

Сергій Петрович Рабінович

Львівська лабораторія прав людини і громадянина  
Науково-дослідний інститут державного будівництва та  
місцевого самоврядування Національної академії правових наук України  
Львів, Україна

## ПЕРЕГЛЯД КОНСТИТУЦІЇ І РЕВОЛЮЦІЙНА УСТАНОВЧА ВЛАДА: ПОЛІТИКО-ПРАВОВІ СТРАТЕГІЇ ЛЕГІТИМАЦІЇ ЗМІН ДО ОСНОВНОГО ЗАКОНУ ДЕРЖАВИ

**Анотація.** *Актуальність дослідження зумовлена триваючими конституційними трансформаціями, які відбуваються в Україні, та їх революційним характером. При цьому методологічні засоби опису таких трансформацій та зв'язок змін у правовій системі із здійсненням установчої влади зазвичай залишаються поза увагою українського правознавства. Метою статті є виявлення впливу типу праворозуміння на вирішення питання про конституційність і чинність акта, яким оформлюється здійснення функцій первинної установчої влади. Використане у статті поєднання діалектичного підходу з методом порівняльного аналізу дало змогу встановити особливості розуміння ознаки дійсності установчого акта з позицій основних типів розуміння права. При цьому діалектичний підхід виявляє свої евристичні можливості у формі принципів єдності історичного і логічного, змісту і форми, сутності та явища, а також закони єдності протилежностей і заперечення в розвитку політико-правових феноменів. Автором доведено, що звернення до соціально-діяльного і соціально-психологічного обґрунтувань легітимності революційної зміни конституції дозволяє стверджувати, що основні правові характеристики акта здійснення установчої влади (правомірність і чинність) соціально зумовлені та конкретно-історичні. З огляду на це, такі характеристики є реляційними та релятивними. Реляційність установчого акта полягає у його зв'язку з конкретною системою права та конкретною правовою свідомістю та у співвіднесеності з відмінними типами праворозуміння. Релятивність акта стосується історичної змінюваності правової оцінки акта. Соціологічний позитивізм і юснатуралізм слугують стратегіями легітимації, які можуть використовуватись як у революційних, так і консервативних цілях. Юридичний нормативізм виступає засобом легітимації актів ординарної нормотворчості і делегітимації неконституційних актів установчого значення.*

**Ключові слова:** конституція, установча влада, юридична революція, дійсність чинність конституції, дієвість конституції, нормативізм, соціологія права.

Serhii P. Rabinovych

*Lviv Laboratory on Rights of Man and the Citizen  
Research Institute of State Building and Local Government  
of the National Academy of Legal Sciences of Ukraine  
Lviv, Ukraine*

## CONSTITUTION REVISION AND REVOLUTIONARY CONSTITUENT POWER: POLITICAL AND LEGAL STRATEGIES FOR LEGITIMIZING CHANGES TO THE FUNDAMENTAL LAW OF THE STATE

**Abstract.** *The study is relevant due to the ongoing constitutional transformations taking place in Ukraine, and their revolutionary nature. With that, methodological tools for describing such transformations and the connection of changes in the legal system with the exercise of constituent power usually remain without attention of Ukrainian jurisprudence. The purpose of the paper is to identify the influence of the type of legal understanding to solve the issues of constitutionality and the force of the act, formalizing the exercise of the functions of the primary constituent power. The combination of the dialectical approach with the method of comparative analysis used in the article enabled the establishment of the features of understanding the sign of the validity of the constituent act from the standpoint of the main types of understanding of law. Moreover, the dialectical approach manifests its heuristic capabilities in the form of principles of historical and logical unity, content and form, essence and phenomenon, including the laws of unity of opposites and denial in the development of political and legal phenomena. The author has proved that the appeal to the socio-activity and socio-psychological justifications of the legitimacy of the revolutionary constitutional amendments allows us to argue that the main legal attributes of the act of exercise of constituent power (legitimacy and force) are socially determined and specifically historical. Factoring this in, such attributes are relational and relative. The relationality of a constituent act lies in its relationship with a specific system of law and a specific legal consciousness and in correlation to different types of legal understanding. Relativity of an act refers to the historical turnover of a legal assessment of an act. Sociological positivism and natural law serve as strategies of legitimation that can be used for both revolutionary and conservative purposes. Legal normativism acts as a means of legitimizing acts of ordinary rule-making and delegitimizing unconstitutional acts of constituent significance.*

**Keywords:** constitution, constituent power, legal revolution, validity of constitution, efficiency of constitution, normativism, sociology of law.

### INTRODUCTION

The desire to maintain continuity in the constitutional development of the state and at the same time to make fundamental changes in the rule of law inevitably creates the contradiction between legality and legitimacy, which is most clearly manifested during the political and legal revolutions [1]. Over the last 15 years, the constitutional process in Ukraine has been largely extraordinary [2–3]. The extraordinary nature of this process is manifested, first of all, in those key historical moments during which changes were made to the Fundamental Law with regard to the form of state government and a redistribution of powers between the president, parliament

and government. The peculiar points of socio-political bifurcation, which marked the movement of the “pendulum” of political and legal changes in the state, were the Orange Revolution, the rise to power of V. Yanukovych, the which is quite reasonably evaluated as usurpation, and also the events of the Revolution of Dignity [4–5]. The relevance of the proposed study is predetermined by the problem of evaluating the legal significance of the acts that were supposed to shape changes in the form of government in Ukraine in 2004, 2010 and 2014<sup>1</sup>, but the problem has remained unresolved in modern Ukrainian jurisprudence and demands its theoretical understanding.

The purpose of this article is to explore the specificity of the influence of the type of legal consciousness on the decision on the constitutionality and validity of acts, which regulate changes in the constitutional order and the exercise of the functions of the primary constituent power.

In turn, the achievement of the outlined purpose implies the necessity of solving the following interrelated problems: clarification of the political and legal significance of the constituent power design in constitutionalism and establishment of the nature of the conditionality of the basic legal characteristics of the act of the constituent power – legitimacy and validity – by that type legal understanding, from the standpoint of which the legitimation of such an act emerges. Considering the purpose and objectives of the study, it is also appropriate to appeal to the content analysis of texts of legal doctrine, in particular, the doctrine of ideas, views and concepts of Ukrainian and foreign constitutionalists. This analysis is based on a comparison of the semantic meanings of the concepts of reality and legitimacy in the works of representatives of the main classical types of legal consciousness. Thus, the common logic techniques of comparison and differentiation, generalization and typification allow us to investigate the specific features of theoretical models developed by individual schools of jurisprudence to explain the phenomenon of the emergence and change of constitutional law and order. Establishing the practical relevance of these explanatory models for legitimizing constitutional transformations requires a recourse to the method of ascending from abstract to specific. Its use in research makes it possible to demonstrate the socio-instrumental importance of constitutional consciousness.

## 1. LITERATURE REVIEW

A number of legal and political aspects of the mentioned constitutional changes in Ukraine have repeatedly become the subject of attention of Ukrainian and foreign

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<sup>1</sup> Constitution of Ukraine. (1996). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>; Law of Ukraine “On Amendments to the Constitution of Ukraine” (2004, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/2222-15>; Decision of the Constitutional Court of Ukraine “In the case of the constitutional submission of 252 People’s Deputies of Ukraine on compliance with the Constitution of Ukraine (constitutionality) of the Law of Ukraine” On Amendments to the Constitution of Ukraine “of December 8, 2004 N 2222-IV)” (2010, September). Retrieved from [http://search.ligazakon.ua/l\\_doc2.nsf/link1/KS10094.html](http://search.ligazakon.ua/l_doc2.nsf/link1/KS10094.html).

constitutionalists, philosophers and theorists of law. At the monographic level, these issues were considered, in particular, by R. Maksakova [6], O. Vodiannikov [7], O. Myronenko [8], V. Rechitskyi [9–10], and M. Savchyn [11]. The domestic scientists analysed separate stages of the constitutional process in Ukraine, considered their substantive, constitutional, procedural and socio-political aspects, assessed the constitutionality, validity and legitimacy of acts, which outlined the amendments to the Fundamental Law, for which various arguments were presented – legal, political, and sociological. At the same time, the theoretical and methodological bases of such evaluation are, for the most part, insufficiently clarified, which cannot be overlooked. Against this background, the arguments presented by various authors, even within a single publication, can sometimes be based on different types of legal reasoning, and are therefore often incompatible with their opponents' positions.

In some cases, there is a substitution for constitutional law evaluations of purely political or, conversely, abstractions from political reality in favour of the “purity” of constitutional dogma. The process of changing the constitution is often described by terms that have different meanings, whether formal, legal, sociological, or axiological, which may lack proper disambiguation. In recent years, the general constitutional and theoretical problems of the exercise of constituent power have been covered in the publications of Z. Oklopcic [12], M. Loughlin [13], G. Brunkhorst [14], and M. Pereira [15]. Of interest is the debate that unfolded in 2015 on the pages of the *International Journal of Constitutional Law* between M. Tushnet and J. Komárek regarding the issue of constitutional revolutions in connection with the concept of constituent power [16–18].

Instead, discussing the question of changing the legal foundations of the state system demands relying on sound theoretical and legal developments. Among the latter, an outstanding place belongs to the classic work of Hans Kelzen “Pure theory of Law” (1934) [19], which has not lost its scientific importance to this day [20–22]. In Western legal science, where, unlike the former Soviet territories, jurisprudence tradition was not interrupted, back in the 70's – 80's of the last century, the Kelzen problematics of changing the Fundamental Law was developed by such researchers as J. W. Harris [23] and R. J. Lipkin [24] – in terms of isolating the causes and conditions of such change, J. Hughes [25] – in the context of the matter of validity of the mentioned norm, T. Hopton [26] and L. Wolf-Phillips [27] – in the context of the general issue of constitutional and legal legitimation of the policy. These issues have not lost their significance at the beginning of the 21st century, as evidenced, in particular, by the publications of M. Rosenfeld [28], R. Barnett [29], Z. Zevit [30] and R. H. Fallon [31].

Methodological significance for the consideration of the problems discussed below, in particular the issues of constitutional legitimation, are works on constitutional sociology, certain aspects of which are actively explored by K. Thornhill [32–33], T. Spaak [34], and Y. Roznay [35]. The work of the latter of the aforementioned researchers is based on a considerably empirical study of the nature and the limits of the political

power to amend the fundamental law [36] and the concept of “unconstitutional constitutional amendments”. These issues continue to be of interest to contemporary constitutionalists in the European post-socialist space (E. Tanchev and M. Petrović) [37–38].

## 2. MATERIALS AND METHODS

The purpose of the study outlined above necessitates the use of a number of interrelated philosophical and general scientific research approaches, general methods and techniques that enable to achieve it in the most adequate and effective way.

The basic philosophical approach used in the proposed intelligence is the dialectical approach. This approach, used in the moderate on the antithesis of materialism and idealism of interpretation, serves as an implicit pivotal idea that structures the way of considering the validity of acts of constituent power, applied further primarily in the form of principles of unity of historical and logical, content and form, phenomenon and essence, including the unity of opposites and the negation of negation and the transition of quantity into quality in the development of social phenomena. For example, the principle of unity of the historical and the logical, in which the logical, namely the constitutional and legal, is conceived as a removed form of social and state development, is a conceptual means of understanding changes in the form of state government in Ukraine. The methodological principle of unity of form and content of phenomena facilitates the consideration of political and legal transformations, in particular those that occur in modern states of transitional, transitive type, as phenomena where the legal becomes a form of political. It is the dialectics of phenomenon and essence that reveal the unity of the socio-political and legal aspects of the constitutional process, its legal essence as the essence of the “first order” and the socio-psychological essence of legal (constitutional and legal) phenomena as some kind of essence of the “second order”. Dialectical methodology, based on the use of the law of unity of opposites, creates the necessary conditions for combining procedural and formal discretion in the constitutional process with its substantive continuity. Dialectics also reveal the processes of socio-political and state transformations that are described by the emergence of new-quality constitutional phenomena. The quantitative changes to the basic law become qualitative changes and can confirm the ongoing constitutional revolution. Under these conditions, the desire to preserve the visibility of substantive continuity in the constitutional order inevitably conflicts with formal violations of such continuity. In the Ukrainian constitutional process of 2004-2014, the paradox of turning a constitutional “wrong” into a constitutional right manifests itself through a dialectical “denial of objection”: revolutionary changes in the form of state government are a denial of previous constitutional regulation and at the same time a return to the regulation that preceded the “constitutional reverse” of 2010. In turn, comprehending these political and legal transformations requires finding methods that would reveal the specifics of the argumentative means of explaining the transition of constitutional “wrong” to constitutional law as a qualitative, revolutionary legal transformation.

In view of this, the dialectical approach in the study is complemented by the use of other philosophical approaches, general scientific methods and techniques. Thus, in particular, the principle of social determinism and sociological approach to the process of constitutional transformation gain substantial importance, allowing to immerse the process of evaluation of legal forms in the social context of legitimation and see the constitutional and legal categories of real social interests. The task of identifying the semantic connotations of the signs of reality and constitutional legitimacy of those acts of public authorities, through which changes in the rule of law take place, necessitates the use of a hermeneutic approach that focuses on the very problem of understanding constitutional and legal phenomena, which, due to this, is revealed as a problem of constitutional legal consciousness. The root of the problem lies in the tension between static Aristotelian logic, which fundamentally prevents the transformation of “A” to “non-A” as its formal opposite, and a dialectical logic that allows to describe any phenomenon in the process of its development, in particular, allows to reveal dynamics of revolutionary political and legal changes and explain the inadequacy of attempts to interpret them in the context of constitutional succession.

An important methodologically significant aspect of the problem of constitutional consciousness is the differences in “preunderstanding” (G. Gadamer), namely, the differences between the criteria of legal nature of social and, in particular, political phenomena. Legal precondition sets the semantic boundaries of legal and non-legal, and therefore serves as an implicit factor that determines the strategy of exploring constitutional transformations and evaluating the individual acts by which such transformations are outlined. The main differences here are the differences of legalistic positivism, sociological and natural law approaches to understanding constitutional law. If the statistician understanding of constitutional law is based on the description of normative, deontic legal reality and implicitly appeals to procedural aspects of the formation of state will as a source of justice, then the sociology of constitutional law provides a description of the actual state of affairs and empirical social processes, while understanding them as processes of law. Both cognitive strategies are descriptive and therefore positivist, but in substantially different ways. The dichotomy of the existing and the proper attests to the essential discrepancy between the results of the description of both realities, with the formal similarity of the means employed in the process (description). On the other hand, both positivist strategies of legal knowledge are opposed by a naturalist understanding of constitutional law. Such a difference manifests itself not in the deontic mode of the existence of law, from which derives a considerable part of the representatives of the school of natural law (since in this sense logistical normativism paradoxically turns out to be similar to natural law), but, instead, in its metaphysical ontological bases and in the ideal character of values, to which constitutional naturalism appeals. Accordingly, the criteria of legality are significantly different in the latter case: the naturalism, considered as an alternative to the two previous cases, appeals to the ideal and meaningful criteria of the legal as such. At the same time, the juxtapo-

sition of naturalism and sociology manifests itself when appealing to the real political processes of objectification of natural ideas and values.

### 3. RESULTS AND DISCUSSION

#### 3.1 *The concept of constituent power in constitutional law*

Establishment of the practical significance of explanatory theoretical models for the legitimation of constitutional transformations enables the demonstration of instrumental significance of constitutional understanding and facilitates the demythologization of established conceptual constructions, and, above all, the concept of constituent power (*pouvoir constituant*). Usually, the fact that this concept is endowed with two substantially distinct, albeit interrelated meanings remains left out by the constitutionalists. The first one is value-normative, while the second one is functional and descriptive. The first sense embodies the understanding of constituent power as the “power of the people,” and the second – its understanding as a function of the drafting and adoption of the constitution (the so-called primary constituent power) and the subsequent change of the basic law (derivative, secondary, or institutional constituent power). The first sense is, according to G. Hart, an “ascriptive” (non-descriptive) meaning attributed to certain actions. Note that both meanings are implicitly present in Antonio Negri’s assertion that “the constituent power is a subject. This subject, this collective subjectivity, is distracted from any conditions and contradictions, which from time to time are limited by their constituent force in the specific circumstances of political and constitutional history” [7].

The primary constituent power is unlimited by definition – at least in formal and procedural aspect. In the substantive aspect, it is often considered to be bound by the requirements of superpositive, “natural” law. The complexity of disconnecting the two above mentioned connotations of the concept of primary constituent power causes it to be understood as “emerging and existing in the relationship between the constitutional imagination (constitutional myth of founding) and the activity of the bodies of established power. Constituent power, therefore, cannot be equated with that of a certain community, even a large one – this approach reduces the constituent power to the question of fact. The notion of constituent power connects the symbolic and the real in constitutional discourse” [7]. The elusive nature of such a relationship and connection may lead to the conclusion that “today, like many centuries ago, [the notion of constituent power] is still covered by the veil of les mystères de l’Etat [mysteries of the state – in French], unrecognized and incomprehensible as the mysteries of theology. Namely, the study of such power... leads to the depths of social psychology and anthropology. Neither the political science nor the legal have any power to explain this phenomenon using their scientific toolkit...” [7]. In our view, the last thesis allows one clarification: the powerlessness of legal dogma manifests itself in the light of the jurisprudence of the sociologist-positivist orientation and other descriptive disciplines.

The purification of the constitutional vocabulary from the mystical veneer enables the statement that a value judgment on a particular political decision as on an “act of primary constituent power” is possible only as an *ex post facto* evaluation. Such an evaluation is possible, so to speak, not so much thanks to a victory of the rule of law (which is always indisputable), but thanks to a rule of law of the victors – a rule that established itself as a socio-political fact. Such qualification of a procedurally or competently unconstitutional act as a “constituent” allows to bring the act beyond the limits of law and order and thus eliminate the possibility of its legal evaluation. As for the control over the conformity of the exercise of the primary constituent power with a particular value-normative, “material” factors, to be efficient, such control can be exercised only by the new constituent power or the bodies constituted by it. For obvious reasons, this will always cast doubt on the objectivity of such control and, at the very least, on its independence. Given the impossibility of ensuring independent institutional control over the exercise of constituent power, its connection with the requirements of natural law remains purely transcendental and metaphysical. In a descriptive way, the basic approaches to the interpretation of the founding power can be distinguished according to three types of understanding of law: legalistic, sociological and value-metaphysical.

In one of the thorough domestic studies of constituent power, the latter is defined from a sociological standpoint as “the relation of domination-subjugation, by means of which through a politically dominant public entity as a sovereign establishes (constitutes) in the territory of the state or part thereof certain public-power institutions and their basic forms of functioning (establishes the actual constitution) and also provides for their legitimation by legalizing the public order in which it is interested, by adopting or amending legal acts (legal constitution), acting as organizational and constitutional legal prerequisites for the functioning of public power” [6]. If from the standpoint of its content the constituent power is the power that establishes the actual constitution, then from the standpoint of form this power is about “legalizing”, “endowing a binding force” of a certain system of organization and exercise of political power, serving for this purpose, we should point out, not merely legal and extra-legal means (especially at the initial stage of its formation).

Without denying the importance of the normative (both legal, dogmatic, and natural-legal) dimension of constitutional and legal phenomena and recognizing their unconditional legitimate value, we shall point at one advantage that empirical and descriptive interpretation of the constituent power gives: as opposed to normative criteria of recognition of certain actual social power as “people’s power” or “constituent power”, sociological approach creates prerequisites for scientific reflection of the most complex and ambiguous aspects of the development of the political and legal phenomenon, which, subsequently, as a result of radical social and political changes is retroactively referred to as “constituent power”. Since the *de facto* legal form is not always a prerequisite for the exercise of constituent power, it is the empirical and sociological approach

that allows us to trace the process of transformation of the actual constitution into a legal constitution, the transformation of political decisions which, from legal and dogmatic positions, are considered to be “non-legal” acts into acts that subsequently, from the standpoint of other types of legal thinking, become treated as “legal”.

Therefore, in the analytical sense it is necessary to distinguish between functional and value-normative aspects of the constituent acts. Within the same rule of law, unity of both aspects is presumed regarding any constituent acts, including those adopted with formal and/or material violations of the constitution. However, changing the law allows you to separate the two aspects, and sometimes even raise the issue of responsibility of officials for participating in the adoption of the constituent act.

The “derivative” nature of the constituent power exercised by the subject of authority of the constituent power appears to be a delusion in the event of going beyond the established constitutional powers upon adopting the act. In such case, the public authority *de facto* exercises its own primary, not derivative, constituent power.

If, when the constitution is amended, the constituent function is performed by an act adopted in violation of the constitution, this inevitably causes the relativity of the legal meaning of such a quasi-constituent act. From the standpoints of the constitution in force at the time of the adoption of the act, the competence restrictions (the “letter of the constitution”), participation in the adoption of the act can be considered as a special type of constitutional or other sectoral offense. Appealing to the “spirit” of the current Constitution may justify qualifying actions such as abuse of power or authority. In contrast, in view of the “spirit” of the constitution, validity of which is considered to be “renewed” as a result of a decision by a body of constitutional jurisdiction, the adoption of such an act may be interpreted as restoring the state of the “rule of law” or as an act of the said principle. In the latter case, unlike the previous one, the role of moral and political factors in the legal evaluation of the decisions and actions of the subject of power is much greater.

Within the same constitutional law and order, the unity of the functional and value-normative aspects of the constituent acts is assumed in relation to any of them, including those adopted with formal and/or material violations of the constitution. The change of law enables a separation of the two aspects and evaluation of the act of functionally constituent power from the standpoint of the dogma of the previous or subsequent law and order in the context of quasi-constituent. On the other hand, in the absence of special legal regulation of this issue, empirically-oriented sociological-positivist legal consciousness, which deduces the legally proper from the existing, allows to keep in force all acts of public authorities, approved “to execute” a quasi-constituent act at the time of its defective approval. Constituent and quasi-constitutive acts of public authorities as acts of constitutional change occupy a special place in the system of acts of public authorities, serving as a legal form of political transformation in society and the state.

### 3.2 *The validity of the Constitution from the standpoint of Hans Kelsen's normativism*

From a methodological standpoint, of interest is the consideration of the transformation of non-law into law in Kelzen's "pure theory of law" – a normativist concept, which uses sociological principles in important points [22]. One of the achievements of Hans Kelzen's doctrinal legacy was the legal concept of revolution used in the first edition of *The Pure Theory of Law* (1934) and reproduced in its second edition in 1960. According to Kelzen, "a revolution in the broad sense of the word, including the coup d'état, is any illegitimate, that is, such that does not conform to the provisions of the constitution, change of the same constitution or its replacement with another fundamental law. From a legal standpoint, it does not matter whether this change in the legal situation has occurred through the use of force against the lawful government, or by members of the same government; the movement of the masses or a group of individuals. It is crucial that the current constitution be modified or replaced in some way in a manner not stipulated in the previous constitution" [19].

The principle that "law cannot define its own limits" expresses the issue of the marginal ground of law as a logical and legal problem of regressus in infinitum – an endless regression to legal sanctions. To overcome this, the Austrian jurist posits the concept of "die Grundnorm", which is outside the constitution and is "logically necessary for the objective validity (force) of positive legal rules" [19]. At the same time, Kelzen acknowledges that a separate rule and law and order of law in general, to recognize their reality, require not only a logical basis, but also the necessary social condition – minimal efficiency and effectiveness. "Rules of the legal order are valid because the Fundamental Rule, which constitutes the basic rule of their creation, is presumed to be valid and not because they are efficient; however, they are only valid as long as this legal order is efficient" [19]. Thus, according to Kelzen, when the constitution ceases to be efficient, it automatically loses its validity.

The absence of a statutory established mechanism for refuting the presumption of the constitutionality of acts of the hierarchically supreme bodies of state power logically leads to the inconsistency of this presumption. It should be noted that the above refers to the legal qualification of decisions (actions) of public authorities made by them within the limits of the constitutional order of the law. Both the scope of the presumption of constitutionality and the possibility of its refutation are limited by the *established* law and order. Being an integral element of the existing law and order, the presumption of constitutionality extends to acts of public authorities issued within its normative, constitutional and semantic boundaries. Accordingly, it is unlikely that this presumption may be valid in relation to acts which change the constitution with one or other violations of the rules of amendment of the previous constitution. At the same time, the functions of constituent power are exercised by state bodies, the constitution is not

specifically authorized to do so, or the situations when these functions are exercised in a manner not provided for by the constitution. According to “pure theory of law”, in such cases, one basic rule is replaced by another.

The founder of normativism emphasized that “the subjective meaning [of a legal act] must be distinguished from the objective one. The “duty” is a subjective meaning of any human act of will intentionally directed at the behaviour of another human. But not each of such acts has this objective meaning. And only when it has the objective meaning of duty, is this duty called the “norm”. The fact that “duty” is also an objective meaning of the act is manifested in that the behaviour to which the act is intentionally directed is perceived as being necessary not only from the standpoint of the one who performs the act, but also from the standpoint of the third, disinterested party. Moreover, even if the will, the subjective meaning of which is a duty, actually ceases to exist, and the meaning (that is, a duty) does not disappear with it; if the obligation remains effective (“gilt”) and after the disappearance of the will, if it is valid even when the individual, who – according to the subjective meaning of the act of will – must behave in a certain way, knows nothing about the act and its meaning, and, nevertheless, it is considered obliged or governed to act in accordance with a duty, it is then when the duty as an “objective” duty is “valid”, such that obliges the addressee with a “norm” [20].

Thus, within the hierarchically constructed legal system, the objective normative sense of a legal act expresses some conventional legal-normative meaning of the text that sets out the content. Such significance, on the one hand, derives from the act of higher legal force, which imparts to other, hierarchically lower acts, logically preceding them (legal logical and dogmatic legitimation). At the same time, according to Kelzen, “a legal norm is considered objectively valid only if the behaviour it regulates, at least to some extent, actually corresponds to it”. Therefore, in the context of pure theory of law, the objective, social meaning of the norm is “objective”. Such meaning is expressed in the acts of competent law enforcement authorities and in the behaviour of persons who follow the norm. This brings to the active, behavioral, and therefore – sociological legitimation of acts of constituent power.

However, when it comes to decisions of authorities of power, the subjective meaning of which is aimed at repealing certain provisions of the current constitution, however, the possibility of such termination of constitutional provisions is not explicitly stipulated and at the same time is not prohibited by them. Such decisions can be imparted by an objective normative meaning only and exclusively in retrospect, in the subsequent behaviour of bodies and officials as human rights defenders.

“Legally revolutionary” constituent acts cannot be regarded as acts pertaining to the existing law and order (that is, the law which they claim to be subjective in their subjective meaning), and therefore, in the legal-dogmatic understanding are outside the field of current law.

### 3.3 *Socio-psychological foundations of the normativity of the Constitution: Georg Jellinek and Alf Ross*

Sociological jurisprudence, as opposed to legal dogma, explicitly or implicitly relies on the principle of “normative force of fact” put forward by Georg Jellinek. Rejecting the idea of the completeness of the system of law, a prominent jurist pointed to the reality of the historical priority of national-political facts (“power”) regarding the positive law. From a sociological-positivist standpoint, he emphasized the fictitious nature of legal continuity in the process of state development: “...the history of law is at the same time a history of upheavals in law and gaps that are not filled in by the legal content within separate legal orders and next to them, and only through fiction, which in its groundlessness is not inferior to the most daring natural-legal speculations, can it still maintain the semblance of continuous continuity rights” [39]. Jellinek provides a psychological justification for the transformation of empirical state order into *law* and order. According to the thinker, the elements that lead to such a transformation are: a) a mental perception of what is actually happening as being both normative (a conservative element from which there is a presumption that an existing social fact is at the same time a legitimate fact); b) a mental conception of law that is above positive law (rationalistic, evolutionary, progressive element in law). “Before custom causes the transformation of the factual into normative, the belief in the rationality of the new order will create in such cases an idea of its legitimacy” [39].

In denying the absolutization of the juxtaposition of law and power, the German scientist emphasized that “only the force that does not cause us to feel its conformity to the norm is perceived by us as non-legal” [39]. In pointing to the huge number of social factors on which depend the features of the “process of transforming state relations based on strength” (“political facts”) into legal relations, Jellinek summarizes his considerations about the key role of factual (especially socio-political and social-psychological) factors for resolving the issue of lawfulness/unlawfulness of political acts: “There are epochs in the life of peoples, which in the minds of both contemporaries and subsequent generations are periods of lawlessness and pure arbitrariness. This consciousness can acquire legal significance in the event that it is possible to destroy the order, which is recognized as illegal, which subsequently, in relation to the restored one, that has not yet lost its nature and order in the people’s consciousness, will appear as a usurpation rather than law” [39]. Methodologically significant here is the accentuation of socio-evaluative (in epistemological terms) and de facto specific historical and relativistic (in ontological sense) nature of the attribute of “legitimacy” of an act of public authority. Such an argument by Jellinek attests to the decisive role of legal consciousness in the legal qualification of acts aimed at changing the existing constitutional order.

The above is also confirmed by the discussion on the validity of legal acts that took place in the 20th century between the law schools of normativism and legal realism.

According to one of Kelzen's opponents, a representative of Scandinavian legal realism Alpha Ross, the basis of the validity of law and order is beyond the rule of law, and therefore by definition can only be meta-legal (socio-political, moral, divine, etc.): the duty to obey the law "is a moral obligation to the legal system, not a legal duty under that system". The "obligation to the system" cannot follow from the system itself, but it must follow the rules or principles contained outside the system [40]. In practical terms, Ross's reasoning can be used, in particular, to justify not the legal but moral (moral and political) nature of sanctions, which ensures compliance with legal standards by judges of higher courts and members of other bodies authorized to make final and non-appealable decisions. However, such a proof, quite correct from the standpoint of formal logic, does not prevent the empowerment of various government bodies to assess judges' observance of their moral obligations, including upon making final decisions. Moreover, given the direct indication of the Constitution, such a moral assessment in practice can take on a legal form – despite some formal inconsistency of such a normative decision and even the appearance of the effect of the so-called "reverse control" [10]. In the end, in view of concrete historical facts, a radical change in socio-political circumstances and the implementation under such conditions of a legal assessment of even a formally final act cannot be completely ruled out. For obvious reasons, such an assessment can no longer be based on the principles of legalistic positivism.

Thus, from the arguments of Ross, as well as from the views of Jellinek, the conclusion follows about the socio-historically determined complementarity of both the sociological and natural-legal approaches to legal dogma. From the standpoint of both jurists follows the inevitability of going beyond the latter when substantiating the legitimacy of a revolutionary change in the legal system. Among other things, the above statements of a Scandinavian jurist can also be considered as a sociological interpretation of the special nature of acts of constituent power outside the law and order established by them, although, despite this, they are also considered to belong to the latter.

To explain the transformation of the factual into normative (so surprising for Kantian thinking), the well-known theoretician of law Ya. M. Magaziner, in the work "The General Theory of Law on the Basis of Soviet Legislation", resorts to a geometric analogy: "When the side of a square adjoins the circumference of a circle, then the same point of contact of these two figures is both a point on the side of the square and on the circumference of a circle. Same as in public life: the same point – an unlawful act – becomes the intersection of two sharply distinct legal figures, two consecutive but different legal systems (for example, autocratic and constitutional) and what was an offense for one of them, will be the source for the following one" [41]. In the aforementioned work, the author gives many examples of the transformation of constitutional non-law into law so as to prove that in history "the new law often stemmed from a violation and even destruction of law: the destructive act was also a creative act. Destruction is not only a factual force that terminates the existing rule

of law, and, like the elements of water or volcanic lava, hides this [legal] communication, but is also the legal date from which stems a new order, that is, the source of that order” [41].

From the standpoint of modern constitutionalism, such a combination of the sociology of constitutional law with its dogma in the description of the exercise of constituent power is described as follows: “Formally, constituent power is reduced to legitimization... both by means of mechanisms – the transformation of the actual constitution into a legal one, and by means of extra-legal mechanisms at the initial stage of implementation, followed by the provision of a legal form for these transformations”. It is substantial that the new rule of law turns out to be completely invalid from the standpoint of the internal logic of the previous law and order in cases where amendments to the constitution are made in a different way than that provided for by the constitution itself. At this point, however, Kelzen’s logic is combined with the logic of the sociology of law: the question of evaluating a constituent act arises when the legal system actually goes beyond the law, namely, when the most fundamental rule directly related to a specific constitution is changed. Consequently, a change in the constitution as a direct or indirect result of the adoption of the relevant act by the public authority indicates the actual implementation of the functions of constituent power. Such power may be derivative (exercised in accordance with the provisions of the constitution) or primary, that is, exercised independently of or in violation of such requirements.

From the perspectives of various types of legal understanding, such an act, committed by a body of constitutional legal proceedings, may receive an excellent legal assessment. Thus, from a regulatory standpoint, it should be admitted that the adoption of the said act is aimed at changing the fundamental rule, according to which “the current constitution must be respected”. The problem here is that, within the framework of the existing law and order, there are no bodies authorized to state the fact of such a change. A revolutionary change in the rule of law creates the necessary political conditions for the establishment of certain “legal” consequences of the adoption of an act committed with the departure from the previous law and order. This applies to any acts, in particular, even formally final. However, the weak point of this approach is the danger of the retroactive effect and stability of the situation of private individuals and their associations that arose as a result of decisions of public authorities.

However, according to sociological legal understanding, the presence of legal properties in an act is not so much the result of specialized and formal (official) recognition as actual social recognition, social legitimacy, including recognition of “external” with respect to the system of bodies within which the act was issued. This is of particular importance in assessing acts that de facto change the constitution — acts of the implementation of “constituent power”. Thus, the next radical change in the alignment of political forces, a revolutionary change in the rule of law creates both real opportunities and, in a certain sense, even socio-legal grounds for the revaluation of acts of the previous state power by the newly formed public authorities. Since, according to

Ya. M. Magaziner, “a crime can only become a source of law when it is committed by a person or a group of persons having or having seized power over the rule of law, that is, when the same act is a crime in terms of old law and source of law – from the standpoint of the new law “for the re-qualification of acts that served as the source of law in the previous law and order, it is necessary to change the “power over the law and order itself” [41]. It is clear that such a change is necessary for any radical socio-political transformation, in particular for the transition from an undemocratic political regime to a democratic one.

## CONCLUSIONS

1. Differences in the value-normative and functional-descriptive aspects of the conceptual apparatus of constitutionalism enable the identification of mythological components in the doctrine of constitutional law. Such components include, in particular, the concept of constituent power, considered from the standpoint of its legitimizing and political-ideological functions.

2. An appeal to the socio-active (G. Kelzen) and socio-psychological (G. Jellinek, A. Ross) types of justification for the “revolutionary” constitutional changes suggests that the basic legal characteristics of the act of exercising constituent power (lawfulness and validity) are socially determined and specifically historical. Factoring this in, such characteristics are relational (formally) and relative (meaningful).

3. Attributing the value-normative meaning of “acts of the primary constituent authority” to certain actions and decisions allows not only to remove the problem of their inconsistency with the predefined procedural rules, but also to create the conceptual basis of the new rule of law. In the context of political and legal transit, the positivistic sociology of law acts as a retroactive strategy, performed “retroactively” by the legitimation of political decisions and actions. Sociological positivism serves as a strategy of “ascertaining” socio-empirical legitimation, which can be used for both revolutionary and conservative purposes. Natural law argumentation is also politically ambivalent, which allows providing meaningful legitimation to new constituent (in the functional meaning) acts and delegating the constituent significance of previous acts. The metaphysical nature of the evaluation criteria allows the use of natural law both prospectively and retrospectively. But legal dogma, in particular, in the legal and normativist version, appears to be a promising and at the same time conservative strategy for formal legitimization of acts of ordinary rule-making and delegation of unconstitutional acts of constituent significance.

4. Consideration of the requirements of legal certainty requires a limitation of retroactivity in the subsequent assessment of the consequences of the “legal-revolutionary” change (that is, a change made in violation of the formal constitutional requirements) of the rule of law. This shows the law-making role of time, which, thus, is able to turn political facts into legal acts, the action of which can no longer be rejected.

## REFERENCES

- [1] Petryshyn, O., & Petryshyn, O. (2018). Reforming Ukraine: Problems of Constitutional Regulation and Implementation of Human Rights. *Baltic Journal of European Studies*, 8(1), 63–75.
- [2] Pietnoczka, P. (2017). Constitutional process in Ukraine in 2014-2016. *Przegląd Wschodnioeuropejski*, 8(2), 145–157.
- [3] Mykhailiuk, G. (2018). Current challenges for the implementation of constitutional reform on judiciary in Ukraine on its way towards European integration. *Journal of Contemporary European Research*, 14(1), 40–46.
- [4] Berchenko, H., & Fedchyshyn, S. (2018). Constituent power: The theory and practice of its implementation in Ukraine. *Russian Law Journal*, 6(4), 37–61.
- [5] Tomkina, O. O., & Yakovliev, A. A. (2018). Issues of the modern constitutional process: The moral foundations of public authority (in the aspect of legal guarantees of democracy). *Journal of Advanced Research in Law and Economics*, 9(7), 2447–2453.
- [6] Maksakova, R. N. (2012). *Constitutional and legal problems of constituent power in Ukraine*. Zaporizhzhia: Classical Private University.
- [7] Vodiannikov, O. J. (2016). *Constitution and revolution: anatomy of the constituent power. Constitutional polylogue. 20 years of the Constitution of Ukraine: society and power in the constitutional process*. Kyiv: VAITE.
- [8] Myronenko, O. M. (2011). *Constitutional Court of Ukraine: history and contemporary, doctrine and practice*. Kyiv: Koretsky Institute of State and Law.
- [9] Vdovichenko, S., Kampo, V., & Ovcharenko, V. (2011). *Control for Independent Constitutional proceeding*. Kyiv: Alerta.
- [10] Rechitskyi, V. (2014). Law commentary on the current Constitutional changes in Ukraine. *Human Rights in Ukraine*, 10, 2–5.
- [11] Savchyn, M. (2015). *Constitutionalism and Nature of Constitution*. Uzhgorod: Lira.
- [12] Oklopcic, Z. (2008). The Paradox of Constitutionalism: Constituent Power and Constitutional Form. *International Journal of Constitutional Law*, 6(2), 358–370.
- [13] Loughlin, M. (2013). The concept of constituent power. *European Journal of Political Theory*, 13(3), 218–237.
- [14] Brunkhorst, H. (2016). Constituent power and constitutionalization in Europe. *International Journal of Constitutional Law*, 14(3), 680–696.
- [15] Pereira, M. (2017). In Praise of Rebellion: Constituent Power and Dissent in the American Revolution. *Law, Culture and the Humanities*. Retrieved from <https://journals.sagepub.com/doi/10.1177/1743872117735249>.
- [16] Tushnet, M. (2015). Peasants with pitchforks, and toilers with Twitter: Constitutional revolutions and the constituent power. *International Journal of Constitutional Law*, 13(3), 639–654.
- [17] Komárek, J. (2015). Constitutional revolutions and the constituent power: A reply to Mark Tushnet. *International Journal of Constitutional Law*, 13(4), 1054–1058.
- [18] Tushnet, M. (2015). Constitutional revolutions and the constituent power: A rejoinder to Jan Komárek. *International Journal of Constitutional Law*, 13(4), 1059–1062.
- [19] Kelzen, G. (2004). *Pure theory of Law. Problem of Justice*. Kyiv: Yunivers.
- [20] Małecka, M. (2017). Posner versus Kelsen: the challenges for scientific analysis of law. *European Journal of Law and Economics*, 43(3), 495–516.
- [21] Zanichelli, M. (2017). Kelsen and the rights issue. *Notizie di Politeia*, 33(127), 154–159.

- [22] Riofrío, J. C. (2019). Kelsen, the new inverted pyramid and the classics of constitutional law. *Russian Law Journal*, 7(1), 87–118.
- [23] Harris, J. W. (1971). When and why does the Grundnorm Change? *Cambridge Law Journal*, 29(1), 103–133.
- [24] Lipkin, R. J. (1989). The Anatomy of Constitutional Revolutions. *Nebraska Law Review*, 68(3), 701–806.
- [25] Hughes, G. (1971). Validity and the Basic Norm. *California Law Review*, 59(3), 695–714.
- [26] Hopton, T. C. (1978). Grundnorm and Constitution: The Legitimacy of Politics. *McGill Law Journal*, 24, 72–91.
- [27] Wolf-Phillips, L. (1979). Constitutional legitimacy: A study of the doctrine of necessity. *Third World Quarterly*, 1(4), 97–133.
- [28] Rosenfeld, M. (2001). The rule of law and the legitimacy of constitutional democracy. *Southern California Law Review*, 74, 1307–1352.
- [29] Barnett, R. E. (2003). Constitutional legitimacy. *Columbia Law Review*, 103, 111–148.
- [30] Zevit, Z. (2004). Foundations of constitutional legitimacy: legal-political culture, constitutional aptness, and baseline community. *Studies in Law, Politics and Society*, 32, 123–161.
- [31] Fallon, R. H. (2005). Legitimacy and the Constitution. *Harvard Law Review*, 118(6), 1787–1853.
- [32] Thornhill, C. (2010). Niklas Luhmann and the sociology of the constitution. *Journal of Classical Sociology*, 10(4), 315–337.
- [33] Thornhill, C. (2017). The Sociology of Constitutions. *Annual Review of Law and Social Science*, 13, 493–513.
- [34] Spaak, T. (2015). Ross on the Dualism of Reality and Validity. *Utopia y Praxis Latinoamericana*, 72, 41–66.
- [35] Roznai, Y., & Yolcu, S. (2012). An unconstitutional constitutional amendment – The Turkish perspective: A comment on the Turkish Constitutional Court’s headscarf decision. *International Journal of Constitutional Law*, 10(1), 175–207.
- [36] Roznai, Y. (2017). *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*. Oxford: Oxford University Press.
- [37] Tanchev, E. (2000). Constitutional safeguards of legality and legitimacy. In M. Kelly (Ed.), *Openness and Transparency in Governance: Challenges and Opportunities* (pp. 72–99). Bratislava: NISPAcee.
- [38] Petrović, M. (2004). Constitution and legitimacy. *Facta Universitati, Series: Law and Politics*, 2(1), 7–39.
- [39] Jellinek, G. (2004). *General Doctrine of State*. St. Petersburg: R. Aslanov’s publishing house “Legal Centre Press”.
- [40] Ross, A. (2009). Validity and the Conflict between Legal Positivism and Natural Law. *Russian Yearbook of Legal Theory*, 2, 458–473.
- [41] Magaziner, J. M. (2006). *Selected works on General Law theory*. St. Peterburg: R. Aslanov’s publishing house “Legal Centre Press”.

### Serhii P. Rabinovych

Doctor of Law, Professor, Chief Researcher

Lviv Laboratory on Rights of Man and the Citizen

Research Institute of State Building and Local Government of  
the National Academy of Legal Sciences of Ukraine  
79044, 79/101 Academic Ephremov Str., Lviv, Ukraine

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