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NATIONAL AND SUPRANATIONAL IN THE GLOBAL CONFLICT OF CONSTITUTIONAL VALUES: NOT ALL "ETERNAL" THINGS ARE INVARIABLE

The profound transformation of social legal reality occurring in the modern times is inextricably linked to the revision of the approaches and stereotypes which only recently determined the development of constitutional reality and axiology of interaction between the national and supranational. Sometimes these approaches are even completely reneged, even though they had seemed unalterable and eternal. The modern crisis of constitutionalism must not be understood in narrow legal terms, but as a systemic challenge to the entire legal civilization.

1. We have inconsiderately refused to recognize any ideology as "state" or "obligatory" (part 2 of Article 13 of the Russian Constitution), but could not escape the struggle of ideas or the confrontation of political and legal values that are fundamentally constitutional.[5] Today this struggle tends to sharply escalate, acquiring qualitatively new manifestations. In fact, we are talking about a new ideolo-

[5] See: *Бондарь Н. С., Баринов Э. Э.* Аксиология конституционного мировоззрения. Часть I. Конституционное мировоззрение в ценностном измерении обновленной Конституции России // Конституционное и муниципальное право. 2021. № 12. С. 3–12.

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gy – a militant one, one that disregards the international legal norms and rules – the ideology of a socio-cultural fracture of the world, "confrontation of civilizations" (S. Huntington), balancing between war and peace (emergence of new forms of wars – economic sanctions, information war, hybrid war, etc.).

What we are dealing with is not only a revision of core values of the modern life, but also a change in the constitutional and legal meaning and understanding of the fundamental categories of legal axiology, designed to reflect the "eternal" and "invariable" in the rapidly changing assessment scale of the personality, society, the state and the surrounding social and legal reality. Moreover, the very phrase "invariable, eternal, fundamental constitutional ideals and values in the modern world" can be perceived as an oxymoron: is it possible to speak of "invariable" constitutional values in a globally changing system of axiological coordinates of the contemporary world order?

Still, this wording may (and should) offer at least comparative characteristics of stability and dynamism, to be embodied in the constitutional norms and institutions of the ideals of state legal development, principles and higher values, as well as the analysis of the dialectical relationship of relevant phenomena in their temporal dimension. This refers not only to the static condition, but also to the evolution of "eternal" constitutional principles; in the Constitution of the Russian Federation they are primarily reflected in the preamble, chapters 1 and 2. This thesis is also confirmed in foreign constitutionalism, both in connection with the practice of constitutional solidification and implementation of certain principles (for example, the principles of "secularism" of the state, etc.[1]) and in the establishment of more general provisions which can be considered an "eternal clause" in the text of the Constitution.[2]

In this regard, it is crucial that constitutional ideals can relate to the characteristics of "eternal" and, hence, invariable phenomena, only insofar as they retain their relevance in a given historical era in the essential social and political context, and also meet the needs of formally legal, moral and ethical impact on real relations and not turn into some relic of the past, remaining significant for the generation of contemporaries. However, this does not mean that the relevant phenomena, defined through these concepts, remain immovable and invariable, without undergoing either internal or externally (primarily politically) stimulated change or development.[3]

In this regard, the context of implementation, protection, and development of invariable (fundamental) "eternal" constitutional ideals, both at the legislative level and in law enforcement, especially in the practice of constitutional justice, assumes a specific importance – not only formally legal, but to some extent also socio-political and socio-cultural. The point is that constitutional ideals are not only a doctrinal and cognitive category: by being recognized in the constitution, they also acquire the properties of a category of the effective law.

At the same time, the analysis of any value components in terms of their embodiment and implementation in constitutionalism suggests the need for understanding of the place of values in the system of modern constitutionalism, as well as their role in forming a holistic view of the features of constitutional development of the modern society, including establishment of a relationship between national and supranational factors in the modern constitutionalism. The essential transformations of values at different levels of their implementation should also be taken into account.

2. A peculiar political and legal result of the modern socio-cultural civilizational rift is emergence of a "multilevel" (national and supranational) value-based constitutionalism, with systemic characteristics that raise obvious questions.

At the heart of this "multilevel" quality, especially at its supranational level, lies the problem of forming a *global modern constitutionalism*. To what extent is its affirmation a reality? Are there prerequisites for constitutional globality today? If so, what could become its regulatory basis? At the first glance, the UN Charter would be the first candidate. But to what extent does this correspond to the current reality, given the gap between the real practice of interstate interactions and the regulatory mechanisms and models laid down in the Charter? Besides, it is obvious that earlier forms of international dialogue, focused on the recognized values of modern constitutionalism, have actually lost their relevance.

In this context, the problem of forming a system of "multilevel" constitutionalism is associated with the emergence of a largely artificial supranational constitutional level, where certain basic values are defined and proclaimed to be universal. These values are far removed from the generally recognized principles and norms of international law, on the one hand, and from the norms conventional for the modern constitutionalism and national legal order, on the other. Legitimacy of this order is explained by the ideas of global representation replacing the idea of state sovereignty (J. Habermas) with the far-reaching consequences of implementation of these "ideas," including formation of the new European constitutionalism.

Just recently, at least two largely contradictory but interrelated trends manifested in the constitutional development of the European continent countries. On the one hand, there were processes of legal globalization, which consisted not only in convergence and transfusion, but also in competition and rivalry of the leading legal systems of today. On the other hand, there were trends for establishing constitutional legal sovereignty, based on the new awareness of countries, including Western European democracies, of the need to protect sovereign rights, take into account and preserve the socio-cultural features of national-state constitutional systems. As for today, the global trend suggests formation of not even supranational, but the so-called *post-national euroconstitutionalism.* The main factor of its "democratic legitimacy" is not the states with their national constitutions, but a certain homogenized political community of Europeans who have overcome national customs regimes and state borders.

Such a situation can lead to *erosion of national approaches to law as a socio-cultural phenomenon designed*

in "Law Literature for his monograph Judicial Constitutionalism: Doctrine and Practice" (2018).

[1] See: *Roznai Y.* Negotiating the Eternal: The Paradox of Entrenching Secularism in Constitutions // Michigan State Law Review. 2017. No. 2. P. 253–332.

[2] See: *Suteu S.* Eternity clauses in post-conflict and post-authoritarian constitution-making: Promise and limits // Global Constitutionalism. 2017. Vol. 6. No. 1. P. 63–100.

[3] *Бондарь Н. С.* «Вечные» конституционное идеалы: насколько они неизменны в меняющемся мире // Государство и право. 2020. № 6. С. 20–34.

to be an equal measure of freedom for all. The category of equality in the system of modern values acts as a concentrated expression of the integral combination, "amalgamation" of the moral and legal image of the individual (as a person and as a citizen). The main threats to the modern legal order, in these conditions, are profound deformations of the requirements of equality and disregard of the sociocultural characteristics of this universal category. Forms and ways of manifestation of these processes are multifaceted; they do not fit into common principles, have an ultimately wide range of expressly national and cultural axiological criteria, institutional and other characteristics.

This topic has become particularly relevant in modern conditions where an individual becomes alienated not only from the state, but, first and foremost, from the moral and ethical principles of legal life. An important task of the theory and practice of modern jurisprudence is to bring the individual back into a legal environment that is not reducible to formal legal regulation only. Harmonization of formally legal, moral and ethical principles in the law and in the status and behavioral characteristics of a legal person is possible and necessary, first and foremost, on the basis of the Constitution.

The constitutional amendments of 2020 in this regard have significantly increased the specific weight and concentration of moral and ethical principles in the constitutional norms, including those that relate to the anthropological characteristics of the subjects of constitutional legal relations. The effective system of ethical and legal principles of the revised Constitution helps evaluate the actions of citizens and public authorities from the perspective of sin, good and evil, justice and injustice, honesty and duty, i.e. ethical legal concepts and standards.

This provides the grounds for singling out *constitutional anthropology* as a relatively independent doctrinal and practical jurisdictional trend. Hence comes the recognition that the deep foundations of the constitutional spirit and model of human relations with society and the state are centered in the legal, moral and ethical characteristics of the individual, rendering him or her the qualities of a legal personality. In a concentrated form, these anthropological characteristics can be represented through the categories of, first, *equality*, second, *justice*, and third, *personal dignity*. It seems reasonable to view these categories as somewhat of an "*ethical legal trinity*" of a legal personality, as they reflect the principal diversity of axiological characteristics of the subjects of social and legal life in terms of their socio-cultural and formally legal, secular and biblical-philosophical, moral, ethical and constitutionally legal values.

Therefore, in determining the regulatory legal potential of constitutional equality, at least three interrelated principles of its normativity must be considered: *first*, the requirement of equality of the individual as a person (the biological normativity given to man by birth, "equality before God"); *second*, equality of the individual as a personality (sociocultural, moral and ethical normativity of equality requirements before society); *third*, equality of the individual as a citizen (formally legal normativity of equality before the state, law, court). In such a "trinity" rest the deep, even sacral origins of constitutional regulation of the individual's position in the society and the state – spiritual, moral, sociocultural, and not just its legal origins, which is reflected in the specific content of individual constitutions.

So, for instance, the Arab countries have no liberal interpretation of the formal legal equality of men and women; equality itself is perceived in terms of the provisions of the state religion as interpreted by the Islamic law. In India, the principle of equality provided for at the constitutional level actually operates in the context of the varna-caste system, the Hindu law of dharma, which presupposes following one's own path and abandoning a strife for a significant change in one's social status, as solidified in the social norm. Europe also has some peculiarities: the constitutional treatment of abortion and the right to life in Poland; the reference to constitutional identity in assessing the constitutionality of Hungary's 2016 constitutional amendments. Furthermore, over fifty countries in the world have established the so-called constitutional sexual equality, the equality of same-sex marriage, which is certainly based on socio-cultural confrontation rather than on political and ideological struggle.

In a concentrated version, this can be assessed as a manifestation of the deep processes of change, deformation of socio-cultural principles in modern constitutionalism: on the one hand, clericalization of law in some regions of the world, especially in Muslim fundamentalist countries, and on the other hand, secularization of law stripping it of moral and ethical principles in Western democracies.

At the same time, the problem of formation of supranational constitutionalism on the basis of a homogeneous European society harbors a serious political paradox. In fact, as noted by the same J. Habermas, Z. Brzezinski and others, the main foundation for such a consolidation of a united European nation is the transnational media, nongovernmental organizations (actively involved in spreading new global "values"), mass political movements (feminist activism, "green" movement, BLM, etc.). Meanwhile, it is becoming evident that the values transmitted by these structures are actually formed not within the complex European public space itself through dialogue and search for compromise, but through the creation of the "right" information agenda and the "new" legal values. In this situation, maintaining the national foundation of the legal system appears to be the key to maintaining a sovereign statehood that reflects, first and foremost, the interests of the people living on its territory. That is why the national constitutional courts are increasingly turning to the idea of constitutional identity, and legislators are creating adequate mechanisms at the constitutional and sectoral legislative levels to prevent uncontrolled penetration of the new "universal" values into national legal orders.

Thus, the system of basic views of the possible models of value-based constitutionalism is currently undergoing a major transformation. Globalization of the world order, including the legal order, poses certain threats to nation-states that are founded on law as a cultural phenomenon of a specific nation. In such a scenario, formation of some kind of a "universal" constitutionalism disregarding the national specificities should be perceived as a forced cultural (and legal) assimilation, which is currently still considered within the framework of the international legal order. Hence comes the problem of the relationship between the national and supranational in the value system of constitutionalism in the present conditions.

3. Analysis of the relationship between national and supranational in its current manifestations (as applied to Rus-

sia, and in view of the content of the constitutional reform of 2020 and its impact on intranational and international problems) suggests that it is necessary to understand the essence of new approaches to this relationship, to the interaction between the international and intranational law.

The change in real international relations, state policies aimed at certain international institutions, previously established and transforming (primarily politically) supranational jurisdictions do not exclude the fact that the generally recognized principles and norms of international law ultimately predetermine important characteristics of the real state of affairs in the modern legal order, national legal systems and trends in their development. This fully applies to the Russian Federation. Poly-systemic, multi-dimensional inclusion of international law in the domestic constitutional regulation helped form the fundamental idea of the national and supranational dimension of legal relations, their relationship in the national system of constitutional coordinates, taking into account the connection between the intranational and international law, at the doctrinal level. It also helped implement these approaches in the existing system of legal order – despite all the complexity and unfavorable aspects of the current foreign political situation.

The constitutional reform of 2020[1] contributed to reassessment of the relationship between national and international law and was, in this part, a natural response to the increasing collisions between acts of international law, especially the decisions of the ECHR as a body of supranational jurisdiction, and constitutional provisions. However, it must be acknowledged that this reform was not the only and certainly not the root cause of a major transformation of approaches to solving these issues. Crisis trends of geopolitical development, which have no formal legal equivalent, nevertheless directly affect the legal life in its national and international manifestations, predetermine the need for a serious rethinking of international legal relations in terms of opportunities, conditions, and limits of their influence on jurisdictional and other characteristics of the national legal order. Russia's withdrawal from the Council of Europe[2] and the denunciation of corresponding obligations, including those under the Convention for the Protection of Human Rights and Fundamental Freedoms, are of significant, although not decisive, importance in this respect.

Nevertheless, such circumstances, albeit creating their own context for rethinking the problem of the relationship between national and international law, do not refute the national legal understanding of the generally recognized principles and norms of international law and international treaties of the Russian Federation as a part of its legal system (part 4 of article 15 of the Russian Constitution), in terms of their fundamental political and legal value in the system of intranational legal relations. The relevant constitutional provisions constitute the foundations of the constitutional order of the Russian Federation having superior regulatory legal importance (Art. 16 of the Russian Constitution). They are essential for determining the nature and legal consequences of the penetration of supranational (e.g. European) legal standards of modern constitutionalism into the space of the Russian legal system, ensure their interaction with national constitutional and other legal requirements, and open additional opportunities for the implementation and protection of national constitutional values.

This purpose of the relevant constitutional provisions establishes the unquestionable supreme legal force, the priority of the Russian Constitution in the system of legal order based on the interaction of its national and supranational principles, and, in fact, emphasizes that *in matters related to the place and role of the international law in the modern national legal order, the Constitution also serves as a constituent act*. Meanwhile, with all the diversity and depth of approaches in domestic jurisprudence to the analysis of the relationship between the Russian Constitution and the norms of international law, including the amendment to Article 79, the constituent properties of the Constitution are, sadly, still not fully considered and are understudied in terms of the international legal aspect. Without this, however, it is difficult to establish a convincing (legal constitutional) case for the unconditional priority of the values of the Basic Law over the norms of international law.

The 2020 adoption of the amendments on the priority of the Constitution of the Russian Federation was objectively conditioned by the need to strengthen the constitutional and legal framework for the consistent implementation of the provisions of supranational legal regulation. Among other drivers were the importance of strengthening state sovereignty and the development of constitutional and legal assessments of national identity, the emphasis on reinforcing the role of the Constitution in the hierarchy of legal sources, and the inviolability of its supremacy as a constituent document with supreme legal force.

The provisions concerning the supremacy of the Constitution of the Russian Federation as a condition for the fulfillment of international obligations in the national legal system have been consistently substantiated by the Constitutional Court of the Russian Federation on the basis of the letter and spirit of the Constitution. This was not only because of the attention to the specific collisions at different levels of legal jurisdictions in the practice of the Constitutional Court of the Russian Federation (primarily the ECHR decisions) and the existing constitutional regulation, but also due to the relationship between the fundamental axiological principles of the Constitution and the international law.

First, the decisions of the Constitutional Court – even at the initial stages of its activity – provided comprehensive justification for the axiological characteristics of the fundamental features of the Constitution, including the value of its constituent properties. This means, in particular, that the Basic Law alone is the constitutional act with respect to the entire legal system of the state. It concerns both internal characteristics of this system (e.g. its federal nature) and external characteristics, related to creation of opportunities and limits of international treaties of the Russian Federation by the Constitution itself, as well as the norms of international law as a part of the national legal system.[3]

[1] Закон о поправке к Конституции РФ от 14 марта 2020 г. № 1-ФКЗ «О совершенствовании регулирования отдельных вопросов организации и функционирования публичной власти» // КонсультантПлюс : [справ.-правовая система]. URL: http://www.consultant.ru/document/cons_doc_LAW_346019/ (date of address: 14.06.2022).

[2] Заявление МИД России о запуске процедуры выхода из Совета Европы // Министерство иностранных дел Российской Федерации : [сайт]. URL: https://mid.ru/ru/press_service/spokesman/official_statement/1804379 (date of address: 14.06.2022).

[3] See: Постановления Конституционного Суда РФ от 18 июля 2003 г. № 13-П ; от 21 января 2010 г. № 1-П ; от 26 февраля 2010 г. № 4-П ; от 19 июля 2011 г. № 17-П, and others.

Second, the decisions of the Constitutional Court of the Russian Federation emphasized the need to ensure the constitutionality of international legal provisions when they come into force for the Russian Federation and for their subsequent application (e.g., Decision of the Constitutional Court of the Russian Federation of July 9, 2012, No. 17-P).

Third, the Constitutional Court pointed at the constitutional possibility of executing the decisions of interstate bodies, provided that they conform to universally recognized principles of international law that define universally recognized rights and freedoms and are part of the constitutional status of the individual (Decision of the Constitutional Court of the Russian Federation of July 14, 2015, No. 21-P).

Fourth, the Constitutional Court of the Russian Federation drew attention to the importance of a balanced approach to legal assessments of emerging collisions of national and supranational legal standards, excluding the focus on subordination to different legal systems. The interaction of the European conventional and Russian constitutional legal order is impossible in the conditions of subordination, because only the dialogue between the different legal systems is the basis of their proper balance (Decision of April 19, 2016 No. 12-P). It is also important to take into account the legal position of the Constitutional Court of the Russian Federation formulated in the Decision of July 14, 2015 No. 21-P: the decisions of supranational jurisdictional bodies in no way cancel the priority of the Russian Constitution for the Russian legal system and shall be implemented only if its supreme legal force is recognized.

Assertion of supremacy of the Constitution of the Russian Federation in regard to the relationship between national and international law is a consequence and natural outcome of the return to the sovereignty of Russian statehood and the resulting transformation of the legal order in the modern conditions of development of state and society. The constitutional amendments, in this context, do not diminish the role and importance of international law (interstate regulation), secured by part. 4 of Art. 15 of the Constitution of the Russian Federation. Rather, they serve as a development or particularization of the model of implementation of supranational legal standards, which is also consistent with the approach that the choice of the relationship between the national and international systems is sovereign for each state.

Apparently, the constitutional legal amendments of Article 79 of the Constitution of the Russian Federation, supplemented by the provision about the constitutional possibility of non-execution of the decision of the interstate body, containing the "collision" interpretation of an international treaty in relation to the Constitution, should be considered in general context and in connection with the provisions of Article 15 of the Constitution of the Russian Federation. These changes should be recognized as an evolutionary reflection of legal reality, oriented toward strengthening the protection of constitutional values and the national legal order. The priority effect of the Constitution, now expressly provided for by its 2020 amendment, is implemented in direct relation with the exercise of the constitutional-judicial jurisdiction (clause "b" of part 5.1 of Article 125 of the Constitution of the Russian Federation). Therefore, it seems appropriate to pose *the question of judicial axiology* as an instrumental means of resolving collisions between national and international law, which is especially relevant in the current context of geopolitical crisis.