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Convergence of Legal Systems and Incompatibility of Certain Institutions in the Dialogue of Civilizations

Both the terms — convergence and civilization — are regarded as highly controversial by scholars. In this paper the term convergence will imply a possibility for various legal systems regulating public relations to get to close quarters, as well as an available extent for legal systems to adopt law institutions of another system. Opinions vary on the concept of civilization, their types and number in the history of mankind and at present. The Department of Social Science of the Russian Academy of Sciences held a conference to debate on over 250 definitions of the term ‘civilization’ and, at the same time, speeches only concentrated on the two types of existing civilizations, i.e. traditional and technocratic. The famous English historian A. Toynbee used to number 19 (later, he consolidated them to 13) civilizations that had ever existed*, while modern French constitutionalists J. Jicquel and J.-É Jicquel only write about one type of world civilization, an industrial one, that has according to them become universal, they also call it ‘the Western civilization’.† Some scholars believe that civilization can be presented by just one country, and name Russia for example.‡

There is no need to formulate yet another definition of civilization in speculating on legal systems. Just note that in the word ‘civilization’ bears no rating meaning (like good or bad, civilized or uncivilized peoples). Deliberating the issue of legal systems, we regard the civilization as a particular entity, as a way to arrange mode of life in large human communities or groups, whether we

* *Toynbee A.* Postizheniye istoriyi [Understanding History], Moscow, 1991, p. 731.

† *Gicquel J., Gicquel J.-É.* Droit constitutionnel et institutions politiques, 21-e éd. P. 2007, p. 29.

‡ *Lukasheva Y.A.* Chelovek, pravo, tsvilizatsiyi: normativno-tsennostnoye izmereniye [Man, Law, Civilizations: Norms and Values], Moscow, 2009, p. 213.

like it or not. Civilization is a lifestyle of people(s), structured in a system and based on identical principles (including various types of social norms, legal included), on views that are or ought to be regarded as irrefutable. Civilizations are not a static phenomenon, they do develop, so the scope of, say, Chinese, African or Russian civilizations varies with place and time. Modern China and Imperial China are quite different things.

A civilizational approach to various legal systems of the world is richer than the formational one suggested by Marxism, as it allows to treat phenomena from various sides, but a formational way to consider legal systems should not be cast aside. It might more limited, but it better reveals the core of the subject. There is no denying that the history of humankind witnessed the slaveholding and feudal systems (though not in all countries), as well as now existing modern capitalism and totalitarian socialism.* Formational legal systems correlated with them. However, one can distinguish between social systems by other factors. Anglo-Saxon capitalist legal system in the UK, the US, Australia and others differs from the continental Roman-Germanic one, while the legal system of Muslim fundamentalist countries (for instance, in Saudi Arabia or Oman) differs from the one in the 'advanced' Muslim countries like Egypt or Syria.

If we are to distinguish basic, principal legal systems taking both civilizational and formational features into account, then, in my opinion, such systems are related to three leading civilizations of the modern world: Muslim, totalitarian socialist and capitalist (ranging from Christian social capitalism in the developed countries to capitalism of other nature elsewhere). The remnants of other civilizations (for example, the traditional African Micronesian) do not have any considerable impact on the progress of the mankind, though common law (tribal law) keeps playing a significant role in everyday life of these countries as well as in top echelons of power (according to common law, traditional kingdoms and kings still exist, for instance, Buganda or Ashanti

* The concept and classification of social and economic formations, as the name implies, were related, first and foremost, to economic characteristics. Other sides were ignored, or diminished (except social, class relations of the issues of class power).

kingdoms in Uganda and Ghana. Although their 'kings', as a rule, live abroad and rarely visit their realms, the tribesmen traditionally obey them).

Muslim civilization dating back to 1500 years is the least amended in Muslim fundamentalist monarchies through the centuries. Population of some dozens Muslim states (of more than 200 world states) as well as of other closely-related countries (for instance, India) is estimated at about 1.2 billion people. As already mentioned above, modernized 'advanced' Muslim states considerably differ from the Muslim fundamentalist states, but main laws are based on some common legal postulates in the both types.

Both groups of Muslim countries admit the necessity of a basic constitutional law. In Muslim fundamentalist countries the main nizams ('man-made' laws) were bestowed by monarchs (introduced in Kuwait in 1962; in Saudi Arabia in 1992; in Oman in 1996 etc.);* but it is the Koran, as is stated in some principal nizams, that serves as a constitution there, i.e. prophet Muhammad's maxims recorded from memory of the descending generations. The Koran is claimed to include genuine 'divine' laws (qanuns), while nizams are only man-made norms. The Sunnah, Muhammad's hagiography, also is a significant source of norms.

Interpretation of these two sources (especially the Koran) enabled the Muslim lawyers to lay the foundation of the Muslim law in its various dissents (Shafiites; Khanbalites; Zeidites and others, named after the authors of the first old books) by the 11th century. In Muslim fundamentalist countries there are few nizams, man-made laws, they still remain essentially doctrinal systems. In 'advanced' Muslim countries, republic is a form of state rule, the Parliament or Plebiscite adopted constitutions, there are law codes and abundance of legislative acts. Nevertheless, some principal legal regulations are common for the both groups of Muslim states. The Koran is the main legal act. Constitutions

* In some countries the main nizams are called constitutions. They are always adopted by monarchs after consulting with Ash-Shura, a council appointed by the monarch from authoritative figures (males) of the Muslim community, the ummah. A few years ago two women were present in Ash-Shura of Oman for a while, they are no longer there. At Ash-Shura's unanimous opinion the monarch has to adopt their decision, even if his own opinion is different.

of 'advanced' Muslim countries state that the main source of law is the Shariah* and the official religion is Islam. Legal system should correspond them both. In fact, one cannot but notice a certain influence of Western constitutional postulates even on royal nizams, but it is totally denied in the countries concerned, and such facts are claimed to be a mere coincidence. Constitutional basis of Muslim community is treated as a unique one.

In Muslim civilization the constituent element of the society is not an individual person (as is in capitalist civilization existing in the most developed countries in the form of social capitalism), nor is it a collective group based on common social interests and on their priority over the individual interests (as in totalitarian socialist civilizations), but it is a specific community of 'mu'mins', the ummah. It unites members on the grounds of common belief, Islam. One of the typical features of Muslim legal system is the inseparable integrity of norms of religion, law and morality, obligatory for all mu'mins derived from the Koran (though the law itself, *fiqh*, is acknowledged by some experts). All other beliefs and postulates are rejected by the doctrine, it may go as far as the sacred war against the 'kuffar' (the unfaithful) in medieval Islam (nowadays these Koranic maxims are being interpreted in a different way).

The concept of ummah's integrity results in the obligation of zakāt (5% surplus wealth tax in favour of the poor and the needy) and prohibition of riba, usury interests in loans. These regulations can now be found in the main nizams of Muslim fundamentalist countries (for example, in Article 21 of the Main Nizam in Saudi Arabia in 1991)[†]. Ummah is arranged in the form of a state, a Muslim caliphate. That's why *de jure* (though not always *de facto*) state property dominates over private property. That's why in Muslim fundamentalist countries there are no foreign oil companies, as it belongs to the state (ummah) that sells it. Foreign companies can only service the production fields. The Main

* The concept of shariah (the path to follow) differs doctrinally from legal norms proper (fiqh). The latter is a component of shariah, while it is the two 'sacred' books, the Koran and Sunnah, that contain the fundamentals of shariah.

[†] The Basic Law of Government // Highlight of Development in Saudi Arabia. Riyadh, *sine anno*.

Nizam of Saudi Arabia of 1992, and similar acts of other Muslim fundamentalist countries, unlike former European norms, proclaim the state property sacred rather than the private one.

Man is passive in Muslim law, he is guided by Allah. It is assumed that the laws aren't created by men, Allah inspires them. Though Muslim countries adopted human rights charters, and constitutions comprise special articles, the core of Muslim constitutional law is obligations of a Muslim in respect of Allah and ummah rather than rights. These obligations, including religious ones, must be strictly obeyed, otherwise the punishment is imposed (in Muslim fundamentalist countries the religious vice squad, mutawwa, track the exact performance of daily religious ceremonies).

In Muslim civilization people are not equal. There exist noble tribes alongside with others, everyone of their origin has a certain share in oil production, but sheikhs receive much more. Men and women are not equal either. Polygamy is legal (a Muslim can have up to 4 wives, as well as other women). In cases of adultery a wife may be slain with impunity, while a husband may not. In cases of inheritance a woman can only get a half of what a man would receive, testimonies of two women witnesses are equal to one man witness, etc. In 'advanced' Muslim countries constitutions state the equality of men and women, but with a proviso 'equality according to shariah', but shariah excludes the equality. Crude oil production and other hard work are performed mostly by foreign contract labourers, who live separately and under special regulations.

Constitutional basis of a political system in Muslim fundamentalist countries is set in accordance with the caliphate principle. Parliaments are substituted by the Ash-Shura principle. All kinds of elections, i.e. to representative bodies, are rejected as the institution that might spoil the ummah's integrity, though, for instance, both elected President and Parliament do exist in Iran, and presidential elections of 2009 demonstrated a very sharp

campaign.* In Muslim fundamentalist countries political parties and trade unions are banned (they are considered to destroy the ummah integrity). Monarch is theoretically supposed to be elected (such was the original tradition of a caliphate). He is elected following the bayah procedure from the royal ruling family (Al Sabah in Kuwait, Al Thani in Qatar etc.) The choice of the monarch is made at the family council together with the ulema, the scholars, arbiters of the Koran. The history showed that not only son could be elected as the monarch, but brother and nephew as well.

In 'advanced' Muslim countries there do exist parties, public associations, parliament, but the central figure to play the principal role is the President (in Algeria, Egypt, Syria etc.) who leads the parliamentary party of unchallenged majority. President can be re-elected for unlimited number of times. In some countries the same president has been elected for the 5th time (Egypt), or sometimes the late president is succeeded by his son, prior trained for it (Syria).

The population of the five remaining totalitarian socialist countries (Vietnam, China, the Democratic People's Republic of Korea (DPRK), Cuba, Laos) totals 1.4 billion people (China alone numbering 1.3 billion). Modern situation in these countries differs a bit from Marx and Engels's theory of socialism or Lenin and the Bolsheviks' position (namely, the issues of property, of 'exploiters', partly of ideology), but the principles of Marxism and Leninism are still believed to be the basis of the state regime and the actual law. The level of totalitarianism varies (for example, the situations in China and DPRK are very different), but constitutions of these countries and legal doctrine still result from totalitarian socialism postulates: the leading role belongs to only one party, the Communist party (other parties are allowed to operate, but the leading role is vested to one party by the constitutional law;† socialist ownership of the means of production prevails; ergatocracy is performed by authoritative

* One should note that in Iran it is not the President who is regarded as the head of the society, but the *faqih* (the leader), one of the persons having the title of ayatollah, the religious leader.

† Some countries allow to have other parties, and they did exist (it is believed that of all the remaining totalitarian socialist countries only China has more than one party), but they couldn't be oppositional, had to be allied to the Communist party, acknowledge its leading role formalized in constitutions.

bodies arranged in council forms (some constitutions, however, formulate nowadays the principle of people's power); the principle of power division (as branches of state powers) and local authoritative bodies are denied. Some constitutions retained the term 'dictatorship of the proletariat' up to the 2000s (DPRK), while others formulate it as 'democratic dictatorship of the people' (but, anyway, it is dictatorship). Inequality of classes is officially confirmed by the constitution (the leading class is proletariat, the led one is peasantry); principles of total directive planning and distribution by labour flourish ('from each according to his ability, to each according to his labour'); one obligatory ideology, Marxism-Leninism, dominates (with some national peculiar features, ideas of Mao Zedong or Deng Xiaoping in China, or Juche in DPRK that are transcribed in constitutions). Opposition, 'anti-socialist' propagation and campaigning are banned by criminal law and are penalized. Public associations are allowed to operate, but they act in accordance with the principle of democratic centralism and are subordinate to the leading role of the party, natural rights of man are not acknowledged.

In the totalitarian socialist civilization the principal deep-rooted concept is the priority of the society, the collective and the state over the personality. I'd like to refer here to I.V. Stalin's notable words from his Kremlin celebration speech of 1945 devoted to the victory in the Great Patriotic War, who called a man a just a 'small cog' in the wheels of the party-and-state machine. The man's status depends on his belonging to a certain social class or stratum. Citizens are divided into labouring and non-labouring ('exploiters'), the latter were not granted suffrage and some other political rights in totalitarian socialist countries (not only in Russia). At present some social and economic rights in constitutions of totalitarian socialist countries are formulated differently. There are citizens' right and labourers' rights. The workers and the peasantry also differ in rights. Up to a certain period the peasantry in the USSR were deprived of passports and, hence, freedom of movement and travel. In modern China this difference results in the city dwellers' advantage over the peasantry at

representative bodies elections at the ratio of 5:1. Exploiters' and some others' access to the leading Communist party was restricted, though nowadays entrepreneurs can be affiliated to this party in China, there even are businessmen who hold leading positions in the local party bodies.

Law in totalitarian socialist countries has for a long time relied upon the principle of private property ban. At present private property is allowed in a number of countries, in China it has become widespread (there even are large private property owners, dollar multimillionaires), but the attitude towards it is still negative. The constitutions state that socialist sector (mode) plays the leading role, the supreme form of property is the state socialist property, it can enjoy advanced remedies of legal protection (forms of property are unequal). However, some constitutions formulate the principle of socialist market economy.

The capitalist civilization (about 3 billion people) resulted from the elimination of feudal vassalage, but social profile elements were finally acquired during the domestic changes and people's (especially the labourers') struggle for social rights. It isn't by chance that the first constitutional articles on social function of the private property and individual social and economic human rights appeared in the dramatic course of revolutionary events in Mexico and Germany in 1917 and 1919, while an advanced social legal system in capitalist countries was built after the Second World War (in 1945), in the period of considerable rise in democratic movement in the world after Nazism had been defeated.

Constitutions in capitalist countries appear to be based on quite different foundations when compared with Muslim or totalitarian socialist countries. Individualistic approach to man prevails in this type of civilization. An individual is a cell of the society, he has priority over the society and the state. His independence is based on private property and essential natural rights (right for life, freedom, security of person, etc.) Legal regulation is relied on and legislative system is provided by legal equality of people despite race,

nationality, gender (though even in the UK women only got the suffrage in 1919, in France in 1946, in Switzerland in 1971), despite any other physical or personal characteristics. Modern law in the capitalist civilization is not limited to legal equality or recognition of personal and political rights. Social and economic rights (right for labour, freedom of labour, paid leave, enacted minimum wage and 'consumer goods basket' (cost of living), a certain level of free public education, state retirement benefits etc.) are acknowledged and provided for to a certain extent.

Individual private property (or that of a group of individuals), freedom to possess and dispose of it plays the primary role in the capitalist civilization, even in its social type. It admits of a person's economic and other activities. A state (a social state) has to provide only basic needs of a person (cost of living, a certain level of free public education and medical care, state retirement and unemployment benefits, the infrastructure: communication system, transport routes) and to perform other 'common causes', but a man has to provide for and take care of his family himself. That's why, in particular, the doctrine of a universal welfare state did not root in it, as it led to man's dependency, excessive expectations from the benefactor state. Man's activities presuppose free competition in all areas: economy, politics, ideology.

These are the grounds for the following constitutional principles: freedom of economic activities, market freedom, multiparty system, political competition, ideological variety, etc. The social state isn't passive, it isn't the 'night-watchman' of the 19th century (though at that time it wasn't just a watchman), the state socially supports the man, it serves as a social regulator, performs social arbitrary functions, but not as an instrument to reform the society on the new grounds from the top down. The state activities have to correspond to evolutionary laws of the society; have to correct the deficiencies of such an evolution (in particular, debauchery of the free-market environment), to provide legal rights and personal interests.

Legal system of social capitalism involves other principles: freedom of

associations; division of powers; dominance of elections to determine figures and parties to rule the state during the service term; democratic social, legal, secular state, local authoritative bodies; civil servants' responsibility and reporting, including the head of the state; democratic political regime. However, social capitalism still remains capitalism. Its legal system bears disadvantages typical for this type of civilization. The primary target of the development is pursuit of profits, while the will of a dominating social stratum and of the party to have won the elections is supposed to be the will of the whole society. The state, first and foremost, protects the interests of economically, politically and ideologically dominating strata. The social capitalist state can correct the drawbacks of its approaches, but cannot withdraw them.

The outline of legal systems of the three major civilizations proves that they tend to contingency. The contingency is has the formal and the substantive nature. Its first aspect is changes in the form of law. Constitutions have been accepted as the main legal act of all countries (as mentioned above, in the 20th century they were adopted even in Muslim fundamentalist countries). Modern constitutions have common features in their inner structure: they set, in a varying degree, a legal basis for a social and state organism, individual status (norms of such a type can be traced even in Muslim nizams), social characteristics. All this distinguishes them from former instrumental constitutions of the 18th–19th centuries. Original traditional norms (including legal practices, judicial precedents, law of equity in Anglo-Saxon legislation, especially well-developed in the UK) are substituted by codes of law and other abundant legislative acts (there are no codes in the UK, but the USA has an incomplete Penal Code), 'advanced' Muslim countries adopt their codes of law, it can even be witnessed in Muslim fundamentalist countries in a few isolated instances. To a certain extent, the doctrinal sources are superseded by legal acts (Koranic exegesis by medieval mufassirs (lawyers); it often happens that a new up-to-date commentary is given as in the case of 'jihad against the kuffar (the unfaithful)'). 'Advanced' Muslim countries no longer have Islamic courts that

administrate severe mutilation as a penalty, though they are sometimes revived (in the north of African Nigeria, in the insurgent Chechnya). The form of law, arranging law enforcement bodies, legal procedures are getting more commonly grounded, and the interdependence can be witnessed, no matter how it might be denied with the words about a mere coincidence.

Contingence of legal systems is also progressing in their content. At present contingence of legal systems cannot be realized on the grounds of backtracking to old terms, on the contrary, it demands social progress. Creating a genuinely democratic, social, legal, secular state is a guideline and a goal to achieve, formalized in the main legal codes, constitutions.

Elements of democratization are typical of all countries, they can be detected and formalized in constitutions and some other acts dealing with human rights and fundamental freedoms in accordance with the international standards. Several Muslim fundamentalist countries organized parliaments, and the Kuwaiti can enjoy female suffrage (though no woman has been elected yet).^{*} The first elections to in part appointed and in part elected authoritative bodies were held in some cities of Saudi Arabia in 2005. As for the fact that some categories of 'exploiters' were deprived of suffrage in totalitarian socialist countries, it is no longer the case. There are some other elements of democratization, but they are difficult to detect, however, or are only of formal nature.

Nowadays almost all countries possess certain elements of a social state (zakāt in Muslim countries, state retirement benefits, health care, norms of constitutions concerning the social function of private property, social partnership, social justice, more specific legal norms on minimum wages and cost of living, etc.) But the real minimum monthly wages or consumer goods basket. i.e. actual performance of the norms social justice give good reasons to believe that it will take a long way to reach a genuine social state (even during the crisis Russian billionaires boosted their profit 1.5–2 times, scandalously

^{*} In Yemen, under a similar situation in 2009, women established their own parliament, Ash-Shura.

high bonuses are paid again in the USA).

The doctrine of a legal state externalizes itself through adopting eligible legal acts that withdraw lacunae and disadvantages in legal regulation; through setting norms of state as well as responsibility of its authoritative bodies and the right for a person to appeal to the courts against their activities. However, to have a perfect legal state, still more measures should be taken, while some countries see a gap between the doctrine of a legal state and the real life. Many developed and other countries are secular states, and Muslim and totalitarian socialist countries make attempts towards the same status, but neither of them can be called secular states.

Considering a certain convergence in legal systems of various countries, one cannot but notice them having legal norms and institutions that cannot be converged, as they are antagonistic in nature and exclude each other. This contradiction is only possible to reconcile by eliminating or substituting one of the legal systems.

In the field of legal economic regulation such antagonistic institutions are as follows: regulated market economy with indicative planning *vs.* a totally free market; equality of all forms of property *vs.* supreme position of one form (socialist property in totalitarian socialist countries, public property of ummah in Muslim countries); private property immunity and absoluteness *vs.* a possibility to legally restrict it in favour of the state and public interests; absolute freedom of private property on natural resources *vs.* restrictions of this freedom in favour of public interests; marked role of one economic mode *vs.* equal legal regulation of various modes and their competition, which doesn't exclude state support of some industries if required, etc.

In the field of political relations, incompatible regulations are the following: political diversity *vs.* political rating and exceptional position of a certain social stratum, association, individual; ban on political parties and associations *vs.* their free legal establishment; a superior (leading) role of one party formalized in the constitution *vs.* equality of parties and public associations and their

competition; rejecting elections and plebiscite as ways to put the people's will into life and substituting them with consultative bodies *vs.* acknowledging their dominating role, at least in the nearest future,* etc.

In the field of regulation of social relations: leading role of one class or stratum, its exceptional position *vs.* equality of legal position for all social strata; equal chances for everyone *de jure* only *vs.* real providing everyone with the cost of living and targeted social support (state support) of disadvantaged persons and strata; the global product distribution mainly according to the capital *vs.* multifaceted principles of the global product distribution mainly according to the labour, etc.

In the field of spiritual life: obligatory state ideology *vs.* diversity of ideologies; absolute freedom for all intellectual forms *vs.* state support of cutting edge forms of artistic creativity and ban on destructive forms entrenching on society interests, life, freedom and human rights, such a ban can be performed only by adopting certain legislative acts and establishing public councils under the most authoritative mass media, etc.

In the field of regulation of an individual's legal position: equality of all citizens *vs.* inequality of some groups (women, 'exploiters', etc.); acknowledging and providing basic constitutional right for citizens on the level of international standards *vs.* limited acknowledgement (for example, concerning social rights etc.).

We have certainly mentioned not all the tendencies of convergence of legal systems and not all antagonistic social institutions preventing it. Besides, only principal issues of public law have been considered, without touching other fields. This matter is quite voluminous and requires a complex and multifaceted consideration.

* Perhaps, in the future super-informational society some other ways to identify the will of each person may be found and, resulting from it, ways to identify common will taking into account interests of various strata and individuals.