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# THE RULE OF LAW AS AN ELEMENT OF CONSTITUTIONALISM

## 1. The concept of constitutionalism

The constitutionalism represents a set of ideas, attitudes and manners of conduct, that explain the principle of limitation of state power with legal means. The term is without clear definition, used in multiple connotations and so general that invokes argument for all of its aspects.

Generally, constitutionalism has two meanings. On, one hand, constitutionalism is used to indicate the need for codification of rules for the state organization. For example, in the 18 century, a great enthusiasm for the written constitutions emerged. The main and leading idea of this constitutions was to regulate the organization and function of the main governmental bodies and control of the relationship between the government and the citizens. Constitutionalism in the later sense, on the other hand, is constitutionalism as a political ideal. It refers to a certain view on government power. As *Carla. M. Zoethout* emphasizes ,, the constitutionalism expresses the necessity of limiting state power by means of the law, it is a conviction that no government should have unlimited power to do whatever it wants, because every government can relapse into arbitrary rule, unless precautions are being taken"[1].

Hereby, two basic aspects of constitutionalism can be underlined:

[1] Carla M. Zoethout and Piet J. Boon. Defining constitutionalism and democracy: an introduction p. 5. http://www.ancl-radc.org.za/sites/default/files/Constitutionalism%20in%20Africa%20pgs%201-17.pdf

1. The first aspect, concerns the formal constitutionalism- refers to the organizational function of constitutionalism. ,,Power is proscribed and procedures prescribed" [2].
2. The substantial aspect of constitutionalism- refers to the idea of protection of individual rights and freedoms from governmental actions and interference.

*Treneska- Deskoska* stresses that "*the term traditionally means limited authority and is defined as a system of legal limitations of the state power"*[3]. Its opposite is arbitrary, absolutist, authoritarian or totalitarian government[4].

Constitutionalism is a doctrine which governs the legitimacy of government action. It is a concept of conformity of action not only with the written or unwritten constitution but more important of conformity with the broad philosophical values within the state.

*Hilaire Barnett* emphasizes that the doctrine of constitutionalism suggests the following:

a) That the exercise of powers be within the legal limits and those who exercise the power are accountable to law,
b) That the exercise of power must conform to the notion of respect for individual and individual citizens rights,
c) That the powers conferred on institutions within the state- whether legislative, executive or judicial- be sufficiently disperse between the various institutions so as to avoid the abuse of power.
d) That the government, in formulating policy and the legislature, in legitimating that policy, are accountable to the electorate on whose trust power is held[5].

*The Constitutionalism is an ideal and ideology for limited and controlled government.* The way to reach this ideal are the legal mechanisms, means and instruments which limit the power. Hereby, to understand constitutionalism means to embrace all its

[2] Andrews. W.G. Constitutions and constitutionalism. London 1963. P.13
[3] Treneska -Deskoska Renata. Constitutionalism. Skopje. 2015. p. 3
[4] ibid
[5] Barnett Hilaire. Constitutional and Administrative Law. Routledge Cavendish. 2006. p.5

elements. *Treneska* determines that there are many definitions for the term constitutionalism, but its substance may be described through the following elements:

a) Separation of powers (separation between different branches of the government and separation between different levels of authority)
b) Consent of the governed.
c) Existence of ,,higher law" (collection and system of written and unwritten of rules regulating the government in the state
d) Protection of human rights
e) The Rule of law[6].

To summarize, it is very difficult to isolate and point to one sole definition for constitutionalism. The term is multilayered and its true meaning can be perceived only if all the mentioned elements are analyzed.

## 2. The rule of law

The rule of law is neither a rule, nor a law. It is more a political or moral principle. The rule of law is probably one of the most challenging concepts of constitution and one that may be interpreted in different ways. It is not the concept with one accepted meaning.

The rule of law is generally understood as a doctrine which concentrates on the role of law in securing the correct balance in rights and powers between individuals and the state. The rule of law may be interpreted as a philosophy which lays down fundamental requirements for the law or a procedural device by which those with power rule under law. Generally, two aspects are emphasized for the principle of rule of law. The first one refers to the substance of the relationship between citizens and government. The second, deals with the processes through which that relationship is conducted. Or,

[6] Treneska -Deskoska Renata. Constitutionalism. Skopje. 2015. p. 4

phased more simply as Ian Loveland pointed out, „The rule of law is concerned with what the government can do-and how government can do it"[7].

In connection with the above mentioned, procedurally oriented version of the concept of rule of law by *Joseph Raz,* is in relation with 8 specific postulates:

a) The law should be general, prospective, open and clear,
b) The law should be relatively stable (not subject to frequent and unnecessary changes)
c) The law should identify the jurisdictional limits to the exercise of delegated legislative powers
d) The independence of the judiciary should be guaranteed
e) The application of the law should accord with the rules of natural justice
f) The courts should have a power of review over law-making and administrative action
g) The courts should be easily accessible
h) Crime preventing agencies should not be able to choose which law to enforce and when[8].

For *Raz*, the rule of law is a political ideal which a legal system may lack or posses and by which it can be judged. It is a virtue of the legal system, but it must not be confused with the constitutionalism, democracy, justice or equality. It does not necessary mean that the legal system that respect above mentioned postulates is necessarily „morally good". That is why his doctrine is morally neutral[9]. *Raz* draws analogy between the principle of rule of law and a knife. One quality of a good knife is a sharpness. However the quality of sharpness says nothing as to the use to which the knife might be put: murder or beneficial surgery[10]. The same is with the rule of law. That is why this principle must be put in the greater prospective or it might be misused.

[7] Loveland Ian. Constitutional Law, Administrative Law and Human Rights. Oxford university press.London 2006.p. 56
[8] Raz Jozeph. The Rule of Law and its Virtue. In Caroll Alex. Constitutional and administrative law. Pearson Longma. London 2007. P.46
[9] Barnett Hilaire. Constitutional and Administrative Law. Routledge Cavendish. 2006. p.77
[10] ibid. p.78

Other interpretations of the doctrine go beyond the procedural and formal requirements and face certain values that this principle should protect. *Alex Caroll* emphasizes that purpose of all law should be respect ,,for the supreme value of human personality" and that the observance of the rule of law should entail:

a) The existence of representative government
b) Respect of the human rights and freedoms
c) Absence of retrospective penal laws
d) The right to bring proceedings against the state
e) The right to a fair trial
f) An independent judiciary
g) Adequate control of delegated legistlation[11].

Other authors highlight the effective system of horizontal accountability, as an element of the principle of rule of law. This element assumes that the system is composed of institutions that hold each other accountable and responsible to the law and public. This horizontal accountability is crucial element of the doctrine. Institutionalized democracies nurture not only vertical accountability (making elected officials answerable to the ballot box) but also horizontal accountability as a network of relatively autonomous powers that oversee the duty of the government to obey the law[12]. An independent judicial brunch is a part of the system of horizontal accountability. There is threatening danger of ,,asymmetric equilibrium" in the systems that lack this element.

According to *Berman*, the rule of law means that the respective heads of each body would be bound by the law which they themselves had enacted, they could change it lawfully, but until they did, so they must obey it-they must rule under law[13]. Summary,

[11] Caroll Alex. Constitutional and administrative law. Pearson Longma. London 2007. P.47
[12] Whitinghton Keith E, Kelemen R Daniel, Caldeira Gregory A. The Oxford Handbook of Law and Politics. Oxford University Press. 2008.p 65
[13] Berman H.J. Law and revolution: The formation of the Western Legal Tradition. Cambridge Mass. Harvard University Press. 1983.292 in Whitinghton Keith E, Kelemen R Daniel, Caldeira Gregory A. The Oxford Handbook of Law and Politics. Oxford University Press. 2008.p 64

an independent judicial branch and the principle of separation of powers are conditio sine qua non for the principle of rule of law.

## 3. The dilemmas- Obligation to obey the law vs. the right to disobey law

The discussion for the right vs. duty to disobey law is eternal, open and incomplete. This dilemma seems to represent an attempt to see ,,*the dark side of the moon*".

*Hillarie Barnett* highlights that the ,,alternative perception of the ,, rule of law" is ,,the law and order model" that emphasizes the peaceful settlement of disputes without recourse to violence, armed force and terrorism"[14].

**3.1. Obligation to obey the law**- Legal theory makes strong connection between positivist school and the idea of absolute obedience to law. The positivists embrace the understanding that the state is primary and the only law that exists is the one created by the state. The individual is secondary, therefore the existence and content of the human rights depends solely on the existing laws. The legislative is not limited in determining the content of the laws and the state has the discretionary power to determine whether it will allow rights of its subjects (not citizens) or will limit or revoke them. *Kelsen* points to the absolute freedom of the state in the creation of the law and almost makes a strict distinction between the law and the morale. For him the legal norms may have any content and must be obeyed regardless of the values that are protected by the law if any. The obedience is complementary even to immoral laws[15].

Guided by the standpoint for the law as a fact, the question arises to which degree the voted by the majority and the established law should be obeyed? Does the obligation to obey remains event when the law represses the rights and freedoms? Is there an absolute obligation for obedience to the immoral norms? And finally, is there an obligation for the disobedience the law, in pursuit of higher ideal?

[14] Barnett Hilaire. Constitutional and Administrative Law. Routledge Cavendish. 2006. p.81

[15] Kelzen Hans. The General Theory of Law. Berkeley.1967. 114

In order to search for the answers to this question one must accept the premise that there is the duty to obey the law. This duty is a result of the fact that the law should protect some universal values that are basis of the society. Aristotle argues that the law should be tempered with equality, justice and rightness in society. If the law protects this values, than it will be obeyed by the people. The law derives its authority from the obedience of the people. In a democratic state with responsive institutions, the dispute between the rights of the individuals and action of the government will be dealt through provided and prescribed instruments and mechanisms. This instruments and mechanisms are tools through which the will of the citizens to protect their rights, is channeled.

**3.2. The right to disobey the law**- if one accepts the premise for the absolute obedience to the law, the question that arises is what happens if the government fails to the demands of the citizens. The democratic government must be sensitive to demands for change. If it fails in this regard, than what can citizens do? Do they have the right to disobey the law and to which extend? Which is the *Aristotle`s* „middle way", that may be used by the citizens in order to protect the rights, and through them some values, and make the government sensitive to their demands.

Some examples in history of mankind, go in relation to *John Rawls* thesis for peaceful protest as a method of civil disobedience. Mahatma Gandhi and the peaceful civil disobedience led to independence of India, the campaign of Martin Luther King that led to reforms of acts concerning racial segregation, protests against the war in Vietnam had an impact in government policy. The viewpoint of *Rawls* is founded on the theory of social contract and the mutual recognition of the rights and obligations of the state as well as the citizens. The state must remain sensitive to the requests of the citizens. *Rawls* places the degree of upholding the law in correlation with the degree of participation in the creation of the law. This relation is proportionate. Finally, *Rawls* accepts the idea for the right to disobey the law, and the mechanism for it is the peaceful protest as a form of civil disobedience.

The quest for solution of the modus the state and its institutions should act in case of violation of the law, seem even more dramatic. Is a strong, decisive and sharp response

necessary in the protection of the law and the system which for some reason has lost its legitimacy or is it required a balanced and thoughtful act that shall not remain deaf and insensitive to the changes that are requested. Which is the Aristotelian "middle way" in this case?

In this context, *Ronald Dvorkin* and *Alexaner Bickel* offer specific solutions that are bound exclusively to the actions of the courts. It seems that the preservation of the legitimacy and the feeling of trust in the system are violated through the procedures and decisions by the courts. They are the final instance which should institutionally channel the will of change manifested by the breaking of the law.

*Ronald Dworkin* argues for official tolerance in the face of law braking . ,,The state should act in caution in prosecuting civilly disobedient acts. The state should respect the stand taken in defense of rights, and the decision to prosecute should be decided on the basis of utilitarianism. By prosecuting disobedience to law, the state upholds to positive law. By using the positive law in concrete case the courts may reveal the defects on law. In case like this the courts must not be rigid in implementing the law and should decide on the basis of utilitarianism ( for the greatest happiness of the greatest number).

*Alexander Bickel* theory of passive virtue of the court, is connected to the question whether the courts have jurisdiction to diagnose ,,the pathology of the system" at all and how should they act in such case. The judicial function is interested in the values that should be preserved in the long run, i.e. its principal mission is to articulate the "moral unity" of the nation[16]. For *Bickel,* the judicial control of constitutionality represents a counter-majority institution, but still he favorises judicial control. The institution of the judicial control "must play its part", and in the process of judicial control of constitutionality, the court must guide and educate the other branches of the government. The judicial control is just one element in the constitutional scheme tasked with sharpening and promoting the system of values even in situations when there no national consensus for it.

[16]*Alexander Bickel`s Philosophy of Prudence*. Antony Townsend Kronman. The Yale Law Journal. Vol.94.no 7.1985.p. 1577

Through its function, the Supreme court intends to participate directly in the shaping of the moral vision to which the nation tends to, and it is rooted in the moral and legal tradition and in the Constitution. Therefore the court in accordance with *Bickel* is an educator meaning that it should show where the personal convictions of the citizens lead. In order to achieve it, the so called passive virtue is required, as a model and mean for superseding the conflict with the will of the majority. The passive virtue represents techniques and means, a set of perceptive and judgment capabilities to assess the legal situation, to gain time and to confront the court with the pressure of the public[17]. For *Kronman,* the broader meaning of the term ,,passive virtues" supersedes the usual techniques for self-limitation of the court in the process of review of the laws and covers the forms of practical wisdom, the modality of deliberation whose practicing is necessary for its functioning[18].

## Conclusion

In the broadest sense, the principle of rule of law may be equated to the constitutionalism. Treneska argues that "the constitutionalism understood as limitation of the government is established with a combination of historic tradition and higher principles that do not depend on the will of the government"[19]. The constitutionalism and the rule of law are two different concepts that intertwine. The concept of rule of law opens essential issues for the constitutionalism. Therefore to discuss about constitutionalism means to elaborate its other elements. The rule of law is a narrower principle of constitutionalism. Finally, the principle of the rule of law is only one element of the constitutionalism.

[17]Bickel.p.68

[18]*Alexander Bickel`s Philosophy of Prudence*. Antony Townsend Kronman. The Yale Law Journal. Vol.94.no 7.1985.p. 1585

[19] Treneska -Deskoska Renata. *Constitutionalism.* Skopje. 2015. p. 6

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