CHALLENGES FOR CONTEMPORARY CONSTITUTIONALISM: GLOBALIZATION OR SOVEREIGNIZATION?

Today's processes of global development are getting more and more unstable, unpredictable and sometimes even dangerous. In this context, quite a natural process aimed at increasing significance of law as a critical factor providing stability and protection of predictable development of social realities as per certain lines defined by legal norms, is obviously expected. A particular role is assigned to constitutions of contemporary law-governed democratic states, the constitutionalism system in general, since in its classical, technical sense, it's destined to embrace national political, socioeconomic, legal systems in a consistent manner, to correlate them with universal constitutional values, principles and foundations and to set forth regulatory benchmarks for civilizational development hereon.

Does today's constitutionalism meet these requirements to the full extent? Probably, this question is largely rhetorical, if only because deep contradictions and unpredictability of today's social and political reality will inevitably affect the constitutionalism system as well. Trying to oppose them and to minimize negative tendencies with legal tools and mechanisms, the constitutionalism system has been subjected to negative influence of political realities itself, so law itself that I. Kant once called "an office which is the holiest God has ordained on earth"[1] faces real threats.

It was on full display owing to the influence of the so-called globalization factors on the today's social and legal environment: they exert a powerful direct impact on changing approaches to interpretation, understanding and substantiation of contemporary constitutionalism values, as well as on their implementation in practice.

1. *What is a new priority in development of contemporary constitutionalism – globalization or sovereignization?*

[1] (See http://informsky.ru/filosofia-prava-kanta-1.html. See also: S.S. Alexeev. The Holiest God has Ordained on Earth. Immanuel Kant and Law Issues of the Modern Age. 2nd Ed. Moscow: Norma, 2015)

When addressing this issue, the very nature of constitutionalism, deep changes in legislation and today's legal environment in general come to the forefront[2]. To answer this question, one can offer a point that today's global changes, including the legal environment with its competition, contradictions and introduction of some new constitutional values (e.g. "constitutionally acceptable gender equality", equality of same-sex marriages that has been already acknowledged by about fifty countries of the world, including 27 members of the Council of Europe[3]) are underlain not by political and ideological, or even class struggle, but social and cultural confrontation, where an important role is assigned to constitutional and legal tools, means of confrontation, amongst other things.

The recent focus on partnership of civilizations, rapprochement and convergence of legal systems (driven by the so-called "Perestroika period") is being transformed into confrontation of social and cultural civilizations today[4], their constitutional and legal systems. Also, it is important to bear in mind that remaining processes of legal globalization expressed in more and more controversial forms do not result in building better understanding, overcoming discrepancies, reinforcing legal and especially social equality. On the contrary, they lead to a greater gap of inequality, including shrinking from significant benchmarks of supranational jurisdictional mechanisms with their politicized double standards.

Hence, methodologically essential questions arise, for example: is globalization really able to assert such serious influence on the contemporary legal environment, that it's possible (and required) to review the role of national constitutions and constitutional values they acknowledge, to announce the priority of international legal

[2] These issues are systematically researched, particularly in relation to legislation development. See, e.g. Conceptions of the Development of the Russian Legislation: Monograph. 7th Rev. Ed. Executive editors T.Y. Khabrieva, Yu.A. Tikhomirov. Moscow: Jurisprudence Publishing House, 2015; Khabrieva T.Y. Harmonization of Legal System of the Russian Federation in the Conditions of International Integration: Challenges of Contemporaneity // Journal of Foreign Legislation and Comparative Law. 2014. No. 1.

[3] State-sponsored homophobia. A world survey of sexual orientation laws: criminalisation, protection and recognition.2016.11[t]ed.URL:
https://www.ilga.org/sites/default/files/02_ILGA_State_Sponsored_Homophobia_2016_ENG_WEB_150516.pdf.

[4] In this respect, Samuel Huntington's ideas are particularly interesting. See: Huntington S. *The Clash of Civilizations*. Moscow: AST, 2003.

norms over norms of national constitutions, and the priority of international jurisdictional bodies over national ones?

When looking for answers to these questions, it's important to understand what is put into the term of legal globalization, since on the global stage it is opposed to legal sovereignty and the doctrine of patriotism. The following words said at the meeting of the UN General Assembly quite recently, in 2018, are particularly interesting: "We reject the ideology of globalism, and we embrace the doctrine of patriotism... Around the world, responsible nations must defend against threats to sovereignty not just from global governance, but also from other, new forms of coercion and domination." [5] Until recently, it would have been hard even to imagine that those words would be said not by some protester at a rally, for example, in some Western capital filled with lumpen and advocates of anti-globalism, but... the President of the USA. But here we are: D. Trump in his speech in the UN strictly opposed globalism to sovereignty and patriotism.

In constitutional and legal aspect it implies that globalization processes can and should not be reviewed, as we've been rightly reminded from across the Ocean, through the lens of international legal norms' priority over national legislation and, moreover, constitution, but in accordance with the idea of constitutionally acknowledged patriotism. These approaches announcing anti-globalism and national patriotism as state policy represent a new look at both prioritization of universal (common) and national (specific) bases of constitutional regulation, and the imperativeness degree of international legal norms in comparison with national constitutions in the context of today's world order[6].

It is directly linked with the problem of competitiveness among constitutional values underlying contemporary processes of globalization and legal progress. Ignorance of the multicultural nature of today's legal systems, their national and

[5] URL: https://ria.ru/world/20180925/1529327692.html (accessed on November 06, 2018)

[6] In this regard it's fair to recollect abrasive criticism by the West aimed at the Judgement of the Constitutional Court of the Russian Federation (hereinafter – CC of the RF) No. 21-P of July 14, 2015, where it was clearly stated that resolutions of supranational jurisdictional bodies "do not abrogate the priority of the Constitution of the Russian Federation for Russia's legal system, and therefore are subject to realization on the basis of the principle of supremacy and supreme legal force of exactly the Constitution of the Russian Federation in the legal system of Russia" // Law Book of the Russian Federation. 2015. No. 30. Art. 4658.

historical specificities can lead (and has already led) to political, ideological and legal expansion performed by economically, militarily and politically dominant countries and coalitions within the globalization process. This expansion is not based on the rule of law, but on the rule of force, rejection of fundamental ideas of democracy and state sovereignty.

Therefore, it's important to take into account that the idea of state sovereignty in its classical meaning is considered the cornerstone of contemporary constitutionalism along with human rights. Such an approach has been recognized by almost all today's constitutions. Besides, the normative content of this constitutional principle always has certain historical background. In the context of federative and multinational nature of our country, it has been substantiated quite concisely and multidimensionally in judgements of the Russian Constitutional Court. In accordance with these approaches state sovereignty implying all legislative, executive and judiciary powers of the state on its territory and independence in international communications is one and undivided. It is a fundamental qualitative feature of the Russian Federation that describes its constitutional and legal status.

In addition to that, globalization of law exerts direct impact on the normative content of the state sovereignty constitutional principle, predetermines new value criteria for its implementation and protection, considering new approaches to correlation between regulatory systems of international law and national legislation. At the same time, domestic and international crises, conflicts and contradictions are intermingled and diffused, so functioning of a certain state and its society is subject to a stronger influence of universal principles of humankind development.

In this context the problem of today's challenges to law is urgent, which also means global constitutionalism crisis.

2. *On major threats to contemporary constitutionalism.*

To understand major threats to constitutionalism and to define ways to minimize them, by legal means as well, it's important to keep in mind that the constitutional and legal system basically reflects the state of the society, its economic, social and political contradictions; while the Constitution as a core of the national legal system is essentially born by social contradictions to reflect them and serves as an institutional and legal matrix to solve them.

2.1. Today, the most acute contradictions and the biggest threat for law and the constitutionalism system is connected with a problem that can be defined as *a global deficit of constitutional equality*. The very concept of constitutional equality suggests that this principle requires not to recognize technical standards of equality only, but to fill this principle with social content based on constitutional requirements for justice (Preamble to the Constitution of the Russian Federation), human dignity (Art. 21) and, therefore, impermissibility of unfair or constitutionally unjustified inequality.

In this respect, a "normative" model of constitutional equality embraces unity of technical, moral and ethical, social and cultural bases. When defining a regulatory law-enforcement and, therefore, regulatory binding (imperative) potential of constitutional equality, at least three naturally interrelated bases of its normativity need to be taken into consideration: *first*, a requirement for equality of individuals as people (a sort of biological normativity coming from the fact of human birth, "equality before God"); *second*, equality of individuals as personalities (social and cultural, moral and ethical normativity of requirements for equality before the society); *third*, equality of individuals as citizens (technical normativity of requirements for equality before the state, the law and court).

In this sense the regulatory imperative of constitutional equality is not limited to technical content. It's a much more meaningful and multidimensional category: it includes regulatory requirements for equal rights and equality before the law, which is concurrently reinforced by normativity of social, economic, cultural, moral and ethical bases of a regulatory equivalent of equality. Again, absolutization of technical bases of equality – at the expense of the social component of equality regime and

social and distributive functions of law – is one of the most serious global risks posed by liberal perception of constitutional values.

That's what allows describing *constitutional equality* not only as a principle, original foundation of the entire system of legal regulation, a special legal regime based on requirements for justice and human dignity, but also as an all encompassing category that *embodies essential features of law as a measure of freedom, which is equal for everyone*. Consequently, *a deficit of equality as a global challenge to contemporary constitutionalism* can distort not only any national legislative and law enforcement system, but the nature of law as such – this amazing phenomenon of modern civilization, without which it would be impossible to ensure an equal measure of freedom for everyone.

As for the crisis of constitutional inequality as such, it definitely has extralegal, meta-juridical origins. First of all, it is referred to more and more menacing proportions of social stratification, a growing gap between rich and poor countries and regions, ethnic, sociodemographic, professional and other groups of the population. Acuteness of such problems as poverty, social stratification and increasing social inequality that turns into a threat to foundations of social stability and democratic development of contemporary states is a key indicator of a contemporary constitutionalism systemic crisis. Deepening of social stratification and constitutional inequality is a highroad to social disruptions and revolutions. As pallid statistics shows, today Russia ranks high in the list of countries with deep social and wealth disparity, inequality of wealth distribution: more than 70% of all personal assets belong to 1% of the richest Russians in the country (this indicator is 46% on average in the world, 44% in Africa, 37% in the USA, 32% in Europe and China and 17% in Japan). Russia is also the global leader by its 5% of the wealthiest population (which is more than 80% of individual wealth of the country). There are similar processes on the microeconomic level: a head of a private business in Russia has a salary, which is 20–30 times higher (as reported by independent experts, the difference is even greater) than one of common employees; the highest salary in the industry is 20–40 times

higher than the lowest one in the Russian Federation; and the gap between regions is even larger.

Besides, based on historical experience, issues of equality and justice always emerge full blown in turning periods of development of the society and state, which is the case of contemporary Russia as well: transition to market economy and pluralistic political democracy is accompanied by a serious shift in our beliefs regarding these eternal values of the modern civilization. We can't fail to see that political and economic transformations in the country, in the 1990s in particular, caused deep contradictions, including new forms of inequality. At the same time, the potential of the Constitution of the Russian Federation adopted in 1993 that enshrined the social nature of new Russian statehood (Art. 7, 38–43, etc.) clearly enough to use it in order to resist negative trends and look for efficient solutions of relevant problems was never called for to the full extent. Moreover, in that period the priority was given to the so-called market and economic norms of the Constitution of the Russian Federation (Art. 8, 9, 35, 36, etc.), though they didn’t truly correspond to the deepest content of its principles and spirit in practice.

It made the CC of the RF introduce significant amendments into interpretation of respective statements of the Constitution, formulate legal propositions regarding social accountability of private entrepreneurship, Russian socially oriented free market economy that used to be at its early stage of development at the time, relations of business and authorities, etc. based on fundamental principles and values of our Constitution.

2.2. Deformations of social and cultural bases of law, a gap between the statutory regulation system and moral and ethical bases is the second global threat to contemporary constitutionalism, which is directly linked with a global deficit of constitutional equality, in the socioeconomic respect among other things.

Attempts to lay stress on law as one of the main tools for sanctions and confrontations instead of interaction and cooperation are obvious nowadays. Basically, in this context, there’s a new wave of law politicization, a kind of its social and cultural (as opposed to class and political) ideologization, when perception of law and

constitutionalism that are common for a certain cultural and legal tradition are offered to replace universal legal standards and principles. These processes result in inadequate reinforcement (dominance) of religious, ethnic and other geopolitical factors of legal regulation in some countries or regions of the modern world. It leads to controversial and often completely opposite processes of active legislation secularization in Western democratic countries, on the one hand; and to equally active and sometimes combative clericalism of law and justice in other regions of the world, particularly in countries of Islamic fundamentalism, on the other hand.

A gap between law and justice, and a general social and cultural normativity has an impact on perception of the Constitution that can be seen in this case as a formal, technical instrumental act instead of social, legal and cultural institution regulating today's life. It is underlain by a delusional perception of the state legislation as some self-reliant tool of social transformations which is not determined by any moral characteristics or spiritual content based on public life.

However, the rule of law that determines supremacy and direct effect of the Constitution is implemented in the setting of general social normativity and linked with the effect of social and cultural, moral and ethical bases, since legal norms always exist in a certain social context. The Constitution is premised on the idea of the statutory law that interlinks essential features of an equal measure of freedom with technical certainty, universality and the generally binding nature of law.

Examination of spirituality of the Constitution suggests using quite delicate methodological tools to obtain not only scientifically reasoned knowledge of this phenomenon's essential features, but of special psychological perception of this document based on faith in genuineness of constitutional provisions, their social and legal value. It's faith (and trust inspired by it) as a relatively independent philosophical system of assessments and worldviews that represents a way to reflect sacred features of the Constitution that are impossible to be perceived from the outside, since they are expressed not in a language, but in the spirit of this unique document.

In this respect, it's fair to say somewhat conditionally that there are tangible differences in perceptions of the above-mentioned ideals and approaches in the Anglo-

Saxon legal system, on the one hand, and in the Romano-Germanic (continental) one, on the other hand. Without getting into specifics of law historical origins, it should be noted, for example, that the Romano-Germanic legal system largely adheres to doctrinal interpretation of law, borrowed from the Roman law, its systematic and methodological elaboration and a structural approach to law. It also shows a high level of development of moral and ethical bases. There's no coincidence. Moral and ethical bases defining continental law were initially (genetically) translated from the language of Greek philosophy into the language of precise legal wording of the Roman law to be developed and reinforced methodologically later through active influence of classical German philosophy on the continental law.

So, what gives law such a high level of moral and ethical bases? It's clear that a determinative factor elevating law within the system of social normativity is requirements for equality and justice it expresses. In this respect legal reasoning of justice as a particular category is a key objective of both ancient and medieval, and contemporary constitutional jurisprudence.

No rational technical reasoning can be free of national culture and morality, values of legal and social phenomena. The category of "morality" as such is acknowledged as constitutionally significant – not in Russia only, where in Part 3, Art. 55 of the Constitution of the RF morality is considered one of objectives that can require fundamental rights to be limited for its achievement. Though the term is actively used in Russian sectoral legislation (currently Federal Law No. 31), it hasn't been fully deployed as a legal definition; as a rule, a general wording of the above-mentioned article of the Constitution is reproduced in sectoral laws regarding possibilities to limit some fundamental rights or other for the benefit of morality. Therefore, the issue of certain mechanisms and introduction of moral values into the existing legislation system in practice remains acute. It should be noted that today there are only a few feeble attempts of positive juridification of moral values in accordance with the spirit of the Constitution to provide a legal groundwork for them as necessary regulators of common life. Meanwhile, to reveal deep internal links, common patterns and social and cultural specificities of contemporary

constitutionalism it's critical to consider respective factors and phenomena of legal reality, through the lens of correlation between language and spirit of the national Constitution among other things.

Thereupon it's possible to understand not only implications and historical meaning of the Constitution of the Russian Federation, but those features that can become (and have already become under certain conditions) prerequisites of political illusions and legal romanticism, a source of hopes and disappointment, as well as of constitutional insights and new attainments. Probably, it was manifested most visibly in constitutional and legal illusions related to absolutization of the primacy of international law.

3. *It's critical to overcome illusions of the primacy of international law to ensure legal sovereignty of Russia.* Considering international legal aspects of today's threats to law in the context of Russian constitutionalism, first of all, provisions of Part 4, Art. 15 of the Constitution of the RF should be taken into account, since they underlie interaction of international and national legal norms, as well as penetration of supranational values of contemporary constitutionalism into the Russian legal system. It's them that ensure certain interaction with national constitutional norms, open up opportunities to provide a supplementary guarantee and protection for national constitutional values over supranational institutes (P. 3, Art. 46, Art. 79).

By virtue of respective provisions of the Constitution of the Russian Federation it is suggested in particular that values, principles and institutes of national constitutionalism are implemented not by intrastate legal mechanics and jurisdictional procedures only, but by international remedies as well, including regional ones, in the framework of supranational monitoring and jurisdictional institutes. This interaction of national and supranational elements in implementation of constitutionalism values is not peculiar for Russia only; it reflects a general trend of civilizational development. Within the European borders, for example, it is expressed in the concept of the European Constitutional Space.

Penetration of universal values into the national legal system, particularly when it comes to their possible interpretation by supranational bodies, is linked with

conflicts and collisions that have acutely occurred between the jurisdiction of national constitutional court and the jurisdiction under the European Convention (as represented by the ECHR) lately in issues of ensuring the fundamental human rights and freedoms. Assessing the situation, it's important to note that the CC of the RF may be one of the first European national bodies of constitutional justice that has come to quite a significant conclusion about acknowledgment of the principal identity of constitutional rights and freedoms in accordance with the Convention and the national Constitution[7]. In its turn, it suggests an opportunity to use a unified institutional law enforcement mechanism for decisions taken by both the CC of the RF and the ECHR. It is also proved by the fact that it's not just direct influence of international (European) institutes of human rights protection on national constitutional systems, but sort of constitutionalization of generally recognized principles and norms of international law and, thereupon, penetration of intrastate legal (constitutional) bases into the field of international relations defining the European Constitutional Space among other things.

However, it doesn't mean that Russia is unconditionally bound with interpretations of convention provisions issued by the ECHR in accordance with value orientations dominating in Europe, if these interpretations suggest accepting some measures on the national level that cut across with a national system of constitutional values. The CC of the RF has defined attitudes in this behalf: it comes down to the fact that as a constitutional democracy and a member of the global community Russia enters into international treaties and takes part in interstate entities partially delegating its powers, but it doesn't imply a rejection of state sovereignty. Therefore, in a situation, when the content of the ECHR provision affects principles and norms of the Constitution, particularly regarding orders to a respondent state based on the Convention for the Protection of Human Rights and Fundamental Freedoms illegitimately interpreted by the ECHR in the framework of a certain case from a legal point of view, Russia may flinch from its obligations on an exceptional

[7] See: Judgement of the Constitutional Court of the Russian Federation No. 4-P of February 26, 2010 // Law Book of the Russian Federation. 2010. No. 11. Art. 1255.

basis, if such a deviation is the only possible way to avoid violation of the fundamental principles and norms of the Constitution of the Russian Federation.

Besides, experience has proven that defending national constitutional identity by constitutional justice is related to a search of flexible, well-balanced approaches that allow taking international obligations into account to the extent they are compliant with the constitutionally acceptable legal order. Respective approaches used by Russia (as represented by the CC of the RF) and legislators match forming practices of solving similar problems by Constitutional Courts of other European countries (e.g. Germany, Italy, United Kingdom).

It proves, on the one hand, an active role played by constitutional justice in overcoming global challenges to law, contemporary legal order and the constitutionalism system in general; and on the other hand, the fact that correlation between norms of international and national law and relations of supranational jurisdiction with national judicial authorities are eventually issues that should be addressed based on full compliance with the legal sovereignty of Russia.