

CONSTITUTIONALIZATION IN THE CONTEXT OF MODERN CONSTITUTIONALISM: THEORETICAL AND METHODOLOGICAL ANALYSIS

Deiak Ivan

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Annotation. The article examines constitutionalization as an important category of constitutional law. The author explores various approaches to understanding this concept, its historical development, and modern interpretations. The views of domestic and foreign scholars on the essence, characteristics, and forms of manifestation of constitutionalization are analyzed. Special attention is paid to the relationship between the concepts of “constitutional order,” “constitutionalism,” and “constitutionalization.” The author emphasizes that constitutionalization is a dynamic process that reflects the practical aspect of constitutionalism and has a global character.

The article examines various aspects of constitutionalization, including its impact on the legal system, the expansion of constitutional regulation, and the subordination of government activities to constitutional principles. The author analyzes the role of constitutionalization in ensuring the unity of the legal system and guaranteeing constitutional rights and freedoms. Special attention is paid to the process of constitutionalization in the context of developing a democratic state governed by the rule of law.

Based on the analysis of scientific sources, the author formulates their own definition of constitutionalization as a multifaceted process that includes the formal establishment of rights in the constitution, subordination of government activities to constitutional principles, expansion of constitutional regulation of various spheres of public life, and the influence of constitutional norms on the development of the legal system.

The conclusions emphasize the importance of further research on constitutionalization for improving constitutional and legal regulation and ensuring the effective operation of constitutional norms in modern society.

Key words: constitutionalization, constitutionalism, constitutional law, legal system, rule of law.

1. Problem statement.

Constitutionalization is one of the key categories of modern science of constitutional law, which reflects the process of penetration of constitutional norms and principles into various fields of law and spheres of social life. In the conditions of the development of a democratic legal state and the establishment of the rule of law, the study of this phenomenon becomes especially relevant. Constitutionalization acts not only as a theoretical concept, but also as a practical tool for ensuring the unity and coherence of the legal system, guaranteeing the constitutional rights and freedoms of a person and a citizen.

The study of constitutionalization as a category of the science of constitutional law allows a deeper understanding of the mechanisms of influence of the Basic Law on all spheres of legal regulation, the processes of state formation and the development of civil society. This study is important for determining directions for improving constitutional and legal regulation, increasing the effectiveness of constitutional control, and ensuring the real effect of constitutional norms in the everyday life of society.

2. The purpose of this study is a comprehensive analysis of constitutionalization as a category of the science of constitutional law, determination of its essence, signs and forms of manifestation in the modern conditions of the development of Ukrainian constitutionalism.

3. Analysis of the source base.

The source base of the research consists of the works of domestic and foreign constitutionalist scientists, in particular the works of D. Belov, M. Savchyn, A. Krusyan, O. Boryslavskaia, V. Shapoval, as well as foreign researchers such as L. Favoro, A. Chaillot, M. Rosenfeld. An important source is also the decisions of the Constitutional Court of Ukraine, which reflect the practical aspects of the constitutionalization of various branches of law. The analysis of these sources makes it possible to form a holistic view of the theoretical foundations and practical manifestations of constitutionalization in modern legal discourse.

4. Presentation of the research material.

The modern constitution, notes D. Grim, is rightly considered one of the great achievements of civilization of our time. Two hundred years after its appearance on the periphery of the Western world, it became a generally accepted scheme for establishing and legitimizing political rule. Almost all countries in the world now have constitutions. But from the beginning, the constitution was an achievement that was in danger of disappearing. The vast majority of constitutions adopted with great hope for a better future fail sooner or later. Most countries have more than one constitution. The United States is a rare exception. Their constitution, which was preceded by a number of constitutions of former colonies, was not only the first, but also the oldest still in force. At the same time, the modern constitution was threatened by circumstances that had changed significantly. The object of constitutionalization was public power, and until recently public power was identical to state power. The state, in turn, could be clearly distinguished from civil society. Today, the scientist points out, we are faced with the erosion of these prerequisites of modern constitutionalism. Internally, the line between private and public is blurring. Private actors share public power without obeying the requirements of the constitution. Externally, the identity of public power and state power has been eliminated. Now there are institutions that exercise public power even at the international level with direct action in states. The question of whether they can be constitutionalized remains open [1, p. 49].

In countries and supranational entities around the world, constitutional reform has transferred an unprecedented amount of power from representative institutions to the judiciary. It is widely believed that the constitutionalization of rights and the establishment of judicial control have a progressive origin and significant consequences of the redistribution of state power. At the same time, R. Hirschl notes in this regard that the tendency towards constitutionalization is unlikely to be due to the true commitment of politicians to democracy, social justice or universal rights. Rather, it is best understood as the product of a strategic interaction between political elites, powerful economic stakeholders, and judicial leaders. This self-interested coalition of legal innovators determines the timing, scope, and nature of constitutional reforms. While the expansion of judicial power through constitutionalization has had a limited effect on advancing progressive notions of distributive justice, it has had a transformative effect on political discourse. The global trend towards juristocracy, R. Hirschl claims, is part of a wider process in which political and economic elites, claiming to support democracy and sustainable development, try to isolate policy-making from the vicissitudes of democratic politics [2, p. 38].

The terms “constitutional system”, “constitutionalism” and “constitutionalization” are closely related and have a similar meaning, but are not identical. Scholars often consider “constitutionalism” as a complex category that includes both value and practical aspects. Thus, D. Byelov, analyzing the fundamental values of constitutionalism, interprets modern constitutionalism as a socio-political movement, theory, doctrine and practice [3, p. 45].

It can be assumed that “constitutionalization” is the category that most corresponds to the practical aspect of constitutionalism, reflecting the dynamic side of its content. H. Toibner claims that constitutionalism,

being the basis of modern processes of legal globalization, is manifested, in particular, through the constitutionalization of legal systems, national branches of law and the entire legal order at the international (global) level [4, p. 81].

It should be noted that the term “constitutionalization” is becoming increasingly relevant and in demand at the current stage of the state’s constitutional development. This is evidenced by the increase in the frequency of its use in scientific works, which may be due to the search for new approaches in research and the desire to offer an alternative to the traditional concept of “constitutional and legal regulation”.

Thus, in particular, the category “constitutionalism”, notes D. Byelov, becomes one of the most frequently used concepts in the science of constitutional law, which are used in the form of status and evaluation characteristics of the state, ways of organizing state power in both Ukrainian and foreign constitutional practice [3, p. 48].

According to M. Savchyn, the idea of constitutionalism is based on the constitutional tradition, the sovereignty of the people, the separation of powers, legal succession (continuity) and judicial control over the legal content of the acts of the authorities. Legal succession means the preservation of national traditions of constitutionalism, their multiplication on the basis of changing concrete historical reality, real constitutional legal relations. The essential content of legal succession is the criterion of increasing the “catalogue” of basic rights and freedoms, as well as expanding the procedural and procedural possibilities of their protection in order to ensure a dignified life of an individual. Etymologically, the concept of constitutionalism can be defined as the duration, persistence over time of certain constitutional phenomena and processes, in particular the long-term perception and reproduction of individual legal decisions, as well as the subordination of political decisions to social values, which are provided by constitutional protection [6, p. 17].

At the same time, legal succession (continuity), the scientist claims, means that the national legal system has its own history and its historical heritage is multiplied by new elements while preserving the old ones; development of constitutional law according to the “old” law. Therefore, the natural rights of a person must be enshrined in the constitution, since it is about ensuring the legal certainty of a person’s status and limiting the possibility of their arbitrary interpretation. The sovereignty of the people as a structural element of constitutionalism determines the sources of public power, its legitimacy, and the constituent nature of the constitution. This mechanism ensures the limitation of the arbitrariness of public power, which is the ideological value of constitutionalism. The content of the state’s activity is not only the provision of civil and political rights, but also social rights and rights to development (collective rights), which requires constitutional justice to dynamically interpret basic rights. The main legal mechanism for limiting the arbitrariness of power is the separation of powers and judicial control over acts of public authority [6, p. 18].

At the same time, it should be noted that the actual concept of “constitutionalization” was introduced into scientific circulation by foreign researchers and comes from the word “constitution”. Thus, in particular, according to the North American explanatory dictionary of the English language, the first known use of the term “constitutionalization” dates back to 1831 and meant: providing a constitution or organizing something according to constitutional principles [7].

Intensive study of the concept of “constitutionalization” by foreign scientists began at the end of the 20th – the beginning of the 21st century and continues to this day. This term has gained particular popularity in constitutional and legal discourse, sometimes even being overused.

The outstanding L. Favoriu was one of the first to pay attention to the phenomenon of “constitutionalization” and in his work he substantiated the need to identify a new stage of post-constitutional development of the countries of the former USSR, emphasizing the importance of ensuring strict correspondence between the constitution and legislation. The scientist, in particular, singled out the following key aspects:

- the need to explain the constitutionalization of the legal order;
- understanding of the process of constitutionalization and its impact on political life;
- the role of legislative power and constitutional justice;
- the relationship between the constitutionalization of sources of law and the improvement of democratic procedures;

– the impact of constitutionalization on various branches of law and the modernization of the legal order [8].

The questions raised by scientists stimulated further research into various aspects of the concept of “constitutionalization”, discussions about its legal nature continue both in foreign and domestic scientific literature. Today, this term does not have a clear interpretation and is characterized by different connotations in the writings of scientists.

Thus, in particular, professor of public law M. Lochlin singles out two types of constitutionalization: international and domestic, connecting the latter with the idea of expanding constitutional regulation of human rights. He defines constitutionalization as a process of law-making at all levels of public power, which involves subordinating the activities of public power bodies to constitutional structures, processes, principles and values [9, p. 49].

Scientist T. Podorozhna writes in this regard: “Each article, each provision of the Constitution of Ukraine must be embodied in the daily practice of all state bodies, all officials, and all citizens of Ukraine. In view of this, constitutionalization is a state law phenomenon that arises purely from the will of state authorities. Participants in this process are all subjects of the law-making, law-enforcing and law-enforcement process. These bodies are responsible for drafting and adopting the Constitution of Ukraine, constitutional laws and other normative legal acts and sources of law; they carry out measures to implement the current legislation, its interpretation, protection and protection of legal norms. At the same time, one should not give preference to one of them” [10, p. 28].

H. Brown highlights the ambiguity of the term “constitutionalization” in modern discourse. He notes that this term is used in a variety of contexts, which leads to the need for its constant clarification by authors. The scientist emphasizes that there is often uncertainty in the scientific literature regarding the exact meaning of this term and the mechanisms of its practical implementation. He raises the question of what exactly is subject to constitutionalization and how this process takes place in practice. According to the author’s observations, “constitutionalization” is most often used to describe empirical phenomena in international law. This includes the development of global legal regimes, the growing influence of international organizations and the general evolution of international law. At the same time, G. Brown notes that with a deeper analysis of the literature, difficulties arise with a clear understanding of the essence of this term. He points to the diversity of its applications, which cover both descriptive and normative aspects, which complicates the formation of a single definition and understanding of the process of constitutionalization [11, p. 209].

According to the definition of Y. Shemshuchenko and Y. Barabash, constitutionalization is, on the one hand, formally defined consecutive stages, and on the other hand, it is a dynamic influence on the legal system and social relations as a whole [12, p. 35]. Such a process, according to T. Podorozhnaya, involves three stages: a) development and adoption of the fundamental act called “constitution”; b) implementation of its provisions in all structures of the legal system; c) ensuring the priority of constitutional provisions over all other legal phenomena and their strict observance in everyday activities by state bodies and citizens [13, p. 88].

Analyzing the term “constitutionalization” from an empirical point of view, the scientist believes that it belongs to the interpretative concepts of the legal process, covering its subjective and objective aspects. At the same time, H. Brown singles out three key characteristics of this concept. The first and most common interpretation is related to the description of formal legal and political processes that shape the global legal order. The objectification of this order can be expressed through a hierarchical structure. In this context, “constitutionalize” means creating formal legal processes where rights and duties are clearly codified and judicial procedures have defined authoritative mechanisms. The second aspect considers “constitutionalization” as the process of subordinating the organization of legal jurisdiction to the established constitutional order. The third characteristic concerns informal and extralegal processes of norm formation. These norms can arise as a result of various legal and political interactions, which gradually acquire the status of a more authoritative constitutional legal order. Thus, H. Brown presents “constitutionalization” as a multifaceted concept that encompasses both formal and informal aspects of legal and political development [11, p. 210–212].

According to N. Parkhomenko, the process of constitutionalization assumes that the constitution establishes the normative framework and legal foundations of key social relations. In this way, it outlines the systemic, structural, functional and other relationships between various social institutions, which contributes to the

harmonious development of the entire society. On the one hand, the evolution of social relations, and on the other hand, the content and essence of branch legislation must be consistent with the goals, values and principles enshrined in the constitution. This means that these aspects of social life and the legal system directly depend on constitutional norms and principles, forming and developing in accordance with them [14, p. 161].

Constitutionalization, as the scientist T. Podorozhna, already quoted by us, rightly points out, together with the corresponding activities of bodies and officials of public power, also encompasses constitutional practice - the systemic unity of social relations of a higher order, which are consistently developing and require formal legal certainty and an adequate level of standardization of their objective nature. In this sense, constitutionalization appears as a process of permanent and consistent objectification in constitutional practice of value-normative legal institutions, constitutional-legal ideas and ideals of a specific society at a specific stage of development of its political-legal culture [10, p. 29].

It should also be noted that, while researching the historical aspect of the constitutional consolidation of personal rights, some scholars identify differences between the processes in the English legal system of the 17th and 18th centuries and the American system of the 18th century. At the same time, they call the first process "fundamentalization" of individual rights, and the second - "constitutionalization" of individual rights.

Thus, in particular, the Austrian professor of history J. Sturge in his work "Development of constitutional supremacy and constitutionalization of individual rights" offers a definition of constitutionalization. According to his interpretation, this is a process that began at the end of the 18th century and is characterized by three main aspects:

1. Introduction of individual rights to constitutional documents.
2. Separation of constitutional and legislative power.
3. Establishing a hierarchy where ordinary legislation is subordinated to the constitution as a higher legal act [15].

This approach, in our opinion, emphasizes the importance of formally enshrining rights in the constitution and creating a legal structure that ensures their priority over ordinary laws.

5. Conclusions.

So, in our opinion, constitutionalization is a multifaceted process that reflects the dynamic side of constitutionalism and has a global character. This process includes the formal enshrining of rights in the constitution, subordinating the activities of government bodies to constitutional principles (consolidating provisions in the text of the constitution, giving them constitutional force), expanding constitutional regulation of various spheres of social life, as well as the influence of constitutional norms on the development of the legal system.

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