ppi 201502ZU4645
Esta publicación científica en formato digital es continuidad de la revista impresa
ISSN-Versión Impresa 0798-1406 / ISSN-Versión on line 2542-3185Depósito legal pp 197402ZU34

CUESTIONES POLÍTICAS

Instituto de Estudios Políticos y Derecho Público "Dr. Humberto J. La Roche"
de la Facultad de Ciencias Jurídicas y Políticas de la Universidad del Zulia
Maracaibo, Venezuela

Vol.38 | *Nº Especial*

2da Parte
2020

Cuestiones Políticas Vol. 38, Nº Especial (2da parte) 2020, 122-130
IEPDP-Facultad de Ciencias Jurídicas y Políticas - LUZ

Unity of law and legal act as a key principle of the rule of law

DOI: https://doi.org/10.46398/cuestpol.382e.08

Ainur Razifovich Gilmullin *
Eduard Vladimirovich Krasnov **

Abstract

This article discusses one of the key principles of the rule of law, such as the principle of unity of law. Consequently, the opinions of scholars who define this principle were a naturalized and their main characteristics stand out. In addition, the article provides an attempt to compare the principle of unity of law with the principles of the rule of law and highlight its general characteristics and differences. In methodological terms, the technique of documentary research and comparative hermeneutics was used. It is concluded that the categories of «rule of law» are understood by several authors very differently, there is no consolidation in the definition of this concept; often the above principles contradict each other: they express the static or dynamics of the rule of law, so they require additional doctrinal legal awareness and study. Under modern socio-political conditions, it would be better to use unity of law as the principle of the rule of law; because, it is the principle of unity of law that can provide effective and rational protection and realization of the rights and freedoms of citizens, societies and states.

Keywords: rule of law; principles of the rule oflaw; unity of law; legal hermeneutics; state theory.

* Kazan Federal University, PhD, senior lecturer of the Department of Theory and History of State and Law. ORCID ID: https://orcid.org/0000-0002-9842-8587. Email: gilmullinainur@yandex.ru

** Kazan Federal University, assistant of the Department of Theory and History of State and Law. ORCID ID: https://orcid.org/0000-0001-7955-3676. Email: adickkrasnov@yandex.ru

Recibido el 12/06/2020 Aceptado 12/11/2020

La unidad de la ley y el acto jurídico como principio clave del Estado de Derecho

Resumen

Este artículo discute uno de los principios clave del estado de derecho, como lo es el principio de la unidad de la ley. En consecuencia, se analizaron las opiniones de estudiosos que definen este principio y destacan sus principales características. Además, el artículo proporciona un intento de comparar el principio de unidad de la ley con los principios del estado de derecho y se destacan sus características generales y diferencias. En lo metodológico se hizo uso la técnica de investigación documental y de la hermenéutica comparada. Se concluye que las categorías de "estado de derecho" son entendidas por varios autores de manera muy diferente, no hay consolidación en la definición de este concepto; a menudo, los principios anteriores se contradicen entre sí: expresan la estática o la dinámica del estado de derecho, por lo que requieren una conciencia y un estudio jurídicos doctrinales adicionales. En el marco de las condiciones sociopolíticas modernas, sería mejor utilizar la unidad de la ley como el principio del estado de derecho; porque, es el principio de la unidad de la ley el que puede proporcionar una protección y realización eficaz y racional de los derechos y libertades del ciudadano, las sociedades y los Estados.

Palabras clave: estado de derecho; principios del estado de derecho; unidad de la ley; hermenéutica Jurídica; teoría del estado.

Introduction

Such social phenomena as "law" and "right", their correlation and meanings for each other were chronically of particular importance for the theory and philosophy of law throughout the history of the state and law. At the same time, without exaggeration, it can be noted that it was the relation of law and right that became the forerunner for the metaphysical search of society political organization based on the free and safe development of a man, namely, legal statehood.

The rule of law as an abstract-idealistic construction of public life legal structure in a particular state undoubtedly needs a systematic disclosure of its content, axiological aspects, etc., where special importance is given to the fundamental principles. The principles of the rule of law are the most fundamentally general principles of state power exercise in the framework of a fair society development focused on the preservation and development

of a man and his rights, as well as on society freedom provision. It is worth noting that the principles of the rule of law express its foundation.

Modern scholars distinguish a large number of principles of the rule of law. For example, M.M. Utyashev identifies more than ten principles of the rule of law: the principle of popular sovereignty, the principle of legitimacy of power, the principle of priority of law over power, the principle of equality of state and personality, the principle of inviolability of a person, the principle of law and right identity, the rule of law, the principle of independence of the judiciary, the principle of power separation, the principle of political equality of citizens and the principle of universal suffrage (Utyashev, 2005).

1. Methods

It is worth noting that a fairly large number of works mentions the categories of "rule of law" as the principles of the rule of law. Moreover, quite often these terms are contrasted with each other. This is largely due to the existence of various concepts of legal understanding, when under legal positivism, under the law they understand only those acts that are authorized to issue by specially created legislative bodies of power, while in sociological legal understanding, the law also refers to the norms that can be created by various subjects of law, up to citizens and legal entities.

However, when it comes to the rule of law, as one of the most important principles of the rule of law, there is some uncertainty in its interpretation. So, if we look at the works of the same S.A. Kotlyarevsky, then we can conclude that in his works "the rule of law as a principle of the rule of law passes through a red thread" (Glushachenko, 2003). It is noteworthy that the law in this context does not consider the whole totality of its sources, but only constitutional laws. "They are the highest expression of state power, they receive powers and legislative institutions, and the legislative life of the country flows within them" (Kotlyarevsky, 1915: 451). Continuing his thought, he comes to the conclusion that the rule of law lies in the lawfulness of decrees for both the monarchy and the republics. He also believes that it is necessary to establish a legislative order during a legal norm determination.

It is worth noting that in Western European doctrine this principle is also understood ambiguously. The concept of the rule of law was developed in German jurisprudence, which either reduced to the formula "ordered by the law of bureaucracy". Such a formulation can be traced in the works by K.T. Welker and R.G.F. Gneyst (Gneist, 1879); or to the subordination of the executive and legislative branches of government, when, within the framework of a constitutional monarchy, the first submits to the second

(Welcker, 1813). At the same time, it should be noted that the languages of other nations also include this institution: in English, the phrase "rule of law" corresponds to it, and the case is the same in French (Nersesyants, 1996). In general, it is necessary to agree with M.M. Brinchuk, who correctly noted that "it is not accidental that the concept of the rule of law is used in some countries, instead of the category of the rule of law" (Brinchuk, 2005: 09). Based on this, we can come to the assumption that the institution and principle coincide in the above countries.

2. Results and Discussion

Meanwhile, not all authors are inclined to consider the category "rule of law" as the principle of the rule of law. So, for example, N.V. Shishkina singles it out as a sign of this state: "The rule of law is one of the essential features of a rule of law state, which means that law dominates all people and the state itself, that is, bodies and officials, the priority of law is affirmed" (Shishkina, 2006: 277). Such a substitution of concepts allows us to say that far from all authors distinguish the principles of the rule of law from its features. In our opinion, the main difference between these concepts is that the principles have doctrinal legal representations, i.e. theoretical standards, goals, and guidelines and they should also be expressed in law-making and law enforcement activities.

At the same time, the signs express our reality, and determine its most characteristic features. Strictly speaking, the principles express the state of law and related elements at the level of statics, while the signs reflect legal phenomena in dynamics, that is, in constantly changing conditions that characterize the real state of things. From this point of view, it was more appropriate to single out the principles of the rule of law in statics and dynamics (Krasnov, 2017).

Also, it should be noted that some scholars often use the term "rule of law" as a synonym. For example, S.S. Alekseev writes that "the rule of law is a specific social phenomenon, stipulated by the natural right of a person to freedom, inviolability and equality, since these universal values form the basis of an individual legal status" (Alekseev, 1997: 49). In another work, he uses almost identical definition, saying that "the rule of law is a specific social phenomenon, due to the natural, inalienable right of a person and a citizen to freedom, equality, justice, and personal privacy" (Alekseev, 1999: 52). In this regard, a logical question arises concerning the relationship between the principle of the rule of law and the rule of law.

First of all, it should be noted that not all authors use the terminology "rule of law". More often you can see the use of the phrase "rule of law." So,

in particular V.N. Khropanyuk among the main features that are inherent in the rule of law, includes "the rule of law in all areas of public life" (Khropanyuk, 2008: 384). It can be assumed that in this case, scholars try to give this principle the role of a certain power principle, thanks to which it will be possible to ensure and respect the rights and freedoms of citizens. However, if we adhere to the sociological concept of legal understanding, then in this case not only the acts emanating from the state on behalf of its competent authorities will have the highest legal force.

Recently, the number of sources of law has been steadily increasing; as such, they stand out not only for legal acts, legal contracts, legal customs and legal precedents, but also for legal doctrine as "a product of intellectual activity and, to some extent, the result of scientific creativity" (Gilmullin, 2017: 159), as well as for situational law, which refers to the law in dynamics, "living" law - the normative basis of complex legal implementation (Pogodin, 2013). The essence of this concept is that any person can be engaged in law-making within a specific relationship. It seems that in relation to the principles of the rule of law, this source of law should also be taken into account, despite still weak theoretical study of the described legal phenomenon.

Also, it is worth noting the interesting approach by F.M. Rayanova, who, under the legal essence of the state, singles out the supremacy of the ruler's will or the supremacy of the law adopted by the representative people government (Rayanov, 2005). Of course, it is worth emphasizing that it was not a rule of law state, but the state in general. However, if we try to extrapolate this view to the nature of the rule of law, then it can be assumed that the rule of law distinguishes the rule of law from the "unlawful" or "pre-legal" state. Indeed, the rule of law may also be the legal will of the monarch, which will be mandatory, however, this will not mean its combination with the interests of society and the will of the people.

Even more questions are raised by the statement from M.M. Brinchuk, according to which "in a state of law, power is bound by law when law is above power" (Brinchuk, 2005: 07). This thesis raises questions about the sources of law development and the degree of authority participation in this process. It seems that it would be more appropriate to clarify that it is the law that should prevail over the authorities, because otherwise you may encounter a number of problems in private law relations, where the subjects of law can, in fact, create various legal rules within the framework provided by legislation. These conceptual provisions can also be seen in the works of the famous English lawyer Albert Dicey, who, speaking of "Rule of law", indicated that no one was above the law (Dicey, 1959).

Secondly, the question arises of the relationship between the concepts of "rule of law" and the terminology of "rule of law". Do these categorical concepts always have to be understood in the same way? For example, a

number of scholars uses these expressions as subsidiary by their content to each other. So, N.I. Matuzov and A.V. Malko highlight "the rule of law and its dominance in public life" as the way to limit political power (Matuzov and Malko, 2004).

In a way, such an interpretation allows us to say that scholars have tried to separate the law as the highest source of law among other legal acts and its dominant position for participants in legal relations. The conclusion suggests itself that here the main difference will be the understanding of the rule of law as a de jure principle, while the rule of law is considered from a de facto point of view, that is, in this case, this principle reflects the real picture of the life of society and the state. Separately, it is worth mentioning the "liberal" theory of the rule of law by Trevor Allan, which points to the "internal morality" (Allan, 2001) of law as the reflection of the rule of law.

The view by N.M. Marchenko on the problem of correlation of the following categories is also of interest: "supremacy" and "domination". So, in his textbook, he singles out "the rule of law" as one of the most important principles. At the same time, the author emphasizes that the law is considered in the literal sense - "as an act emanating from the highest public authority and having the highest legal force" (Marchenko, 2011). At the same time, speaking of the rule of law, Marchenko emphasizes that this terminological construction should really be implemented, that is, a "real rule of law" should exist in the country, as if emphasizing the thesis of the previous paragraph on the need to distinguish between these categories in terms of highlighting principles in statics and dynamics.

Given the complexity and polarity of the presented points of view, it is worth noting that E.A. Laktunina proposes to use the unity of law and right as the principle of the rule of law (Laktunina, 2005). Speaking about the rule of law, it should be noted that all its components should work as a single mechanism, the same applies to its principles. Therefore, implying the dominance or supremacy of something, we are already embarking on the slippery path of juxtaposing phenomena to each other. At the same time, it should be remembered that the law in a state of law should be legal in nature, but law should reflect the rule of law in society. In this part of the analysis, it is acceptable to pay attention to the fact that the first, most prominent hypotheses:

> About the nature and content of laws, about their objective principles, about their correspondence to divine principles, justice, humanity, power, etc. began to develop even in ancient Greek political and legal thought at the beginning of the 1st millennium BC (Gilmullin, 2020: 09).

In other words, the unity of law and right should imply the unity of the statics and dynamics of the rule of law, when the norms created by a

specially authorized state body find their proper concretization in the acts of the executive and judicial authorities, in the rule-making activities of legal entities.

Conclusions

We can conclude that:

- The categories of "rule of law" are understood by various authors very differently and subjectively. There is no consolidation in the definition of this concept. In addition to the mentioned above, it can be noted that in some works there is a confusion and substitution of this principle by others that are similar in essence, but still differ in content.
- Often, the above principles contradict each other: they express either the statics or the dynamics of the rule of law, thereby requiring additional doctrinal legal awareness and elaboration.
- It should be noted that in modern socio-political conditions it would be better to use the unity of law and right as the principle of the rule of law. This principle expresses the statics and dynamics of the rule of law, their clear relationship and implementation in the mechanism of a state ruled by law.
- All categories considered in the framework of this analysis, in terms of content and practical significance, represent: 1) achievement, the result of philosophical and legal thought at a certain historical stage of development; 2) the indicator of human culture and civilization state; 3) the basis for further rational development of democratic, legal and social states and their institutions; 4) mechanisms that ensure the conservation of human nature and its worthy existence.
- As some authors note: "international law of the XXI-st century is a human right" (Gilmullin *et al.,* 2019). In our opinion, it is precisely the principle of the unity of law and right that can strengthen this trend in modern international law and provide effective and rational protection and implementation of the rights and freedoms of a man, societies and states.

Acknowledgements

The work is performed according to the Russian Government Program of Competitive Growth of Kazan Federal University.

Bibliographic References

ALEKSEEV, Sergei. 1997. The philosophy of law. NORMA. Novosibirsk, Russia.

ALEKSEEV, Sergei. 1999. Law: ABC-Theory-Philosophy: Experience in Integrated Research. "Statute". Novosibirsk, Russia.

ALLAN, Trevor. 2001. Constitutional justice: a liberal theory of the rule of law. T.RS ALLAN.

BRINCHUK, Mikhail Mikhaĭlovich. 2005. "Round table of the editorial council on the following topic: "The rule of law state: declaration or development trend of our society?" In: Constitutional state. Vol.1, pp. 4-14.

DICEY, Albert Venn. 1959. Introduction to the Study of the Law of the Constitution. 10th ed. Liberty Classes. Indianapolis, USA.

GILMULLIN, Ainur. 2017. Legal doctrine in the mechanism of the Russian state: scientific and theoretical analysis. Scientific notes of Kazan University. Kazan, Russia.

GILMULLIN, Ainur. 2020. Philosophical and legal search for ideas on legality in the history of the ancient Greek state and law. History of the state and law. Kazan, Russia.

GILMULLIN, Ainur; ABDULLIN, Adel'Il'dusovich; KLIMOVSKAYA, Lenara; ABDRASHITOV, Vagil. 2019. "On the Role of Modern Doctrines on Human Rights (International Legal Examination)" In: International Journal of Innovative Technology and Exploring Engineering (IJITEE). Vol. 1, pp. 5155-5158.

GLUSHACHENKO, Sergey Borisovich. 2003. Russian lawyers of the second half of the XIX-th - early XX-th centuries on the rights of an individual and the rule of law state. Historical and legal research: The thesis by PhD in Law: 12.00.01. M.: RSL, (From the funds of the Russian State Library).

GNEIST, Rudolph. 1879. Der Rechtsstaat und die verwaltungsgerichte in Deutschland / von Rudolf Gneist. 2 umgearbeitete und erweiterte Auflage. Verlag von Julius Springer (In Russian).

KHROPANYUK, Velous. 2008. Theory of State and Law. Textbook for higher education. Edited by Professor V.G. Strekozov. M.: Publishing house "Interstil", "Omega-L". Samara, Russia.

KOTLYAREVSKY, Simon. 1915. Power and law. The problem of the rule of law state. Novosibirsk, Russia.

KRASNOV, Eduard. 2017. "The rule of law as the principle of the rule of law state" In: Law and state: theory and practice. Vol.12, pp. 54-57.

LAKTUNINA, Edward. 2005. Correspondence round table of the journal. Legal state. Kazan, Russia.

MARCHENKO, Mikhail. 2011. Theory of State and Law. Part 1. Theory of the state: Textbook. Publishing house "Mirror-M". Pune, India.

MATUZOV, Nikolaj Ignatevič; MALKO, Aleksandr Vasilevič. 2004. Theory of state and law: the textbook. M.: Lawyer. Russia.

NERSESYANTS, Valdem S. 1996. Law math. Experience of the past and perspectives. M.: Yurist. Russia.

POGODIN, Aleksandr. 2013. "Situational law and general regulatory legal relationship in legal application" In: Legal World. Vol. 2. No. 194, pp. 64-68.

RAYANOV, Frank. 2005. Round table of the editorial council on the following topic: "The rule of law: declaration or trend of our society development?". Constitutional state, pp. 4-14.

SHISHKINA, Noara. 2006. Theory of State and Law: The manual for distance learning. SibAGS. Novosibirsk, Russia.

UTYASHEV, M. 2005. "Modern ideas about the rule of law state and its principles" In: The rule of law state. Vol. 1, pp. 15-20.

WELCKER, karl Theodor. 1813. Die letzten Griinde von Recht. Staat und Strafe. Novosibirsk, Russia.

UNIVERSIDAD DEL ZULIA

CUESTIONES POLÍTICAS

Vol.38 NºEspecial

Esta revista fue editada en formato digital y publicada en diciembre de 2020, por el ***Fondo Editorial Serbiluz, Universidad del Zulia. Maracaibo-Venezuela***

www.luz.edu.ve
www.serbi.luz.edu.ve
www.produccioncientificaluz.org