through the prism of the evolution of historical and legal thought.

Presentation of research material. First of all, it should be noted that modern Ukrainian authors tend towards the Euro-continental understanding of constitutionalism, in which it is viewed as a certain state formation, as a constitutional and legal realization of a democratic, social, and legal state in the form of a republic. In doing so, they equate the legal state with the constitutional state (O. Skakun [3, p. 212], M. Tsvik, V. Tkachenko, L. Bohachova [4, p. 121], O. Radchenko [5, p. 48], and others). A legal state (constitutional state) is a form of organization of state power, in which the rule of law prevails in all spheres of life. In a legal state, everyone - both state bodies and citizens – are equally responsible before the law. It realizes all human rights; there is a division of power into legislative, executive, and judicial branches. That is, it is such an organization of society where law and

legal order have priority over the state and other institutions of political and social power, and not vice versa. And the fundamental rights of the individual and their social security constitute the content of freedom based on laws that are adopted and amended through legal means [6, p. 103].

That is, the constitutional state is revealed through a set of characteristics: priority of human rights over state laws; equality of all citizens, universality of law, its extension to all citizens of the state, its institutions and authorities; presence of independent judiciary as a guarantor of observance of human rights and state laws by citizens; priority in state regulation of social relations and processes of the prohibition method over permission methods; freedom and rights of other people as the most important or even the only limitation of individual rights; division of state power into legislative, executive and judicial branches.

However, it is worth noting that in the science of constitutional law, one can also encounter the definition of so-called "imaginary constitutionalism" (historically formed at the beginning of the 20th century) [7, p. 18]. An example of the existence of imaginary constitutionalism can be the Russian state after 1905. Here, constitutionalism was illusory due to the weakness of civil society. This gave M. Weber grounds to call Russian constitutionalism in 1906 pseudo-constitutionalism [8, p. 22].

Characteristic features of this type of constitutionalism are: discrepancies between the constitutionally proclaimed democratic system and the real practice of governance; fusion of all types of power in one center; priority of executive power over legislative and judicial; making major political decisions outside the constitutionally fixed procedure by bypassing or falsifying it; substitution of open discussion with behind-the-scenes intrigue; official corruption in various forms; emergence of bureaucratic bourgeoisie as a special ruling class, etc. [9, p. 184–206].

One of the significant reasons for this phenomenon is the deep contradiction between the desired constitutionally expressed democratic system and the real practice of governance, which combines both democratic and authoritarian tendencies. Overcoming the legalistic approach (where law is reduced to a set of legal norms) to understanding human rights acquires important methodological significance in this context. Therefore, usually, the adoption of democratic constitutional and legal norms does not yet remove the issue of real democratization of society. The famous Ukrainian thinker B. Kistyakivsky, comparing law and right, perceived them as a score and music. The principle of the rule of law presupposes the distinction between right and law, using right as the main regulator of all relations in society, in particular limiting the state by right.

In addition, historically, another model of constitutionalism is possible - the so-called "nominal constitutionalism" (formed during Soviet times) [7, p. 19]. Its main features are: a gap between real dictatorship and written constitution; fusion of law and ideology; merging of party and state bodies; absence of official opposition; fictitious elections; exercise of state power by representative bodies at all levels; lack of constitutional regulation of

relations between different branches of power in the sense of the concept of checks and balances, etc. [9, p. 482–563].

As A. Medushevsky asserts, "if we talk about nominal constitutionalism, these are essentially constitutions only in name, they camouflage real power. In all Soviet constitutions, except for the last one in 1977, the Communist Party, which was the real power, did not figure at all. And in this sense, it was nominal constitutionalism" [10, p. 54].

The political and legal system of constitutionalism, being an important institutional and procedural guarantee for the establishment, development, and functioning of civil society institutions, has acted and continues to act as a condition for building a rule of law state [11, p. 9–11]. Hence, in the first half and middle of the 20th century, constitutionalism as a socio-political phenomenon and doctrinal teaching in countries with undemocratic regimes (primarily totalitarian - fascist, national socialist, Stalinist-Bolshevik) was not recognized. In particular, in Soviet state law of that period or in the Soviet political science of that time, primarily for known ideological reasons, the phenomenon of constitutionalism was usually either silenced or presented partially or deliberately falsely. Almost always, the negative essence of this phenomenon was emphasized, and its belonging exclusively to the bourgeois system was underlined. For example, "constitutionalism" was written about as a "reactionary trend in politics and legal science that recognizes constitutional monarchy as the best form of government" [12, p. 58].

The attitude towards the phenomenon of constitutionalism changed somewhat at the formal level in Soviet state-legal science at the end of the 1970s. In particular, attempts were made to introduce the term "socialist constitutionalism" ("Soviet socialist constitutionalism") into scientific circulation as a separate concept. It was proposed to consider "Soviet constitutionalism" as a complex concept that includes: firstly, a system of certain knowledge, views (constitutionalism as a theory, ideology, form of expression of objective reality); secondly, a socio-political movement (whose main issue is the constitution, achieving certain class goals on its basis, satisfying class interests); thirdly, a certain state of social relations (which is achieved as a result of strict adherence to constitutional prescriptions). At the same time, the elements of the "Soviet constitutionalism" system became: a) socio-economic political relations that form the actual constitution of Soviet society; b) current Soviet constitutional legislation; c) constitutional-legal relations; d) constitutional legal consciousness of Soviet citizens and the people as a whole; e) constitutional legality; f) constitutional legal order [13, p. 34].

However, these ideas and views, even in such a superficial and rather distant from the classical understanding of constitutionalism variant, did not gain proper acceptance in the former Soviet Union, and in fact until the beginning of Gorbachev's "perestroika" (second half of the 1980s), the Soviet legal paradigm remained totalitarian in essence and, accordingly, a complete opposite to the paradigm of constitutionalism (not recognizing the separation of powers, parliamentarism, local self-government, primacy of human rights, constitutional justice, etc.) [14, p. 172].

It should be noted that it would be erroneous to believe that people's activities are mainly related to satisfying generally significant needs, and therefore they primarily realize themselves in politics. In reality, the absolute majority of individuals are engaged in satisfying a wide variety of interests and needs, including purely individual ones, the sphere of realization of which is everyday life. In it, the actions of individuals are spontaneous and elemental in nature and reflect their desire for autonomy and independence from collective life. The everyday life of individuals, its primary forms, constitute the sphere of civil society. However, the diversity of everyday needs and primary forms of their realization requires coordination and integration of the aspirations of individuals and social groups to ensure the integrity and progress of the entire society. The state maintains the balance and interconnection of social, group, and individual interests through management functions. Thus, global society, that is, the all-encompassing human community, consists of civil society and the state.

Civil society and constitutionalism are social universals, ideal types that reflect different aspects and states of society life that oppose each other. Civil society constitutes the sphere of absolute freedom of private individuals in their relations with each other. According to the definition of French constitutionalist J-L. Quermonne, "civil society consists of a multiplicity of interpersonal relationships and social forces that unite a given society of men and women without direct intervention and assistance from the state" [15, p. 194].

Let us note that the dialectic of general and private interest as a reflection of the interconnection of order and spontaneity, necessity and freedom demanded an appropriate regime of relations between society and the state within the framework of Western civilization. Growing on the values of Greco-Roman civilization and the commandments of Christianity, the regime of constitutionalism initially proceeded from criticism of power, searching for moderate forms of political organization of society. The idea of people's power was opposed to the absolute power of a sole ruler. However, the terror of the Jacobin dictatorship during the Great French Revolution discredited the idea of people's power. It began to be equated with the tyranny of the majority, with a way of justifying the immensity of people's power, the possibility of the majority encroaching on human life and its freedom and property. Historical experience has shown that both absolute monarchy and the tyranny of the majority are equally dangerous. It was necessary to define the limits of state power that would be sufficient both to ensure stability and order, and to guarantee the rights and freedoms of citizens.

The principle of limited power was formulated by the liberal figure of the Restoration era, B. Constant. The essence of this principle was that there should be no unlimited power on earth - neither the power of the people, nor those who call themselves its representatives, nor the power of the monarch, nor the power of the law, which should be confined within the same limits as the power that gives it [16, p. 197].

Approaching the understanding of constitutionalism in the history of political and legal thought was associated with shifting the emphasis in the

analysis of power from its nature – monarchical, religious, people's power – to the relationship of power with the individual. This is vividly traced in the justification of the people's right to disobedience and tyrannicide in case of the monarch's violation of Christian commandments.

After lengthy searches for ways to limit state power, humanity settled on law. It is quite evident that the preconditions for the emergence of tyrannical, despotic regimes are inherent, among other things, in the personal qualities of those who hold the levers of power. It is law that allows limiting the influence of the subjective (personal) factor in state governance. According to P. Eidelberg, author of the well-known work "The Philosophy of the American Constitution," if the "rule of men" is the rule of temporary interests and strategies, accompanied by innovations, improvisations, and changes, then the "rule of law," on the contrary, is guided by legitimate temporary principles and goals, as one of the main sources of law [17, p. 234]. Law is organically linked to the state, therefore it has the necessary resources to limit state power.

"Limitation by law" also means that the concepts of law underlying legislation, administration, and judiciary, i.e., the exercise of state power, are subordinated to the ideology of the inalienability of human rights, according to which state power is limited by human rights. Essentially, constitutionalism, based on notions of natural law and natural human rights, implies, first and foremost, the priority of law over the most authoritative legislative customs, and from this point of view, the presence of a written constitution as the fundamental law is not a necessary condition for limiting state power by law. This primarily refers to common law countries, where principles of law, regardless of the presence of a written constitution, serve as a source of formal legal guarantees of freedom, independence, and property [1, p. 121].

In the modern understanding, constitutionalism is interpreted primarily as the binding of state power by law, and the constitution acts as a form of fundamental legalization of the legal nature of the organization and functioning of power in its relations with subjects of civil society, as the specifics of limitation depend on the peculiarities of the legal system of a particular country.

As is known, law is a product of historical development and in the process of its formation was influenced by various factors: economic, national, social, psychological, cultural, etc. This influence generated a certain type of legal understanding, i.e., a person's attitude towards legal institutions, and formed certain relations between the state, individual, and society. These relations, concerning the foundations of organization and functioning of the state and society, as well as the legal status of the individual, constitute the content of constitutional-legal relations. Thus, differences in constitutional-legal relations, explaining the existence of different variants of constitutionalism, are due to belonging to one or another legal system, i.e., a certain type of legal understanding.

Therefore, real influence on society is created not by the constitution itself, but by the constitutional system. This system consists, firstly, of society's

attitude towards the constitution, and secondly, of behavioral patterns and institutions created around the constitution. If these components do not correspond to constitutional provisions, then the constitution itself turns into a collection of empty declarations. What is important is the understanding and perception by society of the values of constitutionalism, not the declarations of the constitution [18, p. 259]. Constitutionalism is organically linked to the political system it has formed, and only this interconnection allows us to speak about real democracy.

Conclusions. Thus, the understanding of constitutionalism was largely formed under the influence of socio-cultural traditions of specific communities. These traditions defined ideas about the state, freedom, value priorities, and the nature of interaction between the individual and authority. Consequently, the original meaning of the term "constitutionalism" as a political and legal principle of limiting state power by the constitution acquired additional nuances in different cultural contexts.

Despite differences between various models of constitutionalism, common principles can be identified that characterize it as a legal principle: 1) Priority of legal laws, particularly the constitution as the fundamental law; 2) Legal protection of individual rights and freedoms; 3) Institutional and legal structure of state power (horizontal and vertical distribution).

It is important to note that the universality of these principles is associated with the transition of Western society from a religious worldview to a rational perception of the world. This transformation changed people's ideas about the state and society, contributed to the formation of the classical liberal type of civil society, and the emergence of the concept of an autonomous personality.

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