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THE CONFLICT OF CULTURES OF MODERN JUDICIAL-LEGAL SYSTEMS: SOCIAL JUSTICE OR ECONOMIC PRAGMATISM?

Current challenges to law and threats to the world order should be estimated not in terms of narrow, formal legal aspect, but as systemic cultural processes, the conflict of legal cultures of modern civilization, manifested, inter alia, at the level of confrontation of the main judicial and legal systems of nowadays – Roman-German (continental) Law and Common (Anglo-Saxon) Law.

1. Today, it is obvious that the general humanistic tuning for partnership, interaction of judicial and legal systems, which had illusively been encouraging many persons until recently, has been replaced by the clash of civilizations, the hybrid war against Russia in all areas, including the judicial-legal field, the irreconcilable conflict of jurisdictions, and the confrontation of legal cultures. However, this has not only today's political and ideological prerequisites, but also deep philosophical and legal, ideological roots associated with the peculiarities in the approaches of the relevant legal systems to the fundamental constitutional values of modernity. One of the watersheds, bifurcation for them, is the question of what underlying the judiciary functioning and the search for judicial and legal solutions by modern national and supranational jurisdictions: economic pragmatism or social justice?

For us, the answer to this question is obvious: the desire for justice is inherent both in the very essence of law – an equal, fair amount of freedom for all, and in the very nature of human personality, which has its deep historical roots. It would not be exaggeration to note that in context of justice (in correlation of this category to problems of justice, judicial jurisprudence), philosophers of Ancient Greece

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and lawyers of no less ancient Jus romanum (Roman Law) developed many approaches and ideas that have not lost their relevance today; moreover, they deserve close attention, and need to be considered in the current conditions of a kind of renaissance of judicial jurisprudence, which, I believe, has begun. It is no coincidence that concepts "justice", "judgement", "jurisprudence", "jus" (law) have a single-root ancient Roman origin – justitia, jus.

Meanwhile, the current understanding of this category in legal science is so contradictory that the current state "can be described as *scientific chaos in understanding justice and its correlation to law*,"[1] and even more so in correlation of justice to judgement[2].

2. In general terms, including the focus on pragmatic interests of the judicial search for justice, this category seems possible to be presented, at least, in the following aspects.

Firstly, the moral-ethical, spiritual-religious principles of justice, which may have the most profound historical prerequisites for justice demand in chronological terms, and deserve special attention. All modern world religions (in their classical manifestation non-politicized by modern living conditions) adhere, at their core, to a single approach in the context of understanding goodness, respect, compassion, truth, justice, etc. Divine justice is absolute in this regard, because it is God (and only He) who can repay a human, considering everything he has done (bad and good, sinful and righteous). This retaliation also takes place on a kind of scales of "Divine justice", where everything good and bad is weighed extremely accurately, and everyone is rewarded according to justice, i. e. in proportion to merit. By the way, these are manifestations of Biblical ideas about the Divine origin of court, judicial activity as focused on the search and affirmation of justice in human society.

Secondly, even if we agree that its highest manifestation has a Divine origin, the very fact that justice is implemented on earth, in human community, confirms unconditional social principles of demands for justice, their filling with deep sociocultural, national, specific historical features. In this regard, justice is a greatly social category to have philosophical, sociocultural, political-ideological coordinates in modern society and, in particular, in judgement, bearing in mind the need for analyzing, interpreting legislation, evaluating decisions of public authorities, qualifying behaviour of individuals and social groups through the prism of social justice, based on criteria values recognized in society and the state, principles of social and economic policy, actively using power and legal mechanisms.

Therefore, another *mandatory level of implementation of justice* (including, inter alia, the field of judicial jurisprudence) is *state-legal*, *formal-legal*. Due to its special significance, including direct access of relevant demands (justice and equality) to *the level of constitutional by their nature relations between property, power and freedom*, the formal-legal content of demands for justice has in modern conditions, first of all, the constitutional level of its recognition and consolidation, involving regulation of relevant relations (falling in the field of administration of justice, in case of disputes and conflicts) based on the unity of social, political-ideological and spiritual-moral principles of justice. In the Constitution of the Russian Federation (with its amendments in 2020), this is implemented not just in separate provisions, but at the level of fundamental principles related to assertion of not only freedom of conscience and freedom of religion (Article 28), but spiritual sovereignty of the secular state (preamble, Part 1 of Article 3 in the normative unity with Articles 13, 14), on the one hand, and recognition of the faith in God transferred to us by our ancestors (Part 2 of Article 67.1 of the Constitution of the Russian Federation), on the other hand. But this approach, in particular, on the base of Article 67 of the Constitution of the Russian Federation, should not be considered as clericalization of Constitutional Law; to a greater extent, this implies the opportunity for constitutionalization of moral, ethical, spiritual and religious principles, philosophical and legal justification of sacred moral ideals of the spiritual (religious) culture of society, recognized by the Constitution.

In this regard, there may be grounds for asserting that it is impossible to substantiate the natural-legal and state-legal personality of an individual without biblical and philosophical ideas, as well as to make ethical and legal measurements of judgement as a special form of state-governmental activity aimed at protecting and restoring demands for legal justice to be violated in modern society, without considering moral and ethical principles. This issue (including judicial and legal ones) has acquired particular relevance in modern conditions, when the loss of trust in authorities, alienation of a human, occurs not only in relation to the state, but primarily at the level of moral and ethical principles of legal life. Returning a human to the legal environment, which is not limited only to formal legal regulation, is an important task of the theory and practice of modern jurisprudence.

At the same time, in all this, there is manifestation of the unity of biological and social, divine and earthly, not only in the context of man's origin, but also in the status features, in interrelations of man and citizen with society and state. This "trinity" (personality–society–state) presents deep, sacred spiritual-moral, sociocultural, and not only legal, principles of equality and justice. In this understanding, *the normative imperative of the category of justice* is not limited to the formal legal content of an individual's status features. This is a much more substantial, multidimensional category; along, for example, with normative demands of fair and equal for everyone legal capacity, legal ability, equal rights, equality of everyone under the law, etc., it is simultaneously reinforced by *equal for everyone normative justice* of social, economic, sociocultural, moral and ethical principles that present in foundations of the constitutional system, in competence and functional features of all branches of government and their public bodies.[3]

3. On this base, *constitutional justice* may be formalized as an universal category of intersectoral significance for the entire legal system, all forms of law applicability. Without claiming to give exhaustive description of this category, it is generally possible to distinguish at least the following normative-legal principles (properties) of constitutional justice: *first*, axiological features of constitutional arrangement of society and state, their functioning in the legal dimension of social justice demands; *secondly*, universal requirements for

[1] See: *Вайпан В. А.* Теория справедливости: Право и экономика. М. : Юстицинформ, 2017. С. 28.

[2] Some of the works available on this subject, including those that have appeared recently (see, for example: *Клеандров М. И.* Правосудие и справедливость. 2-е изд., перераб. и доп. М. : Норма, 2023), can be considered only as the first approaches to researching this problem.

[3] Судья КС Николай Бондарь: Конституция 1993 года — живой документ нашей эпохи // Конституционный Суд РФ : [website]. URL: http://www.ksrf.ru/ru/Press-srv/Smi/Pages/ViewItem.aspx?ParamId=6294 (accessed: 23.05.2023).

legal equality, including the possibility of equitable inequality in legal regulation (differentiation) and law applicability (individualization); *thirdly*, property equivalence as expression of private law (a kind of market-economic) justice; *fourthly*, distributive justice as the basis of socially focused policy to ensure conditions of decent life for everyone; *fifthly*, relatively speaking, "balancing" justice as a criterion for ensuring constitutionally justified (fair) proportionality of restrictions, balance of values; sixthly, equal for everyone judicial protection as a legal warranty of fair law and order in society and state; *seventhly*, inevitability of equal, but only for "equal entities" (!), legal responsibility as the moral and legal basis for constitutional justice in tort relations; *eighthly*, the special democratic legal mode of legal regulation and law applicability, based on demands for justice, equal for everyone respect for personal dignity.

It is important to consider that harmonization of formal-legal and moral-ethical demands in law, law applicability, as well as in all forms and areas of state-governmental activity, especially in the judicial one (which initially, by its essential features, is focused on protection and affirmation of demands for justice), is possible only on the basis of consistent observance of national traditions, respect for fundamental values related to man, society, and state.

In Russia, where the very etymology of the concept "justice" has special, deep moral and ethical roots (in Russian, this word is single-rooted with the word "truth"), the system of prevailing legal principles has always made it possible to evaluate citizens' actions, and actions of public authorities, including from the standpoint of sinfulness, good and evil, truth and lies, justice and injustice, honesty and duty, i. e. on the basis of mandatory consideration of ethical, moral concepts and standards.[1] This, of course, is fully characteristic of the modern period, despite the fact that in the international legal order, in many other countries, the very foundations of normal ethical and legal life order are being destroyed, and Russia is imposed even in this area alien for it values and behaviour rules, with a hybrid war to have actually been declared.

Under these conditions, it is even more important to understand historical prerequisites and national traditions, including those related to modern challenges of judicial jurisprudence, which is especially acute at the *bifurcation point in development of the main judicial and legal systems of modernity – Common (Anglo-Saxon) Law and Roman-German (continental) Law*, an important indicator of which is their attitude to the eternal idea, values of social and legal justice.

4. High proportion of sociocultural, philosophical content of fundamental ideals of constitutionalism confirms the obvious fact that in presence of common ideas about constitutional ideals, there are serious differences both in their doctrinal, philosophical and legal understanding, and in practical approaches to implementation in the Anglo-Saxon and Roman-German (continental) legal systems.

Without touching on historical legal genesis, including the history of Russia's choice of the continental European path of legal development[2], it is important to consider in this case the high level of doctrinality, system-methodological elaboration, structuring, concentration of moral and ethical principles taken from Roman Law. This is not accidental: moral and ethical principles that defined continental law were "translated" in their original, genetic plan, transformed from the language of Greek philosophy into coordinates of exact legal formulations of Roman Law; in future, these processes received powerful philosophical, ideological, methodological justification through active influence of classical German philosophy on Continental Law (especially, Constitutional Law).

In this regard, it seems natural that historical features of formation of legal systems largely determine their deep ideological features, bearing in mind, inter alia, value features that receive their legal formalization in the form of fundamental constitutional principles of relevant legal systems. Herewith, in presence of profound national, historical, philosophical and ideological differences between modern legal systems, it is important to consider the fact that they cannot but have some common guidelines for functioning. Ultimately, these guidelines and ideals are associated with interrelations between power and freedom, state and individual, and a kind of common denominator and at the same time a value guideline for implementation of these interrelations, at least at the level of judicial and legal systems, is the universal *category of the common good*. The understanding of the common good is based on approaches related to searching for a balance of values of power and freedom, public interests and private ones, bearing in mind that in constitutional and legal terms, the category of the common good, on the one hand, embodies axiological guidelines for the search for the fundamental principles of modern constitutionalism, and, on the other hand, it is in this category that manifest fundamental philosophical and ideological differences in approaches of the Continental European and Anglo-Saxon legal systems to fundamental principles of constitutionalism.[3]

5. In this aspect, it is permissible to talk about two main approaches that define value landmarks of interrelations between power and freedom in different ways, including when searching for a balance of public and private interests and focus on this basis to achieve the common good. These are utilitarianism (economic utility) and social justice.[4]

In this respect, the Anglo-Saxon legal system is characterized by consistent utilitarianism. Genetically, it is connected with economic factors, focus on material benefits, business, financial and economic success, and its doctrinal and legal justification is based on postulates of the economic school of law, including ideas of "constitutional economics", which, by the way, have received insufficiently critical perception in our legal science.[5] In this case, the economic usefulness of decisions taken, including those at the legislative level, acts as an unconditional criterion for

[1] *Бондарь Н. С.* Конституция России в условиях глобальных перемен правовой жизни: от политических иллюзий к юридическому реализму // Журнал российского права. 2018. № 12. С. 18–32.

[2] There are, as you know, various opinions and assessments. See, for example: *Давид Р.* Основные правовые системы современности. М., 1988 ; *Раймон Л.* Великие правовые системы современности: сравнительно-правовой подход. 2-е изд. М., 2009 ; *Синюков В. Н.* Российская правовая система. 2-е изд. М. : Норма, 2012 ; *Марченко М. Н.* Правовые системы современного мира. 2-е изд. М., 2009.

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

[4] See in detail: *Дедов Д. И.* Общее благо как система критериев правомерного регулирования экономики. М., 2003 ; *Момотов В. В.* Принцип справедливости и целесообразности в институтах англо-американских и континентально-европейских правопорядков // Российское правосудие. 2017. № 12. С. 16–24 (ч. 1) ; 2018. № 1. С. 35–48 (ч. 2).

[5] See more about this in detail: *Бондарь Н. С.* Экономический конституционализм России: очерки теории и практики. М. : Норма, 2017. С. 14–24.

finding a balance of interests and at the same time as a value guideline for achieving the common good. Therefore, in the norm-controlled, practical and applied aspect, it is proposed to proceed from the fact that the law correlated with constitutional requirements should look not for what is fair, but for how economic interests in the particular legal relationship can be satisfied first of all.

The economic pragmatism cultivated, including at the constitutional and legal levels, is obvious to largely determine the Western model of consumer society. In this case, the criterion of the jurisdictional search for the balance of interests is the rate (level) of satisfaction of the relationship participants' needs; it is obvious, however, that the search for the balance of interests based on economic utility, material expediency, is inevitably associated (at least ultimately) with the level of satisfaction, (not) sufficiency of benefits. To assess this situation, the formula, a kind of set phrase, is quite appropriate: *"It's not enough to have a lot; you still need to have enough."* In this regard, legal, including judicial, approaches to finding the balance of interests should be based on indicators related not to coordinates of the consumer formula "a lot-a little", but to the concept "sufficiently". And, a kind of *measure of sufficiency, the balance of public and private interests is the category of justice*, which in this case acts simultaneously as a constitutional criterion for assessing the common good, as well as the search for the balance between power and freedom.

Historically, these approaches are associated with specific features of the Roman-German legal system, the normative and doctrinal justification of which was based on reception of Roman Law. It is no exaggeration that legal justification of justice (as a category of *aequitas*) was one of main historical achievements of ancient and medieval jurisprudence; it is no coincidence that experts have long noted that "none of the most brilliant provisions of Roman Law provided it so far the right to immortality as its attitude to aequitas… Representing from the subjective side only a certain virtue, aequitas at the same time determined the content of norms. The right was recognized as natural when it was seen as something universal, invariably correct and just…"[1]

Normative and doctrinal justification of the category of social justice as a criterion for harmonizing relations between power and freedom, achieving on this basis the common good implying benefits (including economic ones) for everyone, has increased relevance for judicial activity, including constitutional, norm-controlled and interpretative ensuring the supremacy of the Constitution. After all, the Constitution itself is concentrated manifestation of the meta-legal principles of justice; the common good must be considered in this case beyond the arithmetic summation (especially division) of benefits for individual citizens, organizations, and other entities of law.[2]

6. This reflects the fact that a kind of *philosophical and legal basis for the orientation of justice for the common good as a criterion for the harmonization of relations between power and freedom is the concept of the priority of the whole over the part*. Its origins are in "Metaphysics" by Aristotle, with its postulate that "the whole is not more important, but more than the sum of its parts." Subsequently, this seemingly internally contradictory formula was justified within the framework of the philosophical school of holism, which today seems to be experiencing its renaissance: holism, i. e. the philosophy of the whole, the unity, comes to replace mechanicism, reductionism. Russia's national-specific approach to arrangement and performance of public power, its relationship with the individual and society should probably be interpreted largely from the standpoint of holistic legal awareness, striving for state integrity, the unity of society on the base of social partnership, economic, political and social solidarity (Article 75.1 of the Constitution of the Russian Federation), which, however, is manifested not only through centralization, universalization, but also optimal differentiation in those areas where it is justified and necessary.[3]

The content and limits of such centralization, universalization and differentiation inevitably imply the need for finding the balance between public and private interests, power and freedom at various levels of their manifestation, which was clearly expressed, including in the light of the 2020 amendments: now our Basic Law is focused on understanding justice as a legal measure of freedom and equality and at the same time – a socially significant factor of constitutionally justified differentiation, targeted social support of citizens in normative unity with constitutional demands of mutual trust between the state and society, protection of the citizens' dignity (Article 75, Parts 6, 7; Article 75.1).

In these new constitutional provisions, among other things, the legal positions of the Constitutional Court of the Russian Federation have been implemented, suggesting that the constitutional principle of justice is complex, in fact, comprehensive, includes the principles of both distributive and retributive (equalizing) justice, assuming proportionality, adequacy. In this regard, the practice of the Constitutional Court of the Russian Federation demonstrates the focus on identification, in relation to demands for justice, of not only negative (anti-discrimination), but also positive aspects of equality, which was justified in the demands: a) equality of starting positions (Resolutions of the Constitutional Court of the Russian Federation, dated May 15, 2006, No. 5-P, dated July 5, 2017, No. 18-P); b) fair equality of opportunities, meaning equality of rights and freedoms (Resolutions of the Constitutional Court of the Russian Federation, dated April 22, 2013, No. 8-P; dated May 13, 2014, No. 14-P); c) fair inequality of results based, in particular, on overcoming unfair equality (Resolutions of the Constitutional Court of the Russian Federation, dated July 11, 2017, No. 20-P, dated December 13, 2016, No. 28-P), overcoming unfair inequality (Resolution of the Constitutional Court of the Russian Federation, dated December 11, 2014, No. 32-P), etc. In general and statistical context, it is appropriate to note that in almost 2/3 of Resolutions of the Constitutional Court of the Russian Federation, the category of justice was applied as a criterion for constitutionality of the regulatory legal acts being checked.[4]

The proposed approaches, of course, do not exhaust the ideas about contradictions and trends of development, the epistemology of modern judicial jurisprudence, evaluated, in particular, at the fork of the most important, constitutionally significant values of modern legal systems, which include the values of social and legal justice.

[1] See: *Кипп Т.* История источников римского права. СПб., 1908. С. 8.
[2] See: *Бондарь Н. С.* «Вечные» конституционные идеалы…
[3] See: Пути развития философии права в России : круглый стол Междисциплинарного центра философии права Института философии РАН / А. А. Гусейнов, В. С. Степин, А. В. Смирнов, В. Г. Графский, В. В. Лапаева, Г. А. Гаджиев, Н. С. Бондарь // Российский журнал правовых исследований. 2017. № 1 (10). С. 23–25.
[4] See: *Бондарь Н. С.* «Вечные» конституционные идеалы…